COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Fairhurst v. De Beers Canada Inc.,*
2012 BCCA 257

Date: 20120614
Docket: CA039153

Between:

Michelle Fairhurst

Respondent
(Plaintiff)

And:

**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.**

Appellants
(Defendants)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman

On appeal from the Supreme Court of British Columbia, June 1, 2011
(*Fairhurst v. Anglo American PLC*, 2011 BCSC 705,
Vancouver Registry, Docket Number S071269)

Counsel for the Appellant: K.L. Kay
D. Royal

Counsel for the Respondent: R. Mogerman
M. Buckley

Place and Date of Hearing: Vancouver, British Columbia
May 9, 2012

Place and Date of Judgment: Vancouver, British Columbia
June 14, 2012

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Low
The Honourable Mr. Justice Groberman

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] In this case, the Court must apply the "real and substantial connection" test for court jurisdiction, as codified by the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, to allegations of a criminal anti-competition conspiracy of global (and indeed historic) proportions. In her proposed class action, the plaintiff alleges that over the ten-year period ending February 22, 2007 (the "Class Period"), she and other members of the proposed class, all of whom reside in British Columbia, "directly or indirectly purchased hundreds of millions of dollars of Gem Grade Diamonds ... manufactured and distributed by the defendants". She pleads that the defendants have conspired to fix prices illegally, contrary to the common law and the *Competition Act*, R.S.C. 1985, c. C-34. As a result, she says, the class members paid more for such diamonds than they would otherwise have, and were thus "injured in their business and property and have suffered damages in an amount presently undetermined." The plaintiff seeks damages for conspiracy, tortious interference with economic interests, and conduct contrary to Part VI of the *Competition Act*; a declaration that the defendants have been unjustly enriched by their conduct and hold their illegal "overcharges" on constructive trust for the benefit of the plaintiffs; an order directing the defendants to disgorge such charges; and punitive damages.

[2] In late 2010, the defendants applied in the Supreme Court of British Columbia for an order striking out Ms. Fairhurst's statement of claim or dismissing or staying the action on the ground that the Court did not have jurisdiction to entertain the action. For reasons indexed as 2011 BCSC 705, the chambers judge, Madam Justice Brown, dismissed the application, ruling that the plaintiff had pleaded the elements necessary to support a finding of territorial competence and that the defendants had not rebutted that finding.

[3] The defendants appeal the chambers judge's ruling.

The Pleadings

[4] The plaintiff's claims are framed in broad terms. Among other things, she alleges in her statement of claim that during the Class Period:

> ... the defendants were the source of most Gem Grade Diamonds sold in the world. Through direct ownership, or agreements and combinations with others, the defendants controlled about two-thirds of the world's supply of Gem Grade Diamonds, particularly diamonds in larger sizes. The rest of the Gem Grade Diamond industry is highly fragmented.
>
> During the Class Period, the defendants routinely acknowledged that their control over the Gem Grade Diamond industry constituted an illegal cartel that violates antitrust laws. For example, in 1999, the defendants' Chairman, Nicholas Oppenheimer explained that the De Beer Group likes to think of itself as the world's best known and longest running monopoly. He declared publicly that, as a matter of policy, the De Beers Group violated antitrust law by managing the Gem Grade Diamond market, controlling supply, managing prices and acting collusively with other firms in the Gem Grade Diamond industry.
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> The defendants' control over the Gem Grade Diamond industry began through agreements with other producers more than a century ago. In 1890, De Beers Consolidated signed a sales contract with the newly formed London Diamond Syndicate, which agreed to purchase the entire production from all its mines, thereby foreclosing the market to others. In 1930, the London Diamond Syndicate became the Diamond Corporation which, in turn, formed the basis for the CSO [Central Selling Organization] that functioned as defendants' marketing arm until DTC [The Diamond Trading Company Ltd.] was substituted for the same role in 2000.
>
> During the Class Period, the defendants obtained Gem Grade Diamonds from mines they owned and from the mines of other mining companies under contract to them, including mines in Canada. The Gem Grade Diamonds were sorted by the CSO, and now by the DTC. The defendants created a price book that valued Gem Grade Diamonds according to certain physical characteristics, according to its weight, shape, quality (i.e. the absence or presence of cracks and occlusions). Once the Gem Grade Diamonds were sorted and graded, they were priced according to the price book.
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> During the Class Period, Gem Grade Diamonds of various grades were placed into boxes for distribution at a "sight". The defendants controlled the distribution of Gem Grade Diamonds by the use of "sightholders." A sightholder is an individual selected by and operating under defendants' direction who takes delivery, generally in London, of a box of rough Gem Grade Diamonds at a "sight" during a "sight week" held approximately ten times per year. The sightholder re-sells the Gem Grade Diamonds, either as rough diamonds, or after cutting, polishing and other finishing, for distribution through manufacturers, wholesalers and jewelers to consumers and other end users.
>
> ...

During the Class Period, senior executives and employees of the defendants, acting in their capacities as agents for the defendants, conspired with each other, the sightholders and others to illegally fix the price of Gem Grade Diamonds sold in Canada including in British Columbia and supplied to manufacturers, wholesalers, and jewellers, for inclusion in products sold in Canada including in British Columbia. In furtherance of the conspiracy, such persons engaged in communications, conversations and attended meetings with each other in which these persons unlawfully agreed to:

(a) fix, increase and maintain at artificially high levels the prices at which the defendants would sell Gem Grade Diamonds in Canada including in British Columbia and to manufacturers, wholesalers, and jewellers, for inclusion in products sold in Canada including in British Columbia;

(b) exchange information in order to monitor and enforce adherence to the agreed-upon prices for Gem Grade Diamonds; and

(c) allocate the market share or to set specific volumes of Gem Grade Diamonds that the defendants would manufacture and supply in Canada including in British Columbia and elsewhere.

...

During the Class Period, at times and places some of which are unknown to the plaintiff, the defendants wrongfully, unlawfully, maliciously and lacking *bona fides* conspired and agreed together, the one with the other or others of them and with their servants and agents:

(a) to 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, unduly, 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 among themselves the customers for Gem Grade Diamonds in British Columbia, Canada, and elsewhere;

(d) to allocate among themselves and others market shares of Gem Grade Diamonds in British Columbia, Canada, and elsewhere; and

(e) to allocate among themselves and others all or part of certain contracts to supply Gem Grade Diamonds in British Columbia, Canada, and elsewhere.

The defendants were motivated to conspire and their predominant purposes and predominant concerns were:

(a) to harm the plaintiff and other Class Members by requiring them to pay artificially high prices for Gem Grade Diamonds and for products containing Gem Grade Diamonds; and

> (b) to illegally increase their profits on the sale of Gem Grade Diamonds.
>
> ...
>
> In addition, the defendants used threats and promises and entered into agreements with sightholders and other resellers of Gem Grade Diamonds to fix the resale price of Gem Grade Diamonds at artificially high levels. The defendants also refused to supply Gem Grade Diamonds and/or supplied inferior quality Gem Grade Diamonds to sightholders who had low pricing policies.

[5] The British Columbia "connections" asserted in the statement of claim, then, are that the members of the plaintiff class reside in British Columbia and that the defendants, by conspiring to keep the price of Gem Grade Diamonds artificially high across all the markets in which they are sold, affected "purchasers in British Columbia", including (presumably) the plaintiff. The statement of claim does not state explicitly that Ms. Fairhurst purchased her diamond(s) in the province, or from whom, and her claim is not one of breach of contract. (Indeed, Ms. Fairhurst does not allege any contractual relationship between herself and any of the defendants.) She does plead that the defendants' wrongful acts were "directed towards the plaintiff and other purchasers of Gem Grade Diamonds ... in British Columbia and in Canada". Thus as the proceeding now stands, the plaintiff class would consist of persons who purchased diamonds in British Columbia <u>and</u> reside in the province.

[6] The defendants have not yet filed a statement of defence, but both parties filed extensive evidence, including expert opinion evidence, before the chambers judge. The defendants provided the following information as to their jurisdictions of incorporation and business operations:

- De Beers Investments, Inc. is a Luxembourg corporation with its sole office in Luxembourg. According to the defendants' affidavit evidence, it is a holding company whose only asset is shares in the capital of De Beers S.A. and is restricted by its articles of incorporation to holding that asset.

- De Beers S.A. is a Luxembourg corporation with its place of business in Luxembourg. It holds shares in various

corporations as described below. According to the defendants, it is not and has never been involved in commercial operations anywhere in the world.

- De Beers Consolidated Mines, Ltd. is a public company, 74% of the shares of which are owned indirectly by De Beers S.A. It was incorporated under the laws of South Africa and explores for and mines rough diamonds in that country. Some of its rough diamond production is sold to the South African State Diamond Trader, a body established by the government of South Africa to promote the local diamond cutting and polishing industry. The rest of this company's production is sold to De Beers Group Services (Pty.) Ltd., a South African company which sells exported diamonds to The Diamond Trading Company Limited.

- The Diamond Trading Company Limited ("DTC") is a U.K. company which operates primarily in London and is engaged in the commercial sale of rough diamonds in England to trade customers called "sightholders". According to the affidavit evidence, it is not engaged in manufacturing, distributing or selling polished gems or jewelry.

- De Beers Centenary A.G is a Swiss corporation whose sole office is in Switzerland. According to the affidavit evidence, it does not have any employees and has never engaged in buying or selling diamonds anywhere in the world. It was previously a holding company but evidently is no longer.

- De Beers Canada Inc. is a Canadian corporation with its registered office in Toronto. According to the pleadings, it has mining operations and field offices in Ontario and in the Northwest Territories, although none of its mines was

operational during the Class Period. It is registered extra-provincially in British Columbia but does not carry on business in this province and has never sold rough or polished diamonds in or into British Columbia or anywhere else in Canada. It sells (all of its) rough diamonds to DTC and does not engage in selling or trading gemstones.

- CSO Valuations A.G. is a Swiss corporation which is said to be a shell that has no existing business activities and has never engaged in selling or buying diamonds anywhere in the world. According to the defendants, it is an indirect subsidiary of De Beers S.A.

I have attached as a schedule to these reasons a corporate chart reflecting the foregoing.

Court Jurisdiction and Proceedings Transfer Act

[7] As is well known, the *Court Jurisdiction and Proceedings Transfer Act* ("*CJPTA*") has both modified and codified the law relating to the territorial competence of British Columbia courts: see *Lloyd's Underwriters v. Cominco Ltd*. 2007 BCCA 249 at paras. 3; 33-35, 54-55; *aff'd* 2009 SCC 11, at para. 22; *Stanway v. Wyeth Pharmaceuticals Inc*. 2009 BCCA 592, at paras. 8-24. Section 3 of the *CJPTA* states:

> 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 counterclaim,
>
> (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 British Columbia at the time of the commencement of the proceeding, or

> (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

[8] Section 10 states:

> 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, <u>a real and substantial connection between British Columbia and those facts is presumed to exist if the proceeding</u>
>
> ...
>
> (f) concerns restitutionary obligations that, to a substantial extent, arose in British Columbia, [or]
>
> (g) concerns a tort committed in British Columbia... [Emphasis added.]

I note that s. 10 does <u>not</u> list the fact that the plaintiff in a proceeding resides in the province as a circumstance that, without more, gives rise to the presumption of real and substantial connection. This is consistent with the position at common law, as recently confirmed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 86: "The presence of the plaintiff in the jurisdiction is not, on its own, a sufficient connecting factor."

[9] Section 11 of the *CJPTA* provides that once a real and substantial connection is established, the court may, after considering the parties' interests and the ends of justice, decline to exercise its competence on the ground of what was formerly called *forum non conveniens,* i.e., on the basis that another court is "a more appropriate forum" to hear the proceeding. In deciding this question, the court is required to consider the following circumstances:

> (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.

We are told that the defendants did not raise s. 11, or *forum non conveniens*, in their application below; nor was it referred to in the hearing on appeal.

The Chambers Judge's Analysis

[10] The chambers judge recounted the parties' respective positions at paras. 16-31 of her reasons. She began by noting the defendants' contention that with the exception of De Beers Canada Inc., none of them carries on business in British Columbia, is ordinarily resident in British Columbia, or sells or distributes Gem Grade Diamonds (defined in the statement of claim as "natural diamonds for use as gemstones in jewellery or for investment") either in British Columbia or elsewhere. She described the "diamond pipeline" as explained in the defendants' evidence:

> The only commercial sales made by any defendants are of "rough diamonds". These are diamonds that have been mined but not processed. <u>All of the rough diamonds are sold either to independent customers called "sightholders" in London, or to the state diamond trader</u> 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. <u>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</u>. [At para. 18; emphasis added.]

[11] The defendants argued that in light of this evidence, there was no basis for finding that a real and substantial connection existed between British Columbia and the subject-matter of the action. With respect to s. 10(g) of the *CJPTA*, they submitted 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 <u>the defendant says that</u> <u>the plaintiff has only alleged harm suffered in British Columbia, which is an insufficient basis for pleading a tort committed in British Columbia</u>. 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. [At para. 21; emphasis added.]

Technically, the statement of claim does not make any explicit reference to the "place of harm" suffered by the plaintiff. However, both parties seem to have accepted that the plaintiff's pleading that she is a "purchaser of Gem Grade Diamonds in British Columbia" is effectively a pleading that she suffered harm in British Columbia due to the alleged wrongdoing of the defendants. Since this inference has not been challenged, I will not quibble with it.

[12] In response to the defendants' contention that none of them sells or has sold Gem Grade Diamonds into British Columbia, the plaintiff argued that nothing in the defendants' evidence directly challenged the facts asserted in the statement of claim, and that the plaintiff "need only demonstrate that there is a good arguable case that the Court has jurisdiction".

[13] The chambers judge commenced her analysis of the case at para. 32 of her reasons, beginning by quoting s. 3 and the material part of s. 10 of the *CJPTA*. Although counsel had referred her to several authorities, she relied mainly on *Stanway, supra.* It involved allegations of negligent manufacture, but dealt with some of the same issues as those raised in the case at bar. To begin with, Smith J.A. for the Court helpfully reviewed the role of affidavit evidence in a jurisdictional challenge. He noted that prior to the enactment of the *CJPTA*, issues of jurisdiction *simpliciter* had been decided on the sufficiency of the pleadings alone, although an exception was made where the material before the court showed that a plaintiff's claim was "tenuous", i.e., "where evidence introduced by the foreign defendant contradicts material facts pleaded by the plaintiff or otherwise proves facts fatal to the plaintiff's claim." (See *AG Armeno Mines and Minerals Inc. v. Newmont Gold Co.* 2000 BCCA 405, at para. 19.)

[14] Since the enactment of the *CJPTA*, however, the traditional approach had been "eclipsed". The Act signalled a "legislative intention to settle the law on territorial competence [together with] Rule 14 of the *Rules of Court* ... which sets out

the procedure for challenging territorial competence." (Para 21.) Section 10, the Court said in *Stanway*, now imposes a "mandatory presumption" – i.e., a presumption that "requires that the inference be made" if the "basic facts" set out in s. 10 are proven and not rebutted. In the words of Smith J.A.:

> 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. [At para. 22.]

(See also *Purple Echo Productions, Inc. v. KCTS Television,* 2008 BCCA 85, at paras. 34-42.)

[15] In *Stanway*, it appears the U.S. defendants had acknowledged that certain of their activities in relation to Canadian defendants and consumers were sufficient to establish a real and substantial connection. At the same time, they argued (as do the defendants in the present case) that the connections were "tenuous or relatively insignificant" and that they had rebutted them with uncontradicted evidence. This argument was rejected. The Court reasoned :

> 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: see *The Koursk*, [1924] P. 140 (C.A.), where Scrutton L.J. said, at 155,
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>> The substantial question in the present case is: What is meant by "joint tortfeasors"? and one way of answering it is: "Is the cause of action against them the same?" Certain classes of persons seem clearly to be "joint tortfeasors": The agent who commits a tort within the scope of his employment for his principal, and the principal; the servant who commits a tort in the course of his employment, and his master; two persons who agree on common action, in the course of, and to further which, one of them commits a tort. These seem clearly joint tortfeasors; there is one tort committed by one of them on behalf of, or in concert with another.
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> ...
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> 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*.
>
> 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. Far from falsifying the pleading that the US and Canadian defendants were joint tortfeasors, the evidence led by the US defendants supports it ... [At paras. 68-70; emphasis added.]

In the result, the Court held that territorial competence had been established.

[16] The chambers judge in the case at bar found the facts before her to be similar to those in *Stanway*. In her analysis:

> 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. [At para. 38; emphasis added.]

She also found that the defendants' evidence had not rebutted the presumption of territorial competence, stating:

> ... 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. [At para. 39.]

Alternatively, she noted that the plaintiff had pleaded restitution as a cause of action and that "to a substantial extent", the waiver of tort would arise in British Columbia "because the tort occurred here and the waiver in this Court would result in a restitutionary obligation in British Columbia." (Para. 40.)

[17] In the result, she dismissed the defendants' application.

On Appeal

Deficiencies in the Pleadings

[18] On appeal, the defendants contend in their factum that the chambers judge erred in:

> ... finding that there was a real and substantial connection between British Columbia and the facts on which the proceeding against each of the Defendants is based pursuant to subsection 3(e) of the *CJPTA* by:
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> (i) finding that the Plaintiff had sufficiently pled the elements of tortious conspiracy necessary to support a finding of territorial competence over each of the Defendants;
>
> (ii) finding the Defendants failed to rebut the presumption in subsection 10(g) of the *CJPTA* by failing to adequately consider the evidence tendered by each Defendant as to their particular connections to British Columbia, their actual business activities and the allegations in the Claim; and
>
> (iii) finding that, because the Defendants are related corporate entities, the Court has jurisdiction over every single one of them notwithstanding there is no assertion of joint enterprise in the Statement of Claim.

Before us, Ms. Kay on behalf of the defendants argued that the decision appealed from creates an "unbounded jurisdiction test" under which a plaintiff need only plead a conspiracy in vague terms to establish territorial competence. Adopting the language used by the Supreme Court of Canada recently in *Club Resorts, supra*, counsel submitted that the result below was neither predictable, nor fair, nor based on principled or objective factors.

[19] Many of the defendants' specific submissions on appeal were directed at deficiencies in the plaintiff's pleading, as opposed to the issue of territorial competence. In particular, the defendants contended, Ms. Fairhurst had not "properly pleaded that a conspiracy – or any other tort [had] occurred in British Columbia"; she had "failed to sufficiently describe the parties to the alleged conspiracy and their relationship as amongst each other"; she had failed to "identify any unlawful act or acts engaged in by the Defendants"; she had failed to show that "any alleged wrongful act was directed at her or others in British Columbia"; and it

was “implausible” to assert a conspiracy by any of the defendants with persons who are their customers. Finally, it was said, the plaintiff had “made no allegation and adduced no facts that would make such an alleged conspiracy credible.”

[20] With respect, many of these arguments assume incorrectly that the chambers judge was required to determine on this application whether a cause of action was made out. The only application before her related to territorial jurisdiction. (Indeed, we were told that a motion under R. 9-5 as to whether a cause of action has been “properly pleaded” is being held in reserve until the Supreme Court of Canada has decided appeals in two ‘indirect purchaser’ cases – *Sun-Rype Products Ltd. v. Archer Daniels Midland Company* 2011 BCCA 187 and *Pro-Sys Consultants Ltd. v. Microsoft Corporation* 2011 BCCA 186.) In the present application, it was not open to the court below, nor is it open to this court, to make findings of fact on disputed evidence. As this court stated in *Purple Echo Productions, supra*:

> ... the nature of the inquiry does not change merely because evidence is adduced. The objective is to determine whether there are facts alleged, which if true, would found jurisdiction. The court is not charged with the task of determining whether the facts are true. A plaintiff need show only an arguable case that they can be established. [At para. 34.]

[21] Nor is it our task to weigh the ‘implausibility’ of the claim as pleaded. Thus the defendants’ objection that:

> To allow the Plaintiff to benefit from the statutory presumption in circumstances where the Claim asserts nothing more than a bald allegation of conspiracy, is bereft of jurisdictional facts regarding the alleged involvement of each of the Defendants, and makes assertions on behalf of a class of indirect purchasers essentially renders foreign defendants subject to legal proceedings in British Columbia based on nothing more than legal drafting claiming an implausible and legally untenable allegation of injury arising in British Columbia and an indiscriminate “scatter gun” approach to naming defendants.

misconceives the role of the court under s. 10 of the *CJPTA*. As *Stanway* makes clear, if the “facts on which the proceeding ... was based” come within any of the sub-paras. of s. 10, a real and substantial connection between British Columbia and those “facts” is presumed to exist. The cases cited by the defendants to the contrary

– *UniNet Technologies Inc. v. Communication Services Inc*. 2005 BCCA 114 and *Roth v. Interlock Services Inc.* 2004 BCCA 407 – were decided prior to the enactment of the *CJPTA*, when there was a discretionary aspect to the determination of "real and substantial" connection. The Act now provides objective criteria for making that determination, leaving more subjective elements to the assessment of *forum non conveniens* under s. 11.

[22] I will advert to two other arguments advanced by the defendants about the pleadings generally. The first is that the plaintiff failed to specify the role each defendant is alleged to have played in the alleged conspiracy. Instead, it is said, the defendants were simply 'lumped together' without the demonstration of any real and substantial connection between each individual defendant and the claim.

[23] Ms. Kay referred us to the decision of the Saskatchewan Court of Queen's Bench in *Wall Estate v. Glaxosmithkline Inc*. 2010 SKQB 351, [2010] S.J. No. 625, in which the plaintiffs in a proposed class action alleged that the defendant corporations, only one of which was Canadian, had manufactured and sold a drug that negatively affected the plaintiffs. Four foreign defendants sought a stay of the action as against them and a declaration that the Court did not have territorial competence under the *Court Jurisdiction and Proceeding Transfer Act* of Saskatchewan.

[24] The Court in *Wall Estate* noted at para. 41 of its reasons that *The Queens Bench Rules* required that a plaintiff properly frame the cause of action by sufficiently setting out the material facts in the pleading. Emphasizing that one of the purposes of pleadings is "to clearly and precisely define the question in controversy" (see *Ducharme v. Davies* [1984] 1 W.W.R. 699 (Sask. Q.B.)), the Court continued:

> In other words, it is not sufficient to simply assert that the foreign defendants have engaged in actionable wrongdoing. The pleadings must disclose enough material facts to form a basic factual foundation for such allegations.
>
> I find that the plaintiffs' particularization of the claim falls far short of what is necessary to assert that there is a real and substantial connection between Saskatchewan and the facts on which the proposed class action against the foreign defendants is based. The claim fails to make any plausible causal

> connection between the foreign defendants and Avandia's existence in Saskatchewan. Specifically, there is no claim that any of the foreign defendants played any role whatsoever in anything to do with the manufacturing, promoting, marketing, labelling or selling of Avandia in Saskatchewan. The plaintiffs have made vague, obscure and unparticularized assertions against the foreign defendants through the indiscriminate use of the term “the GSK defendants”. However, the inclusion of all defendants within the collective definition of “the GSK defendants” followed by the inarticulated assertions that all defendants are connected to all the alleged wrongdoings does not provide a sufficient basis to establish the requisite real and substantial connection between Saskatchewan and the foreign defendants in the pleadings.
>
> Accordingly, I conclude that the plaintiffs' claim is deficient in its articulation of linking the foreign defendants' conduct to the alleged wrongful conduct giving rise to the action such that there is no basis for this Court's assumption of jurisdiction over the foreign defendants. [At paras. 42-4; emphasis added.]

[25] As a separate matter, the Court in *Wall Estate* also ruled that the evidence filed in the proceeding demonstrated conclusively that there was no reasonable factual basis to substantiate the “necessary link between Saskatchewan and the alleged wrongdoing on the part of the foreign defendants.” Instead, the evidence demonstrated that only the Canadian corporate defendant manufactured, promoted, labelled, marketed and sold the drug in question in Canada and that the foreign defendants had no involvement in that business. (See para. 46.) In the result, the action was dismissed as against the foreign defendants.

[26] I agree with the defendants in the case at bar that the pleadings here are not a model of clarity and specificity, especially in connection with the alleged breaches of Part VI of the *Competition Act*. Part VI includes four basic offences – conspiracy with a competitor to fix prices (s. 45(1)), implementation by a corporation that carries on business in Canada of a directive to give effect to a conspiracy (s. 46(1)), bid-rigging (s. 47) and making a false or misleading representation to the public (s. 52(1)). The pleadings do not provide material facts that clearly support any of the foregoing offences.

[27] The only task for the court below, however, was to consider whether territorial jurisdiction was made out. Section 10 of the *CJPTA* does not require that each individual defendant’s conduct be particularized in the pleading; it refers only to the

connection between British Columbia and "the facts on which [the] proceeding is based". Ms. Fairhurst's pleading does allege that "the defendants" committed various wrongs or conspired to do so, that their conduct was directed at the plaintiff and other purchasers of Gem Grade Diamonds, and that injury and loss to the plaintiff class as purchasers in this province resulted. Unlike the defendants in *Wall Estate*, the defendants in this case know that they are alleged to have conspired to fix prices illegally, albeit at unspecified points in the 'diamond pipeline'.

[28] The defendants' remaining argument concerning the pleadings generally is that their affidavit evidence rebutted any presumption of territorial competence. The defendants state in their factum:

> ... Each of the affiants put forth by the Defendants provided clear and cogent evidence showing that the purported connection between the Defendants, the Claim and British Columbia was not real and substantial. The Plaintiff had an opportunity to cross-examine all of these witnesses but elected only to cross-examine the affiant for the DTC, Michael Page. This examination lasted only forty minutes.
>
> The Defendants' evidence irrefutably establishes that none of the Defendants have conducted business in British Columbia nor do any of the Defendants have any presence in British Columbia.
>
> The only Defendant with any connection whatsoever to British Columbia is DBC, which is extra-provincially registered in the province and has an attorney for service in the province. While extra-provincial registration provides some indication that a defendant is "ordinarily resident" within the province and therefore subject to court's jurisdiction, the British Columbia courts have not exercised jurisdiction over a foreign defendant solely on the basis of an extra-provincial registration. In the case of DBC, there is no other connection, let alone a real and substantial one, between DBC and British Columbia and DBC's uncontested evidence is that it did not carry on business in British Columbia during the Class Period and does not currently have any mining or exploration activities in the province. On the record before the Court, it would be inappropriate to conclude that DBC was "ordinarily resident" within the province.
>
> The Defendants have also presented clear and uncontradicted factual evidence that any connection between each of the Defendants and the harm allegedly suffered by the Plaintiff is, at best, extremely remote. [Emphasis added.]

[29] In response, the plaintiff suggests that the evidence tendered by the defendants does not "tell the whole story". Mr. Mogerman observes that the

defendants do not say they have no connection to the events described in the pleadings, or that agents or employees of the defendants have not participated in any activities directed at illegally raising the price of Gem Grade Diamonds for sale. As well, he notes that the corporate structure of the De Beers "group" has changed during the Class Period, such that entities that are now merely holding companies might have had different roles in the group earlier in the Class Period. As submitted in Ms. Fairhurst's factum:

> The [defendants'] alleged conduct takes place both vertically and horizontally within the Diamond Pipeline and is capable of moving the price of Gem Grade Diamonds across the entire market. Key to the plaintiff's allegations is that if prices are illegally increased at any stage of the diamond pipeline (creating an illegal overcharge), then with the knowledge and intent of the defendants, the normal distributive channels deliver the Gem Grade Diamonds to British Columbia, inclusive of the illegal overcharge. Given [De Beers'] dominance of the diamond markets, there is no doubt that British Columbians have spent many millions of dollars on Gem Grade Diamonds sold by the De Beers group of companies. Even the defendants' expert agrees that De Beers Gem Grade Diamonds are sold in British Columbia and that it is possible that price increases by the defendants led to higher prices in British Columbia. [Emphasis added.]

[30] The plaintiff also relies on the evidence of her expert, Dr. French, an economist with considerable experience in the workings of the diamond industry. Although the defendants assert that they sell rough diamonds to sightholders who are independent of them and who then distribute the diamonds to cutting centres, Dr. French suggests that by means of their market domination and other means of influence over sightholders (and subsidiaries selling into the secondary market), the De Beers group generally, and DTC in particular, are able to control the supply and thus to fix the price of diamonds in the worldwide market.

[31] I have already noted that it is not our role, nor was it the role of the court below, to make factual findings at this stage. Although the defendants may believe they have tendered "clear evidence" that none of them is involved in the commercial operations at issue in this proceeding, there is also evidence that may ground the wrongs complained of by the plaintiff at trial. The fact a corporation is merely a "holding company" does not mean its agents or employees do not participate, or

have not participated, in price-fixing or other illegal activities. A corporation need not carry on business in British Columbia to affect prices illegally in the province. Importantly, it has not been shown that any of the defendants could not have participated in the conspiracy as alleged, or that the price of Gem Grade Diamonds is not affected by the conduct of the defendants in respect of rough diamonds. The two commodities are hardly unrelated.

[32] In my view, then, the evidence filed by the defendants does not make it “plain and obvious” that the action as pleaded could not lie within territorial competence of a British Columbia court. In so finding, I take some comfort from a decision of the Ontario Superior Court of Justice, *per* Cumming J., in *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.* [2002] O.J. No. 298, 20 C.P.C. (5th) 351. Like the case at bar, it involved a proposed class action based on alleged damages suffered by the plaintiffs in Canada due to alleged “worldwide price-fixing conspiracies” by a group of corporations, only one of which was Canadian, in connection with certain vitamins. A considerable volume of evidence was adduced by the parties regarding the *situs* of the alleged conspiracies for purposes of Ontario’s Rule 17.02(g). In response to the defendants’ submission that the statement of claim was deficient and that there was no evidence the alleged conspiracies took place in Canada, the Court ruled that:

> ... there is a good arguable case that any conspiracy entered into abroad that fixes prices or allocates markets in Canada so as to create losses through artificially higher prices in Canada, gives rise to the tort of civil conspiracy in Canada. It is arguable that a conspiracy that injures Canadians gives rise to liability in Canada, even if the conspiracy was formed abroad. [Para. 58.]

With respect to Rule 17.02(h), which permits service *ex juris* where damages are sustained in Ontario, the Court continued:

> Damages is an essential element of the torts of conspiracy and intentional interference with economic interests. There is a presumption that any price-fixing scheme will cause damages to the purchasers of the price-fixed product. There is a presumption that cartel fixed prices will be higher than prices in a competitive market: see, for example, *In Re Alcoholic Beverages Litigation,* 95 F.R.D. 321 at 327 (E.D.N.Y.) [Para. 73.]

[33] As for the defendants' argument in *Vitapharm* that the plaintiffs had not sufficiently particularized the role of each defendant in the alleged conspiracies, the Court observed that by their nature, conspiracies and conspirators are secretive and that it was "far too early to put the plaintiffs to the task of unravelling the apparently complex corporate arrangements and of proving their case against specific entities", citing *Nutreco Canada Inc. v. Hoffmann* 2001 BCSC 1146.

[34] In my view, it is also too early in this case to put the plaintiff to the task of "unravelling" the defendants' respective roles, if any, in the alleged conspiracy. I would not accede to the defendants' objections regarding the pleadings generally.

Situs

[35] I turn finally to the central issue in this appeal – whether the statement of claim asserts a "tort committed in British Columbia" or "restitutionary obligations that, to a substantial extent, arose in British Columbia." The plaintiff of course argues that as in the case of most torts, including negligent manufacture or failure to warn, the wrong is not complete without damage. She says she has alleged damage suffered in British Columbia, and that she has alleged the *situs* of the wrongs is British Columbia, where all members of the plaintiff class reside. (Section 10(g) refers to a "tort committed in British Columbia" rather than a tort the *situs* of which is in British Columbia, but no one has argued that there is a difference between the two.)

[36] The Supreme Court of Canada's well-known decision in *Moran v. Pyle National (Canada) Ltd.* [1975] 1 S.C.R. 393 is the leading authority on the question of jurisdiction in cases involving the negligent manufacture of products sold into the stream of commerce. Mr. Justice Dickson (as he then was) formulated the following principle:

> Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. In the *Distillers'* case and again in the *Cordova* case a real and substantial connection test was hinted at. Cheshire, 8th ed., 1970, p. 281, has suggested a test very similar to this; the author says that it would not be inappropriate to regard a tort as having

> occurred in any country substantially affected by the defendant's activities or its consequences and the law of which is likely to have been in the reasonable contemplation of the parties. Applying this test to a case of careless manufacture, the following rule can be formulated: where a foreign defendant carelessly manufactures a product in a foreign jurisdiction which enters into the normal channels of trade and he knows or ought to know both that as a result of his carelessness a consumer may well be injured and it is reasonably foreseeable that the product would be used or consumed where the plaintiff used or consumed it, then the forum in which the plaintiff suffered damage is entitled to exercise judicial jurisdiction over that foreign defendant. [At 408-09; emphasis added.]

[37] *Moran v. Pyle* was applied by this court in 1990 in *G.W.L. Properties Ltd. v. Grace & Co.-Conn*., 50 B.C.L.R. (2d) 260, the facts of which are also well-known. There, service *ex juris* under former R. 13(1)(h) was challenged on the basis that since the defendant had apparently not manufactured or distributed the asbestos product in Canada, it could not be said it had committed a tort in British Columbia. The Court rejected that argument, citing the passage quoted above in *Moran v. Pyle*.

[38] A similar result was reached in *Furlan v. Shell Oil Co.* 2000 BCCA 404. It involved allegations of negligent manufacture of a resin by the defendants in the United States, which resin was incorporated into various plumbing products, also outside the province. The finished products were then purchased by consumers in British Columbia. This court rejected the defendants' argument that by showing they had not sold the resin to any British Columbia purchaser, they had negated jurisdiction *simpliciter*. In the analysis of Mr. Justice Mackenzie for the Court:

> ... *G.W.L. Properties*, *supra*, stands for the proposition that if the damage from a manufactured product occurs in British Columbia the tort of negligence is committed in British Columbia even though the negligent act or omission happened elsewhere. Damage is an essential element of the tort of negligence: see G.H.L. Fridman, *The Law of Torts in Canada,* vol.1 (Toronto, Carswell, 1989) at 320, citing *Long v. Western Propeller Co. Ltd.* (1968), 67 D.L.R. (2d) 345 at 348 (Man. C.A.). There is jurisdiction over the tort where the damage occurs: *Moran v. Pyle National ...* In *G.W.L. Properties* the foreign defendant was the manufacturer of the finished product rather than the supplier of a semi-processed material but I do not think that difference is significant. If as alleged the supplier was under a duty to warn the manufacturer or the ultimate consumer that the material was unfit for the intended manufacture, the plaintiff who has suffered the damage may look to the supplier for recovery in a negligence action. The fact that a manufacturer is interposed between the plaintiff and the supplier does not insulate the

> supplier from liability. Once jurisdiction over the tort is established then any defendants potentially liable to the plaintiff for the tort are properly joined in the action. [At para. 21.]

(See also *Robson v. DaimlerChrysler Corp*. 2002 BCCA 354 (*lve. to app. rfd.* [2002] S.C.C. A Nos. 332 and 333).)

[39] The foregoing cases, of course, did not involve allegations of conspiracy, the wrong with which we are concerned in the case at bar. Conspiracy was alleged in *British Columbia v. Imperial Tobacco Canada Ltd*. 2006 BCCA 398. Nine of the defendants were non-Canadian companies, only three of whom manufactured cigarettes sold in the province. The remaining six (the "joint breach defendants") were "alleged to be liable because of their relationship with one or more of the appellants who did manufacture cigarettes sold in British Columbia." (Para. 6.) In an application to this court in 2006, those defendants objected that they had been wrongly served *ex juris*. (The *CJPTA* was not yet in force.) Madam Justice Rowles, speaking for the Court, explained:

> Some of the defendants argue that service *ex juris* cannot be supported when the "real and substantial connection" test is applied. They submit that the Government's action is concerned with activities and wrongs that occurred in other jurisdictions and that it lacks the requisite connection to British Columbia to found jurisdiction under principles of private international law. The arguments made on this issue closely parallel the arguments made on the defendants' earlier challenge to the constitutionality of the *Act*. [At para. 27.]

[40] The Court concluded, however, that the analysis in *Moran* applied to the joint breach defendants. More importantly for this case, the Court also cited *Vitapharm, supra*, with apparent approval, including Cumming J.'s holdings that (a) "If an actionable conspiracy is proven and damage occurs in Ontario, then a tort has been committed in Ontario"; (b) "Damage occurred in Ontario because under the applicable antitrust laws, such damages were presumed as a matter of law once the existence of a conspiracy was proven; (c) "Foreign conspirators are necessary and proper parties to the action"; and (d) since the foreign conspirators in that case were alleged to have acted through their agents, "they were properly joined in the action on the basis that they carried on business in the jurisdiction". (*Imperial Tobacco,* at

para. 42.) In the result, the "joint breach defendants" were found to have been validly served.

[41] In their factum, the defendants here seek to distinguish *Furlan, Robson* and *Harrington v. Dow Corning Corp.* 2000 BCCA 605, on the basis that in contrast to the case at bar, the foreign defendants had supplied "the very products" that were the subject of the litigation in British Columbia. With respect to *Nutreco, Imperial Tobacco* and *Stanway, supra,* the defendants contend that jurisdiction was not founded on "the mere pleading of conspiracy alone" but also on the fact that in *Nutreco,* there was factual evidence that the vitamins had been distributed in Canada either directly or through companies controlled by the defendants; that in *Imperial Tobacco* all foreign and domestic defendants were alleged to have engaged in a "joint enterprise" and the foreign defendants "had in fact breached duties in British Columbia"; and that in *Stanway,* jurisdiction was found "based on the pleading of a joint enterprise between the defendants and the fact that the US defendants [had] engaged in activities of harmonizing and coordinating the marketing of the subject drug in Canada."

[42] It is certainly true that jurisdiction was not taken in any of the cases discussed above based on a "mere allegation of conspiracy". Rather, the courts found that the "real and substantial" connection was established on the basis that the pleading referred to torts "committed in British Columbia". (See *Stanway* at para. 62; *Imperial Tobacco* at para. 32 and *Nutreco* at para. 40.) As seen above, the enactment of the *CJPTA* has clarified the "real and substantial connection" test by legislating that where the tort is alleged to have taken place in British Columbia, or where a "restitutionary obligation" is alleged to have arisen here, a real and substantial connection is established. Although counsel for the defendants describes this connection as "tenuous", the mandatory presumption leaves little room for the exercise of discretion once the connection is established. (Even without s. 10, it is likely this principle would apply. In its recent judgment in *Club Resorts, supra*, the Supreme Court of Canada confirmed that the "*situs* of the tort is clearly an

appropriate connecting factor" in discussing the jurisdictional rules of Quebec. (Para. 88.))

[43] A recent decision of the Court of Appeal of Quebec, *Option Consommateurs v. Infineon Technologies AG*, indexed as 2011 QCCA 2116, provides further support for the view that an 'economic tort' such as conspiracy to fix prices illegally will be regarded as taking place where the economic damage is suffered. In *Option Consommateurs*, the personal plaintiff, Ms. Cloutier, had purchased online from her home a computer product with dynamic random access memory ("DRAM") supplied by Dell Computer Corporation ("Dell"). Some time later, she launched a proposed class action against various corporate defendants involved in the distribution chain, claiming they had artificially inflated the price of DRAM contrary to the *Competition Act* and breached other duties arising under the *Civil Code of Quebec*. Evidently, the applicable limitation in the *Competition Act* had expired; but the Court ruled that the conspiracy alleged by the plaintiffs could "ground an action in extracontractual liability pursuant to article 1457 C.C.Q. for all members of the class." (Para. 28.)

[44] One of the defendants' arguments in challenging the jurisdiction of the Superior Court of Quebec was that even if the contract was deemed to have been made in Quebec, Ms. Cloutier had suffered a <u>purely financial loss</u>, which could not constitute a "connecting factor" sufficient to found jurisdiction. The Court of Appeal disagreed with this argument and distinguished certain earlier Quebec authorities on the basis that they had involved financial damage merely "recorded" in the province. Where on the other hand financial injury was "materially suffered in Quebec", the Superior Court would take jurisdiction. In the analysis of Kasirer J.A. for the Court:

> ... I am of the view that the Superior Court has jurisdiction to hear the matter. Ms. Cloutier suffered an economic loss to be sure, but it is of a different character than the one spoken to by the Court in respect of the plaintiff in *Quebecor Printing* [*Memphis Inc.* v. *Regenair Inc.* [2001] R.J.Q. 966 (C.A.)], She alleges that she paid too high a price for the computer she purchased because of the unfairly priced DRAM it contained. That remote-parties contract between Ms. Cloutier and Dell was deemed by the *Consumer Protection Act* to have been concluded in Montreal. The loss that she suffered on the occasion of concluding that contract grounds jurisdiction for the Quebec courts here. <u>That loss is a "*préjudice*/damage" within the meaning of article 3148(3) notwithstanding its purely financial character.</u>

> Taking the facts alleged in the motion to be true, it constitutes a material injury, suffered in Quebec, that was caused by the price-fixing conspiracy. The loss was not just recorded here because of the locus of Ms. Cloutier's patrimony but it was substantively suffered here and, as a result, grounds jurisdiction for the class action. [At para. 72; emphasis added.]

[45] The parallels between *Option Consommateurs* and the case at bar are obvious, and in my opinion, similar reasoning applies with even greater force in this instance by virtue of the *CJPTA.* Indeed, no authority has been cited to us that would call into question the plaintiff's submission that the conspiracy as pleaded here concerns a tort committed in British Columbia and restitutionary obligations that to a substantial extent arose in the province. It appears that in cases of alleged conspiracy causing economic loss, no less than in cases of alleged negligent manufacture causing personal injury, Canadian courts recognize the "important interest a state has in injuries suffered by persons within its territory." (*Moran,* at 409.) It may seem inconceivable to the large European and South African corporate defendants in this proceeding that, in the phrase of Ms. Kay, they are being "called to the court" of a jurisdiction on the far side of North America that seldom, if ever, figures in their decision-making. However, consumers in this province, no less than in other jurisdictions, may be affected by conduct of the kind alleged by the plaintiff. The territorial competence of British Columbia courts over the defendants is the result of the operation of 'objective' rules of territorial competence that have been formulated to reflect the realities of modern commerce.

[46] Having said this, I also acknowledge that if s. 11 of the *CJPTA* had been invoked, the result might well have been different. I make no comment on whether it is open to the defendants to seek to have the Supreme Court of British Columbia decline jurisdiction under that provision at a later stage.

Disposition

[47] For the reasons given above, I am satisfied that the action as pleaded is presumed to have a real and substantial connection with British Columbia under ss. 10(f) and (g) of the *CJPTA*, thus meeting the requirements for territorial competence imposed by s. 3(e). I would dismiss the appeal.

"The Honourable Madam Justice Newbury"

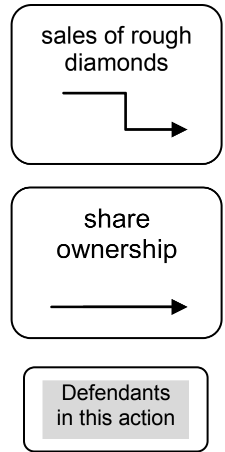
I Agree:

"The Honourable Mr. Justice Low"

I Agree:

"The Honourable Mr. Justice Groberman"

SCHEDULE



DB Investments, Inc. (U.K.)

De Beers S.A. (Luxembourg)

74%

Ponahalo 26%

De Beers Consol. Mines, Ltd. (S. Africa)

De Beers Canada Inc. (Canada)

De Beer's Group Services Pty Ltd. (S. Africa)

S. Af. State Diamond Trader

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The Diamond Trading Co. Limited (U.K.)

"Sight-holders" (U.K.)

CSO Valuations A.G. (Switzerland)

De Beers Centenary A.G. (Switzerland)