SUPREME COURT OF NOVA SCOTIA
Citation: Wamboldt Estate v. Wamboldt, 2017 NSSC 288

Date: 20171107
Docket: Bwt No. 459126
Registry: Bridgewater

Between:

Michael Dockrill, in his capacity as the executor of the estate of Reginald McKean Wamboldt, deceased

Plaintiff

v.

Reginald Leland Wamboldt

Defendant

LIBRARY HEADING

Judge:	The Honourable Justice Mona M. Lynch
Heard:	August 28, 2017, in Bridgewater, Nova Scotia
Written Decision:	November 7, 2017
Subject:	Jurisdiction, *Court Jurisdiction and Proceedings Transfer Act*
Summary:	Probate of the estate of the deceased opened in Nova Scotia. The estate started an action against the defendant for damages arising from the defendant acting as attorney pursuant to a power of attorney in dealing with the assets of the deceased. Deceased had moved to Ontario a few years prior to his death. Defendant sought a declaration that Nova Scotia did not have jurisdiction to hear the matter and that Ontario was the more appropriate forum.

Issues:

(1) Does the Supreme Court of Nova Scotia have territorial competence over the Estate's claim?

(2) If the Supreme Court of Nova Scotia has territorial competence, should the court exercise its discretion to decline jurisdiction because Ontario is the more appropriate forum??

Result:

Nova Scotia has territorial competence both because the defendant attorned to the jurisdiction by filing a defence on the merits and there is a real and substantial connection. The defendant did not discharge the burden to show that there was a more appropriate forum in which to hear the proceeding. Motion dismissed.

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Respondent

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Counsel:	Rubin Dexter and Benjamin P. Carver, for the Plaintiff Timothy C. Matthews, for the Defendant

By the Court:

Background:

[1] Michael B. Dockrill, the plaintiff, in his representative capacity as the executor of the estate of Reginald McKean Wamboldt, the deceased, started an action on January 9, 2017, against the defendant, Reginald Leland Wamboldt. The statement of claim makes a claim for a full and complete accounting of all the defendant's dealings in connection with the property of the deceased under a power of attorney, along with other remedies. The plaintiff alleges a breach of the defendant's fiduciary duty to the estate. The defendant filed a statement of defence on February 16, 2017, indicating that: the defendant did not submit to the jurisdiction of the court; *forum non conveniens;* Ontario was the proper choice of law; the action was statute barred, etc.; and denying all allegations in the statement of claim.

[2] When counsel for the defendant was asked to accept service of the notice of action and statement of claim, he did so and then he wrote to the counsel for the plaintiff indicating that accepting service was not to be interpreted as a submission to the jurisdiction of the Supreme Court of Nova Scotia. Counsel for the defendant also wrote that he would be filing a defence and would plead the *Court Jurisdiction and Proceedings Transfer Act* (*CJPTA*), among other defences.

[3] The defendant filed a notice of motion on May 2, 2017, seeking an order declaring that the Supreme Court of Nova Scotia did not have jurisdiction over the action or for a declaration that Nova Scotia is *forum non conveniens.* It was later agreed by both counsel that the defendant would not be found to have submitted to the jurisdiction of the Supreme Court of Nova Scotia simply by appearing on the motion contesting jurisdiction.

[4] The motion in relation to jurisdiction was heard on August 28, 2017.

Issues:

(a) Does the Supreme Court of Nova Scotia have territorial competence over the estate's claim?

(b) If so, should the court exercise its discretion to decline jurisdiction because Ontario is the more appropriate forum?

Legislative Framework:

[5] Section 2(h) of the *Court Jurisdiction and Proceedings Transfer Act*, SNS 2003 (2nd Sess.) c. 2 defines territorial jurisdiction as:

> (h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between
>
> (i) the territory or legal system of the state in which the court is established, and
>
> (ii) a party to a proceeding in the court or the facts on which the proceeding is based.

Section 3(2) requires territorial competence to be determined solely by reference to Part I of that Act. Section 4 sets out when a court has territorial competence:

> 4 A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

Real and substantial connection is presumed to exist as set out in s. 11:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;

(b) concerns the administration of the estate of a deceased person in relation to

(i) immovable property of the deceased person in the Province, or

(ii) movable property anywhere of the deceased person if, at the time of death, the person was ordinarily resident in the Province;

(c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to

(i) immovable or movable property in the Province, or

(ii) movable property anywhere of a deceased person who, at the time of death, was ordinarily resident in the Province;

(d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:

(i) the trust assets include immovable or movable property in the Province and the relief claimed is only as to that property,

(ii) that trustee is ordinarily resident in the Province,

(iii) the administration of the trust is principally carried on in the Province,

(iv) by the express terms of a trust document, the trust is governed by the law of the Province;

(e) concerns contractual obligations, and

(i) the contractual obligations, to a substantial extent, were to be performed in the Province,

(ii) by its express terms, the contract is governed by the law of the Province, or

(iii) the contract

(A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and

(B) resulted from a solicitation of business in the Province by or on behalf of the seller;

(f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;

(g) concerns a tort committed in the Province;

(h) concerns a business carried on in the Province;

(i) is a claim for an injunction ordering a party to do or refrain from doing anything

(i) in the Province, or

(ii) in relation to immovable or movable property in the Province;

(j) is for a determination of the personal status or capacity of a person who is ordinarily resident in the Province;

(k) is for enforcement of a judgment of a court made in or outside the Province or an arbitral award made in or outside the Province; or

(l) is for the recovery of taxes or other indebtedness and is brought by Her Majesty in right of the Province or of Canada or by a municipality or other local authority of the Province.

S. 12 sets out that the court may decline to exercise territorial competence on the ground that another state is a more appropriate forum, and it sets out the circumstances relevant to that decision:

12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.

(2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including

(a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;

(b) the law to be applied to issues in the proceeding;

(c) the desirability of avoiding multiplicity of legal proceedings;

(d) the desirability of avoiding conflicting decisions in different courts;

(e) the enforcement of an eventual judgment; and

(f) the fair and efficient working of the Canadian legal system as a whole.

Position of the Parties:

[6] The defendant submits that Ontario is the appropriate forum for the resolution of this matter and that Nova Scotia does not have territorial competence and, if they do, that Nova Scotia is *forum non conveniens* as Ontario is the appropriate jurisdiction. The plaintiff submits that the defendant attorned to the jurisdiction of the court when he filed a defence to the merits of the plaintiff's claim, that Nova Scotia has territorial competence, and the court should exercise its discretion to accept jurisdiction.

Analysis:

(a) Does the Supreme Court of Nova Scotia have territorial competence over the Estate's claim?

[7] The *CJPTA* contains a codification of many of the common law factors which have been considered in cases dealing with the exercise of jurisdiction by a court. In deciding whether to assume jurisdiction, the court is to undertake a two-step analysis: 1. Can the court assume jurisdiction? and, if so, 2. Should the court assume jurisdiction or is there another more appropriate forum? (**Penny v. Bouch,** 2009 NSSC 378 para 20; upheld on appeal 2009 NSCA 80).

[8] The ways that a court can establish jurisdiction over a defendant who does not live in the province are set out in **Muscutt v. Courcelles** [2002], O.J. No. 2128 (ONCA) at para 19:

> 19 There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. Both bases of jurisdiction also provide bases for the recognition and enforcement of extra-provincial judgments.

[9] In considering s. 4 of the *CJPTA* in the present case, the defendant is not a plaintiff in another proceeding under (a), there is no agreement between the parties that the court has jurisdiction under (c) and the defendant was not ordinarily resident in Nova Scotia when the action was commenced under (d).

[10] The first question is whether the defendant submitted to the court's jurisdiction during the course of the proceeding (s.4(b) of the *CJPTA*). If he did not, the next question is whether there is a real and substantial connection between the province and the facts on which the proceeding against the defendant is based (s.4(e) of the *CJPTA*).

[11] The defendant submits that he did not attorn to the jurisdiction of the court by simply filing a defence which disputed jurisdiction and denied the substance of the claim. He submits that denial of the substance of the claim after first asserting lack of jurisdiction does not amount to attornment.

[12] The plaintiff says that the defendant cannot have it both ways and the defendant should have filed a motion disputing jurisdiction before a defence was filed as set out in *Civil Procedure Rule* 4.07, which reads:

> **4.07** **(1)** A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> **(2)** A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.
>
> **(3)** A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

The plaintiff also submits that the defendant attorned to the jurisdiction of the court by filing a defence on the merits of the claim and not simply disputing the jurisdiction of the court.

[13] *Civil Procedure Rule* 4.07 clearly anticipates that a defendant will make a motion to dismiss the action for want of jurisdiction prior to filing a notice of defence. *Rule* 4.07(3) requires a judge who dismisses the motion to set a deadline

for filing a notice of defence. Here, the notice of defence was filed prior to the motion to dismiss the action for want of jurisdiction.

[14] In **Newton v. Waterbury Newton**, 2011 NSCA 34, the court considered whether the defendant had attorned to the court's jurisdiction. While the defendant in the case took other steps in the proceeding, the court notes in para. 8 that the defence was not filed simply to avoid a default judgment and that the defence was not confined to a plea of want of jurisdiction, but "**denied the substance of the claim as well**" (emphasis added). They note in paragraph 9 that the chambers judge had concluded that *Rule* 4.07(3) assumes that a motion to dismiss must occur before the filing of a defence. The court noted again at paragraph 12 that the defendant's defence was not confined to contesting jurisdiction, but "**he denied the substance of the claim as well**" (emphasis added). The court dismissed the appeal from the Chambers judge's decision (2010 NSSC 359), which found that *Rule* 4.07 does not permit the defendant to file a defence and then apply for a stay (para. 22) and that by filing a defence addressing the merits of the claims the defendant had attorned to the jurisdiction of the court (para. 23).

[15] The plaintiff also points to *Halsbury's Laws of Canada – Conflict of Laws Commencement of a Claim*, HCF-6 (2016 Reissue), Janet Walker:

> **Appearance to defend on the merits**. Defendants who appear to defend the action on the merits implicitly consent to the jurisdiction of the court to determine the controversy. This is sometimes called "attornment". Entering an appearance solely to contest jurisdiction is not regarded as attornment. **The former practice of preserving the right to challenge jurisdiction by entering a conditional appearance has been replaced by the practice of determining jurisdictional challenges at the outset before a defendant enters a defence on the merits. Once a party takes steps to contest the merits of the claim, rather than the court's jurisdiction, even if those steps are taken in error, or with express notice of the intention to challenge jurisdiction, the party will be precluded from challenging the jurisdiction of the court, whether in respect of the whole of the claim or of a part of it.** In some circumstances, attornment may be regarded also as an acceptance of the court as a convenient forum. (emphasis added)

[16] While the defendant submits that the plaintiff was not taken by surprise or prejudiced by the claim challenging the jurisdiction of the court, that is not the test. Attorning to the jurisdiction of the court is not a technicality, as the defendant submits. The test is whether the party goes beyond challenging the jurisdiction of the court (**Fraser v. 4358376 Canada Inc.,** 2014 ONCA 553 at para. 14).

[17] Other cases support that the defendant has attorned to the jurisdiction of the court. In **M.J. Jones Inc. v. Kingsway General Insurance Co.** [2004] O.J. No. 3286 (ONCA) at paras. 20-22 the court says:

> 20 A foreign defendant is also precluded from contemporaneously disputing jurisdiction *simpliciter* and defending on the merits. Otherwise, litigants would incur unnecessary litigation costs in a claim which, as it may turn out, the court did not have jurisdiction to determine in the first place.
> 21 Further, if foreign defendants were permitted to defend contemporaneously on the merits and to dispute jurisdiction, then, in addition to the possibility of unnecessary expense, a defendant could retreat if it appeared that the success of their defence was in jeopardy.
> 22 Accordingly, it is well-accepted law that a foreign defendant that engages on the merits of the action will be taken to have "attorned" to the domestic court's jurisdiction…

That was reiterated in **Strugarova v. Air France,** 2009 CarswellOnt 9412 (ONSC) at paras. 50 and 51:

> 50 With respect to the issue of attornment by the filing of a statement of defence, I am of the view that I am bound by the Ontario Court of Appeal's decision in *M.J. Jones Inc. v. Kingsway General Insurance Co.*, [2004] O.J. No. 3286 (Ont. C.A. [In Chambers]). In that case, the Ontario Court of Appeal was asked to determine whether or not the act of filing a statement of defence would constitute attornment, notwithstanding that the defendant was clearly disputing the forum for the hearing of the action. The Court of Appeal stated that the filing of statement of defence would constitute attornment to the jurisdiction where the defence was filed (see: paras. 19 to 22).
>
> 51 The Ontario Court of Appeal's approach is the same as the reasoning and the conclusion by the Court in *Vertzyas v. Singapore Airlines Ltd.*, *supra.* In that case, where the defendant had sought to defend proceedings both on jurisdictional issues and on the merits up to the date of hearing, the Court held that the combination of those acts constituted a submission to jurisdiction whereby the defendant waived its right to object to the jurisdiction of the Court (paras. 107 to 110).

[18] While the defendant was clear that he was disputing jurisdiction, he filed a defence on the merits and, by filing that defence, he attorned to the jurisdiction of

the Supreme Court of Nova Scotia. Therefore, territorial competence has been proven.

[19] If I am wrong that by simply filing a defence which disputes jurisdiction, the defendant attorned to the jurisdiction of the court, I would have found that there is a real and substantial connection between Nova Scotia and the facts on which the proceedings against the defendant is based (s.4(e) *CJPTA*).

[20] A real and substantial connection is presumed to exist if any of the enumerated factors in s. 11 of the *CJPTA* exist. I find that there is an allegation of a breach of fiduciary duties on the part of the defendant as set out in the statement of claim. In **Check Group Canada Inc. v. Icer Canada Corp.,** 2010 NSSC 463, Murphy J. found on a motion to dismiss or stay an action on the ground that the court lacked territorial competence at para. 50, that "breach of fiduciary and good faith duties, claimed by the plaintiff, are intentional torts".

[21] The plaintiff need only show an arguable case (**JTG Management Services Limited v. Bank of Nanjing Co.**, 2015 BCCA 200 at para. 19). The allegations are that the defendant breached his fiduciary duty in the province of Nova Scotia and that restitutionary obligations to a substantial extent arose in Nova Scotia. The evidence is clear that all of the property of the deceased started out in Nova Scotia and the allegation is that the deceased's property was transferred from Nova Scotia to another province by the defendant.

[22] I am satisfied that there is a real and substantial connection between the province of Nova Scotia and the facts on which the proceeding against the defendant are based.

(b) If so, should the court exercise its discretion to decline jurisdiction because Ontario is the more appropriate forum?

[23] Having found territorial competence, I must now decide whether to exercise my discretion to decline jurisdiction because Ontario is the more appropriate forum.

[24] The defendant submits that Ontario is the more appropriate forum. The deceased resided in Ontario from 2008 until his death on November 29, 2011. The defendant acted as attorney pursuant to a power of attorney executed by the deceased on March 18, 2009. The defendant resided in Alberta and acted as

attorney primarily in Alberta, dealing with the assets of the deceased which originated in Nova Scotia.

[25] The plaintiff is entitled to have the proceeding in the forum they have chosen unless the defendant shows that another forum is clearly more appropriate. In **Armoyan v. Armoyan,** 2013 NSCA 99, Fichaud J.A. says at paragraph 219:

> [219] Despite that a court has jurisdiction *simpliciter*, the court should stay its proceeding and defer to another forum that is clearly more convenient. Ms. Armoyan had the burden to show that Florida clearly was the more convenient forum.

And in **Bouch v. Penny,** 2009 NSCA 80, Saunders, J.A. says at paras. 61 and 62:

> [61] While the language of s. 12(1) provides that a hearing judge may decline to exercise territorial competence on the ground that another jurisdiction "is a more appropriate forum" I am not persuaded Justice Wright erred when he applied the language "clearly more appropriate" as directed by the Supreme Court of Canada in **Amchem**, or followed by this Court in subsequent decisions, **Dennis** being an example. To my mind Wright, J. did not impose an unfair or improper burden of persuasion upon the appellants.
>
> [62] As Justice Sopinka made clear in **Amchem**, the existence of a more appropriate forum must be clearly established in order to displace the forum selected by the plaintiff. Where there is no one forum that is the most appropriate, the domestic forum chosen by the plaintiff wins out by default. Justice Wright was bound by the Supreme Court's ruling in **Amchem**. Nothing in the **Act** changes the test to be applied in such circumstances. Accordingly, I would not disturb Justice Wright's conclusion: (emphasis in original)

[26] The Nova Scotia Court of Appeal in **Bouch,** supra, endorses a holistic approach to the question based on the totality of the evidence (para. 59). In **Armoyan,** supra, the court endorsed the objective "to ensure that both parties are treated fairly and the process for resolving their litigation is efficient" (para. 273).

[27] Here the defendant submits that the law to be applied, regarding the power of attorney and the limitation periods, is the law of Ontario. The defendant submits that this would require expert evidence, thus adding significant cost to the defendant. However, *Rule* 54.04(1) allows the law of a foreign state to be proven by reference to official publications of legislation, judicial decisions and

authoritative sources. Expert opinion is one manner of proving foreign law, but it is not necessary.

[28] When I look at the factors under s. 12(2) of the *CJPTA*, many of them are neutral, such as the avoidance of a multiplicity of proceeding, conflicting decisions and enforcement of judgment.

[29] However, two of the factors in s. 12(2) point to Nova Scotia as the more convenient forum. The first is 12(2)(a), comparative convenience and expense for the parties. The defendant lives in Alberta and will have to travel and retain counsel in either Ontario or Nova Scotia. Witnesses regarding the deceased's capacity are in both Nova Scotia and Ontario and expenses will result either way. Witnesses regarding the financial holdings of the deceased are in Nova Scotia.

[30] The other factor favouring Nova Scotia is the fair and efficient working of the Canadian legal system as a whole. The estate is a financial position that would prohibit it from continuing the claim in Ontario. Access to justice considerations favour Nova Scotia to allow the plaintiff to pursue the claim.

[31] Also, I must consider that the estate has chosen the forum and the standard to displace the plaintiff's chosen jurisdiction is high (**Young v. Tyco International of Canada Ltd.**, 2008 ONCA 709, para. 28). I am mindful that I am not determining the merits of the case.

[32] Considering all of the factors, the defendant has not discharged the burden of showing that Ontario is the more appropriate forum in which to hear the proceeding. The parties can be treated fairly and the matter heard efficiently in Nova Scotia.

Conclusion

[33] The motion is dismissed.

Justice Mona Lynch