Multiactive Software Inc. v. Advanced Service Solutions Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Multiactive Software Inc. v. Advanced Service Solutions Inc., 2003 BCSC 643

Date: 20030425

Docket: S025176

Registry: Vancouver

Between:

MULTIACTIVE SOFTWARE INC.

PLAINTIFF

And

ADVANCED SERVICE SOLUTIONS INC.

DEFENDANT

Before: The Honourable Mr. Justice Preston

Reasons for Judgment

Counsel for the Plaintiff: D. Moonje
Counsel for the Defendant: R.J.C. Deane
Date and Place of Hearing: March 14, 2003
Vancouver, B.C.

[1] This is the defendant's application for a declaration declining jurisdiction over proceedings commenced by the plaintiff Multiactive Software Inc. (the "Canadian Company"). There is another action ongoing in Florida commenced by the defendant applicant, Advanced Service Solutions, Inc. (the "Florida Company").

[2] The Canadian Company is a federally incorporated company with an office in Vancouver, B.C. It provides computer software to customers throughout North America and around the world through a network of distributors and resellers, one of which is the Florida Company. The Florida Company provides services to customers in Florida, elsewhere in the United States and in the United Kingdom.

[3] The companies are parties to a licensing agreement (the "Agreement") that they entered into on July 25, 2000. Under the Agreement the Florida Company has the right to use, promote, market and service certain software products supplied by the Canadian Company.

[4] Section 15(b) of the Agreement reads as follows:

15. (b) This Agreement and its application and interpretation will be governed exclusively by the laws prevailing in the Province of British Columbia, Canada which will be deemed to be the proper law hereof. The parties irrevocably attorn to the jurisdiction of the courts of British Columbia, Canadain the event of any proceedings regarding this Agreement. The ***International Sale of Goods Act*** R.S.B.C. 1996, c. 236 and the United Nations *Convention on Contracts for the International Sale of Goods* set out in the schedule thereto shall not apply to the governance or any interpretation of this Agreement. [emphasis added]

[5] The following is a chronology of the events that led up to this application:

· The companies had a business relationship since 1996, predating the signing of the Agreement. Differences arose between them in 2001 and 2002. On September 4, 2002, the Florida Company had its solicitor write a letter to the Canadian Company setting out various complaints. The letter complained of unfair business practices including assertions that the Canadian Company had; (1)inappropriately interfered with the Florida Company's business relationships in Florida; (2) had improperly levied charges on the Florida Company; (3) had failed to properly account for the Florida Company's purchase of software inventory and payments made under the Agreement and; (4) undermined the marketing of one of its products by developing and distributing another line of products at lower cost. The letter concluded:

If these circumstances are not remedied in a timely fashion ... [the Florida Company] will take all legal action necessary to enforce its rights against ... [the Canadian Company].

· On September 13, 2002, the Canadian Company commenced action (the "B.C. Action") against the Florida Company in this court. The B.C. Action claims US$161,777.38 owing in respect of product supplied by the Canadian Company under the Agreement. The Florida Company has entered an appearance in the B.C. Action but has taken no other steps.

· On September 27, 2002, the Florida Company commenced an action against the Canadian Company in the Circuit Court of the Fifteenth Judicial Circuit in and for Palm Beach County, Florida (the "Florida Action). That action alleges the torts of interference with advantageous business relations, fraudulent misrepresentation, and breaches of the Florida ***Deceptive and Unfair Trade Practices Act*** . That ***Act*** provides remedies for unfair methods of competition, unconscionable acts or practices and unfair or deceptive trade practices affecting persons in Florida.

· On November 12, 2002, the Canadian Company filed a motion in the Florida Action asking the Florida court to dismiss the Florida Action for "Lack of Venue and Jurisdiction". On its motion, the Canadian Company relied upon section 15. (b) of the Agreement. It contended that the claims in the Florida Action should have been brought by way of counterclaim in the B.C. Action.

· On January 30, 2003, the motion to dismiss the Florida Action was heard in the Florida Court. Judge Maass of that Court dismissed the motion, retained jurisdiction over the Florida Action and ordered that the Canadian Company serve its answer to the Florida Action within 20 days.

· On February 18, 2003, the Canadian Company served its answer in the Florida Action. Among other answers and affirmative defences it pleads the Agreement and the parol evidence rule in answer to the allegation of fraudulent misrepresentation; it pleads the Agreement and the independent tort doctrine and the economic loss doctrine in answer to the tort claims; it pleads breach of the Agreement as a bar to the claims arising out of duties imposed by the Agreement; and it pleads a set-off of the monies owing under the Agreement.

· On March 14, 2003, this application to decline jurisdiction over the B.C. Action was heard in this court.

[6] The applicable Rule of the ***Rules of Court,*** B.C. Reg. 221/90 is Rule 14(6)(c). It provides that a party who alleges that the court should decline jurisdiction may apply for a declaration to that effect.

[7] The major issues on this application are: (1) the effect of the agreement between the parties regarding choice of law and attornment to the British Columbiacourts, and (2) whether, taking all of the circumstances into consideration, and applying the doctrine of *forum non conveniens* , British Columbia is the appropriate jurisdiction for this litigation.

Law

[8] ***472900 B.C. Ltd. V. Thrifty Canada Ltd.*** **(1998), 168 D.L.R. (4 th) 602 (B.C.C.A.)** provides a convenient starting point for consideration of the modern law in this area. In ***Thrifty*** Mr. Justice Esson, writing for a five-judge court, established that:

1. The right of a plaintiff to sue in the court of its choice is not now a significant factor in determining the appropriate jurisdiction in which a dispute should be litigated.

2. A primary purpose of the present rule is to avoid two actions proceeding in different jurisdictions with the attendant risk of conflicting decisions.

3. Comity is now the governing principle when determining whether to decline jurisdiction over a proceeding. The level of comity will be higher if the competing jurisdiction is another Canadian province rather than another foreign jurisdiction.

4. The existence of a clause attorning to a particular jurisdiction is an important circumstance in determining the appropriate jurisdiction.

5. Overall, the doctrine of *forum non conveniens* will form the foundation for determination of the appropriate forum.

The doctrine of *forum non conveniens.*

[9] In ***Amchem Products Inc. v. British Columbia Worker's Compensation Board*** **,** **[1993] 1 S.C.R. 897 at p. 921** Mr. Justice Sopinka, speaking of *forum non conveniens* , observed:

The burden of proof should not play a significant role in these matters as it only applies in cases in which the judge cannot come to a determinate conclusion on the basis of the material presented by the parties.

[10] The factors to be applied when considering the doctrine of *forum conveniens* were summarized by Madam Justice Dillon in ***Procon Mining & Tunnelling Ltd. v. Waddy Lake Resources Ltd.*** **(2002), 16 C.P.C. (5 th) 30 (B.C.S.C.)** as follows:

The factors to consider within *forum non conveniens* include; where each party resides, where each party carries on business, where the cause of action arose, where the loss or damage occurred, any juridical advantage to the plaintiff in this jurisdiction, any juridical disadvantage to the defendant in this jurisdiction, convenience or inconvenience to any witnesses, cost of conducting the litigation in this province, applicable substantive law, and whether there are parallel proceedings in another jurisdiction (***Amchem Products Inc. v. British Columbia; Stern v. Dove Audio Inc.*** , [1994] B.C.J. No. 865 (B.C.S.C.) (QL) at para. 62; ***Global Light Telecommunications Inc. v. GST***

Application of the *forum non conveniens* factors to the facts of this case:

Where each party resides.

[11] The Florida Company has a place of business in Lake Worth, Florida. The Canadian Company has offices in British Columbia and elsewhere including Duluth, Georgia. This factor does not point strongly to a forum.

Where each party carries on business.

[12] The Florida Company conducts business in a number of states and the United Kingdom. It entered into the Agreement to purchase software within the context of an ongoing relationship with the Canadian Company. The software was supplied from British Columbia and invoiced from British Columbia. The sales representatives, managers and support personnel responsible for dealing with the Florida Company were based in the Canadian Company's Duluth, Georgia offices. Considering the nature of the dispute, with which I will deal in detail later, this factor does not strongly indicate an appropriate forum.

Where the cause of action arose and loss or damage was sustained.

[13] The software products supplied to the Florida Company were supplied from British Columbiaand the invoices were sent from British Columbia. Payment had been made in the

past to British Columbia. The British Columbia Action is for non-payment of these invoices. This points to British Columbia as the appropriate forum.

Juridical advantage.

[14] The Canadian Company has not pointed to a juridical advantage that is available to it in British Columbiathat is not available in Florida. This factor does not indicate an appropriate forum.

Inconvenience to potential witnesses and cost of the litigation.

[15] The majority of the witnesses who will be called at a trial of the dispute between the parties will be from Florida or Atlanta, Georgia. This points to Florida as the appropriate forum.

Applicable substantive law.

[16] The dispute, insofar as it relates to the Agreement, will be governed by British Columbialaw. The claims raised by the Florida Company in the Florida Action based on the Florida ***Deceptive and Unfair Trade Practices Act*** will likely be unavailable to it in the British Columbia Action. It would be open to the Florida Company to raise claims of tort in the British Columbia Action. Those tort claims may invoke Florida law. This does not point to a clear choice of forum. There would be little difficulty involved in either court applying the law of the other.

The jurisdiction attornment clause.

[17] In ***Thrifty,*** Esson, J. observed:

The chambers judge ... gave no weight to the important circumstance that the parties had expressly agreed that:

This Agreement shall be interpreted in accordance with the laws of the Province of Ontario and the parties hereby attorn to the non-exclusive jurisdiction of the Courts of the Province of Ontario. (para. 63)

[18] The nature and types of jurisdiction attornment clauses and the significance to be attached to them was considered more fully in ***Old North State Brewing Company v. Newlands Services Ltd.*** (**1998), 58 B.C.L.R. (3d) 144 (C.A.)** which was decided 52 days before ***Thrifty*** . It was not referred to in ***Thrifty*** . The relevant portion of the clause in ***Old North State*** was:

This agreement will be governed by and interpreted in accordance with the laws of the Province of British Columbia, Canada and the parties will attorn to the jurisdiction of the Court of the Province of British Columbia.

[19] The court in ***Old North State*** treated this clause as conferring jurisdiction on the court of the jurisdiction attorned to, not as an agreement to submit to the exclusive jurisdiction of that court.

[20] The same distinction was made by Madam Justice L. Smith in ***B.C. Rail Partnership v. Standard Car Truck Company et al.*** (**2003) BCSC 150** . The clause before her read:

Lessee irrevocably and unconditionally submits to the jurisdiction of and venue in, federal and provincial courts located in Nova Scotia, Canadafor any proceeding arising under this Agreement.

[21] She interpreted that clause to mean that the lessee submitted to the jurisdiction of the Nova Scotia courts for proceedings arising from the agreement and precluded the lessee from contesting the jurisdiction of the Nova Scotia courts if proceedings were commenced there.

[22] As to the effect of attornment clauses, she concluded:

I conclude, then, in summary that an exclusive jurisdiction clause will be a very important factor such that a plaintiff will have to prove a strong case for overriding the agreement and bringing suit elsewhere. A non-exclusive attornment clause will also be a factor, but of lesser strength. ... the burden is on the plaintiff in any event. (para 27)

[23] The clause before me is a non-exclusive jurisdiction clause. While it is to be given weight in determining the forum it does not attract the more significant weight that an exclusive jurisdiction clause would.

[24] The non-exclusive jurisdiction attornment clause favours British Columbiaas the forum. In view of the wording of the clause it can be placed on no higher footing than evidence that the parties turned their mind to the issue of the location of proceedings if disputes should arise and agreed proceedings in British Columbia could not be defeated by an objection to jurisdiction and that British Columbia law would apply to the interpretation of the Agreement.

Parallel proceedings in Florida and British Columbia .

[25] The British Columbia Action is for monies owing for the sale of goods. The Florida Action is based upon the torts of interference with advantageous business relations, fraudulent misrepresentation, and breaches of the Florida ***Deceptive and Unfair Trade Practices Act*** .

[26] The Florida Company is entitled to raise a claim of equitable set-off arising from the claims advanced in the Florida Action in defence of the debt claims advanced in the British Columbia Action. Alternatively, the Florida Company may apply in the British Columbia Action for a stay of any judgment until the resolution of the Florida Action. If either of those two claims are successful the final resolution of the B.C. Action would have to await the result of the Florida Action.

[27] The Canadian Company has raised its debt claims in the Florida Action and claimed set off. The Canadian Company has also raised a defence of breach of contract, relied upon the contract to invoke the parol evidence rule, pleaded the independent tort doctrine and the economic loss doctrine and has pleaded waiver and estoppel in the Florida Action.

[28] If the matter were to proceed in both British Columbia and Florida, the actions will be, in many respects, parallel actions.

Result

[29] In my view, the application of the doctrine of *forum non conveniens* favours the Floridajurisdiction. The fact that all claims may be resolved in that jurisdiction without parallel proceedings and with significantly less inconvenience to potential witnesses are substantial factors and outweigh the two most substantial competing factors, the application of British Columbia law to the interpretation of the Agreement and the non-exclusive jurisdiction attornment clause.

[30] The Florida court did not give reasons for determining that the applicable test under Florida law did not warrant the dismissal of the Florida proceedings. The test propounded by Mr. Justice Sopinka in ***Amchem , supra ,* p. 937** , requires that I determine whether the result reached by the Florida court is inconsistent with the principles of *forum non conveniens* . He said:

Does this mean that a decision of the courts of one of these countries which, in the result, is consistent with the application of our rules would not be entitled to respect? The response must be in the negative. It is the result of the decision when measured against our principles that is important and not necessarily the reasoning that leads to that decision.

[31] The Canadian Company took the position before the Florida court that the claims brought in the Florida Action were "inextricably interwoven" with the Agreement.

[32] The Florida court was entitled to take into consideration that all the claims between the parties could be litigated in the Florida Action but the same was not true of the British Columbia Action.

[33] With respect, on the factors in evidence, I cannot come to the conclusion that the result reached by the Florida court is inconsistent with the principles of *forum non conveniens.*

[34] Accordingly, the application of the Florida Company is granted. There will be a declaration that this court declines jurisdiction.

[35] Costs will follow the event.

"B.M. Preston, J."
The Honourable Mr. Justice B.M. Preston