IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fairhurst v. Anglo American PLC,*
2011 BCSC 705

Date: 20110601
Docket: S071269
Registry: Vancouver

Between:

Michelle Fairhurst

Plaintiff

And

Anglo American PLC, Central Holdings Limited, S.A., De Beers Canada Inc., DB Investments, Inc., De Beers S.A., De Beers Consolidated Mines, Ltd., The Diamond Trading Company Limited, CSO Valuations A.G. and De Beers Centenary A.G.

Defendants

Before: The Honourable Madam Justice B.J. Brown

Reasons for Judgment

Counsel for the plaintiff (respondent):	J.J. Camp Q.C. R. Mogerman
Counsel for the defendants (applicants):	K. Kay D. Royal
Place and Date of Hearing:	Vancouver, B.C. January 10 - 11, 2011
Place and Date of Judgment:	Vancouver, B.C. June 1, 2011

INTRODUCTION

[1] This application concerns the jurisdiction of this Court over claims advanced by the plaintiff as a purchaser of diamond jewellery in British Columbia. This is a proposed class action. The plaintiff asserts that the defendants improperly conspired to drive up the price of diamonds, and that she and other buyers of diamonds have been harmed as a result.

[2] The defendants apply for an order that the writ and statement of claim be struck and that the proceedings be dismissed or stayed on the grounds that the pleadings do not allege facts that, if true, would establish that the Court has jurisdiction over the defendants in respect of the claim made against the defendants. Alternatively, the defendants submit that the Court does not have jurisdiction over the defendants in respect of the claim made against them in this proceeding.

[3] The action is continuing only against the defendants De Beers Canada Inc., DB Investments, Inc., De Beers S.A., De Beers Consolidated Mines, Ltd., the Diamond Trading Company Limited, CSO Valuations A.G. and De Beers Centenary A.G. This application is brought by all of these defendants.

THE PLEADINGS

[4] The plaintiff pleads that during the class period the defendants were the source of most gem grade diamonds sold in the world. Gem grade diamonds are defined as natural diamonds for use as gem stones in jewellery or for investment. The plaintiff pleads that during the class period senior executives and employees of the defendants, acting in their capacity as agents for the defendants, conspired with each other, the sightholders, and others, to illegally fix the prices of gem grade diamonds sold in Canada, including British Columbia.

[5] The plaintiff pleads that during the class period the defendants together wrongfully agreed to:

(a) suppress and eliminate competition in the sale of gem grade diamonds in British Columbia, Canada, and elsewhere, by fixing the price of gem grade diamonds at artificially high levels and allocating the market share and volume of gem grade diamonds;

(b) to prevent or lessen competition in the manufacture, sale and distribution of gem grade diamonds in British Columbia, Canada, and elsewhere by reducing the supply of gem grade diamonds;

(c) to allocate amongst themselves the customers for gem grade diamonds in British Columbia, Canada, and elsewhere;

(d) to allocate amongst themselves and others market shares of gem grade diamonds in British Columbia, Canada, and elsewhere; and

(e) to allocate among themselves, and to others, all or part of certain contracts to supply gem grade diamonds in British Columbia, Canada, and elsewhere.

[6] The plaintiff pleads that the defendants were motivated to conspire and their predominant purpose and concern was:

(a) to harm the plaintiff and other class members by requiring them to pay artificially high prices for gem grade diamonds; and

(b) to illegally increase their profits from the sale of gem grade diamonds.

[7] The plaintiff says that the acts of conspiracy and illegal price fixing were also in breach of the *Competition Act*, R.S.C. 1985, c. C-34. The plaintiff submits that the acts were unlawful and intended to cause the plaintiff and other class members economic loss. The plaintiff submits that the acts constituted tortious interference with the economic interests of the plaintiff and other class members.

[8] The plaintiff pleads that these agreements to fix prices were calculated to produce, and have produced, pernicious monopolies and that the defendants have been able to charge and receive artificially inflated and unreasonable prices.

[9] The plaintiff says that as a result of the conspiracy, which had the effect of raising, maintaining and stabilizing prices of gem grade diamonds, the plaintiff and other class members have paid more for gem grade diamonds than they would have paid in the absence of the illegal combination and conspiracy.

THE AFFIDAVITS

[10] The defendants have filed affidavits in this matter. In substance the affidavits state that the defendants do not carry on business in British Columbia, and that they are not involved in the sale of gem grade diamonds. Their involvement is, generally speaking, much higher in the “diamond pipeline” in that they sell rough diamonds to sightholders. I recognize that this is a generalization, since some of the defendants are shareholders of others, and some are holding companies. However, the sale of rough diamonds to sightholders is the closest activity, of any of the activities that the defendants perform, to the sale of gem grade diamonds.

[11] The affidavits do not, however, address the substance of the plaintiff’s allegations, which is that the class members have sustained damage as a result of a conspiracy amongst the defendants and others to unlawfully fix, increase, and maintain the prices of gem grade diamonds.

[12] The plaintiff and the defendants have produced affidavits from their respective experts.

[13] Margaret Sanderson, in her affidavit filed by the defendants, challenged the conclusions of the plaintiff’s expert, Gary French, and made the following conclusion:

> In summary, any connection between the Defendant’s sales of rough diamonds on the one hand and the Plaintiff, other Proposed Class Members and any diamond jewellery purchases made in British Columbia on the other hand, is remote in the extreme. The French Report tries to establish a connection between the alleged conduct in British Columbia by assuming that

> partial pass-through must exist, and then concluding the alleged conduct must have impacted British Columbia. In effect, he assumes his conclusion based on misapplication of economic theory. ... [P]rices would not have been lower for gem grade diamonds without the alleged conspiracy. Even if it is assumed that the Defendants were successful in conspiring with unnamed co-conspirators and that such agreement was successful in increasing and sustaining higher prices for rough diamonds during the Class Period, ... Dr. French's economic analysis of the effect of any such overcharge on downstream purchases is deeply flawed.

[14] Dr. French made the following conclusion in his affidavit:

> As discussed herein, De Beers is the largest producer of rough diamonds in the world; has historically been the diamond industry custodian in order to control rough diamond supply, and more recently established Supplier of Choice to influence downstream demand for diamond products, which ultimately influences the demand for rough diamonds. As a consequence, De Beers has possessed a degree of monopoly power in the rough diamond market for over a century, including throughout the class period. Evidence of DeBeers' exercise of monopoly power includes the facts that rough diamond prices have frequently increased more than downstream polished diamond and diamond jewellery prices and the general rate of price inflation, and that downstream entities have been compelled to buy more diamonds than they have been able to re-sell, even though they have paid ever higher prices for rough diamonds
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> ...
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> ... [S]ome of the rough diamond cost increases by De Beers were passed through all the way to consumers. Thus, all re-sellers and consumers in the diamond distribution chain were affected by De Beers' increases in rough diamond prices during the class period.

[15] Finally, the plaintiff has introduced affidavit evidence to show that De Beers Canada Inc. was extra-provincially registered in British Columbia and that De Beers has advertised directly in British Columbia.

THE POSITION OF THE DEFENDANTS

[16] The defendants say that they are all separate corporate entities operating in various jurisdictions and, with the exception of De Beers Canada Inc., operate outside of Canada. None of the defendants is ordinarily resident in British Columbia, carries on business in British Columbia, or participates in the sale or distribution of gem grade diamonds, as claimed by the plaintiff. The defendants say that they are

in no way connected to either British Columbia or the allegations in respect of gem grade diamonds made by the plaintiff. The defendants submit that there is no real and substantial connection between British Columbia and this proceeding through which this Court can find territorial competence over the defendants.

[17] None of the defendants have operations in British Columbia or make sales in British Columbia, or anywhere else in Canada. The only defendant with any operations in Canada is De Beers Canada Inc., which is a mining company that only began producing diamonds after the writ of summons was issued. All of its production is sold commercially by De Beers U.K. Ltd., formerly known as the Diamond Trading Company.

[18] The only commercial sales made by any defendants are of "rough diamonds". These are diamonds that have been mined but not processed. All of the rough diamonds are sold either to independent customers called "sightholders" in London, or to the state diamond trader established by the South African government. These customers then re-sell the rough diamonds to other firms or cut and polish them into individual gem stones. After passing through a series of transactions involving polished diamond dealers, polished diamonds are sold to jewellery manufactures and used to make certain types of jewellery, which pass through wholesale and retail channels and, ultimately, may be sold to consumers such as Ms. Fairhurst. None of the defendants is involved at any stage of the production chain below that of selling rough diamonds. That stage is several levels removed from any activity relating to gem diamonds or diamond jewellery in British Columbia.

[19] The defendants submit that given the number of intervening transactions by independent players between the sales of rough diamonds by any defendant in London or South Africa and the transformation of rough diamonds into polished diamonds and then diamond jewellery by companies unaffiliated with any defendant, there is simply no basis for finding that a real and substantial connection exists between British Columbia and either the defendants or the alleged conduct on which the proceeding against the defendants is premised.

[20] The defendants say that there is no territorial competence over a defendant where there is no real and substantial connection between British Columbia and the facts on which the proceeding against that person is based. The action should be dismissed as against each defendant.

[21] The defendants say that the plaintiff has not properly pleaded that the tort of conspiracy or the tort of intentional interference with economic relations occurred in British Columbia. Rather, the defendant says that the plaintiff has only alleged harm suffered in British Columbia, which is an insufficient basis for pleading a tort committed in British Columbia. The defendant submits that the plaintiff has thus failed to establish an entitlement to the statutory presumption of territorial competence under s. 10(g) of the *Act.*

[22] The defendants also submit that the conclusions offered in the expert reports filed by the plaintiff should not be afforded evidentiary weight.

[23] Finally, the defendants say that they have, by their evidence, rebutted the presumption of a real and substantial connection based on the pleadings.

THE POSITION OF THE PLAINTIFF

[24] The plaintiff says that during the class period senior executives and employees of the defendants, acting on behalf of the defendants, conspired with each other, the sightholders, and others, to illegally fix and unlawfully increase the prices of gem grade diamonds sold in Canada, including British Columbia, and supplied to manufacturers, wholesalers and jewellers for inclusion in products sold in Canada, including British Columbia. The plaintiff says that she specifically alleges that the defendants were motivated to conspire and their predominant purposes were:

(a) to harm the plaintiff and other class members by requiring them to pay artificially high prices for gem grade diamonds; and

(b) to illegally increase their profits on the sale of gem grade diamonds.

[25] The plaintiff alleges that the defendants used threats and promises and entered into agreements with sightholders and other re-sellers of gem grade diamonds to fix the resale price of gem grade diamonds at artificially high levels. The plaintiff claims that these acts are in breach of Part 6 of the *Competition Act* and that the defendants are liable to pay damages pursuant to s. 36 of the *Competition Act.* She claims further that the defendants are liable for the tort of civil conspiracy and for tortious interference with economic interests of the plaintiff and other class members, and that this renders the defendants liable to pay resulting damages.

[26] In the alternative, the plaintiff waives the tort and pleads that she and other class members are entitled to recover under restitutionary principles, including unjust enrichment and constructive trust. She says that she and other class members have suffered damages as a result of the conspiracy which has had the effect of raising, maintaining, and stabilizing prices for gem grade diamonds at artificial and non-competitive levels. The plaintiff also pleads that the defendants' conduct warrants an award of punitive damages.

[27] The plaintiff says that an overcharge imposed on rough diamonds must necessarily impact each of the downstream levels of the diamond pipeline. The plaintiff submits that by reason of the nature of supply and demand in the various levels of the diamond market, all resellers and consumers in the diamond distribution chain were affected by De Beer's increases in rough diamond prices during the class period. Consumers in British Columbia would have absorbed part of the overcharge imposed by De Beers and its co-conspirators.

[28] The plaintiff argues that s. 3(e) of the *Court Jurisdiction and Proceedings Transfer Act* (the "*Act*"), S.B.C. 2003, c. 28 provides that this Court has territorial competence in a proceeding where there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based. Section 10 of the *Act* sets out an array of circumstances in which a real and substantial connection is presumed to exist, but leaves it open to the plaintiff to prove other circumstances that constitute a real and substantial connection.

Section 10(f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia. Section 10(g) concerns a tort committed in British Columbia. The plaintiff says that both of these presumptive circumstances exist in this matter.

[29] The plaintiff says that the legal test for determining whether a court can properly take jurisdiction over a foreign defendant can be met where there is a real and substantial connection between the jurisdiction and the defendant, or between the jurisdiction and the cause of action. The plaintiff says that there is a *prima facie* real and substantial connection between British Columbia and the facts on which the proceeding is based in cases where the proceeding falls within s. 10 of the *Act*.

[30] The plaintiff says that the fact that the defendants do not sell gem grade diamonds directly into British Columbia is not determinative of this Court's jurisdiction. The alleged conspiracy involves the artificial raising of diamond prices which is directed at British Columbia consumers and is implemented within British Columbia. The defendant's conduct is alleged to be part of a worldwide cartel directed at, among others, class members in British Columbia. When a real and substantial connection exists between the jurisdiction and subject matter of the action, any defendants who are potentially liable for the wrongs alleged are properly joined in the action. The plaintiff says that each of the defendants has a real and substantial connection with the subject matter of the action and is, therefore, properly subject to the jurisdiction of this Court. The representative plaintiff and the putative class members are all in British Columbia.

[31] The plaintiff says that she has pleaded sufficient facts to support the allegations made. The plaintiff has asserted that the business of all of the defendants is inextricably interwoven with that of the other and each is the agent of the other with respect to the sale of diamonds for the purpose of the alleged conspiracies. The plaintiff says that the defendant must introduce evidence that puts the allegations into issue. The plaintiff submits that none of the defendants has introduced any evidence that effectively challenges the facts asserted by the plaintiff to support jurisdiction. The plaintiff need only demonstrate that there is a good arguable case that the Court has jurisdiction.

DISCUSSION

[32] Section 2(2) of the *Act* states that the territorial competence of a court is to be determined solely by reference to Part II of the *Act.* Within Part II of the *Act,* s. 3 of the *Act* provides for the following:

> A court has territorial competence in a proceeding that is brought against a person only if
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> ...
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> (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
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> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[33] Section 10 of the *Act* sets out a non-exhaustive list of factors used to determine whether a real and substantial connection exists. The provision creates a presumption of a real and substantial connection between British Columbia and the subject matter if the plaintiff sufficiently pleads that one of these factors exists:

> Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between British Columbia and the facts on which a proceeding is based, a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding
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> > ...
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> > (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia,
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> > (g) concerns a tort committed in British Columbia, ...

[34] The parties have referred me to many cases addressing the jurisdiction of the Court, including the recent decision of the British Columbia Court of Appeal in *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592. There, the Court considered the law governing jurisdiction before and after the enactment of the *Act:*

> [19] Before enactment of the *CJPTA* [the *Act*], questions of jurisdiction *simpliciter* were normally decided solely on the basis of the material facts alleged in the plaintiff's pleading. The pleading was examined to determine whether it alleged "jurisdictional" facts sufficient to establish a real and substantial connection to the defendant or to the cause of action and, if it did, that was sufficient: *Furlan v. Shell Oil Co.*, 2000 BCCA 404, 77 B.C.L.R. (3d) 35 at paras. 13-14, leave to appeal ref'd [2000] S.C.C.A. No. 476.

[20] However, the pleaded allegations did not suffice when the foreign defendant contradicted them with evidence. As Mackenzie J.A. said, writing for the Court in *AG Armeno Mines and Minerals Inc. v. PT Pukuafu Indah*, 2000 BCCA 405, 77 B.C.L.R. (3d) 1, at para. 19,

> [19] ... Normally, issues of jurisdiction *simpliciter* fall to be decided on the sufficiency of the pleadings alone but as we have observed in *Furlan v. Shell Oil Co.*, 2000 BCCA 404, there is an exception where the material before the court establishes that the plaintiff's claim is tenuous. A tenuous claim is one where evidence introduced by the foreign defendant contradicts material facts pleaded by the plaintiff or otherwise proves facts fatal to the plaintiff's claim.

He described the respective evidentiary and persuasive burdens in such a contest in para. 26, where he said,

> [26] I think that an evidentiary issue only arises if the defendant applicant tenders evidence that puts in question facts essential to the plaintiff's case. In that sense, the applicant has the initial burden of introducing evidence that challenges the plaintiff's allegations in the writ or statement of claim.... Once the defendant has discharged its initial burden, I think that the plaintiff is required to tender evidence that satisfies the judge that the plaintiff has a good arguable case in the sense of a triable issue on the facts put in issue by the defendant's evidence.
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> [21] In my view, this approach has been eclipsed by the enactment of the *CJPTA*, which signals a legislative intention to settle the law on territorial competence and by Rule 14 of the Rules of Court, proclaimed in force at the same time, which sets out the procedure for challenging territorial competence. When a challenge is made to territorial competence, the presumption in s. 10 of the *CJPTA* comes into play....
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> [22] The presumption of a real and substantial connection in s. 10 is a mandatory presumption with basic facts. The basic facts are those set out in s. 10(a) through (l), which are taken to be proven if they are pleaded. While the presumption is rebuttable, it is likely to be determinative in almost all cases.

[35] The Court then considered where the tort was committed:

> [58] The tort of negligent manufacture will be taken to have occurred in the place where the damage was suffered regardless of where the wrongful conduct elements of the tort took place if the wrongdoer knew or ought to have known the defective product would be used in the place where the damage took place: *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393.
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> ...
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> [60] As well, a failure to warn British Columbia consumers of a hazardous product is a tort committed in British Columbia, regardless of where the omission took place, if the defendant knew or ought to

have known the product would be used in British Columbia – the duty to warn is a duty to warn the consumer in this jurisdiction: *G.W.L. Properties Ltd. v. Grace & Co.-Conn* (1990), 50 B.C.L.R. (2d) 260 at 264 (C.A.).

[61] The plaintiff pleaded the defendants (including the US defendants) manufactured unsafe products and that they jointly "marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed" the products into the stream of commerce in British Columbia when they knew or ought to have known the products were unsafe. She also pleaded the defendants failed to warn her of the risks of using the products. Further, she pleaded she suffered damage in British Columbia as a result of the defendants' wrongful acts and omissions.

[62] Thus, s. 10(g) of the *CJPTA* was satisfied on the plaintiff's pleading and there was a presumed real and substantial connection between British Columbia and the facts on which the proceeding against the defendants was based on the basis that the proceeding concerns torts committed in British Columbia.

[63] Further, the plea that the defendants jointly "marketed, tested, manufactured, labelled, distributed, promoted, sold, and otherwise placed" the products into the stream of commerce in British Columbia is in effect a plea that the defendants (including the US defendants) carried on business in British Columbia. Thus, s. 10(h) of the *CJPTA* was also satisfied and a presumption of territorial competence was raised.

[64] The question then for the chambers judge was whether the US defendants rebutted the presumption of real and substantial connections on these grounds.

...

[66] The US defendants do not challenge these findings and properly so, since they are supported by the evidence led by the US defendants themselves. Rather, they contend that these connections are "tenuous or relatively insignificant" and that the chambers judge erred in concluding they established a real and substantial connection. They submit that their evidence that they do not carry on business in British Columbia was not contradicted; that a parent company is not liable for the actions of its subsidiary unless the subsidiary does not function independently and is used as a shield for improper conduct; that the evidence establishes that the Canadian defendants manufactured and sold the products in British Columbia independently of them and that, if any misrepresentations were made to British Columbia consumers, they were made by the Canadian defendants; that there was insufficient proximity between the plaintiff and the US defendants to support a duty of care; and that there was no evidence that the defendants engaged in a joint enterprise.

[67] I would not accede to these submissions.

> [68] The plaintiff pleaded the defendants' wrongful acts and omissions were committed jointly, that they were "engaged in a joint enterprise for the promotion and sale of Premarin and Premplus in British Columbia and elsewhere", and that their wrongful conduct caused her damage. This is a pleading that the defendants, including the US defendants, were joint tortfeasors....
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> [69] The plea that the US defendants were parties to torts committed in British Columbia presumptively establishes direct and significant connections between British Columbia and the facts on which the proceeding against the US defendants is based. In other words, it establishes a sufficient real and substantial connection to clothe the British Columbia Supreme Court with jurisdiction over the US defendants: *Moran G.W.L. Properties*.
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> [70] It was not necessary for the plaintiff to support these allegations with evidence except to the extent their truth was challenged by the evidence of the US defendants.

[36] Here, the plaintiff pleads jurisdictional facts. The plaintiff pleads a tortious conspiracy among the defendants to raise diamond prices with the object of creating an overcharge which injured her and other members of the class. The defendants do not seriously challenge these jurisdictional facts in their evidence.

[37] The defendants say that they do not conduct business in British Columbia. However, a tortious conspiracy will be taken to have occurred where the damage was suffered, regardless of where the elements of wrongful conduct took place, if the wrongdoer knew or ought to have known that the product would be sold (and harm would be suffered) in British Columbia: *Moran v. Pyle National (Canada) Ltd.,* [1975] 1 S.C.R. 393*; G.W.L. Properties Ltd. v. Grace & Co.-Conn (1990),* 50 B.C.L.R. (2d) 260 (C.A.)*; Robson v. DaimlerChrysler Corp.,* 2002 BCCA 354.

[38] I am satisfied that the plaintiff has pleaded the elements necessary to support a finding of territorial competence. The plaintiff has properly pleaded harm in British Columbia arising from alleged wrongdoing on the part of the defendants. The diamonds were sold in British Columbia through normal distribution channels. The defendants do not suggest that "their" diamonds were not sold in British Columbia. The diamonds arrived in British Columbia in the ordinary course of De Beers' business, and the defendants knew or ought to have known that the product would be sold in British Columbia.

[39] The defendants have not rebutted the presumption of territorial competence. Although the defendants adduced the report of Ms. Sanderson to challenge the claim that harm was suffered in British Columbia, her findings conflict with those of Mr. French. Accordingly, the claim of harm in British Columbia cannot be said to be fatally flawed.

[40] In the alternative, the plaintiff waives the tort and pleads that it and the other class members are entitled to recover under restitutionary principles. The waiver of tort, if successful, would result in a restitutionary obligation which would, to a substantial extent, arise in British Columbia because the tort occurred here and the waiver in this Court would result in a restitutionary obligation in British Columbia.

[41] Accordingly, I am satisfied that this Court has jurisdiction.

"B.J. Brown J."

The Honourable Madam Justice B.J. Brown