NO. S-1510120
VANCOUVER REGISTRY

IN THE SUPREME COURT OF BRITISH COLUMBIA

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND

IN THE MATTER OF THE *BUSINESS CORPORATIONS ACT*, S.B.C. 2002, c. 57, AS AMENDED

AND

IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF WALTER ENERGY CANADA HOLDINGS, INC. AND THE OTHER PETITIONERS LISTED ON SCHEDULE "A"

PETITIONERS

BOOK OF AUTHORITIES OF THE PETITIONERS

(RE: WALTER CANADA GROUP'S SUMMARY HEARING WRITTEN SUBMISSIONS)

VOLUME 1 OF 2

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IN THE MATTER OF THE COMPANIES' CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

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APPLICATION UNDER THE COMPANIES CREDITORS ARRANGEMENT ACT, R.S.C. 1985, c. C-36, AS AMENDED

Farley J.

Heard: February 19, 2004
Judgment: February 22, 2004
Docket: 03-CL-4932

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Joseph M. Steiner, Donald Hanna for Greater Toronto Airport Authority
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Howard Gorman for Unsecured Creditors Committee
Robert Thornton, Greg Azeff for GECAS
Dan MacDonald, Q.C. for WestJet

Subject: Corporate and Commercial; Civil Practice and Procedure; Insolvency; Public; Contracts

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MOTION by Air Canada against Greater Toronto Airport Authority to enforce terms of earlier order involving terminal access.

***Farley J.*:**

1 As argued, this was a motion by Air Canada (AC) for an Order enforcing paragraphs 6 and 7 of the Amended and Restated Initial Order dated April 1, 2003 (Initial Order) requiring the Greater Toronto Airports' Authority (Authority) not to discontinue, alter or interfere with the right, contract, arrangement, agreement, license or permit to allow AC to relocate its domestic operations (including baggage handling and gating) to Terminal 1 New (NT) and in doing so to have fixed preferential use of all 14 contact gates (bridge gates) in the domestic area of NT during the initial development phase of NT, subject to the terms and conditions of the Memorandum of Understanding between AC and Authority made as of the 31st day of January, 2001 (MOU) and the Terminal Facilities Allocation Protocol (Protocol) as such may evolve from time to time. Apparently the 9 hard stand commuter gates (tarmac gates) are no longer an issue for AC.

2 Paragraphs 6 and 7 of the Initial Order provide:

> 6. **THIS COURT ORDERS** that during the Stay Period, no person, firm, corporation, governmental authority, or other entity shall, without leave, discontinue, fail to renew, alter, interfere with or terminate any right, contract, arrangement, agreement, licence or permit in favour of an Applicant or the Applicants' Property or held by or on behalf of an Applicant, including as a result of any default or non-performance by an Applicant, the making or filing of these proceedings or any allegation contained in these proceedings.

7. **THIS COURT ORDERS** that, during the Stay Period, (a) all persons, firms, corporations, governmental authorities, airports, airport authority or air navigation authorities or any other entity (including, without limitation, NAV Canada, Office of the Superintendent of Financial Institutions ("OSFI"), IBM Canada Limited and BCE Nexxia Inc.) having written or oral agreements with an Applicant (including, without limitation, leases, pooling or consignment agreements, multilateral interline traffic agreements, codeshare agreements, Tier III Commercial Agreements, gate access agreements, frequent flyer programs or statutory or regulatory mandates) for the supply of goods and/or services (including, without limitation, real property, computer software and hardware, aircraft parts, aircraft maintenance services and related equipment, ground handling services and equipment, catering, office supplies and equipment, reservations, employee uniforms, crew accommodations, meals and commissary, communication and other data services, accounting and payroll servicing, insurance or indemnity, clearing, banking, cash management, credit cards or credit card processing, transportation, utility or other required services), by or to an Applicant or any of the Applicants' Property are hereby restrained until further order of this Court from discontinuing, failing to renew on terms no more onerous than those existing prior to these proceedings, altering, interfering with or terminating the supply of such goods or services so long as the normal prices or charges for such goods and services received after the date of this order are paid in accordance with present payment practices (for greater certainty and notwithstanding the terms of any federal or provincial statute or the terms of any lease or any present payment practices, lessors cannot alter, reconcile or recalculate the amount of any rent, operating, maintenance or other expenses payable by any Applicant so as to recover in whole or in part any amount payable by an Applicant in respect of any period of time prior to April 1, 2003 or to compensate it in whole or in part for not receiving amounts owing to it by any Applicant in respect of any period of time prior to April 1, 2003), or as may be hereafter negotiated from time to time, and (b) subject to Section 11.1 of the CCAA, all persons being party to fuel consortia agreements, or agreements or arrangements for hedging the price of, or forward purchasing of fuel, are hereby restrained from terminating, suspending, modifying, cancelling, or otherwise interfering with such hedging agreements or arrangements, notwithstanding any provisions in such agreements or arrangements to the contrary, provided that nothing herein shall require any bank to accept bankers acceptances issued after April 1, 2003. For greater certainty, any reference to "airport authority" made in this order shall include both authorities and any other types of legal entity operating an airport.

3 I have frequently observed in these CCAA proceedings that what is needed amongst all stakeholders and AC in all their various relationships is trust and respect flowing in every direction. I regret to say that I think it a fair observation here that trust and respect does not flow in either direction between AC and Authority. That is unfortunate and in my view completely unnecessary and inappropriate; especially when one considers that AC traffic made up 60% of the traffic which went through the Authority in 2003, and it recognized that AC is building a hub at the Toronto airport so that both sides should recognize the importance of one to the other and considering that AC is attempting to do significant restructuring in these CCAA proceedings. For whatever reasons, it appears that both sides of this equation were content to try to get an edge, even a little edge, on the other in their dealings. Each wishes its own slant on their relationship, but particularly as to how the written word should be interpreted. Suffice it to say that the agreement between AC and Authority is to be interpreted on a common sense, business efficacy/avoidance of commercial absurdity basis and is not to be restricted to the terms of any formal written agreement (as is the case of the settlement documentation as to Terminal One (T1) and Terminal Two (T2) executed between AC and Authority which agreements contain "entire agreement" clauses and which also provide that there is to be a separate agreement as to NT). There is no "entire agreement" clause in the subject documentation between AC and the Authority. Indeed there is no requirement that this relationship re NT be reduced to a written agreement as the T1 and T2 agreements provide that they:

> Shall not be construed as an agreement or understanding between [Authority] and [AC] with respect to any matters relating to [NT] which matters will be dealt with in separate arrangements between [Authority] and [A.C.]

4 John Kaldeway, the Vice President, Transition Programs of Authority wrote AC on May 29, 2003, two months into the CCAA proceedings (in dealing with an Initial Order which Authority has not come back on or as to this aspect appealed), stating in a most reasonable way its general concern that the Authority's operations and particularly its transition to NT would not be impacted adversely by AC's CCAA proceedings:

> The [Authority] assigns air carriers to the various terminals at the Airport in such a manner as to ensure the most efficient use of airport resources. It has been and continues to be our intent to have Air Canada, and its alliance and code-share (SA) partners, as the first occupants of the new terminal (NT). This, of course, assumes both that a successful restructuring by Air Canada has occurred or is continuing with an ongoing operational configuration which would warrant a transfer of operations to the new terminal, as well as the negotiation of the appropriate commercial arrangements.

> It is important through the process of [AC's] restructuring and the completion of the construction of the first phase of the new terminal that we maintain full and effective communications on how the restructuring and the final completion of the new terminal will impact and shape our mutual plans. In this regard, this letter will discuss important issues relating to the completion of the construction and the transition of air carrier operations into the new terminal.
>
> . . .
>
> AC and the Authority have entered into an Operating Agreement and Lease in respect of [T2] dated January 31, 2001. As you are aware, upon the completion of the first stage of [NT], the [Authority] must proceed immediately with the construction of Pier-F and the new international hammerhead. Until the opening of Pier-F, we expect that [AC's] domestic operations will be conducted from the terminal while international passenger processing will be conducted in the new terminal with boarding and deplaning to occur at the Infield Terminal to the extent these will not yet be able to be accommodated at the new terminal. Transborder [Transborder being interpreted as trans U.S. border] operations will remain at [T2]. In order to ensure the continued development of [NT] as planned, [AC] and the [Authority] will have to establish an operations protocol to provide for the transfer of operations from Gates 202, 203, 204, 205, 206, 208, 210, 212, 214, 216, 218, and 220 to [NT] in November [2003]. These gates serve domestic traffic only.
>
> . . .
>
> Finally, in view of the demands upon [AC's] as it proceeds with its restructuring and the critical phase of our development program, it is imperative that we establish an appropriate and effective line of communication between us that can respond in real time to emerging issues. Please confirm that John Segaert is the individual in Toronto who is able to bind [AC] with respect to these transitional issues. . . .

5 It is interesting to note that this question of the fixed preferential use of the 14 bridge gates being in issue only flared up in January, 2004 although the Authority indicates that there were rumours circulating in December, 2003 as to AC's major domestic competitor WestJet wanting to use NT. I note that apparently there are sufficient facilities in NT to allow for the checking in and baggage handling of SA international flights but that for these flights passengers would have to be bussed to the infield facility. It also appears that similarly domestic non-AC flights could be included at NT although bussing would be either to Terminal Three (T3) or (T2) in that event. Curiously, there seems to be somewhat of a mismatch of resources in that the Authority has built recently more bridge gates at T3 but has not companioned these new gates with check-in and baggage handling facilities.

6 AC filed its motion on February 5, 2004; the Authority responded with its material on February 12th, AC provided a reply affidavit of Monte Brewer (Brewer) on February 17th; the Authority responded with a further affidavit of Howard Bohan (Bohan) the same day; AC then provided a further affidavit of John Segaert (Segaert) on February 18th; and the Authority responded with the last word with a further Bohan affidavit of February 19th, the day of the hearing. The factum of AC is dated February 17, 2004; the factum of the Authority is dated February 18, 2004. There was no cross-examinations on any of the affidavits - either there was not enough time to do so (which is doubtful as to those in the February 5th and responding February 12th motion records or AC and the Authority were both content to live with any statements of the other side (notwithstanding professed disagreement in the latter affidavits), in other words, they were content to live with the ambiguities, as it does not seem that either side had any appetite for cross-examination. It therefore falls to this court to deal with the morass of material and to attempt to determine what is the agreement between AC and the Authority as to the use of the 14 bridge gates in question based on an objective and reasonable view of matters including commercial reasonability and avoidance of absurdity. My conclusion is based upon the foregoing and the balance of probabilities in interpreting the evidence.

7 It is also curious to note that in many instances the affidavits referred to meetings, discussions and other contacts without specifying a precise date. The lack of precise dates for matters such as these would lead me to the reasonable conclusion that the active participants in these situations did not keep a written record of such, but are now only relying upon their memories as to dates. One would have thought that ordinarily matters of this nature would have been either documented in exchanges between the parties or in contemporaneous notes made at the time. That they were not would lead me to the reasonable conclusion that neither AC nor the Authority had the slightest expectation that as to the domestic use of NT during its first phase, the sole user would not be AC, absent unusual circumstances. Certainly AC was the only domestic carrier to be involved in discussions, liaison, planning, co-ordination and trial runs and testing. I would note that WestJet is a very recent new-comer to the NT scene (although it previously had some now existing operations out of T3) as discussions after WestJet's approach to the Authority about moving WestJet's Hamilton based flight operations to NT only happened in December, 2003; one might reasonably question whether WestJet would be able to get up to a co-ordinated speed for operations at NT for an April 18, 2004 start given that it has not been involved in any of this planning and testing over the past several years. WestJet claims that AC's motive in bringing this motion is to avoid the competition; one may similarly question whether WestJet's motives were "innocent".

8 That AC appeared to both AC and to the Authority as the only game in town up to at least December, 2003 would lead one (and it would appear both AC and the Authority as

well) to consider that one need not dot all the "i"s and cross all the "t"s as to the 14 bridge gates. Further it is within that context that one must interpret the Authority's advice that AC and its SA partners would be the first occupants of NT as being that in respect of domestic carriers it was expected between AC and the Authority that AC would be the only domestic carrier in NT during phase one, subject to the "use it or lose it" provision of the Protocol and the provision that if other airline carriers could not be reasonably accommodated at T2 or T3 before phase two at NT came into play. It would be unreasonable to interpret the element of first occupant as being satisfied by AC domestic going in on April 6, 2004 and WestJet going in twelve days later on April 18, 2004, as per WestJet's January 14, 2004 press release. Curiously the Authority does not directly advise AC before its January 28, 2004 letter which indicates that AC gets not the 14 expected bridge gates on a fixed preferential basis, but rather only 8, with the requirement to share the other 6 with WestJet on a common usage basis. The Authority in my view is not the only one to play it cosy and coy; AC states that in late December it came up with a flight schedule that would allow it to have all of its domestic flights gated out of NT but it only advised the Authority of this on January 12, 2004, immediately after Calin Rovinescu of AC (second in command and the Chief Restructuring Officer in the CCAA proceedings) confirmed with Lou Turpen, the CEO of the Authority that the Authority was having discussions with WestJet, the nature of such discussions was not revealed.

9 I think it is fair to observe that one is disappointed with the lack of trust and respect flowing both ways as well as the lack of communication, co-operation and common sense. I say this notwithstanding that I appreciate how difficult running a major airline or a major airport is, particularly as to co-ordinating and accommodating ever changing scheduling. However, apparently the Authority is on record as not wishing to be bothered with interim scheduling advice but rather to be informed as to the schedule for the next season (the summer season) on a finalized basis in late January 2004 (January 31, 2004 being the last IATA date for such schedules). The Authority complains that usually changes made at such late date are only "tweaks", not the types of changes made by AC in mid-January and then as changed on a wholesale basis later in that month. However there does not appear to be any such restriction on magnitude or quality. One should also observe that the Authority during November and even into December 2003 was having meetings with AC at which the Authority was requesting AC to see if it could adjust its domestic schedule so that it would all be gated out of NT with no bussing to T2 (and therefore no bus terminal is to be built there). It may well be that AC was incentivized to re-think its position once it heard rumours of WestJet's interest. I would not find that unusual. I have no doubt that AC thought that it had the luxury of keeping its options open as to having overflow (if any) as to its domestic flights in phase one of the NT accommodated by bussing to T2 (with a new bus terminal to be built by and at the expense of the Authority which would have the extra benefit of accommodating a swing flight plane from domestic to transborder use (or vice versa) at T2;

that luxury would not "cost" AC anything so long as its expected position of being the only domestic carrier at NT during phase one was maintained).

10 In Segaert's February 5, 2004 affidavit he states at para. 43:

> 43. In or about September, 2003, I had discussions with Mr. Howard Bohan, General Manager, New Terminal 1 Client Task Force, GTAA, regarding the revisions to version 6 of the TFAP. At the time, we discussed the application of the fixed preferential use gates and common use gates provisions of the TFAP in connection with the opening of phase 1 of T1 New. Our discussions for some time had all been premised on Air Canada moving its domestic operations into T1 New from Terminal 2. Mr. Bohan at that time indicated to me that the 14 domestic contact gates would be designated as fixed preferential use gates including reserved facilities that Air Canada would be in a position to control in the manner prescribed by the TFAP. The 9 hard stand commuter gates in T1 New he indicated would be designated as common use gates with Air Canada Jazz being fully accommodated in these facilities with some potential surplus capacity available. At that time as at all other times up until January 28, 2004, there was never any suggestion or doubt expressed by GTAA in their discussions with me that there would be any other domestic carriers operating out of T1 New from the initial phase until completion of the construction of subsequent phases of the development.

11 Segaert was the liaison decision-maker of AC requested by the Authority in the May 29, 2003 letter.

12 Bohan in his February 12, 2004 affidavit does not deny that but attempts to explain away the impact of same at paragraphs 2-7:

> 2. I have reviewed the affidavit of John Segaert sworn February 5, 2004, and in particular paragraph 43 of that affidavit. Mr. Segaert implies that the GTAA has altered an agreement or arrangement that Air Canada would have the permanent use of all fourteen contact gates at T1New on a fixed preferential basis. This is untrue. The discussions described by Mr. Segaert in paragraph 43 are not accurately described and, taken in conjunction with the balance of Mr. Segaert's affidavit, distort the discussions we had concerning the application of the Terminal Facilities Allocation Protocol ("TFAP") for T1New.
>
> 3. The discussions referred to at paragraph 43 of Mr. Segaert's affidavit took place at a meeting late in May or early June, 2003. At that time, the scheduled opening date for T1New was October 2003. Our discussions centred on the application of the TFAP for the purpose of designating fixed preferential contact gates and common use contact gates, as well as fixed preferential check-in counters and common use counters, at the time of the proposed opening date for T1New.

4. Our discussions at that time were based on version 5 of the TFAP. A copy of the TFAP version 5 is attached as Exhibit "P" to John Kaldeway's affidavit.

5. Under the TFAP methodology, the first step is for the GTAA to determine the number of gates or check-in counters available for allocation on a fixed preferential use basis, under section 4.4.1(ii), which provided:.

(ii) Based on the processing standards and the peak gate and Check-in Facility demand analysis, the GTAA will determine the number of Fixed Preferential gates and check-in positions to be allocated from the available gates and Check-in Facilities that have been designated by the GTAA as being available for allocation on a Fixed Preferential Use Basis. For greater certainty, such available gate and Check-in Facilities shall not include any gates and check-in positions that have been designated as GTAA Reserved or common Use Terminal Facilities.

6. Section 8 of the TFAP provides that 10% of the available facilities will be designated GTAA reserve facilities. (Sections 4.4.1(ii) and 8 are unchanged in the current version 7 of the TFAP.)

7. At that time, in late May or June, 2003, the GTAA anticipated Air Canada to be the only domestic carrier that would be operating from T1New at the time of opening. Accordingly, the GTAA then considered that all contact gates at T1New, including 2 GTAA reserved use gates, could be available for allocation on a fixed preferential basis.

13 One should also have regard to the November 23, 2001 Authority Map showing SA domestic (that is AC domestic) as using all gates - and no other carrier. The drawings presented by the Authority are Feb. 10, 11, 2004 and therefore produced only for the hearing.

14 It seems to me that the understanding between AC and the Authority which would have the status and equivalence of the type of agreement contemplated by the subject paragraphs 6 and 7 of the Initial Order under the CCAA was that in the prevailing circumstances and as these parties saw the Protocol (and MOU) playing out during phase one, AC was to have the fixed preferential use of the 14 bridge gates at NT subject to the use it or lose it proviso and the unable to accommodate elsewhere process.

15 Further given this understanding, then if the Authority wished to change course, it is constrained to do so in accord with the MOU and the Protocol in place from time to time. The Protocol is a work in progress and will continue to be so not only in phase one of the NT but during the complete functional life of the NT, unless otherwise replaced.

16 It does not seem to me that the Protocol (or the MOU) can be reasonably interpreted as advanced by the Authority that the Authority has the right and obligation to determine how many common use bridge gates it needs to accommodate carriers it wishes to place in the NT and that any being left over would be available for fixed preferential use (to a carrier which represented 60% of the traffic in the NT as to any type of flight - domestic, transborder and international collectively which at the present time could only be AC and at anytime could only be one carrier as simple mathematics dictate).

17 Given that Segaert was the AC liaison co-ordinating person as requested by the Authority, I do not see that any advice from anyone even in December, 2003 at the Authority to Rick Leach (Leach) or others at AC would have any legal impact. Given that understanding, I am not so surprised that Leach may not have focussed on what was being suggested to him that AC would only get a certain number of bridge gates on a fixed preferential basis. Further, since these suggestions were made at a time when it was understood that on a practical basis AC was the only domestic carrier for phase one of the NT - understood by both the Authority and AC until the approach to the Authority by WestJet in December and thereafter by AC alone, in permitted ignorance until otherwise advised in January, 2004.

18 I understand that the opening of NT was delayed from the expected date of October, 2003 to April 5, 2004, but that such delay was not occasioned by AC. If matters had progressed without such delay, then it would appear that AC would not only have been allocated all 14 bridge gates on a fixed preferential basis, as indicated and evidenced by the discussion between Bohan and Segaert, but that it would have been functionally operating same. I do not see that the delay or the lack of present functional use gives the Authority any flexibility to change its mind as to AC having these bridge gates on such basis. If the Authority wishes to accommodate WestJet at NT, then it would have to follow the Protocol until either AC loses some or all of the 14 gates on a fixed preferential basis for lack of use or additional gates are built in subsequent phases (it is perhaps curious that phase one of the NT has so few gates relatively speaking although subsequent phases will bring the total to over 100; apparently most of that results from NT being squeezed into a space between T2 and T3 and for the interim having to exist in conjunction with T1 before it is demolished and replaced by runway and new construction of piers at NT).

19 The Authority (and indeed WestJet) stressed that the Authority's mandate was to provide equitable access for all air carriers. However one would observe as has been observed frequently in other CCAA proceedings that equitable treatment does not necessarily mean equal treatment. In these circumstances I do not see that there is anything truly inequitable about following the Protocol if WestJet wishes to be accommodated at the NT through use of any of the bridge gates. I pause to note that WestJet apparently could be accommodated

at the NT for check-in and baggage handling if it were content to have its passengers bussed to either T2 or T3. The Authority downplayed to the maximum the inconvenience of such bussing, indicating that it would only involve the same amount of time as it would take a passenger to otherwise walk to the end of one of the piers of NT. One may be sceptical of that assertion but that is the official position of the Authority. I would also be of the view that the Authority has not in any material respect satisfied its obligations to show that it cannot otherwise accommodate WestJet at either T2 or T3, there were no figures as to usage of the check-in and baggage facilities being overloaded at T3 and there are "surplus" gates there; similarly there was no explanation as to the need to "rewire" the computer system as it would seem that under ordinary circumstances the existing cabling could remain intact and only the peripherals of computers would need to be replaced (with their own compatible software programs) and the baggage handling question was not explained as to why it needed to be replaced (or indeed why WestJet could not contract AC to handle this aspect for it at T2). One would also observe that apparently the Authority might be able to accommodate WestJet at NT by using the tarmac gates on a common use basis.

20 I note that AC was willing to accommodate WestJet as to all or part of the computer facilities at T2. Additionally AC indicated that as opposed to leaving the Protocol (as it now exists in version 7) for review after a year of experience to see what, if any, adjustments should be made, it was content to do this after 6 months.

21 I should also note that the Protocol is written without limiting its effect to AC alone. This is appropriate since AC even at the initial stage was not to be the only user as there were to be other international users. But additionally, the Protocol was being developed for use throughout all phases of the NT to and including the end of its functional life.

22 The Authority does not dispute that the usage by AC for its domestic flights as per the last schedule would give the highest use rate of all the terminals at the airport. Having done what the Authority asked it to do up to and including less than a month before WestJet came on the scene, namely put all its domestic flights gated out of NT without the necessity for bussing, I find it passing strange that the Authority would then do its calculations to bring AC below 60% usage as to certain gates by the device of the Authority - not AC - indicating that certain of AC's domestic flights would be bussed to T2.

23 The Authority submits that if I decide in AC's favour on this issue, it will have an impact beyond AC's proposed emergence from CCAA proceedings. All that is required of the Authority is that it respect the MOU and the Protocol in accordance with the internal processing of these documents at least until emergence (one way or the other) from the CCAA proceedings. What the Authority does after that time is up to it, although it would continue to be governed by those documents (in other words I suppose the Authority could decide to

breach their provisions, in which case AC could, if it desired, proceed in the ordinary course with litigation, including going for injunctive relief at that time).

24 Bohan notes that the Authority and WestJet negotiated without disclosing same to the public, including carriers at the airport including AC. He observed that the same confidential arrangements were in place as were for AC moving its Tango operations to T3. However he did not comment on the magnitude of that or its relative impact on the other carriers at T3 which is an acknowledged common use facility - with no exclusive gate, check-in or baggage arrangement or anything "in between" as is the fixed preferential use subject to the various aforesaid provisions in place for NT. I note what Brewer states in his February 17th affidavit at paras. 11 and 2 respectively:

> 11. With respect to paragraph 31, I am advised by Mr. Dave Robinson, Senior Director, Corporate Real Estate, Air Canada, and do verily believe that as part of the Settlement in 2001, Air Canada agreed to give up its exclusive use of Terminal 2 despite the fact that Air Canada had made significant investments therein. While the GTAA would not agree to exclusive use of T1 New, the GTAA and Air Canada came up with a business solution and agreed to the concept of "Fixed Preferential Use" of facilities for domestic and transborder operations at T1 New. I am advised by Mr. Robinson and do verily believe that the concept of Fixed Preferential Use was agreed upon to give Air Canada comfort that it would be able to accommodate its entire domestic and transborder operations in T1 New with Fixed Preferential Use of the domestic and transborder facilities in relation to other carriers during the initial phase of T1 New, subject to the "use it or lose it" principle and subject to the GTAA maximizing facilities throughout Pearson Airport before accommodating another carrier at T1 New. I am advised by Mr. Robinson and do verily believe that Air Canada believed that it was protected by the provision in the MOU requiring the GTAA prove that Air Canada wasn't using its gates efficiently and therefore ought to "lose" them and that the GTAA was protected because Air Canada would lose its Fixed Preferential gates if not using them efficiently. I am advised by Mr. Robinson and do verily believe that Fixed Preferential Use of the T1 New was one of the critical components of the Settlement.
>
> 2. The GTAA Affidavits misconstrue statements and concepts from the First A.C. Affidavits. The GTAA Affidavits suggest that Air Canada's position is that it is entitled to "exclusive" use of all gates at T1 New. This is not the position set out in the First A.C. Affidavits. The position of Air Canada is that it was agreed that Air Canada would be the first tenant of the initial phase of the development of T1 New and that it would have the use of all gates in this first phase on a Fixed Preferential Use basis. As set out in the First A.C. Affidavits, all planning for the development and opening of the initial phase of T1 New was based on and consistent with this agreement. Air Canada's position is that it has always been agreed that the allocation of Fixed Preferential Use gates to Air

> Canada would ensure that it would have first call on as many gates as would reasonably be required to accommodate its operations in T1 New at a reasonable intensity of use subject only to (a) the "use it or lose it" principle enshrined in the MOU; and (b) the provisions enabling new carriers to be introduced to T1 New only when the use of other terminals have been maximized. It was always understood that at the completion of the development of T1 New, there would be sufficient terminal facilities available to accommodate other carriers.

25 It seems to me reasonable in the circumstances prevailing that the contractual relationship between AC and the Authority as to the fixed preferential use of the 14 bridge gates should be interpreted in the overall context of the above.

26 I find that the Authority has committed the 14 bridge gates to AC on a fixed preferential basis pursuant to the Protocol as established and the MOU and that such commitment should be honoured in regard to paragraphs 6 and 7 of the Initial Order.

27 The purpose of the CCAA has been characterized by many courts as involving a broad balancing of a plurality of stakeholder interests, recognizing that the interest of most parties will be best served by the survival of the applicant debtor corporation: see *Nova Metal Products Inc. v. Comiskey (Trustee of)* (1990), 1 O.R. (3d) 289 (Ont. C.A.), at pp. 306-7 (Doherty, J.A. dissenting on unrelated grounds). I see no reason why the Authority should not be held to the understanding and agreement which I have found it had with AC in this regard. Where an affected party is in breach of an initial order (which in this case remains intact as to the paragraphs in question and unappealed or otherwise dealt with on a comeback basis by the Authority in this regard), the court may order the breaching entity to comply with the initial order: see *Skydome Corp., Re*, [1999] O.J. No. 221 (Ont. Gen. Div. [Commercial List]) at paras. 2 and 20. In that regard I order the Authority to live up to its commitment to provide AC with the fixed preferential use of the 14 bridge gates at the NT, subject only to the provisos in the Protocol (and MOU). As offered by AC, the Protocol may be revisited after six months' experience.

28 I note that all concerned (including AC, WestJet and the Authority) wanted me to release this decision as quickly as possible with a view to stabilizing the situation and getting on with implementation.

29 Order accordingly.

Motion granted.

TAB 2

2003 SCC 72, 2003 CSC 72
Supreme Court of Canada

Beals v. Saldanha

2003 CarswellOnt 5101, 2003 CarswellOnt 5102, 2003 SCC 72, 2003 CSC 72, [2003] 3 S.C.R. 416, [2003] S.C.J. No. 77, 113 C.R.R. (2d) 189, 127 A.C.W.S. (3d) 648, 182 O.A.C. 201, 234 D.L.R. (4th) 1, 314 N.R. 209, 39 B.L.R. (3d) 1, 39 C.P.C. (5th) 1, 70 O.R. (3d) 94 (note), 70 O.R. (3d) 94, J.E. 2004-127, REJB 2003-51513

Geoffrey Saldanha, Leueen Saldanha and Dominic Thivy, Appellants v. Frederick H. Beals-III and Patricia A. Beals, Respondents

McLachlin C.J.C., Gonthier, Iacobucci, Major, Bastarache, Binnie, Arbour, LeBel, Deschamps JJ.

Heard: February 20, 2003
Judgment: December 18, 2003 *
Docket: 28829

Proceedings: affirming *Beals v. Saldanha* (2001), 2001 CarswellOnt 2286, 54 O.R. (3d) 641, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191 (Ont. C.A.); reversing in part *Beals v. Saldanha* (1998), 1998 CarswellOnt 4295, 42 O.R. (3d) 127, 27 C.P.C. (4th) 144 (Ont. Gen. Div.); additional reasons at *Beals v. Saldanha* (1999), 1999 CarswellOnt 19 (Ont. Gen. Div.)

Counsel: J. Brian Casey, Janet E. Mills, Matthew J. Latella for Appellants, Geoffrey and Leueen Saldanha
Neal H. Roth for Appellant, Dominic Thivy
Messod Boussidan, Larry J. Levine, Q.C., Kevin D. Sherkin for Respondents

Subject: International; Constitutional; Insolvency; Human Rights

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N.R. 81, (sub nom. *Hunt v. T&N plc)* [1993] 4 S.C.R. 289, 1993 CarswellBC 1271, 1993 CarswellBC 294 (S.C.C.) — followed

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Generally — referred to

s. 7 — considered

Statutes considered by *LeBel J.* (dissenting):

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Generally — referred to

s. 7 — referred to

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en général — referred to

Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), 1982, c. 11, reprinted R.S.C. 1985, App. II, No. 44
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Generally — referred to

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R. 19.02(3) — referred to

Words and phrases considered:

INTRINSIC FRAUD

[Per Major J. (McLachlin C.J.C., Gonthier, Bastarache, Arbour, Deschamps JJ. concurring):] Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence to the recognition of a judgment has not been as clear as that of extrinsic fraud.

Termes et locutions cités

FRAUDE INTRINSÈQUE

[Major, J. (McLachlin, J.C.C., Gonthier, Bastarache, Arbour, Deschamps, souscrivant à l'opinion de Major, J.):] Afin de clarifier les types de fraude susceptibles de vicier un jugement étranger, les tribunaux ont établi une distinction entre la « fraude intrinsèque » et la « fraude extrinsèque ». La fraude extrinsèque est décrite comme celle qui touche la compétence du tribunal d'origine ou comme le type de fraude qui amène à tort le tribunal étranger ou national à croire que la cause d'action relève de sa compétence. Si elle est retenue, la preuve de ce type de fraude justifie l'annulation du jugement. Par ailleurs, la fraude intrinsèque est celle qui touche le bien-fondé de l'affaire et l'existence d'une cause d'action. La mesure dans laquelle la preuve d'une fraude intrinsèque peut être opposée à la reconnaissance d'un jugement n'est pas aussi claire que dans le cas d'une preuve de fraude extrinsèque.

APPEAL from judgment reported at (2001), 2001 CarswellOnt 2286, [2001] O.J. No. 2586, 54 O.R. (3d) 641, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191 (Ont. C.A.), reversing refusal to enforce foreign judgment.

POURVOI à l'encontre de l'arrêt publié à (2001), 2001 CarswellOnt 2286, [2001] O.J. No. 2586, 54 O.R. (3d) 641, 202 D.L.R. (4th) 630, 148 O.A.C. 1, 10 C.P.C. (5th) 191 (C.A. Ont.), qui a infirmé le jugement refusant l'exécution d'un jugement étranger.

***Major J.*:**

I. Introduction

1 The rules related to the recognition and enforcement of foreign judgments by Canadian courts are the focus of this appeal. "Foreign" in the context of this case refers to a judgment rendered by a court outside Canada, as opposed to an interprovincial judgment.

2 The appellants, residents of Ontario, were the owners of a vacant lot in Sarasota County, Florida. They sold the lot to the respondents. A dispute arose as a result of that transaction. The respondents eventually commenced two actions against the appellants in Florida. Only the second action is relevant to this appeal. The appellants received notice at all stages of the litigation and defended the first action, which was dismissed without prejudice. A defence was filed to the second action without the knowledge of the Saldanhas.

3 The appellants chose not to defend any of the three subsequent amendments to the second action. Pursuant to Florida law, the failure to defend the amendments had the effect of not defending the second action and the appellants were subsequently noted in default. Damages of US $260,000 were awarded by a jury convened to assess damages. The damages were not paid and an action was started in Ontario to enforce the Florida judgment.

4 We have to first determine the circumstances under which a foreign judgment shall be recognized and enforced in Canada. Next, the nature and scope of the defences available to the judgment debtor must be established. For the purposes of these reasons, I assume the laws of other Canadian provinces are substantially the same as in Ontario and for that reason, Canada and Ontario are used interchangeably. A future case involving another part of Canada will be considered in light of whatever differences, if any, exist there.

II. Facts

5 The appellants were Ontario residents. In 1981, they and Rose Thivy, who is Dominic Thivy's wife and no longer a party to this action, purchased a lot in Florida for US $4,000. Three years later, Rose Thivy was contacted by a real estate agent acting for the respondents as well as for William and Susanne Foody (who assigned their interest to the Beals' and are no longer parties to this action) enquiring about purchasing the lot. In the name of her co-owners, Mrs. Thivy advised the agent that they would sell the lot for US $8,000. The written offer erroneously referred to "Lot 1" as the lot being purchased instead of "Lot 2". Rose Thivy advised the real estate agent of the error and subsequently changed the number of the lot on the offer to "Lot 2". The amended offer was accepted and "Lot 2" was transferred to the respondents and the Foodys.

6 The respondents had purchased the lot in question in order to construct a model home for their construction business. Some months later, the respondents learned that they had

been building on Lot 1, a lot that they did not own. In February 1985, the respondents commenced what was the first action in Charlotte County, Florida, for "damages which exceeds $5,000". This was a customary way of pleading in Florida to give the Circuit Court monetary jurisdiction. The appellants, representing themselves, filed a defence. In September 1986, the appellants were notified that that action had been dismissed voluntarily and without prejudice because it had been brought in the wrong county.

7 In September 1986, a second action ("Complaint") was commenced by the respondents in the Circuit Court for Sarasota County, Florida. That Complaint was served on the appellants, in Ontario, to rescind the contract of purchase and sale and claimed damages in excess of US $5,000, treble damages and other relief authorized by statute in Florida. This complaint was identical to that in the first action except for the addition of allegations of fraud. Shortly thereafter, an Amended Complaint, simply deleting one of the defendants, was served on the appellants. A statement of defence (a duplicate of the defence filed in the first action) was filed by Mrs. Thivy on behalf of the appellants. The trial judge accepted the evidence of the Saldanhas that they had not signed the document. Accordingly, the Saldanhas were found not to have attorned. As discussed further in these reasons, Dominic Thivy's situation differs.

8 In May 1987, the respondents served a Second Amended Complaint which modified allegations brought against a co-defendant who is no longer a party, but included all the earlier allegations brought against the appellants. No defence was filed. A Third Amended Complaint was served on the appellants on May 7, 1990 and again, no defence was filed. Under Florida law, the appellants were required to file a defence to each new amended complaint; otherwise, they risked being noted in default. A motion to note the appellants in default for their failure to file a defence to the Third Amended Complaint and a notice of hearing were served on the appellants in June 1990. The appellants did not respond to this notice. On July 25, 1990, a Florida court entered "default" against the appellants, the effect of which, under Florida law, was that they were deemed to have admitted the allegations contained in the Third Amended Complaint.

9 The appellants were served with notice of a jury trial to establish damages. They did not respond to the notice nor did they attend the trial held in December 1991. Mr. Foody, the respondent Mr. Beals, and an expert witness on business losses testified at the trial. The jury awarded the respondents damages of US $210,000 in compensatory damages and US $50,000 punitive damages, plus post-judgment interest of 12% per annum. Notice of the monetary judgment was received by the appellants in late December 1991.

10 Upon receipt of the notice of the monetary judgment against them, the Saldanhas sought legal advice. They were advised by an Ontario lawyer that the foreign judgment could not be enforced in Ontario because the appellants had not attorned to the Florida court's

jurisdiction. Relying on this advice, the appellants took no steps to have the judgment set aside, as they were entitled to try and do under Florida law, or to appeal the judgment in Florida. Florida law permitted the appellants ten days to commence an appeal and up to one year to bring a motion to have the judgment obtained there set aside on the grounds of "excusable neglect", "fraud" or "other misconduct of an adverse party".

11 In 1993, the respondents brought an action before the Ontario Court (General Division) seeking the enforcement of the Florida judgment. By the time of the hearing before that court, in 1998, the foreign judgment, with interest, had grown to approximately C $800,000. The trial judge dismissed the action for enforcement on the ground that there had been fraud in relation to the assessment of damages and for the additional reason of public policy. The Ontario Court of Appeal, Weiler J.A. dissenting, allowed the appeal.

III. Judgments Below

A. Ontario Court (General Division) (1998), 42 O.R. (3d) 127 (Ont. Gen. Div.)

12 The trial judge declared the Florida judgment unenforceable in Ontario. Having concluded from the verdict of the Florida jury that it had not been made aware of certain facts, the trial judge dismissed the action on the basis of fraud. He also held that the judgment was unenforceable on the grounds of public policy. The trial judge recommended that the defence of public policy be broadened to include a "judicial sniff test" which would permit a domestic court to refuse enforcement of a foreign judgment in cases where the facts did not satisfy any of the three existing defences to enforcement but were nevertheless egregious.

B. Ontario Court of Appeal (2001), 54 O.R. (3d) 641 (Ont. C.A.)

13 A majority of the Ontario Court of Appeal allowed the appeal. Doherty and Catzman JJ.A. concluded that neither the defence of fraud nor of public policy had application to this case.

14 As to the defence of fraud, Doherty J.A. held that that defence was only available where the allegations of fraud rest on "newly discovered facts", that is, facts that a defendant could not have discovered through the exercise of reasonable diligence prior to the granting of the judgment. He concluded that the trial judge erred in relying on assumed facts that conceivably might have been uncovered by the appellants had they chosen to participate in the Florida proceedings. Even if the trial judge had correctly defined the defence of fraud, Doherty J.A. held that there was no evidence that the judgment had been obtained by fraud.

15 On the defence of public policy, Doherty J.A. rejected the need to incorporate a "judicial sniff test" as part of that defence. Assuming a "sniff test" was required, he held that no reasons

existed in this appeal for public policy to preclude the enforcement of the foreign judgment. He stated (at para. 84):

> The Beals and Foodys launched a lawsuit in Florida. Florida was an entirely proper court for the determination of the allegations in the lawsuit. The Beals and Foodys complied with the procedures dictated by the Florida rules. There is no evidence that they misled the Florida court on any matter. Rather, it would seem they won what might be regarded as a very weak case because the respondents chose not to defend the action. I find nothing in the record to support the trial judge's characterization of the conduct of the Beals and Foodys in Florida as "egregious". They brought their allegations in the proper forum, followed the proper procedures, and were immensely successful in no small measure because the respondents chose not to participate in the proceedings.

16 Weiler J.A., in dissent, would have dismissed the appeal. She concluded that the defences of natural justice and fraud made it inappropriate for a domestic court to enforce the Florida judgment. She stated that the appellants were deprived of natural justice by not having been given sufficient notice to permit them to appreciate the extent of their jeopardy prior to the judgment for damages against them. Weiler J.A. also held that the respondents had concealed certain facts from the Florida jury.

IV. Analysis

17 It was properly conceded by the parties, as explained below, in both the trial court and Court of Appeal, that the Florida court had jurisdiction over the respondents' action pursuant to the "real and substantial connection"test set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.). As a result, the issues raised in this appeal were limited to the application and scope of the defences available to a domestic defendant seeking to have a Canadian court refuse enforcement of a foreign judgment.

18 In *Morguard*, supra, the "real and substantial connection" test for the recognition and enforcement of interprovincial judgments was adopted. *Morguard* did not decide whether that test applied to foreign judgments. However, some courts have extended the application of *Morguard* to judgments rendered outside Canada: *Moses v. Shore Boat Builders Ltd.* (1993), 106 D.L.R. (4th) 654 (B.C. C.A.); leave to appeal refused, [1994] 2 W.W.R. lxv (S.C.C.); *United States v. Ivey* (1996), 30 O.R. (3d) 370 (Ont. C.A.); *Old North State Brewing Co. v. Newlands Services Inc.* (1998), [1999] 4 W.W.R. 573 (B.C. C.A.).

19 The question arises whether the "real and substantial connection" test, which is applied to interprovincial judgments, should apply equally to the recognition of foreign judgments. For the reasons that follow, I conclude that it should. While there are compelling reasons to expand the test's application, there does not appear to be any principled reason not to do so. In light of this, the parties' concession on the point was appropriate.

20 *Morguard*, supra, altered the old common law rules for the recognition and enforcement of interprovincial judgments. These rules, based on territoriality, sovereignty, independence and attornment, were held to be outmoded. La Forest J. concluded that it had been an error to adopt this approach "even in relation to judgments given in sister-provinces" (p. 1095). Central to the decision to modernize the common law rules was the doctrine of comity. Comity was defined as (at pp. 1095 and 1096, respectively):

> ...the deference and respect due by other states to the actions of a state legitimately taken within its territory.
>
> . . . . .
>
> ...the recognition which one nation allows within its territory to the legislative, executive and judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

21 Early common law rules were amended by rules intended to facilitate the flow of wealth, skills and people across boundaries, particularly boundaries of a federal state. *Morguard* established that the determination of the proper exercise of jurisdiction by a court depended upon two principles (relied on by the Ontario Court of Appeal in *Muscutt v. Courcelles* (2002), 213 D.L.R. (4th) 577 (Ont. C.A.), at para. 34), the first being the need for "order and fairness". The second was the existence of a "real and substantial connection" (see also *Indyka v. Indyka* (1967), [1969] 1 A.C. 33 (U.K. H.L.); *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 (S.C.C.)).

22 Modern ideas of order and fairness require that a court must have reasonable grounds for assuming jurisdiction where the participants to the litigation are connected to multiple jurisdictions.

23 *Morguard* established that the courts of one province or territory should recognize and enforce the judgments of another province or territory, if that court had properly exercised jurisdiction in the action, namely that it had a real and substantial connection with either the subject matter of the action or the defendant. A substantial connection with the subject matter of the action will satisfy the real and substantial connection test even in the absence of such a connection with the defendant to the action.

A. The "Real and Substantial Connection" Test and Foreign Judgments

24 The question then is whether the real and substantial connection test should apply to the recognition and enforcement of foreign judgments?

25 In *Moran*, supra, at p. 409, it was recognized that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced:

> By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

That reasoning is equally compelling with respect to foreign jurisdictions.

26 Although La Forest J. noted in *Morguard*, that judgments from beyond Canada's borders could raise different issues than judgments within the federation, he recognized the value of revisiting the rules related to the recognition and enforcement of foreign judgments (at p. 1098):

> The business community operates in a world economy and we correctly speak of a world community even in the face of decentralized political and legal power. Accommodating the flow of wealth, skills and people across state lines has now become imperative. Under these circumstances, our approach to the recognition and enforcement of foreign judgments would appear ripe for reappraisal.... [Emphasis added.]

Although use of the word "foreign" in the above quotation referred to judgments rendered in a sister province, the need to accommodate "the flow of wealth, skills and people across state lines" is as much an imperative internationally as it is interprovincially.

27 The importance of comity was analysed at length in *Morguard*, supra. This doctrine must be permitted to evolve concomitantly with international business relations, cross-border transactions, as well as mobility. The doctrine of comity is:

> ...grounded in the need in modern times to facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner (*Morguard, supra*, at p. 1096).

This doctrine is of particular importance viewed internationally. The principles of order and fairness ensure security of transactions, which necessarily underlie the modern concept of private international law. Although *Morguard* recognized that the considerations underlying the doctrine of comity apply with greater force between the units of a federal state, the reality of international commerce and the movement of people continue to be "directly relevant to determining the appropriate response of private international law to particular issues, such as

the enforcement of monetary judgments" (J. Blom, "The Enforcement of Foreign Judgments: *Morguard* Goes Forth Into the World" (1997), 28 *Can. Bus. L.J.* 373, at p. 375).

28 International comity and the prevalence of international cross-border transactions and movement call for a modernization of private international law. The principles set out in *Morguard*, supra, and further discussed in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), can and should be extended beyond the recognition of interprovincial judgments, even though their application may give rise to different considerations internationally. Subject to the legislatures adopting a different approach by statute, the "real and substantial connection" test should apply to the law with respect to the enforcement and recognition of foreign judgments.

29 Like comity, the notion of reciprocity is equally compelling both in the international and interprovincial context. La Forest J. discussed interprovincial reciprocity in *Morguard*, supra. He stated (at p. 1107):

> ...if this Court thinks it inherently reasonable for a court to exercise jurisdiction under circumstances like those described, it would be odd indeed if it did not also consider it reasonable for the courts of another province to recognize and enforce that court's judgment.

In light of the principles of international comity, La Forest J.'s discussion of reciprocity is also equally applicable to judgments made by courts outside Canada. In the absence of a different statutory approach, it is reasonable that a domestic court recognize and enforce a foreign judgment where the foreign court assumed jurisdiction on the same basis as the domestic court would, for example, on the basis of a "real and substantial connection" test.

30 Federalism was a central concern underlying the decisions in *Morguard*, supra, and *Hunt*, supra. In the latter, La Forest J. stated that he did not think that "litigation engendered against a corporate citizen located in one province by its trading and commercial activities in another province should necessarily be subject to the same rules as those applicable to international commerce" (*Hunt*, supra, at p. 323). Recently, *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), [2002] 4 S.C.R. 205, 2002 SCC 78 (S.C.C.), suggested, in *obiter*, that it may be necessary to afford foreign judgments a different treatment than that recognized for interprovincial judgments (*per* LeBel J., at para. 51):

> However, it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes. In my opinion, the specific findings of these decisions cannot easily be extended beyond this context. In particular, the two cases resulted in the enhancing or even broadening of the principles of reciprocity and speak directly to the context of interprovincial comity within the structure of the Canadian federation.

Although La Forest J. and LeBel J. suggested that the rules applicable to interprovincial versus foreign judgments should differ, they do not preclude the application of the "real and substantial connection" test to both types of judgments provided that any unfairness that may arise as a result of the broadened application of that test be taken into account.

31 The appellants submitted that the recognition of foreign judgments rendered by courts with a real and substantial connection to the action or parties is particularly troublesome in the case of foreign default judgments. If the real and substantial connection test is applied to the recognition of foreign judgments, they argue the test should be modified in the recognition and enforcement of default judgments. In the absence of unfairness or other equally compelling reasons which were not identified in this appeal, there is no logical reason to distinguish between a judgment after trial and a default judgment.

32 The "real and substantial connection" test requires that a significant connection exist between the cause of action and the foreign court. Furthermore, a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction. A fleeting or relatively unimportant connection will not be enough to give a foreign court jurisdiction. The connection to the foreign jurisdiction must be a substantial one.

33 In the present case, the appellants purchased land in Florida, an act that represents a significant engagement with the foreign jurisdiction's legal order. Where a party takes such positive and important steps that bring him or her within the proper jurisdiction of a foreign court, the fear of unfairness related to the duty to defend oneself is lessened. If a Canadian enters into a contract to buy land in another country, it is not unreasonable to expect the individual to enter a defence when sued in that jurisdiction with respect to the transaction.

34 The "real and substantial connection" test is made out for all of the appellants. There exists both a real and substantial connection between the Florida jurisdiction, the subject matter of the action and the defendants. As stated in J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf)), at p. 14-10:

> For the recognition or enforcement in Canada of a foreign judgment *in personam*, the foreign court must have had jurisdiction according to Canadian rules of the conflict of laws.

In light of Canadian rules of conflict of laws, Dominic Thivy attorned to the jurisdiction of the Florida court when he entered a defence to the second action. His subsequent procedural failures under Florida law do not invalidate that attornment. As such, irrespective of the real and substantial connection analysis, the Florida court would have had jurisdiction over Mr. Thivy for the purposes of enforcement in Ontario.

35 A Canadian defendant sued in a foreign jurisdiction has the ability to redress any real or apparent unfairness from the foreign proceedings and the judgment's subsequent enforcement in Canada. The defences applicable in Ontario are natural justice, public policy and fraud. In addition, defendants sued abroad can raise the doctrine of *forum non conveniens*. This would apply in the usual way where it is claimed that the proceedings are not, on the basis of convenience, expense and other considerations, in the proper forum.

36 Here, the appellants entered into a property transaction in Florida when they bought and sold land. Having taken this positive step to bring themselves within the jurisdiction of Florida law, the appellants could reasonably have been expected to defend themselves when the respondents started an action against them in Florida. The appellants failed to defend the claim pursuant to the Florida rules. Nonetheless, they were still entitled, within ten days, to appeal the Florida default judgment, which they did not. In addition, the appellants did not avail themselves of the additional one-year period to have the Florida judgment for damages set aside. While their failure to move to set aside or appeal the Florida judgment was due to their reliance upon negligent legal advice, that negligence cannot be a bar to the enforcement of the respondents' judgment.

37 There are conditions to be met before a domestic court will enforce a judgment from a foreign jurisdiction. The enforcing court, in this case Ontario, must determine whether the foreign court had a real and substantial connection to the action or the parties, at least to the level established in *Morguard*, supra. A real and substantial connection is the overriding factor in the determination of jurisdiction. The presence of more of the traditional indicia of jurisdiction (attornment, agreement to submit, residence and presence in the foreign jurisdiction) will serve to bolster the real and substantial connection to the action or parties. Although such a connection is an important factor, parties to an action continue to be free to select or accept the jurisdiction in which their dispute is to be resolved by attorning or agreeing to the jurisdiction of a foreign court.

38 If a foreign court did not properly take jurisdiction, its judgment will not be enforced. Here, it was correctly conceded by the litigants that the Florida court had a real and substantial connection to the action and parties.

B. Defences to the Enforcement of Judgments

39 Once the "real and substantial connection" test is found to apply to a foreign judgment, the court should then examine the scope of the defences available to a domestic defendant in contesting the recognition of such a judgment.

40 The defences of fraud, public policy and lack of natural justice were developed before *Morguard*, supra, and still pertain. This Court has to consider whether those defences, when

applied internationally, are able to strike the balance required by comity, the balance between order and fairness as well as the real and substantial connection, in respect of enforcing default judgments obtained in foreign courts.

41 These defences were developed by the common law courts to guard against potential unfairness unforeseen in the drafting of the test for the recognition and enforcement of judgments. The existing defences are narrow in application. They are the most recognizable situations in which an injustice may arise but are not exhaustive.

42 Unusual situations may arise that might require the creation of a new defence to the enforcement of a foreign judgment. However, the facts of this case do not justify speculating on that possibility. Should the evolution of private international law require the creation of a new defence, the courts will need to ensure that any new defences continue to be narrow in scope, address specific facts and raise issues not covered by the existing defences.

(1) The Defence of Fraud

43 As a general but qualified statement, neither foreign nor domestic judgments will be enforced if obtained by fraud.

44 Inherent to the defence of fraud is the concern that defendants may try to use this defence as a means of relitigating an action previously decided and so thwart the finality sought in litigation. The desire to avoid the relitigation of issues previously tried and decided has led the courts to treat the defence of fraud narrowly. It limits the type of evidence of fraud which can be pleaded in response to a judgment. If this Court were to widen the scope of the fraud defence, domestic courts would be increasingly drawn into a re-examination of the merits of foreign judgments. That result would obviously be contrary to the quest for finality.

45 Courts have drawn a distinction between "intrinsic fraud" and "extrinsic fraud" in an attempt to clarify the types of fraud that can vitiate the judgment of a foreign court. Extrinsic fraud is identified as fraud going to the jurisdiction of the issuing court or the kind of fraud that misleads the court, foreign or domestic, into believing that it has jurisdiction over the cause of action. Evidence of this kind of fraud, if accepted, will justify setting aside the judgment. On the other hand, intrinsic fraud is fraud which goes to the merits of the case and to the existence of a cause of action. The extent to which evidence of intrinsic fraud can act as a defence to the recognition of a judgment has not been as clear as that of extrinsic fraud.

46 A restrictive application of the defence of fraud was endorsed in *Woodruff v. McLennan* (1887), 14 O.A.R. 242 (Ont. C.A.). The Ontario Court of Appeal stated, at pp. 254-55, that the defence could be raised where:

> the recovery was collusive, [the] defendant had never been served with process, [] [the] suit had been undefended without defendant's default, [][the] defendant had been fraudulently persuaded by plaintiff to let judgment go by default ... or some fraud to defendant's prejudice committed or allowed in the proceedings of the other Court.
>
> *Woodruff* established that evidence of fraud that went to the merits of the case (intrinsic) was inadmissible. Only evidence of fraud which misled a court into taking jurisdiction (extrinsic) was admissible and could bar the enforcement of the judgment.

47 *Woodruff*, supra, was subsequently modified by the Ontario Court of Appeal. See *Jacobs v. Beaver* (1908), 17 O.L.R. 496 (Ont. C.A.), at p. 506:

> ...the fraud relied on must be something collateral or extraneous, and not merely the fraud which is imputed from alleged false statements made at the trial, which were met by counter-statements by the other side, and the whole adjudicated upon by the Court and so passed on into the limbo of estoppel by the judgment. This estoppel cannot, in my opinion, be disturbed except upon the allegation and proof of new and material facts, or newly discovered and material facts which were not before the former Court and from which are to be deduced the new proposition that the former judgment was obtained by fraud. The burden of that issue is upon the defendant, and until he at least gives *prima facie* evidence in support of it, the estoppel stands. And it may be, as I have before stated, that when such evidence is given, and in order to fully prove this new issue, the whole case should be re-opened. [Emphasis added.]

The court, in *Jacobs*, acknowledged that in addition to evidence of extrinsic fraud, evidence of intrinsic fraud was admissible where the defendant could establish "proof of new and material facts" that, not being available at the time of trial, were not before the issuing court and demonstrate that the judgment sought to be enforced was obtained by fraud.

48 Contrary to the decision of the Ontario Court of Appeal in *Jacobs*, the courts of British Columbia take a different view. In *Roglass Consultants Inc. v. Kennedy* (1984), 65 B.C.L.R. 393 (B.C. C.A.), the British Columbia Court of Appeal maintained the strict approach to the fraud defence set out in *Woodruff*. It held that only extrinsic fraud could be raised in defence of the enforcement of a foreign judgment.

49 In *Powell v. Cockburn*, [1977] 2 S.C.R. 218 (S.C.C.), it was clear that the aim in refusing recognition of a judgment because of fraud "is to prevent abuse of judicial process" (p. 234). In that case, the Court did not address fraud going to the merits of a judgment but did confirm that fraud going to jurisdiction (extrinsic fraud) is always open to impeachment.

50 What should be the scope of the defence of fraud in relation to foreign judgments? *Jacobs*, supra, represents a reasonable approach to that defence. It effectively balances the need to guard against fraudulently obtained judgments with the need to treat foreign judgments as final. I agree with Doherty J.A. for the majority in the Court of Appeal that the "new and material facts" discussed in *Jacobs* must be limited to those facts that a defendant could not have discovered and brought to the attention of the foreign court through the exercise of reasonable diligence.

51 The historic description of and the distinction between intrinsic and extrinsic fraud is of no apparent value and, because of its ability to both complicate and confuse, should be discontinued. It is simpler to say that fraud going to jurisdiction can always be raised before a domestic court to challenge the judgment. On the other hand, the merits of a foreign judgment can be challenged for fraud only where the allegations are new and not the subject of prior adjudication. Where material facts not previously discoverable arise that potentially challenge the evidence that was before the foreign court, the domestic court can decline recognition of the judgment.

52 Where a foreign judgment was obtained by fraud that was undetectable by the foreign court, it will not be enforced domestically. "Evidence of fraud undetectable by the foreign court" and the mention of "new and material facts" in *Jacobs*, supra, demand an element of reasonable diligence on the part of a defendant. To repeat Doherty J.A.'s ruling, in order to raise the defence of fraud, a defendant has the burden of demonstrating that the facts sought to be raised could not have been discovered by the exercise of due diligence prior to the obtaining of the foreign judgment. See para. 43:

> A due diligence requirement is consistent with the policy underlying the recognition and enforcement of foreign judgments. In the modern global village, decisions made by foreign courts acting within Canadian concepts of jurisdiction and in accordance with fundamental principles of fairness should be respected and enforced. That policy does not, however, extend to protect decisions which are based on fraud that could not, through the exercise of reasonable diligence, have been brought to the attention of the foreign court. Respect for the foreign court does not diminish when a refusal to enforce its judgment is based on material that could not, through the exercise of reasonable diligence, have been placed before that court. [Emphasis added.]

Such an approach represents a fair balance between the countervailing goals of comity and fairness to the defendant.

53 Although *Jacobs*, supra, was a contested foreign action, the test used is equally applicable to default judgments. Where the foreign default proceedings are not inherently unfair, failing to defend the action, by itself, should prohibit the defendant from claiming

that any of the evidence adduced or steps taken in the foreign proceedings was evidence of fraud just discovered. But if there is evidence of fraud before the foreign court that could not have been discovered by reasonable diligence, that will justify a domestic court's refusal to enforce the judgment.

54 In the present case, the appellants made a conscious decision not to defend the Florida action against them. The pleadings of the respondents then became the facts that were the basis for the Florida judgment. As a result, the appellants are barred from attacking the evidence presented to the Florida judge and jury as being fraudulent.

55 The appellants have not claimed that there was evidence of fraud that they could not have discovered had they defended the Florida action. In the absence of newly discovered evidence of fraud, I agree with the Court of Appeal that the trial judge erred in admitting evidence he found established fraud. He erred in law by failing to limit "new and material facts" to facts which could not have been discovered by the appellants by the exercise of reasonable diligence.

56 There was no evidence before the trial judge to support fraud. In fact, the trial judge, himself, stated (at p. 131):

> No record of the damage assessment proceedings exists, and the evidence heard by the jury is unknown. There is similarly no record of the instructions given to the jury by the trial judge.

In the absence of such evidence, the trial judge erred in concluding the existence of fraud. It is impossible to know whether the evidence now sought to be adduced by the appellants had been previously considered by the jury. The respondent Mr. Beals and an expert on business losses, both testified before the Florida jury and gave uncontradicted evidence. Before the Ontario court, Mr Beals was available for questioning but was not called upon by the appellants to address the allegations of fraud. Similarly, the respondents' counsel in the Florida action testified but no questions of fraud were raised with him.

57 No evidence was led to show that the jury was misled (deliberately or not) on the extent of the damages. The admitted facts presented to the jury included allegations of fraudulent misrepresentations and loss of profits. The claim by the respondents was for damages to recoup the purchase price of the land, loss of profits and punitive damages. The nature of the damages sought, as well as the admitted facts presented to the Florida jury, was evidence upon which that jury could reasonably reach the damages that it did. I agree with the majority in the Court of Appeal that, although the amount of damages awarded may seem disproportionate, it was a palpable and overriding error for the trial judge to conclude on the dollar amount of the judgment alone that the Florida jury must have been misled.

58 As the appellants did not provide any evidence of new and previously undiscoverable facts suggestive of fraud, the defence of fraud cannot form the basis of a valid challenge to the application for enforcement of the respondents' judgment.

(2) The Defence of Natural Justice

59 As previously stated, the denial of natural justice can be the basis of a challenge to a foreign judgment and, if proven, will allow the domestic court to refuse enforcement. A condition precedent to that defence is that the party seeking to impugn the judgment prove, to the civil standard, that the foreign proceedings were contrary to Canadian notions of fundamental justice.

60 A domestic court enforcing a judgment has a heightened duty to protect the interests of defendants when the judgment to be enforced is a foreign one. The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court.

61 The enforcing court must ensure that the defendant was granted a fair process. Contrary to the position taken by my colleague LeBel J., it is not the duty of the plaintiff in the foreign action to establish that the legal system from which the judgment originates is a fair one in order to seek enforcement. The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.

62 Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system. This determination will need to be made for all foreign judgments. Obviously, it is simpler for domestic courts to assess the fairness afforded to a Canadian defendant in another province in Canada. In the case of judgments made by courts outside Canada, the review may be more difficult but is mandatory and the enforcing court must be satisfied that fair process was used in awarding the judgment. This assessment is easier when the foreign legal system is either similar to or familiar to Canadian courts.

63 In the present case, the Florida judgment is from a legal system similar, but not identical, to our own. If the foreign state's principles of justice, court procedures and judicial protections are not similar to ours, the domestic enforcing court will need to ensure that the minimum Canadian standards of fairness were applied. If fair process was not provided to the defendant, recognition and enforcement of the judgment may be denied.

64 The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure

by which the foreign court arrived at its judgment. However, if that procedure, while valid there, is not in accordance with Canada's concept of natural justice, the foreign judgment will be rejected. The defendant carries the burden of proof and, in this case, failed to raise any reasonable apprehension of unfairness.

65 In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend. The Florida proceedings were not contrary to the Canadian concept of natural justice. The appellants concede that they received notice of all the legal procedure taken in the Florida action and that the judge of the foreign court respected the procedure of that jurisdiction. The appellants submit, however, that they were denied natural justice because they were not given sufficient notice to enable them to discover the extent of their financial jeopardy.

66 The appellants claim to have been denied the opportunity to assess the extent of their financial jeopardy because the respondents' claim failed to specify the exact dollar amount of damages and types of damages they were seeking. The Florida claims, particularly the third amended complaint, made it clear that the damages sought were potentially significant. The complaints filed in Florida raised allegations of fraud and sought punitive damages, both of which allow for the possibility of a substantial award of damages. Treble damages were sought. Repayment of the purchase price, the amount lost by the respondents due to their inability to construct a model home on the lot, the expenses incurred in preparing that lot and lost revenue due to the respondents' inability to construct a model home to be used in their construction business were all sought in the third amended complaint. In light of knowing the types of damages claimed, not being provided with a specific dollar value of the amount of damages sought cannot constitute a denial of natural justice. The appellants were mistaken when they presumed that the damages award would be approximately US $8,000.00.

67 The respondents did not give notice that an expert on the assessment of business losses would testify before the Florida jury. The failure to disclose witnesses in a notice of assessment is not a denial of natural justice.

68 LeBel J. would expand the defence of natural justice by interpreting the right to receive notice of a foreign action to include notice of the legal steps to be taken by the defendant where the legal system differs from that of Canada's and of the consequences flowing from a decision to defend, or not defend, the foreign action. Where such notice was not given, he would deny enforcement of the resulting judgment. No such burden should rest with the foreign plaintiff. Within Canada, defendants are presumed to know the law of the jurisdiction seized with an action against them. Plaintiffs are not required to expressly or implicitly notify defendants of the steps that they must take when notified of a claim against them. This approach is equally appropriate in the context of international litigation.

To find otherwise would unduly complicate cross-border transactions and hamper trade with Canadian parties. A defendant to a foreign action instituted in a jurisdiction with a real and substantial connection to the action or parties can reasonably be expected to research the law of the foreign jurisdiction. The Saldanhas and Thivys owned land in the State of Florida and entered into a real estate transaction in that state. When served with notice of an action against them in the State of Florida, the appellants were responsible for gaining knowledge of Florida procedure in order to discover the particularities of that legal system.

69 My interpretation of the Florida legal system differs from that of LeBel J. in that I am of the opinion that the appellants were fully informed about the Florida action. They were advised of the case to meet and were granted a fair opportunity to do so. They did not defend the action. Once they received notice of the amount of the judgment, the appellants obviously had precise notice of the extent of their financial exposure. Their failure to act when confronted with the size of the award of damages was not due to a lack of notice but due to relying on the mistaken advice of their lawyer.

70 For these reasons, the defence of natural justice does not arise.

(3) The Defence of Public Policy

71 The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign *law* is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p.14-28:

> ...the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts.

72 How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biassed.

73 The appellants submitted that the defence of public policy should be broadened to include the case where neither the defence of natural justice nor the current defence of public policy would apply but where the outcome is so egregious that it justifies a domestic court's refusal to enforce the foreign judgment. The appellants argued that, as a matter of Canadian public policy, a foreign judgment should not be enforced if the award is excessive, would shock the conscience of, or would be unacceptable to, reasonable Canadians. The appellants claimed that the public policy defence provides a remedy where the judgment, by its amount alone, would shock the conscience of the reasonable Canadian. It was argued that, if the

respondents and their witnesses were truthful in the Florida proceeding, it must follow that the laws in Florida permit a grossly excessive award for lost profits absent a causal connection between the acts giving rise to liability and the damages suffered. Such a result, the appellants submitted, would shock the conscience of the reasonable Canadian. I do not agree.

74 J. Blom, *supra*, predicted the appellants' request for the expansion of the public policy defence (at p. 400):

> The only change that the *Morguard* approach to recognition may bring in its wake is a greater temptation to expand the notion of public policy, so as to justify refusing a foreign default judgment that meets the *Morguard* criteria, but whose enforcement nevertheless appears to impose a severe hardship on the defendant.

75 The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have a narrow application.

76 The award of damages by the Florida jury does not violate our principles of morality. The sums involved, although they have grown large, are not by themselves a basis to refuse enforcement of the foreign judgment in Canada. Even if it could be argued in another case that the arbitrariness of the award can properly fit into a public policy argument, the record here does not provide any basis allowing the Canadian court to re-evaluate the amount of the award. The public policy defence is not meant to bar enforcement of a judgment rendered by a foreign court with a real and substantial connection to the cause of action for the sole reason that the claim in that foreign jurisdiction would not yield comparable damages in Canada.

77 There was no evidence that the Florida procedure would offend the Canadian concept of justice. I disagree for the foregoing reasons that enforcement of the Florida monetary judgement would shock the conscience of the reasonable Canadian.

C. Section 7 of the Canadian Charter of Rights and Freedoms

78 The appellants submitted that the Florida judgment cannot be enforced because its enforcement would force them into bankruptcy. It was argued that the recognition and enforcement of that judgment by a Canadian court would constitute a violation of s. 7 of the *Charter*. The appellants submitted that a *Charter* remedy should be recognized to the effect that, before a domestic court enforces a foreign judgment which would result in the defendant's bankruptcy, the court must be satisfied that the foreign judgment has been rendered in accordance with the principles of fundamental justice. No authority is offered for that proposition with which I disagree but, in any event, the Florida proceedings were

conducted in conformity with fundamental justice. The obligation of a domestic court to recognize and enforce a foreign judgment cannot depend on the financial ability of the defendant to pay that judgment. As s. 7 of the *Charter* does not shield a Canadian resident from the financial effects of the enforcement of a judgment rendered by a Canadian court, I have difficulty accepting that s. 7 should shield a Canadian defendant from the enforcement of a foreign judgment.

V. Disposition

79 The parties agreed that the Florida court had a real and substantial connection to the action launched by the respondents. Having properly taken jurisdiction, the judgment of that court must be recognized and enforced by a domestic court, provided that no defences bar its enforcement. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence. Although the damage award may appear disproportionate to the original value of the land in question, that cannot be determinative. The judgment of the Florida court should be enforced.

80 The appeal is dismissed with costs.

***Binnie J.*:**

81 The question raised by this appeal is the sufficiency of the notice provided to Ontario defendants (the appellants) of Florida proceedings against them by two Sarasota County real estate developers over the sale of an empty residential building lot in 1984 for US$8,000. The subject matter of their contract turned out to be the wrong lot. The respondents kept the lot (they say they did not intend to purchase) and sued the appellants for damages.

82 The Florida default judgment now commands payment of over $1,000,000 Canadian dollars, an award described by the Ontario trial judge as "breathtaking". The damages were assessed by a Florida jury in less than half a day.

83 If the notice had been sufficient, I would have agreed reluctantly with the majority of my colleagues that the default judgment against them would be enforceable in Ontario despite the fact the foreign court never got to hear the Ontario defendants' side of the story. Their failure to participate using the procedures open to them in Florida would have bound them to the result. However, in my view, the appellants' inactivity in the face of their mushrooming legal problem is explained by the fact they were kept in the dark about the true nature and extent of their jeopardy. They were not served with some of the more important documents on liability filed in the Florida proceeding *before* they were noted in default, nor were they served with other important documents relevant to the assessment of damages filed after default but *prior* to the trial at which judgment was entered against them. Proper notice is a function of the particular circumstances of the case giving rise to the foreign default judgment. In this

case, in my view, there was a failure of notification amounting to a breach of natural justice. In these circumstances, the Ontario courts ought not to give effect to the Florida judgment.

I. Real and Substantial Connection

84 I agree with Major J. that the "real and substantial connection test" developed in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), at p. 325, and *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 (S.C.C.), at p. 1058, provides an appropriate conceptual basis for the enforcement in Canada of final judgments obtained in foreign jurisdictions as it does for final judgments obtained in other provinces.

85 That said, I recognize that there are significant differences between enforcement of a foreign judgment and enforcement of judgments from one province or territory to another within the Canadian federation. As La Forest J. observed in *Morguard* (p. 1098):

> The considerations underlying the rules of comity apply with much greater force between the units of a federal state.

Morguard went on to refer to "[t]he integrating character of our constitutional arrangements" (p. 1100), including (1) common citizenship, (2) interprovincial mobility of citizens, (3) the common market among the provinces envisaged by our Constitution, and (4) the essentially unitary structure of our judicial system presided over by the Supreme Court of Canada. The constitutional flavour of the *Morguard* analysis was picked up and emphasized in *Hunt, supra*, and again in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [*2002*] *4 S.C.R. 205*, 2002 SCC 78, at para. 53. We should not backtrack on the importance of that distinction.

86 It stands to reason that if the issues posed by the enforcement of foreign judgments differ from the issues encountered in the enforcement of judgments among the provinces and the territories, the legal rules are not going to be identical. Accordingly, while I accept that the *Morguard* test ("real and substantial connection") provides a framework for the enforcement of foreign judgments, it would be prudent at this stage not to be overly rigid in staking out a position on available defences beyond what the facts of this case require. Both Major J. (paras. 39-41) and LeBel J. (paras. 217-18) acknowledge (with varying degrees of enthusiasm) that a greater measure of flexibility may be called for in considering defences to the enforcement of foreign judgments as distinguished from interprovincial judgments. The time will come when such a re-examination of available defences will be necessary. The need for such a re-examination does not arise in this case. The appellants come within the traditional limits of the natural justice defence, and their appeal should be allowed on that ground.

II. The Foreign Judgment

87 In 1981, the appellants bought an empty lot in a Florida real estate subdivision near Sarasota for US$4,000. It was described as Lot 2. They did not build. They didn't even visit it. They just paid the municipal taxes. In 1983, they thought they had sold it to the respondents for US$8,000. Despite the fact that all of the closing documentation referred to Lot 2, the respondents (who say they didn't "catch" the reference to Lot 2 in the closing document) eventually claimed that they had *intended* to purchase the lot next door — Lot 1 — and that they had been falsely and fraudulently induced to buy Lot 2 by the appellants and a Florida real estate agent called O'Neill.

88 No doubt the Florida courts had jurisdiction over the ensuing dispute. The land was located in that jurisdiction. The appellants ought to have anticipated, and probably did anticipate, that disputes over Florida land would be decided by Florida courts. However, they could not fairly have anticipated that this pedestrian real estate deal gone sour would eventually explode into a Florida judgment against them said to be worth in excess of $800,000 Canadian dollars at the time of the trial in Ontario in November 1998 with interest continuing to run for the past five years at 12 per cent per annum, producing an ultimate Kafka-esque judgment with an apparent value of over $1,000,000 Canadian dollars.

89 It appears that soon after being served with the respondents' Complaint, the appellants decided to tell their story to the Florida court by filing a Statement of Defence, but to forgo the further expense of hiring a Florida lawyer to represent their interests. The costs would likely have exceeded the amount they thought was in issue. As the trial judge in Ontario put it, based on what was disclosed in the Complaint, litigation of an US$8,000 real estate transaction in Florida hardly seemed to be "worth the candle". The fact this evaluation proved to be disastrously wrong is a measure of the inadequacy of what they were told about the Florida proceedings.

90 My colleague Major J. holds, in effect, that the appellants are largely the victims of what he considers to be some ostrich-like inactivity and some poor legal advice from their Ontario solicitor. There is some truth to this, but such a bizarre outcome nevertheless invites close scrutiny of how the Florida proceedings transformed a minor real estate transaction into a major financial bonanza for the respondents.

91 While the notification procedures under the Florida rules may be considered in Florida to be quite adequate for Florida residents with easy access to advice and counsel from Florida lawyers (and there is no doubt that Florida procedures in general conform to a reasonable standard of fairness), nevertheless the question here is whether the appellants *in this proceeding* were sufficiently informed of the case against them, both with respect to

liability and the potential financial consequences, to allow them to determine in a reasonable way whether or not to participate in the Florida action, or to let it go by default.

III. The Initial Aborted Proceedings

92 The Florida action was initially commenced on February 15, 1985 by the two respondents and their then partners (who will collectively be referred to as the respondents) in the Twentieth Judicial Circuit in and for Charlotte County, Florida. The appellants duly filed a defence. Eventually, this first action was "voluntarily dismissed ... without prejudice" by the Florida court, apparently on the basis the respondents had commenced their action in the wrong Circuit. The respondents immediately started a second action in the Twelfth Judicial Circuit and again the appellants filed a defence. This suggests that when the appellants were notified of what pleading had to be done, they did it.

IV. The Nature of the Complaint Against the Appellants

93 The original plaintiffs, two real estate developers and their wives (including the present respondents), alleged that the appellants misrepresented that they owned building Lot 1, whereas they owned building Lot 2, and that this misrepresentation was "willfully false and fraudulent". The respondents said "they" (i.e., the individual respondents) began building on Lot 1, discovered the error, and "immediately ceased construction". As a result, the respondents incurred the expenses of preparing the lot for construction and lost revenue because they were unable to construct a model home on Lot 1, which was a corner lot.

94 It is not our function to get into the merits of the Florida case but I note the respondent, Frederick Beals III, eventually acknowledged in the Florida proceedings that work terminated in October 1984 not because of an error in the legal description of the lot but because of a falling out among the respondents. At that time, a "Johnny Quick toilet" had been delivered to the work site but the floor slab had not yet been poured. The error with regard to Lot 1 and Lot 2 was not discovered by the respondents until three months later in January 1985.

95 The total expenditures on the project, including the purchase price, the building permits, the survey tests, trusses and some other materials was about US$14,000. The respondent Beals later testified that the average profit experienced on the houses he built in 1984 was about US$5,000 per home. The respondents' eventual award on account of loss of profit was more than ten times that figure.

96 The Complaint and each subsequent "as amended" Complaint simply refers to the *respondents*' damages on "*a* model home" (emphasis added). "A" model home is expressed in the singular and would not normally be understood, I think, to encompass an undisclosed and unbuilt residential subdivision which the respondents now say they had in mind.

97 The respondents claimed treble damages, rescission, punitive damages and costs. In the end, the jury seems to have ordered reimbursement of the actual expenditures (about US $14,000) plus loss of profit (about US$56,000), all of which was trebled to make the total of US$210,000, plus punitive damages of US$50,000. The balance of the current million dollar claim consists of accumulated post-judgment interest compounding at the rate of 12 per cent, plus the effect of a less favourable U.S. currency exchange rate.

V. The Complaint Against Other Parties

98 The respondents also alleged that, in August 1984, they - the developers - had initiated contact with a Sarasota real estate firm, O'Neill's Realty, who showed them Lot 1. The respondents go on to state in their Complaint *that the realtor was only authorized by the appellants to sell Lot 2* (para 25). Nevertheless, the realtor (both the corporation and James O'Neill personally), "knowingly and falsely" misrepresented that the appellants owned Lot 1 (para. 27) and "fraudulently" failed to stop the closing of the sale of the wrong lot (paras. 33, 51). The respondents claimed the same relief against the realtor as they had against the appellants (para. 37). As will be seen, the respondents' allegation in their Complaint against the realtor O'Neill more or less corresponded with the appellants' version of events set out in their Statement of Defence.

99 The respondents subsequently added a complaint against a new defendant, the Commonwealth Land Title Insurance Company, alleging that the title insurer knew or should have known that all of the closing documentation erroneously referred to the appellants' Lot 2, instead of the desired Lot 1, and by "remaining silent" breached its corporate duty of disclosure.

100 With respect to the issue of notice, Florida rules require the written Complaint to expressly warn that "[e]ach defendant is hereby required to serve written defenses ... within 20 days.... If a defendant fails to do so, a default [judgment] will be entered against that defendant for the relief demanded...". This is what the appellants were told. The logical implication of this statement, it seems to me, is that if a written defence were served, the defendants would *not* be in default of the pleading. This also turned out not to be true.

VI. The Statement of Defence

101 The appellants filed, then refiled in the different judicial circuit, a Statement of Defence which pleaded in the relevant part, as follows:

> 2 The facts are as follows:

a) At no time did the Sellers engage the services of O'Neill's Realty, Inc., and/ or James O'Neill to sell the property above-referred to or any other property whatsoever.

b) On or about 1984, the Defendant, James O'Neill, contacted the Sellers and informed them that he had a client who wished to purchase the above-referred to property. As there had been no previous communication of any kind whatsoever between the Sellers and James O'Neill, the Sellers believed that he, the said James O'Neill, represented the Plaintiffs.

c) During subsequent telephone conversations in or about August, 1984, the Sellers advised James O'Neill that they had never been in Port Charlotte, Florida, and that the only information in their possession with respect to the above-referred to property was the number allocated to same, that is to say: Lot 2, Block 3694 of Port Charlotte Subdivision, Section 65.

d) James O'Neill assured the Sellers that they were the owners of the lands that *his* client wished to purchase as he, the said James O'Neill, had perused the Public Records for the property in which *his* client was interested, and the names of the Sellers appeared thereon as owners. The Sellers were satisfied with his representations and therefore proceeded on that basis.

3 On or about August, 1984, the Sellers received a Contract for Sale of Real Estate which said Contract described the above-referred to property as being Lot 1. The Sellers contacted James O'Neill to advise him of the discrepancy.

4 James O'Neill once again assured the Sellers that they did own the property in which his client was interested and therefore the requisite change to the Contract was made. James O'Neill did not indicate to the Sellers that the change had to be initialled.

5 The Contract was returned to James O'Neill and on or about September 20th, 1984, the Sellers received a Warranty Deed which indicated that the property being sold was Lot 2.

6 As the discrepancy had been discussed with and pointed out to James O'Neill, and as the Warranty Deed specified Lot 2, Block 3694 of Port Charlotte Subdivision, Section 65, the Sellers had no reason to believe that the discrepancy in the Lot Number, that is to say Lot 2 as opposed to Lot 1, had not been discussed with the Plaintiffs and that the matter had not been efficiently and legally resolved.

[Emphasis in original.]

102 The respondents never amended their Complaint against the appellants even though, as we will see, there was a good deal of activity in relation to the other defendants (before and after default was noted against the appellants) prior to the Florida court's final judgment against the appellants dated December 13, 1991.

VII. The Appellants' Dilemma

103 The appellants had to decide how to respond to the Complaint. To make an informed decision, they should have been told in general terms of the case they had to meet on liability and, more importantly on these facts, an indication of the jeopardy they faced in terms of damages. This is not a case where the plaintiffs were satisfied with the damages implicit in a failed minor real estate transaction. The Complaint, in my view, did not adequately convey to the appellants the importance of the decision that would eventually be made in the Florida court. The appellants were merely told, unhelpfully, that the claim exceeded US$5,000.

104 The appellants were entitled to draw some comfort from the fact that the respondents' guns were trained not on them alone, but on the real estate agent and the title insurer as well. Moreover, the respondent developers' allegations against the realtor O'Neill coincided with their own Statement of Defence, particularly the allegation that the appellants authorized the realtor to sell only Lot 2 — not Lot 1. On September 12, 1991, prior to the damages trial, the respondents settled with the realtor and the title insurer for US$10,750. This radically transformed the potential jeopardy of the appellants. They were never told of the settlement.

VIII. The Florida Pleadings Rule

105 Under Rule 1.190(a) of the Florida *Rules of Civil Procedure* (Fla. Stat. Ann. § 1.190(a)), the appellants were required to refile their Defence every time the respondents amended their Complaint, even if the amendments were solely directed at other defendants. This was nowhere brought to the appellants' attention. As mentioned earlier, I think the appellants could fairly understand from the "warning" in the original Complaint that only if *no* defence were filed would there be a pleadings default in the action. Otherwise there would be no pleadings default. The respondents never amended their Complaint against the appellants. There was therefore nothing further for the appellants "to answer". They were nevertheless noted in default for failing to file a defence.

106 The respondents' Amended Complaint, Second Amended Complaint, Third Amended Complaint and ultimately Fourth Amended Complaint modified the allegations against other parties. In terms of procedural fairness, I think the appellants were entitled to assume that in the absence of any new allegations against them there was no need to refile a defence that had already been filed in the same action. To non-lawyers, a requirement for such apparently useless duplication would come as a surprise.

107 Yet we are told that:

> Under Florida law Dominic Thivy, Rose Thivy, Geoffrey Saldanha and Leueen Saldanha were under a *mandatory* obligation to deliver a defence to each of the new amended complaints. [Emphasis added.]

It seems to me the appellants were entitled to be told from the outset that their defence would be treated as non-existent if the Complaint were thereafter amended against *other* defendants.

108 When a Canadian resident is served with a legal process from within his or her own jurisdiction, he or she is presumed to know the law and the risks attendant with the notice. There can be no such presumption across different legal systems.

109 As the basis of the respondents' judgment is *default of pleading*, this lack of notification goes to the heart of the present appeal.

IX. Other Information the Appellants Didn't Know

110 It is to be remembered that although the appellants had decided not to have a Florida lawyer, they were very much part of the liability phase of the action until noted in default on July 25, 1990, and very much interested in the assessment of damages phase of the action which did not take place until December 11, 1991. Even a defendant who concedes liability (as opposed to one who merely defaults) might want to contest what may appear to be "breathtaking" damages claimed by the successful party. Liability and assessment of damages are two distinct and separate issues. A defendant may choose to concede the one but contest the other.

111 In administrative law, where issues of notification have been extensively canvassed, albeit in a different context, it is well established that a party must be made aware of "the potential jeopardy faced": D.J.M. Brown and J.M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf ed.), para. 9:5222. One of the criteria determining the stringency of natural justice requirements in particular circumstances is "[t]he importance of the decision to the individual or individuals affected": *Baker v. Canada (Minister of Citizenship & Immigration)*, [1999] 2 S.C.R. 817 (S.C.C.), at para. 25. There is a difference in "importance" between a minor real estate transaction whose defence is "not worth the candle" and a major claim which the respondents have successfully orchestrated into a million dollar liability.

(a) During the Liability Phase which Concluded July 25, 1990

112 The appellants received no notice of the court order dated November 6, 1987, striking out the claim for punitive damages against the realtor and the title insurance defendant on the basis, apparently, that treble damages are themselves intended to be punitive, and an

additional claim for punitive damages is not permitted under Florida law. Despite this ruling, the appellants, as defaulters, were subsequently held liable for treble damages of US$210,000 *plus* punitive damages of US$50,000. The punitive damages issue went very much to the appellants' potential jeopardy, yet it seems they were not kept in the picture about court orders made in the same action as between the other parties relevant to the same head of damage alleged against them. This event pre-dated being noted in default. If the appellants had received the advantage of this ruling, it would potentially have reduced the eventual damages against them by almost 20 per cent. In other words, the oversight, if that is what it was, related to what is now claimed to be worth about a quarter of a million dollars.

113 On June 19, 1990, the appellants were sent a notice that an application would be made to the Florida court to note them in default for failure to file a defence to the Third Amended Complaint or "serve any pleading or other paper as required by law". The appellants had no reason to think that the defence they had already filed was not applicable to the Third Amended Complaint. (Indeed, there apparently was a Fourth Amended Complaint but it is not in the record before us.) Unless the appellants were made aware of the Florida pleadings rule, which they were not, such a notice would simply add to their confusion. It may be obvious to a Florida lawyer that every amended Complaint requires a fresh defence even if there are no changes relevant to the defendant called upon to plead, but such a requirement would not be obvious to an Ontario lawyer, still less to self-represented litigants such as the appellants.

114 The appellants were noted in default on July 25, 1990.

(b) After Being Noted in Default but Prior to the Jury Trial on December 11, 1991

115 In some cases, a court making an assessment of unliquidated damages might think it unnecessary to notify the defaulters of the ongoing proceedings. It would depend on the circumstances. For example, in Ontario, Rule 19.02(3) leaves notice in the discretion of the court (*Rules of Civil Procedure*, R.R.O. 1990, Reg. 194). Whatever may be the minimum requirements in some cases, I believe the circumstances here cried out for notice of the subsequent proceedings because in the period between the noting of default on July 25, 1990 and the damages trial on December 11, 1991, the potential jeopardy changed radically to the appellants' disadvantage.

116 The appellants were not told that by Stipulation dated October 31, 1990, the respondents and realtor (both corporate and individual) made a deal "to delete claims against [the realtor] for treble damages, punitive damages, and statutory violations", leaving the respondents' claim against the realtor (who had been the only contact between the respondents and the appellants) to proceed in simple negligence. The appellants were now the only parties against whom treble damages and punitive damages were sought, but they

were not told of that fact. Had they been so advised, they would have been able to consider cross-proceedings against the realtor for indemnification in respect of the more substantial claims now asserted against them alone.

117 Nor were the appellants served with the court order dated March 27, 1991, striking out as improper the respondents' claim for attorney's costs against the realtor and the title insurance company. By way of contrast, the final judgment against the appellants dated December 13, 1991, specifically "reserves jurisdiction to tax costs, prejudgment interest, and attorney's fees" against the appellants.

118 Nor were the appellants served with an order dated June 17, 1991 for mandatory mediation which provided that "[*a*]*ll* parties are required to participate" (emphasis added). Even defendants who consider it uneconomical to litigate an US$8,000 building lot deal in a foreign country might well consider it to be in their best interest to participate in a mediation. The respondents say that the appellants were not entitled to notice of the order for mediation but it seems wholly incongruous to have a mediation order requiring "[a]ll parties" to participate when the *only* parties who were now the respondents' target for treble and punitive damages were not even told about it.

119 Nor were the appellants told that on September 12, 1991, the respondents settled with the realtor for US$8,250 and subsequently settled with the title insurers for US$2,500 while still retaining title to Lot 2. This left the appellants as the sole target at the damages trial. According to the documents they had received, the appellants were still entitled to believe that the respondents continued to make against the realtor essentially the same points as those the appellants themselves had set out in their Statement of Defence. This was no longer true. The appellants did not know that they were now on their own.

120 Nor were the appellants served, as required by the Florida rules, with notice of the experts the respondents proposed to call at the damages assessment. This too might have operated as a wake-up call to the appellants, who at this late stage were drifting obliviously toward financial disaster.

121 As mentioned above, the Third Amended Complaint claimed the *respondents'* damages on *a* model home. It is true that by their default, the appellants admitted the allegations of fact in the Complaint, but the facts thus admitted were specific to the respondents and to a single model home. There is surely a significant difference between damages on a single home (even a "model" home) and damages on a theory of lost profit from the construction of a non-existent residential subdivision. Yet it is a judgment largely based on the latter allegation, not the allegation in the Complaint, that is the basis of the bulk of the million dollar judgment now sought to be enforced against the appellants in Ontario.

122 On December 11, 1991, the Florida court entered a directed verdict for unliquidated damages against the appellants, and assessed the damages at US$210,000 plus US$50,000 punitive damages. It now appears that the out-of-pocket construction costs which formed a substantial part of the award of compensatory damages against the appellants were not incurred by the respondents, as had been alleged in their Complaint, but by Fox Chase Homes of Sarasota, Inc. or Fox Chase Homes of Charlotte County, Inc., whose names appeared nowhere in the pleadings. In the Ontario action, the trial judge found that under Florida law "causes of action of a corporation such as Fox Chase are the property of the corporation and cannot be passed through to its shareholders. Dissolved corporations cannot maintain actions except through their last directors with appropriate description in the style of cause not present in this matter." There was no such "appropriate description" in the Florida style of cause. In my view, the intervention of one or two corporate entities could raise a number of potential defences not otherwise available in the assessment of damages. The purpose of a pleading is to give notice. It is certainly not implicit in anything said in the Complaint that the respondents were claiming damages on behalf of corporations in which they had an interest.

123 The appellants had not even been told that the respondents would be seeking damages for the *corporation's* lost opportunity to build an undefined number of homes on land to which neither the respondents nor the corporation held title.

124 I do not accept the suggestion that the appellants are the authors of their own misfortune on the basis that if they had hired a Florida lawyer they would have found out about all of these developments. The appellants decided not to defend the case set out against them in the Complaint. That case was subsequently transformed. They never had the opportunity to put their minds to the transformed case because they were never told about it.

125 I do not suggest that any one of the foregoing omissions of notice would necessarily have been fatal to enforcement of the respondents' default judgment in Ontario. Cumulatively, at all events, these continuing omissions seem to me to demonstrate an unfair procedure which in this particular case failed to meet the standards of natural justice.

X. Availability of an Appeal

126 The appellants had ten days to appeal the default judgment. They did not do so, apparently based on advice from their Ontario solicitor. I agree with Major J. that the appellants cannot be relieved of the consequences of their failure to appeal simply because they acted on legal advice.

127 The failure to exhaust local remedies in the foreign court is ordinarily a factor to be taken into account in determining whether a foreign judgment is enforceable in Ontario, but I do not think it is fatal here. We are dealing with a *default* judgment obtained, in my view,

without compliance with the rules of natural justice. Morever, even if the appellants had appealed, we are told that no record of the damage assessment proceedings exists. There is no transcript of the evidence heard by the jury. There is similarly no record of the instructions given to the jury by the trial judge. If the respondents complied with the letter of the Florida rules, as they say they did, a Florida appellate court might well uphold the default judgment. The Ontario court is faced with a *different* issue than that which would have confronted a Florida appellate court. Was the notice, notwithstanding presumed compliance with Florida court rules, sufficient to alert the *foreign* defendants to the case they had to meet, and the potential jeopardy they faced?

128 I agree in this respect with the view of the English Court of Appeal in *Adams v. Cape Industries Plc* (1989), [1991] 1 All E.R. 929 (Eng. C.A.), at pp. 1052-53, that the availability of an appeal in the foreign jurisdiction is not necessarily determinative. *Cape Industries* was also a case of a default judgment.

129 I would also reject the argument that the appeal should be dismissed because the appellants ought to have moved "promptly" to set aside the default judgment for "excusable neglect". Such relief is normally available to a defendant who has formed an intention to defend but for some "excusable" reason had "delayed" in taking appropriate steps. The problem here is that the appellants had in fact filed a Statement of Defence but had decided, based on what they were told about the respondents' action, not to defend it further. The appellants' problem was not that they failed to implement an intention to defend but that their intention not to further defend was based on a different case.

130 In these circumstances, I would not enforce a judgment based on (in my view) inadequate notice __ and thus violative of natural justice __ just because the appellants did not appeal the Florida judgment to the Florida appellate court, or seek the indulgence of the Florida court to set aside for "excusable neglect" a default judgment that rests on such a flawed foundation.

XI. Disposition

131 I would allow the appeal to dismiss the action, with costs throughout to the appellants.

***LeBel J.*:**

I. Introduction

132 The enforcement of this judgment, which has its origins in a straightforward sale of land for US$8,000 and has now grown to well over C$800,000, is unusually harsh. In my view, our law should be flexible enough to recognize and avoid such harshness in circumstances like these, where the respondents' original claim was dubious in the extreme and the appellants

are guilty of little more than bad luck. To hold that the appellants are the sole authors of their own misfortune, it seems to me, is to rely heavily on the benefit of hindsight; and to characterize the respondents' case in the original action as merely weak is something of an understatement. The implication of the position of the majority is that Canadian defendants will from now on be obliged to participate in foreign lawsuits no matter how meritless the claim or how small the amount of damages in issue reasonably appears to be, on pain of potentially devastating consequences from which Canadian courts will be virtually powerless to protect them.

133 In my opinion, this Court should avoid moving the law of conflicts in such a direction. Thus, I respectfully disagree with the reasons of the majority on two points. I would hold that this judgment should not be enforced because a breach of natural justice occurred in the process by which it was obtained. I also have concerns about the way the real and substantial connection test, in its application to foreign-country judgments, is articulated by the majority.

134 Although I agree both that the real and substantial connection test should be extended to judgments from outside Canada and that the Florida court properly took jurisdiction over the defendants in this particular case, in my view the test should be modified significantly when it is applied to judgments originating outside the Canadian federation. Specifically, the assessment of the propriety of the foreign court's jurisdiction should be carried out in a way that acknowledges the additional hardship imposed on a defendant who is required to litigate in a foreign country.

135 Furthermore, the philosophy of *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), which replaces traditional categories with a purposive, principled framework, should not be confined to the question of jurisdiction, but should also be extended to the defences. In my view, liberalizing the jurisdiction side of the analysis while retaining narrow, strictly construed categories on the defence side is not a coherent approach. I would adopt a more flexible approach to the defences than the majority, and on that approach it is my view that the appellants have made out the defence of natural justice.

136 The solution that the majority sets out to the question of recognition and enforcement of foreign judgments appears to go further than courts have gone in other Commonwealth jurisdictions or in the United States (as I will discuss below). This discrepancy may place Canadian defendants in a disadvantageous position in international litigation against foreign plaintiffs. As a result, the risks and thus the transaction costs to our citizens of cross-border ventures will be increased, in some cases beyond what commercially reasonable people would consider acceptable. Canadian residents may consequently be deterred from entering into international transactions — an outcome that frustrates, rather than furthers, the purpose of private international law.

II. Background

137 I agree with Major J.'s outline of the facts. I would, however, place additional emphasis on a number of details that emerge from the record.

138 The Saldanhas and the Thivys (to whom I will refer collectively as the "Sellers") purchased the lot in Florida thinking that they might eventually build a vacation home on it. In the meantime, they had little to do with it. They purchased it without having visited it, and they never saw it. They did not think seriously about selling the land until they received the unsolicited offer from the Bealses and Foodys (the "Buyers") in 1984. This was a relatively small investment from which they anticipated no more than modest returns and on which, it seems reasonable to infer, they did not expect to expend much energy.

139 The Sellers received the Buyers' offer to purchase from a Florida real estate agent, a Mr. O'Neill, in August 1984. They had had no prior dealings with Mr. O'Neill. Mrs. Rose Thivy, who worked in a law office and had done some work as a law clerk as well as some title searching and conveyancing, dealt with Mr. O'Neill on behalf of the group. She testified that she asked Mr. O'Neill how he found her telephone number, and he told her that he had searched the County records to find the owners of the lot his clients wanted to buy.

140 The Buyers' written offer was sent to Mrs. Thivy. She noticed that it erroneously referred to "Lot 1". She assumed that the Buyers were not interested in buying the Sellers' property and that the deal would not proceed. The Sellers did not pursue the matter. Mr. O'Neill then contacted Mrs. Thivy to ask why there had been no response to the offer. Mrs. Thivy pointed out the misidentification of the lot to Mr. O'Neill, who insisted that the Sellers were the registered owners of the lot the Buyers wanted. Mrs. Thivy changed the number on the document to "Lot 2". The Buyers accepted this counteroffer. Subsequently, the Sellers received a deed and other closing documents in the mail. All the documents referred to Lot 2 and not to Lot 1.

141 In January 1985, Mr. Beals telephoned Mrs. Thivy and complained that he had been sold the wrong lot. Mrs. Thivy told him about her conversation with Mr. O'Neill, and suggested that Mr. Beals resolve the problem with him.

142 In March 1985 the Sellers received a copy of a pleading initiating an action by the Buyers in a Florida Circuit Court (the "Complaint"). The Complaint stated that it related to "an action for damages which exceeds $5,000", as was required to give the Circuit Court monetary jurisdiction over the matter, but otherwise did not specify the quantum of damages claimed.

143 The Complaint alleged that the Sellers had fraudulently induced the Buyers to purchase the wrong lot. The Buyers claimed damages based on the purchase price of the lot, the expenses they had incurred in preparing the lot for construction, and revenue they had lost because they had been unable to build a model home on Lot 1. There were also claims against two other defendants, O'Neill's Realty and the Buyers' title insurance company. Attached to the Complaint was the original offer to purchase referring to Lot 1. The contract of purchase and sale referring to Lot 2 was not attached.

144 Mrs. Thivy and Mr. Saldanha both testified that the Sellers had hoped to "rectify the situation" with the Buyers, perhaps by rescinding the transaction and refunding the Buyers' money. When they received the Complaint, however, they decided to defend the lawsuit. Mrs. Thivy telephoned the Florida court for instructions on procedure and form. She then drafted a defence for all the Sellers to sign, and sent it to the court in Florida. In the defence, the Sellers denied that they had ever represented that they owned Lot 1.

145 In the fall of 1986, the Sellers received notice that the action in Florida had been voluntarily dismissed, without prejudice. Mr. Saldanha testified that he thought the reason the action had been dismissed was that the facts the Sellers had set out in their defence were dispositive. As he put it, "when it went away I said, 'Okay, people know the facts, it's over'."

146 But it was not over. A short time later, the Buyers commenced a second action in the Florida court, and the Sellers received a new Complaint in the mail (the "Amended Complaint"). The Amended Complaint set out essentially the same allegations as the previous one. A claim for treble damages was added against the Sellers, and the language was somewhat different, alleging that "wilfully false and fraudulent" misrepresentations were made by the Sellers both directly and through Mr. O'Neill. The Amended Complaint also said that the Sellers had "willingly and wilfully" changed the contract of purchase and sale to read "Lot 2", without informing the Buyers. The damages claimed were spelled out in more detail than before; the Buyers claimed three times the amount they had paid for the land, three times their construction expenses and business losses, rescission of the contract and return of the purchase price, punitive damages, attorney's fees and court costs. Again, the original offer referring to Lot 1, without the Sellers' signatures, was attached, but the contract of purchase and sale, and the other closing documents which identified Lot 2 as the property being transferred, were not.

147 Mrs. Thivy prepared a new defence, which was simply a copy of the old one, and sent it to the Florida court purportedly on behalf of all four defendants. The trial judge accepted the evidence of the Saldanhas, which differed from that of the Thivys on this point, that the Saldanhas chose not to defend the second action and that Mrs. Thivy signed their names to

the new defence without their authorization. The Saldanhas therefore did not attorn to the reinstated action, although the Thivys did.

148 Mr. Saldanha testified that when he and his wife learned of the Amended Complaint, they discussed the matter, and decided that "we were not going to respond to this, because we had already responded". Mr. Saldanha thought that the resurrection of the action was an error of some kind, because the new complaint "seemed to be the same thing regurgitated again" and, in his view, the Sellers had already informed the Florida court of facts that disproved the regurgitated allegations. At this point, as the trial judge put it, "[G]iven their share of the amount at issue, which they assumed to be one-half of the US$8,000, [the Saldanhas] decided the game was not worth the candle, and they would participate no further" ((1998), 42 O.R. (3d) 127 (Ont. Gen. Div.), at p. 130).

149 The Thivys seem to have come to the same conclusion not long afterwards. After the action was relaunched, the Amended Complaint was amended three times, and the Sellers duly received copies of each new version. The Thivys sent their initial defence to the Florida court, but did not respond to any of the new versions of the Amended Complaint. Mrs. Thivy testified that they decided "just to forget about it" because defending the action would probably cost them just as much as the lawsuit was worth, and because they thought that the Florida courts had no jurisdiction over them.

150 The successive versions of the Amended Complaint did not change the allegations against the Sellers in any way. The only changes were to claims against other defendants. Mr. Richard Groner, who acted for the respondents in the litigation in Florida, testified at the Ontario trial as an expert in Florida civil procedure. He testified that, under the applicable rules, each amendment to a complaint requires a response from all the parties on whom it is served, even parties to whom the changes in the pleading have no relevance. Such a party may simply resubmit a copy of his or her earlier defence, or may seek the court's permission to let the earlier defence stand over, but if these steps are not taken the defence that has already been filed ceases to have any legal effect. Therefore, the result of the Sellers' failure to respond to new versions of the Amended Complaint was that they were viewed under the Florida rules as not having raised any defence at all. There was nothing in the documents served on the Sellers to notify them that this was a potential consequence of failure to refile their defence.

151 The Sellers received notice of a default hearing on July 25, 1990, but did not attend or respond. In due course, they were noted in default. As a result, they were deemed to have admitted all the allegations in the Amended Complaint so far as they related to liability. Damages were still a live issue. A hearing was held before a judge and a jury in Florida to assess damages. The Sellers received notice of this hearing, too, but again they did not respond.

152 We do not know much about what was said in the damages hearing. There is no transcript of that proceeding. Mr. Groner testified that in Florida courts transcripts are not mandatory for civil trials; a reporter is provided at the option of and at the expense of the litigants. In this case, he decided not to incur the expense. There is no record of the judge's instructions to the jury. An expert witness testified on the valuation of the Buyers' business losses. No expert's report was filed. Mr. Groner testified that it is usual in civil litigation in Florida for parties to obtain information about an expert witness's qualifications and proposed testimony through the discovery process. Expert reports are generally not submitted to the court. All that survives to provide some clue as to how a simple $8,000 land transaction turned into the extraordinary amount now at stake in this appeal is a "Memorandum of Lost Profits Damage" prepared by Mr. Groner, which he submitted to the trial judge in Florida to support his submissions on jury instructions.

153 In late December 1991, the Sellers received the judgment of the Florida court in the mail. The total amount of the judgment was slightly over $270,000, of which $50,000 was punitive damages, with interest set at 12 per cent per annum from the date of the judgment, December 12, 1991 (there seems some confusion in the record over the amount awarded, which the trial judge said was $260,000; the copy of the Florida court's judgment filed in the record is for two amounts which together total $270,886.57). The Sellers were surprised and dismayed at the size of this amount. Mr. Saldanha testified that at first he thought it was a joke. Mrs. Saldanha testified that when she read the number in print "it was like a real blow to the stomach".

154 The Sellers realized only at this point that the Florida action was not, as they had assumed, a minor dispute that would be more expensive to defend than to lose. They recognized that they needed to seek legal advice immediately. The Thivys and the Saldanhas separately consulted lawyers. They were advised that the judgment would not be enforced in Ontario because the Florida court did not have jurisdiction over them. Acting on this advice, the Sellers did not avail themselves of the various means available to them in the Florida system to challenge the judgment.

155 Mr. Beals was examined for discovery in the proceedings in Ontario, and his testimony was read in. His deposition in the Florida proceedings was also an exhibit in the Ontario trial. Based on that evidence, the trial judge made findings of fact that included the following:

> Mr. Beals signed all the closing documents referring to Lot 2 without reading them.
>
> Construction of the model home on Lot 1 stopped before the Buyers learned that they had bought the wrong lot. Mr. Beals and Mr. Foody decided to discontinue their business relationship for unrelated reasons, and Mr. Beals bought out his partner's interest in the company.

Mr. Beals's company, Fox Chase Homes, was dissolved before the Florida action was commenced.

There is no suggestion that these factual findings were in error.

156 Mr. David Mulock, a Florida litigator, testified for the appellants as an expert on Florida procedural and substantive law. He testified that justifiable reliance is one of the essential components of a fraud claim in Florida law. He stated his opinion that reliance by the Buyers on misrepresentations that they were buying Lot 1 could not have been reasonable, because the ownership of land is a matter of public record which can easily be checked, and routinely is checked in any real estate transaction. Mr. Mulock said that the allegations in the Complaint, even if true, were therefore insufficient to support damages for fraud.

157 Mr. Mulock also testified that when a corporation that has a claim for damages is dissolved, its last directors can pursue the cause of action as long as they indicate in the pleadings that they do so in the capacity of representatives of the corporation. None of the many versions of the Complaint in the Florida action made any reference to Fox Chase Homes.

158 The trial judge inferred from the contents of the Memorandum of Lost Profits Damage and from the verdict reached by the Florida jury that the jury had not been informed of several key facts: that the decision to stop construction and the winding-up of Fox Chase Homes were unrelated to the mistake in the land transaction; that the corporation that had allegedly suffered business losses was not a party to the action; and that there was a contract of purchase and sale signed by both the Buyers and the Sellers referring to Lot 2. This was the basis for his finding that the jury was deliberately misled and the defence of fraud was made out.

III. The Extension of the "Real and Substantial Connection" Test to Foreign-Country Judgments

A. The Need for Clarification

159 The parties agreed before the trial judge that the Florida court had properly assumed jurisdiction. As a result, it is not strictly necessary to deal with the application of the "real and substantial connection" test to foreign-country judgments to dispose of this appeal. Although the issue is moot between these parties, the Court asked for additional submissions on it. My discussion of the jurisdiction question is more extensive than would ordinarily be necessary in light of the appellants' concession of this point and of my agreement with Major J. on what the result of the jurisdiction analysis should be in this case. I have set out my views on this

issue in detail because the principles that ought to shape the jurisdiction analysis should also inform the interpretation of the defences, on which I disagree with the majority.

160 I will follow Major J. in assuming that the relevant laws of other Canadian provinces are substantially the same as those of Ontario. I will be referring to Canada and Ontario interchangeably, except where the context indicates otherwise.

161 *Morguard*, supra, marked the beginning of a new era in Canadian conflicts law, and set out the basic principles and policy objectives underlying that new legal framework. At a practical level, however, it left many questions unanswered. Among them are whether the "real and substantial connection" test applies in international situations, and the precise nature of the connections that support the recognition of jurisdiction. The present appeal is a suitable occasion within which to clarify some of the implications of *Morguard* and to develop its ramifications in the international context. For these reasons, this Court decided to hear submissions on the international application of the test, in the hope of providing some guidance to lower courts on the issues that this case raises although those issues are no longer live between the parties.

162 Under the approach adopted by the majority, the "real and substantial connection" test applies in the international context just as it does within Canada, and if any unfairness results it may be dealt with only by arguing *forum non conveniens* in the foreign forum or invoking defences to the enforcement of the final judgment. My view is different. The jurisdiction test itself should be applied so that the assumption of jurisdiction will not be recognized if it is unfair to the defendant. To do so requires taking into account the differences between the international and interprovincial contexts as well as between the rationales that structure our conflicts law in these two spheres.

B. Constitutional Imperatives Versus International Comity

163 The adoption in *Morguard* of new, liberal and purposive rules governing recognition and enforcement of judgments from one province by the courts of another was based on two underlying rationales: constitutional considerations, particularly the intention of the framers of the Constitution to create an integrated national economy; and considerations of international comity, which La Forest J. held should be evaluated anew "in the light of a changing world order" (p. 1097). While the latter rationale extends to foreign-country judgments, the former does not.

164 In *Morguard*, La Forest J. emphasized that the integrated character of the Canadian federation makes a high degree of cooperation between the courts of the various provinces a practical necessity. As this Court later confirmed in *Hunt v. T & N plc*, [1993] 4 S.C.R. 289 (S.C.C.), it is a "constitutional imperative", inherent in the relationship between the units of our federal state, that each province must recognize the properly assumed jurisdiction

of another, and conversely that no court in a province can intermeddle in matters that are without a constitutionally sufficient connection to that province. Provided that a court's assumption of jurisdiction is based on a real and substantial connection to the forum, the matter is within the sphere of provincial authority, and the resulting judgment is entitled to "full faith and credit", to borrow the language of the United States Constitution, in all the other provinces.

165 As I observed in *Spar Aerospace Ltd. v. American Mobile Satellite Corp.* (2002), [2002] 4 S.C.R. 205, 2002 SCC 78 (S.C.C.), at para. 53, it is clear from the reasoning in both *Morguard* and in *Hunt*, supra, "that federalism was the central concern underlying both decisions". At the same time, *Morguard* left little doubt that the old common law rules were as outdated in the international sphere as they were inappropriate in the interprovincial context. La Forest J. noted that international borders are far more permeable, and international travel and communications much easier, than was the case when the traditional rules were developed in the nineteenth century. Business dealings with residents of other states are both commonplace and essential for any sophisticated modern economy. It is contrary to the interests of a modern state to retain rules of private international law that impede its citizens' participation in the increasingly integrated world economy. La Forest J. endorsed the view of H. E. Yntema that the rules of private international law ought to "promote suitable conditions of interstate and international commerce" ("The Objectives of Private International Law" (1957), 35 Can. Bar Rev. 721, at p. 741, cited in *Morguard*, at p. 1097).

166 *Morguard* thus strongly suggested that the recognition and enforcement of foreign-country judgments should be subject to a more liberal test informed by an updated understanding of international comity. It is equally clear from a reading of *Morguard* and its progeny that the considerations informing the application of the test to foreign-country judgments are not identical to those that shape conflict rules within Canada. As I observed in *Spar*, supra, at para. 51, "it is important to emphasize that *Morguard* and *Hunt* were decided in the context of interprovincial jurisdictional disputes ... [and that] the specific findings of these decisions cannot easily be extended beyond this context". See also *Hunt*, supra, at p. 328. Although constitutional considerations and considerations of international comity both point towards a more liberal jurisdiction test, important differences remain between them.

167 One of those differences is that the rules that apply within the Canadian federation are "constitutional imperatives". Comity as between sovereign nations is not an obligation in the same sense, although it is more than a matter of mere discretion or preference. In *Morguard*, La Forest J. adopted the definition of comity stated by the United States Supreme Court in *Hilton v. Guyot*, 159 U.S. 113 (U.S. N.Y. 1895), at pp. 163-64 (cited in *Morguard*, at p. 1096):

> "Comity," in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one

> nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience, and to the rights of its own citizens or of other persons who are under the protection of its laws.

168 The phrase "international duty and convenience" does not refer to a legally enforceable duty. No super-national legal authority can impose on sovereign states the obligation to honour the principle of comity. Rather, states choose to cooperate with other states out of self-interest, because it is convenient to do so, and out of "duty" in the sense that it is fair and sensible for State A to recognize the acts of State B if it expects State B to recognize its own acts.

169 The provinces, on the other hand, are constitutionally bound both to observe the limits on their own power to assert jurisdiction over defendants outside the province, and to recognize the properly assumed jurisdiction of courts in sister provinces; for them, this is "a matter of absolute obligation". This obligation reflects the unity in diversity that is characteristic of our federal state. In *Morguard*, supra, this Court acknowledged the shared values of the Canadian justice system which, as we know, fully accepts the relevance and importance of its two great legal systems, common law and civil law. The *Morguard* rule was designed in full awareness that Canada shares two legal systems.

170 A further point is that there are significant factual differences between the international and interprovincial contexts that should be reflected in the private international law rules applicable to each. These contextual differences are important because the doctrine of comity should be applied in a context-sensitive manner. The ultimate purpose of rules based on the idea of comity is to "facilitate the flow of wealth, skills and people across state lines in a fair and orderly manner" (*Morguard*, supra, at p. 1096). How this purpose is best to be achieved depends on the context in which the rules operate.

171 A context-sensitive jurisdiction test ought to take into account the difficulty of defending in a foreign jurisdiction and the possibility that the quality of justice there may not meet Canadian standards. Judgments should travel more easily across provincial borders than across international ones, both because of the relative ease of mobility between the provinces and because of the consistent nationwide standards of the Canadian justice system. When a judgment comes from a foreign country, the logistical difficulties of defending in the originating forum may be much greater, and the foreign legal system may be different from those with which Canadians are familiar. Canada is a single country with a fully integrated economy, but the world is not. In *Morguard*, at p. 1095, this Court rightly emphasized that "[m]odern states ... cannot live in splendid isolation". But we still do not live in a borderless global village; our modern world is "home to widely varied cultures with radically divergent value systems" (*Yahoo! Inc. v. La Ligue Contre Le Racisme et L'Antisemitisme*, 169 F.Supp.2d 1181 (U.S. N.D. Cal. 2001), at p. 1186).

172 In my view, it follows from the contextual and purpose-driven approach adopted in *Morguard* that the rules for recognition and enforcement of foreign-country judgments should be carefully fashioned to reflect the realities of the international context, and calibrated to further to the greatest degree possible, the ultimate objective of facilitating international interactions. This means that the rule should be far more liberal than the categorical approach that was followed before *Morguard* (and most influentially stated in *Emmanuel v. Symon* (1907), [1908] 1 K.B. 302 (Eng. C.A.)), but by no means does it follow that it should be as liberal as the interprovincial rule.

173 The traditional rules impeded cross-border commerce by making it difficult for judgment creditors to obtain effective remedies against defendants resident in other countries, thus undermining the security of transactions. But an excessively generous test would be unduly burdensome for defendants and might discourage persons with assets in Canada from entering into transactions that could eventually get them involved in international disputes. This result, too, would frustrate the purpose of private international law. Ideally, the test should represent a balance designed to create the optimum conditions favouring the flow of commodities and services across state lines. In our enthusiasm to advance beyond the parochialism of the past, we should be careful not to overshoot this goal.

174 I would conclude that the "real and substantial connection" test should apply to foreign-country judgments, but the connections required before such judgments will be enforced should be specified more strictly and in a manner that gives due weight to the protection of Canadian defendants without disregarding the legitimate interests of foreign claimants. In my view, this approach is consistent with both the flexible nature of international comity as a principle of enlightened self-interest rather than absolute obligation and the practical differences between the international and interprovincial contexts.

C. The Nature of the Requisite Connecting Factors

175 The "real and substantial connection" test is simply a way of asking whether it was appropriate for the originating forum to take jurisdiction over the matter. If the originating court is an appropriate forum, then it is reasonable to expect the defendant to defend his interests there and to live with the consequences if he decides not to do so. Conversely, if it is not reasonable in the circumstances to expect the defendant to go to the originating court, then it was probably not appropriate for it to take jurisdiction. I would also emphasize at the outset that the requirement that the originating court act "with properly restrained jurisdiction" was expressly recognized by La Forest J. as a means of ensuring fairness to the defendant (*Morguard*, supra, at p. 1103).

176 In my view, it is important to take into account the burdens that defending in the foreign forum would impose on a defendant, in order to determine whether it is reasonable

to expect the defendant to accept them. Among the factors that affect the onerousness of defending in a foreign forum are the difficulty and expense of travelling there and the juridical disadvantage that the defendant may face as a result of differences between the foreign legal system and our own. In *Morguard*, supra, this Court recognized the unfairness of forcing a plaintiff to bring an action in the place where the defendant now resides, "whatever the inconvenience and costs this may bring" (p. 1103). Correlatively, defendants should not be compelled to defend in the jurisdiction of the plaintiff's choosing regardless of the inconvenience and expense entailed; all of these factors should be taken into account by the court in arriving at a solution that justly accommodates the legitimate interests of both parties.

177 One question left open in *Morguard* was exactly what must be connected to the forum to satisfy the "real and substantial connection" test. At various points, La Forest J. refers to "significant contacts with the subject-matter of the action" (p. 1103), "contacts ... to the defendant or the subject-matter of the suit" (p. 1103), "a nexus ... between the subject-matter of the action and the territory where the action is brought" (p. 1104), a "connection between the damages suffered and the jurisdiction" (p. 1108), and a "connection with the transaction or the parties" (p. 1108) (see J. Blom, "Conflict of Laws — Enforcement of Extraprovincial Default Judgment — Real and Substantial Connection": *Morguard Investments Ltd. v. De Savoye* (1990), 46 C.P.C. (2d) 1 (S.C.C.); G. D. Watson and F. Au, "Constitutional Limits on Service Ex Juris: Unanswered Questions from Morguard" (2000), 23 *Advocates' Q.* 167, at p. 200).

178 The justification for requiring a defendant to go to the foreign forum is generally strongest when there is a link to the defendant. If the defendant has become involved in activities in the jurisdiction, or in activities with foreseeable effects in the jurisdiction, it is hardly reasonable for her to claim that she should be shielded from the process of that jurisdiction's courts. This reasoning is reflected in *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 (S.C.C.), a case relied on in *Morguard*. In *Moran* it was held that, in a products liability tort case, the place where the victim suffered damages could assume jurisdiction over a foreign defendant manufacturer who knew or ought to have known that the defective product "would be used or consumed where the plaintiff used or consumed it" — *i.e.*, if there was an indirect but substantial connection between the defendant and the forum (*Moran*, supra, at p. 409, cited in *Morguard*, at p. 1106).

179 But there may be good reasons why jurisdiction should be recognized even where there is little or no connection to the defendant, particularly when other considerations, such as fairness to the plaintiff and the importance of administering the justice system in an efficient manner, are taken into account along with the interests of the defendant. It is not unusual for cross-border litigation to arise out of complex transactions involving a number of parties with connections to several jurisdictions. Watson and Au, *supra*, point out, at p. 200, that when

litigation involves "multiple defendants in different jurisdictions, insisting on a substantial connection between each defendant and the forum can lead to a multiplicity of actions and inconsistent findings". In such circumstances, a test that recognizes jurisdiction based on a connection to the subject matter of the action seems better suited to identifying whether the forum is a reasonable place for the action to be heard.

180 Moreover, the Canadian Constitution does not mandate that the jurisdiction test provide a minimum level of procedural protection to the defendant, regardless of other factors (see Watson and Au, *supra*, at p. 180). In this respect, Canada's Constitution can be contrasted with that of the United States. In the U.S., defendants are protected by the due process clauses of the Fifth and Fourteenth Amendments, which expressly provide that a person cannot be deprived of property without due process of law. Because the defendant in a civil case stands to be deprived of property by an adverse judgment, the court's jurisdiction will not be recognized unless it accords with the defendant's due process rights — a requirement which has been interpreted to mean that there must be certain minimum connections between the defendant and the forum. By contrast, in the *Canadian Charter of Rights and Freedoms*, due process is enshrined in s. 7, which protects "life, liberty and security of the person", but not property rights. As a general rule, the defendant's life, liberty and security of the person are unaffected by the outcome of civil litigation. In Canada, therefore, the defendant's individual constitutional rights are not the starting point for jurisdictional analysis as they are in the U.S. — nor, indeed, would s. 7 rights usually be relevant to jurisdictional issues in civil disputes, although it is possible that there may be situations where fundamental interests of the defendant are implicated and s. 7 could come into play.

181 A broad interpretation of the "real and substantial connection" test, whereby the test may be satisfied even in the absence of a connection to the defendant, seems appropriate given both our constitutional arrangements and the ultimate objective of facilitating the flow of goods and services across borders. Jurisdiction should be acknowledged as proper where the forum was a reasonable place to hear the action, taking into account all the circumstances, including judicial efficiency and the legitimate interests of both parties. At the same time, it should not be forgotten that the jurisdiction test is a safeguard of fairness to the defendant.

182 The test should ensure that, considering the totality of the connections between the forum and all aspects of the action, it is not unfair to expect the defendant to litigate in that forum. It does not follow that there necessarily has to be a connection between the defendant and the forum. There are situations where, given the other connections between the forum and the proceeding, it is a reasonable place for the action to be heard and the defendant can fairly be expected to go there even though he personally has no link at all to that jurisdiction.

D. Balancing Hardship to the Defendant Against the Strength of the Connections

183 The approach outlined above suggests that when a court is asked to recognize and enforce a foreign judgment, and questions whether the originating court's jurisdiction was properly restrained, it should inquire into the connections between the forum and all aspects of the action, on the one hand, and the hardship that litigation in the foreign forum would impose on the defendant, on the other. The question is how real and how substantial a connection has to be to support the conclusion that the originating court was a reasonable place for the action to be heard. The answer is that the connection must be strong enough to make it reasonable for the defendant to be expected to litigate there even though that may entail additional expense, inconvenience and risk. If litigating in the foreign jurisdiction is very burdensome to the defendant, a stronger degree of connection would be required before the originating court's assumption of jurisdiction should be recognized as fair and appropriate.

184 In some respects, this formulation of the jurisdiction test might overlap with the doctrine of *forum non conveniens*, although it is not exactly the same. Certain considerations, such as juridical disadvantage to a defendant required to litigate in the foreign forum, are relevant to both inquiries. When the issue is jurisdiction, however, the court should restrict itself to asking whether the forum was *a* reasonable place for the action to be heard, and should not inquire into whether another place would have been more reasonable.

185 There is an important difference between the inquiry conducted by a court assuming jurisdiction at the outset of the action and the test applied by a court asked to recognize and enforce a judgment at the end. In the former case, two steps are involved: the court must first determine that it has a basis for jurisdiction, and if it does it must go on to decide whether it should nevertheless decline to exercise that jurisdiction because another forum is clearly more appropriate for the hearing of the action. In the latter case of a receiving court, only the first step in this inquiry is relevant. Provided that the originating court had a reasonable basis for jurisdiction, the defendant had its chance to appear there and argue *forum non conveniens*, and cannot question the originating court's decision on that issue in the receiving court.

186 Nevertheless, the receiving court is not bound to agree with the originating court's opinion that it had a reasonable basis on which to assume jurisdiction. If the connections to the originating forum are tenuous or greatly outweighed by the hardship imposed on the defendant forced to litigate there, the receiving court may conclude that it was not even *a* reasonable place for the action to be heard. It is no good to say that the defendant should have raised the question of hardship by arguing *forum non conveniens* before the foreign court. If it is unfair to expect the defendant to litigate on the merits in the foreign jurisdiction, it is probably unfair to expect the defendant to appear there to argue *forum non conveniens*.

E. The Application of the Test in the Canadian and International Contexts

187 A test which balances hardship to the defendant (with due regard to the interests of the plaintiff) against the factors connecting the action to the forum — including links to either party or any other aspect of the action — leads to a very generous approach to the recognition and enforcement of judgments originating in other Canadian provinces. The reason for this is that the hardship imposed on a defendant who has to appear in another province within the Canadian federation will generally be minimal and will usually be outweighed by a genuine connection between the forum and the defendant, the subject-matter of the action or the damages suffered — all of which are invoked as bases of jurisdiction in provincial service *ex juris* statutes and in the *Civil Code of Québec*, S.Q. 1991, c. 64, and each of which, as I noted in *Spar*, supra, at para. 56, appears to be an example of a real and substantial connection.

188 Litigation outside the defendant's home forum may entail a number of burdens, which vary depending on the context. Those burdens potentially include the expense and inconvenience of travelling, the need to obtain legal advice in the foreign jurisdiction, the perils of navigating an unfamiliar legal system whose substantive and procedural rules may be quite different from those that apply in the defendant's home jurisdiction, and even the possibility that the foreign court may be biassed against foreign defendants or generally corrupt.

189 Within Canada, most of these problems do not arise. It is true that physical distances within this country can be significant, and the expense and inconvenience to a defendant in Newfoundland who is required to litigate in British Columbia, for example, would not be inconsiderable. As a rule, however, the distances involved are manageable for citizens of a modern country with an efficient transportation infrastructure. In any event, it may not be necessary for the defendant to go to the jurisdiction in person. Given the relative ease of travel and communications today, it is usually not an extraordinary burden to litigate in another Canadian province.

190 More importantly, there is very little concern that the defendant will be at a disadvantage because she is not familiar with the legal system in the other province, and still less that the legal systems applied in Canada will actually treat her unfairly. As La Forest J. pointed out in *Morguard*, supra, there can be no genuine concern about "differential quality of justice among the provinces" (p. 1100). Indeed, *Morguard* establishes that the Canadian justice system should be understood as an integrated whole. Differences exist in both procedural and substantive matters, but the same basic values apply across the country, and our judicial system is basically unitary. Excessive discrepancies between the provinces will tend to become harmonized under the guidance of the federally appointed judiciary and the overall superintending authority of the Supreme Court of Canada. Furthermore, interprovincial law firms have become commonplace and lawyers across the country are required to abide by the same ethical standards (*Morguard*, at p. 1100).

191 It follows that the assumption of jurisdiction by a sister province, provided that it does not exceed the province's constitutional authority over property, civil rights and the administration of justice in the province and is not prompted by unfair forum-shopping tactics on the plaintiff's part, should be entitled to full recognition and enforcement throughout Canada. A connection to the subject matter of the action should usually suffice to meet the "real and substantial connection" test.

192 Exceptions may arise in cases where litigation away from home would involve travel of a particularly arduous nature for the defendant (which might arise, for example, where the defendant resides in the far north) and, at the same time, the connections to the forum are not especially strong (an example might be a case where all the facts giving rise to the cause of action took place outside the jurisdiction and the only connection is that the plaintiff has suffered damages there). Absent such exceptional circumstances, grounds such as a wrong committed in the jurisdiction or damages suffered there would probably support the assumption of jurisdiction by the province in accordance with the requirements of order and fairness.

193 A judgment which comes to a Canadian court from beyond our international borders is another matter altogether. The distances involved and the difficulty of travelling can be considerably greater when litigation is in a foreign country, and a Canadian defendant faced with a lawsuit outside this country will have to deal with an unfamiliar, and in some cases a very different, legal system.

194 In extreme cases, the foreign legal system itself may be inherently unfair. It is an unfortunate fact that not every country's courts are free of official corruption or systemic bias. In my opinion, it is to this possibility that La Forest J. alluded when he specified that "fairness to the defendant requires that the judgment be issued by a court acting *through fair process* and with properly restrained jurisdiction" (*Morguard*, at p.1103 (emphasis added)). If the process that led to the judgment was unfair in itself, it is not fair to the defendant to enforce that judgment in any circumstance, even if the forum has very strong connections to the action and appears in every other respect to be the natural place for the action to be heard.

195 It should therefore be part of the plaintiff's burden in establishing a *prima facie* case of enforceability to prove that the system from which the judgment came is basically fair. When the originating jurisdiction is another democratic country with fair institutions, this burden will be easily met and may call for nothing more than reliance on judicial notice that the judgment emanates from a legitimate and respected legal system.

196 A less troubling but more common situation arises when there is nothing inherently wrong with the foreign legal system, but it is different enough from ours that a Canadian defendant may encounter considerable difficulties understanding her rights and obligations

and the steps she needs to take to defend herself. To take a simple example, a defendant from a Canadian common law province may find a civilian system such as that of France or Germany quite unfamiliar. Continental legal systems are, of course, just as fair and sophisticated as the legal system of Ontario. The fact remains that an Ontario defendant who is used to a very different system may suffer prejudice as a result of the foreign system's unfamiliarity. Such a defendant cannot hope to protect herself unless she retains local counsel who can both negotiate the process on her behalf and explain it to her in a language she knows. It is not a simple thing to find trustworthy, competent, bilingual counsel in a foreign country; nor is it cheap. The plaintiff, who chose the forum, will presumably not face these difficulties, and therefore the parties will not be on a level playing field. (Conversely, the plaintiff would face the same kind of disadvantage if required to come to Ontario to pursue his case; it is in the nature of international litigation that one party or the other must accept the hardship of litigation in a foreign jurisdiction. The touchstone for an enforcing court in reaching a fair decision as to which of them should bear this burden is the strength of the connections between the action and the originating jurisdiction.)

197 Even legal systems that are relatively similar to Canada's can differ from our system significantly, and in ways that affect a Canadian defendant's ability to make his case effectively and to understand the strengths and weaknesses of his position. The common law system in the United States remains very close in many respects to that of Canada. Yet this action itself provides numerous examples of substantive and procedural differences between the legal system in Florida and that of Ontario which created unforeseen perils for the Ontario defendants. Those differences include the following:

— Discovery in Florida is even broader in scope than it is in Ontario, and some of the functions of pleadings in Ontario are left to the discovery process. The record in this case indicates that it is standard practice for pleadings to disclose no more than a rough outline of the plaintiff's claim and for the defendant to find out the specifics through discovery. Thus, the Amended Complaint did not set out the amount of damages claimed, but simply stated a minimum amount necessary to support the monetary jurisdiction of the Circuit Court. The expert witness, Mr. Groner, testified that the Ontario defendants were expected to ascertain the actual amount being sought through the discovery process. This would, of course, involve expense and would probably necessitate retaining local counsel in Florida.

— Under Florida's procedural rules, the defence filed by the appellants ceased to have any effect once a new version of the Amended Complaint was filed, in spite of the fact that the allegations concerning the appellants were unchanged and the lack of any notification to the appellants that they were supposed to file a new defence.

— Even in cases where significant sums of money are at stake, transcripts are not produced in the Florida courts as a matter of course, but at the option and expense of the litigants. In a default case, this effectively means the plaintiff has complete control over whether there will be a record of what is said in the proceedings.

— Punitive damages appear to be available in a wider range of cases and in much larger amounts under Florida law than they are under Ontario law. An Ontario defendant sued in Florida may therefore be at risk of a far higher damage award than would be contemplated in Ontario.

198 These differences illustrate that for an Ontario defendant, litigation in Florida entails greater hardship and risk than litigation in another Canadian province — and of all 'truly foreign' jurisdictions, Florida, which is not very far away and has a legal system essentially similar to Ontario's, is one of the least foreign. In my opinion, therefore, fairness to defendants requires a stronger degree of connection to support Florida's assumption of jurisdiction than would be the case if the originating court were in a sister province. Furthermore, if the judgment had originated from a more 'foreign' jurisdiction which involved greater difficulties for the defendant, the requisite degree of connection would be even higher.

199 In this case, the jurisdictional point is easily dealt with, not only because of the appellants' concession, but also because there were very strong connections between Florida and every component of the action: the plaintiffs, who live there; the land, which is in Florida; and the defendants, who involved themselves in real estate transactions there. Florida was the natural place for the action to be heard. If the connections were less robust, however, the conclusion might be different. For example, in a case where the only connection to Florida is that the plaintiffs are Florida residents and suffer damages there, it would, as a rule, be unfair to Canadian defendants to expect them to face the expense and risks of litigation in Florida.

F. Should the Test for Jurisdiction be Based on "Reciprocity"?

200 It follows from the propositions set out above that I do not agree with the majority that the notion of "interprovincial reciprocity" is "equally applicable to judgments made by courts outside Canada" (Major J., at para. 29). The argument is that if the circumstances are such that an Ontario court could reasonably take jurisdiction based on equivalent connecting factors to Ontario, then the Ontario court should recognize the jurisdiction of the foreign court. Although there is some initial appeal to this idea, ultimately I do not agree with it. Its effect is to treat a judgment from a foreign country exactly like one that originates within Canada. This approach, in my view, fails to take into account the very real differences between the interprovincial and international contexts.

201 A few preliminary words should be said about the concept of "reciprocity". Some ambiguity is associated with this term. It is sometimes used to refer to the idea that State A should recognize the jurisdiction of State B's courts if State B would do the same for State A in the same circumstances. On the other hand, "reciprocity" sometimes refers to the quite different notion (invoked by the majority here) that State A should recognize the jurisdiction of State B if State A would have assumed jurisdiction in the same circumstances (see *Dicey and Morris on the Conflict of Laws* (13th ed. 2000), vol. 1, at p. 501). Blom has suggested that the latter approach is more properly one of "equivalence of jurisdiction" rather than "reciprocity" (Blom, *supra*, at p. 735).

202 I would note that in *Morguard*, supra, La Forest J. rejected reciprocity in the latter sense (equivalence of jurisdiction) as the basis for a new jurisdiction test in the interprovincial context, and also questioned its usefulness on the international plane (see *Morguard*, at p. 1104; Blom, *supra*, at p. 735). Instead, he espoused an approach whereby the assumption of jurisdiction by a court in a province would be governed by the same principles of order and fairness that guide a court in another province when it determines whether to recognize the first court's jurisdiction. Within Canada, the bases for assuming jurisdiction and the bases for recognizing it should be correlative; as La Forest J. pointed out, "[i]f it is fair and reasonable for the courts of one province to exercise jurisdiction over a subject-matter, it should as a general principle be reasonable for the courts of another province to enforce the resultant judgment" (p. 1094). The logic underlying this statement is not that the forum should recognize a jurisdiction that it claims for itself, but rather that the same principles define when it is reasonable to assume jurisdiction and when it is reasonable to recognize it.

203 It makes sense that the jurisdictional rules on assumption and recognition should dovetail together in a federal state where the justice systems of the various provinces are interconnected parts of a harmonized whole. This reasoning does not extend to the international setting.

204 Nor does the concept of reciprocity in the sense of equivalence of jurisdiction serve the purposes of private international law well. This idea fails to reflect the differences between assuming jurisdiction and enforcing a foreign judgment. When a Canadian court takes jurisdiction over a foreign defendant, it need not inquire into the fairness of its own process, which can be taken for granted. Potential hardship to the defendant can be dealt with under *forum non conveniens*. The ultimate practical effect of the court's judgment will not be determined by its own decision to take jurisdiction, but by the decision of the courts in the defendant's home jurisdiction whether or not to recognize and enforce the Canadian judgment based on that jurisdiction's own domestic law and policy. Conversely, when a foreign judgment arrives in Canada, the enforcing court is the last line of defence for the Canadian defendant. The court should have a discretion to decide that it is not fair to the

defendant to recognize the jurisdiction of the foreign court, even if the Canadian court would have decided it was fair to take jurisdiction itself based on the same connecting factors.

G. Conclusion on Jurisdiction

205 In conclusion, I agree with Major J. that considerations of comity, order and fairness support the application of the "real and substantial connection" test to the recognition and enforcement of judgments originating in foreign countries. In my view, however, the application of the test should be purpose-driven and contextual. What constitutes a connection sufficient to meet the test will not be the same in every context. The jurisdiction test should reflect the difference between the international and interprovincial contexts and the greater hardship that litigation in a foreign country can entail. There is no good reason why Ontario courts should have to treat a judgment from Florida — or one from China, Turkmenistan or Sierra Leone — exactly like a judgment from another Canadian province.

206 I would also question whether international comity requires us to move as far as the majority does in the direction of openness to foreign judgments when the position of jurisdictions with which we tend to compare ourselves is less generous. In England and Australia, for example, the *Emmanuel v. Symon*, supra, framework remains substantially unchanged and the jurisdiction of a foreign court must be based on the presence or residence of the defendant in the foreign jurisdiction or on the defendant's voluntary submission (see, e.g., *Dicey and Morris on the Conflict of Laws*, supra, at pp. 487 and 503; P. E. Nygh, *Conflict of Laws in Australia* (6th ed. 1995), at p. 138). The U.S. position is more liberal, but still does not go as far as the majority does in this case. Generally, U.S. states will apply the "minimum contact test" to foreign-country judgments as they do to judgments of sister states. This test is made out when a non-resident defendant seeking to avail himself of some benefit within a state affirmatively acts in a manner which he knows or should know will result in a significant impact within the forum state (see, e.g., *Mercandino v. Devoe & Raynolds Inc.*, 436 A.2d 942 (U.S. N.J. Super. A.D. 1981), at p. 943). Thus, a connection between the foreign jurisdiction and the cause of action alone, in the absence of purposive conduct by the defendant establishing a connection between himself and the forum, would be insufficient as a basis for jurisdiction and enforceability in the U.S. In such a case, however, the "real and substantial connection" test as it is interpreted by the majority would always be satisfied.

207 Finally, I would note that the logic on which the *Morguard* test is founded suggests that it should supersede, rather than complement, the traditional common law bases of jurisdiction. In my view, it is not necessary to ask whether any of the traditional grounds are present and then go on to ask whether there is a real and substantial connection (as the majority reasons suggest, at para. 37). There should be just one question: is the "real and substantial connection" test made out?

208 This Court noted in *Hunt*, supra, that the traditional grounds were generally sound bases of jurisdiction and were "a good place to start", but also observed that "some of these may well require reconsideration in light of *Morguard*" (p. 325). Such factors as contractual agreement to accept jurisdiction and habitual residence in the foreign forum are usually very clear examples of the kind of connection that reasonably supports the assumption of jurisdiction. Attornment by actively defending the action in the foreign jurisdiction is a slightly different kind of connection; because the defendant has chosen to have his day in court in the foreign forum, no unfairness results from the enforcement of the foreign court's judgment.

209 In some cases, however, the traditional grounds may be more arbitrary and formalistic than they are fair and reasonable. Under the traditional rules, for example, jurisdiction could be acquired by serving a defendant who was present in the jurisdiction, even if her presence was only fleeting and was completely unconnected to the action, and in the absence of any other factor supporting jurisdiction. Another example is the common-law rule that an appearance solely for the purpose of challenging the jurisdiction of the foreign court was an attornment to its jurisdiction, which was argued (but not commented on by the court) in *United States v. Ivey* (1995), 26 O.R. (3d) 533 (Ont. Gen. Div.). Circumstances such as these may not amount to a real and substantial connection, and in my view they should not continue to be recognized as bases for jurisdiction just because they were under the traditional rules.

IV. The Impeachment Defences

A. The Principle Behind the Defences

210 Claimants who seek to have foreign judgments recognized or enforced in this country ask for the support and cooperation of Canadian courts. They thus face the initial burden of showing that the judgment is valid on its face and was issued by a court acting through fair process and with properly restrained jurisdiction based on a real and substantial connection to the action. The petitioner must convince the receiving court that the values of international comity require it to exercise its power in favour of enforcing the judgment. Once this burden has been met, the judgment is *prima facie* enforceable by a Canadian court. The common law has long recognized, however, that the defendant can still establish that the judgment should not be enforced by showing that one of a number of defences to recognition and enforcement applies. The defences relevant to this appeal are commonly grouped under the heading of "impeachment" defences, since all are based on the notion that the way the foreign judgment was obtained was in some way tainted or contrary to Canadian notions of justice. (Other potential defences, such as the foreign public law exception to enforceability in Canada, which might apply, for example, to a tax claim, are not implicated by the facts of this case.)

211 A foreign judgment may be impeached on the basis that its recognition or enforcement would be contrary to public policy, that it was obtained by fraud, or that the foreign proceedings were contrary to natural justice. The burden is on the party raising one of these defences to prove that it applies; the foreign judgment is presumed to be valid, and there is a basic principle that the domestic court will not permit relitigation of matters tried before the foreign court (J.-G. Castel and J. Walker, *Canadian Conflict of Laws* (5th ed. (loose-leaf) at p. 14-24). At the same time, the receiving court has both the authority and the responsibility to uphold the essential values of the domestic legal system and to protect citizens under the protection of its laws from unfairness. The three impeachment defences are established situations where the domestic court will intervene and refuse to enforce the judgment because the law on which it is based or the way it was obtained is simply too offensive to local notions of what is just and reasonable.

B. The Need to Reconsider the Impeachment Defences as a Result of the Change in the Jurisdiction Test

212 An intrinsic tension arises between the impeachment defences and the principle that the law and facts on which the foreign judgment is based cannot be reargued. Acknowledging the foreign court's jurisdiction would mean very little if the defences could be routinely used to discredit the legal, factual or procedural basis of its judgment. On the other hand, the principle of finality of judgments has its limits; it does not and should not mean that the enforcing court can do no more than rubber-stamp the foreign judgment while turning a blind eye to unfairness or impropriety in its provenance.

213 The impeachment defences represent the balance that the courts have found to be appropriate between security of transactions, on the one hand, and fairness in the individual case, on the other. Traditionally, they have been narrow in scope. The old, strict approach to these defences struck a balance appropriate to the requirements of international comity under the pre-*Morguard* common law, when the jurisdiction test was a difficult threshold for foreign plaintiffs to cross. Nearly all judgments that passed it did so because the defendant had either participated in the action in the foreign forum or selected it by agreement. As J. Walker notes in a comment on this case:

> Under such conditions, defendants resisting the enforcement of foreign judgments could be presumed to have defended the actions against them and to have benefited from the procedural safeguards available in the foreign legal systems. Alternatively, defendants could be presumed to have chosen, on the strength of some familiarity with the foreign legal systems, to let their matters be decided in default. ("*Beals v. Saldanha*: Striking the Comity Balance Anew" (2002), 5 *Can. Int'l Law.* 28, at p. 30).

In short, the potential for unfairness to the defendant was minimal, and accordingly there was no need for courts to be concerned with shortcomings in the way the judgment was obtained absent "some egregiously bad feature of the process or the result" (Walker, *supra*, at p. 30).

214 The balance that existed under the traditional approach is lacking in the new test set out by the majority. The category of foreign judgments that are *prima facie* enforceable in this country has been greatly expanded by virtue of the adoption of the *Morguard* test for foreign-country judgments. The law as it now stands will admit a default judgment emanating from a forum that the defendant did not consent to and may have been connected to only indirectly or not at all. This is a salutary development in our law on jurisdiction; if there are sufficient connections between the action and the forum, the judgment should not be shut out on the basis that the forum was inappropriate. But the possibility that the judgment should be unenforceable for some other reason should be considered anew in light of this new context. Castel and Walker, *supra*, have commented that if this Court confirms the application of the *Morguard* test to foreign judgments, "it would seem necessary to revise the defences ... so as to protect persons in Canada who have been sued in foreign courts from the particular kinds of unfairness that can arise in crossborder litigation, and so as to prevent abuse from occurring as a result of liberal rules for the enforcement of foreign default judgments" (p. 14-26).

215 One example of the kind of unfairness Castel and Walker refer to is the increased vulnerability of Canadian residents to nuisance lawsuits in other countries. A defendant may be confronted with a claim that he knows to be frivolous brought by an overseas claimant. His choices are to defend, to settle, or to ignore the claim. Defending in a foreign country is often expensive and difficult. Many foreign jurisdictions do not award costs to the successful party, so that the defendant will have to bear the expenses of litigation even if his position is fully vindicated. On the other hand, failure to defend brings with it considerable risk. The defendant may have little or no knowledge of the legal system and may be unable to predict with confidence that the foreign court will not be persuaded, or required by the operation of its own rules, to uphold a meritless claim.

216 A defendant faced with this dilemma ought to be afforded some protection by Canadian courts against foreign judgments that are clearly flawed, even if the flaws do not meet the stringent tests that traditionally defined the impeachment defences. If no such protection is available, in many cases the only safe option for defendants will be to settle with the claimant despite the fact that the claim is baseless. If the position of the Canadian courts is to be that defendants who fail to defend in the foreign forum do so entirely at their peril, regardless of whether the decision not to defend was based on a rational cost-benefit analysis and irrespective of the frivolousness of the claim and of the use of improper means to persuade the foreign court that it should succeed, Canadian residents may become attractive targets for opportunistic plaintiffs' lawyers in other jurisdictions.

217 In my opinion, the impeachment defences, particularly the defences of fraud and natural justice, ought to be reformulated. The law of conflicts needs to take these new possibilities for abuse into account and to ensure an appropriate recalibration of the balance between respect for the finality of foreign judgments and protection of the rights of Canadian defendants.

218 Furthermore, the nominate defences should be looked at as examples of a single underlying principle governing the exercise of the receiving court's power to recognize and enforce a foreign judgment. The claimant must come before the Canadian court with clean hands, and the court will not accept a judgment whose enforcement would amount to an abuse of its process or bring the administration of justice in Canada into disrepute. Serious consideration should be given to the possibility of a residual category of judgments, beyond those addressed by the defences of public policy, fraud and natural justice, that should not be enforced because they, too, engage this principle — in short, because their enforcement would shock the conscience of Canadians.

C. Reformulation of the Nominate Defences

(1) Public Policy

219 If the enforcement of a foreign judgment in Canada would be contrary to Canadian public policy, the judgment will not be enforced here. This defence addresses objections to the foreign law on which the judgment was based. It will be engaged if the foreign law is either contrary to basic morality or contrary to the fundamental tenets of justice recognized by our legal system.

220 The trial judge held that the public policy defence should be expanded to incorporate a "judicial sniff test" that would allow enforcing courts to reject foreign judgments obtained through questionable or egregious conduct (Jennings J., at p. 144). It has also been suggested that excessively high punitive damage awards should be unenforceable in whole or in part as a matter of public policy; see, e.g., J.S. Ziegel, "Enforcement of Foreign Judgments in Canada, Unlevel Playing Fields, and *Beals v. Saldanha*: A Consumer Perspective" (2003), 38 Can. Bus. L.J. 294, at pp. 306-307; *Kidron v. Grean* (1996), 48 O.R. (3d) 775 (Ont. Gen. Div.) (where the court refused to enforce on summary judgment a foreign judgment for $15 million for emotional distress based on evidence of "hurt feelings"). Ziegel notes that the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted in October 1999, and revised June 2001, by the Special Commission of the Hague Conference on Private International Law, provides that a court asked to enforce an award of non-compensatory damages may, if satisfied that the amount awarded is "grossly excessive", limit enforcement to a lesser amount (Article 33). The Draft

Convention may reflect an international consensus that large punitive damage awards can raise serious concerns, although this idea does not rise to the level of a customary norm.

221 In my view, the better approach is to continue to reserve the public policy defence for cases where the objection is to the law of the foreign forum, rather than the way the law was applied, or the size of the award *per se*. In other words, this defence should continue to be, as the trial judge put it, "directed at the concept of repugnant *laws*, not repugnant *facts*" (at p. 144, (italics in original)). Public policy is potentially an expansive enough concept to subsume the other two defences; it is, of course, contrary to public policy in a broad sense to enforce a judgment that was fraudulently or unfairly obtained. But it is useful to maintain an analytical distinction between the three defences. Furthermore, the defence of public policy has long been associated with condemnation of the foreign jurisdiction's law. To extend it to cover situations where there is nothing objectionable about the foreign law but, rather, a defect in the way the law was applied might send the wrong message, one that conflicts with the norms of international cooperation and respect for other legal systems underlying the doctrine of comity.

222 In *Boardwalk Regency Corp. v. Maalouf* (1992), 88 D.L.R. (4th) 612 (Ont. C.A.), the Ontario Court of Appeal held that the public policy defence applies to laws that violate "conceptions of essential justice and morality" (p. 615). As an example, the court cited a contract relating to the corruption of children (at p. 622). It emphasized that a mere difference between the policy choices reflected in the foreign law and those that prevail in Canada is not enough to engage the defence (pp. 615-16). This approach reflects the principle that diversity among the legal systems of the world should be respected, while at the same time establishing the limits of that principle. A law that offends fundamental or essential moral precepts will not be enforced. While the question is always whether the foreign law violates Canadian ideas of essential justice and morality, the relevant precepts of morality and justice are so basic that they can be said to have a universal character and will generally be respected by all fair legal systems.

223 The defence of public policy should not, however, be reserved for such shockingly immoral laws that one would be hard-pressed to find a non-hypothetical example of the kind of law that would engage it. In my opinion, there is more work for this defence to do. It should also apply to foreign laws that offend basic tenets of our civil justice system, principles that are widely recognized as having a quality of essential fairness. Among these, I would include the idea that civil damages should only be awarded when the defendant is responsible for harm to the plaintiff, and the rule that punitive damages are available when the defendant's conduct goes beyond mere negligence and is morally blameworthy in some way. These are basic principles of justice that are reflected in some form in most developed legal systems, although the particular form in which they are expressed may vary.

224 A law which violates these basic tenets of justice would be fundamentally unfair and worthy of condemnation. A Canadian court presented with a judgment from a jurisdiction whose law provides, for example, that punitive damages can be awarded on the basis of simple negligence or strict liability ought to have a discretion to deny or limit the enforceability of the judgment on grounds of public policy.

225 This does not dispose of all the difficulties raised by large punitive damage awards, which in practice seldom result from the application of unjust laws. The most common source of punitive damage awards that are unusually high by international standards is the United States. In that country, it is more common to use punitive damages as an instrument of social engineering than it is in Canada, and American law tends to permit larger awards as a way of modifying the behaviour of well-funded defendants. There is nothing about that approach that is inherently offensive to Canadian ideas of basic fairness; it is simply a different policy choice, and it affords U.S. plaintiffs a level of protection of which they ought not necessarily to be deprived just because the defendant's assets are here. As far as I know, U.S. federal and state law generally allows for punitive damages only when the defendant's behaviour is morally blameworthy in some way. In this sense, their policy is similar in principle to ours even though the amounts awarded are sometimes startlingly high to Canadian eyes.

226 Serious problems can, however, arise when an exorbitant damage award is granted against a defendant whose actions were merely careless, rather than reprehensible, or where the defendant's actions were blameworthy enough to merit punitive damages in some amount but the amount awarded is so unimaginably large that it would only be justified as a response to the most heinous and despicable conduct. In many such cases, the applicable law does not, in theory at least, support the size of the damage award. Such awards may be fixed by juries or judges who may not apply the law with the utmost scrupulousness, and they are often overturned on appeal.

227 Some very large judgments of this kind have gained a certain level of notoriety and are probably the first to come to mind when concerns about the size of punitive damage awards are raised. A well-known example is *BMW of North America Inc. v. Gore*, 517 U.S. 559 (U.S. Ala. 1996), where the United States Supreme Court overturned a judgment of the Alabama Supreme Court which had awarded $2 million against BMW because they had sold the defendant a car without revealing that it had been repainted.

228 Another example is the *Loewen* case, where a Mississippi jury awarded $500 million (including punitive damages of $400 million) against a funeral company based in British Columbia for anti-competitive behaviour. The Mississippi court rules made the defendant's right to appeal conditional on the posting of a bond worth 125% of the damages owed. The defendants settled the case in 1996, and went on to file a NAFTA claim against the United

States, arguing that the verdict amounted to an uncompensated appropriation of foreign investors' assets. This claim was ultimately unsuccessful, but the NAFTA tribunal remarked on the unfairness of the verdict and the appearance that improper considerations had played a part in inflating it; the trial judge had allowed the plaintiff's attorney to make irrelevant and prejudicial references to matters of race and class and to the fact that the defendants were foreign nationals (*Loewen Group Inc. v. United States of America*, Doc. ARB(AF)/98/3 (U.S. Miss. June 26, 2003) (International Centre for Settlement of Investment Disputes), at para. 4). See also J.A. Talpis, "*If I am from Grand-Mère, Why Am I Being Sued in Texas*?" *Responding to Inappropriate Foreign Jurisdiction in Quebec-United States Crossborder Litigation* (2001).

229 In cases like those referred to above, the problem is not that the law of the foreign jurisdiction conflicts with Canadian public policy, but that the facts of the case do not really justify the size of the award even under the foreign law. These are issues that, in my view, engage the defence of natural justice rather than that of public policy.

(2) Fraud

230 Fraud perpetrated on the court that issued the foreign judgment is a defence to its enforcement in Canada. The defence of fraud is hard to reconcile with the principle that the original court's findings of fact are final and binding. As Castel and Walker, *supra*, observe, "[t]he difficulty lies in defining the extent to which the defence of fraud can be considered without reviewing the deliberations of the foreign court or reconsidering the merits of the claims or defences adjudicated in the foreign proceeding" (pp. 14-24 to 14-25).

231 Courts have attempted to resolve this conflict by distinguishing between the kind of fraud of which evidence will be admitted by the domestic court, and allegations of fraud which are considered to have been directly or impliedly disposed of by the foreign judgment and cannot be raised again. Different courts have drawn the line in different places. At one end of the spectrum is the very strict rule followed in *Woodruff v. McLennan* (1887), 14 O.A.R. 242 (Ont. C.A.), admitting only evidence of "extrinsic fraud" (fraud going to the jurisdiction of the court that issued the judgment, or affecting the defendant's opportunity to present her case). At the other is the liberal rule followed by the English courts in *Abouloff v. Oppenheimer & Co.* (1882), 10 Q.B.D. 295 (Eng. C.A.), and recently affirmed by the House of Lords in *Owens Bank Ltd. v. Bracco*, [1992] 2 All E.R. 193 (U.K. H.L.), whereby the judgment will be vitiated by evidence that the foreign court was deliberately deceived on any matter, including on the merits of the case. A middle position was taken by the Ontario Court of Appeal in *Jacobs v. Beaver* (1908), 17 O.L.R. 496 (Ont. C.A.), and in this case, where it was held that fraud can only be argued on the basis of fresh evidence that was not known, and could not have been discovered with reasonable effort, at the time of the original decision.

232 It should be noted that each of these approaches represents a compromise between the conflicting propositions that the original judgment is conclusive and that a judgment obtained by deception or based on false facts should not be enforced. Even under the permissive English rule, the foreign court's factual conclusions can only be displaced by proof of conscious and intentional deception; it is not enough to argue that the foreign court drew the wrong conclusion from the evidence. In the *Duchess of Kingston's Case, Re* (1776), 2 Smith L.C. 644 (Eng. C.C.R.) (cited in *Abouloff*, supra, at p. 300), De Grey C.J. remarked that "although it is not permitted to show that the [foreign] Court was mistaken, it may be shown that they were misled" (p. 794). None of these compromises has an absolute claim to be the correct solution to the conundrum. What is the best approach depends on the context in which the rule is applied, and the most appropriate rule will be the one that is most conducive in the circumstances to furthering the objectives of private international law.

233 I agree with Major J. that in general the rule that the defence of fraud must be based on previously undiscoverable evidence is a reasonably balanced solution. The distinction between extrinsic and intrinsic fraud is, as Major J. says, an obscure one which creates uncertainty. It is also unduly strict; as Jennings J. noted in the court below, it leaves space for the fraud defence that is not already occupied by a principled jurisdiction test and by the defence of natural justice (at p. 140). On the other hand, defendants usually should not be allowed to reargue matters that they already raised before the foreign court, or chose not to raise there. These considerations suggest that the "extrinsic fraud" approach is too narrow and the "intentional fraud" approach too broad; the rule that only fresh evidence of fraud can be looked at by the enforcing court is, generally speaking, a good compromise.

234 I would not, however, rule out the possibility that a broader test should apply to default judgments in cases where the defendant's decision not to participate was a demonstrably reasonable one. If the defendant ignored what it justifiably considered to be a trivial or meritless claim, and can prove on the civil standard that the plaintiff took advantage of his absence to perpetrate a deliberate deception on the foreign court, it would be inappropriate to insist that a Canadian court asked to enforce the resulting judgment must turn a blind eye to those facts. In *Powell v. Cockburn*, [1977] 2 S.C.R. 218 (S.C.C.), at p. 234, Dickson J. (as he then was) observed that "[t]he aim of the Courts, in refusing recognition because of fraud, is to prevent abuse of the judicial process". In my opinion, enforcement of a judgment that was obtained by intentionally misleading the foreign court in the kind of circumstances I have outlined could well amount to an abuse of the judicial process. In my opinion, a more generous version of the fraud defence ought to be available, as required, to address the dangers of abuse associated with the loosening of the jurisdiction test to admit a broad category of formerly unenforceable default judgments.

(3) Natural Justice

235 A foreign judgment will not be enforced in Canada if the foreign proceedings were contrary to natural justice. The defence concerns the procedure by which the foreign court reached its decision. The clearest examples of a deprivation of natural justice occur when the defendant lacks notice of the foreign proceedings or an opportunity to present his case to the court.

236 In my opinion, two developments should be recognized in connection with this defence. First, the requirements of notice and a hearing should be construed in a purposive and flexible manner. Secondly, substantive principles of justice should also be included in the scope of the defence. The ultimate inquiry is always whether the foreign judgment was obtained in a manner that was fair to the defendant and consistent with basic Canadian notions of justice.

237 The purposive interpretation of the notice requirement was addressed in some detail by Weiler J.A. in her dissenting opinion in the court below ((2001), 54 O.R. (3d) 641 (Ont. C.A.)). The notice requirement is based on "the underlying fundamental principle of justice that defendants have a right to know the case against them and to make an informed decision as to whether or not to present a defence" (at pp. 675-76).

238 Notice is adequate when the defendant is given enough information to assess the extent of his or her jeopardy. This means, among other things, that the defendant should be made aware of the approximate amount sought. Canadian procedural rules require that the amount of damages claimed be stated in the pleadings (Weiler J.A., at p. 676). This is not the rule in all jurisdictions, and notice will still be adequate even where the pleadings do not conform to Canadian standards as long as the defendant is informed in some other way of the amount in issue.

239 A requirement of particular relevance to this appeal is that adequate notice must include alerting the defendant to the consequences of any procedural steps taken or not taken, to the extent that those consequences would not be reasonably apparent to someone in the defendant's position. The claimant bears a certain responsibility for ensuring that a defendant who is not reasonably in a position to understand the particular workings of the foreign process does not inadvertently give up defences or waive rights as a result.

240 Proper notice also requires alerting the defendant to the allegations that will be adjudicated at trial. The defendant must be informed, by the pleadings or otherwise, of the basis on which damages are sought and the case to be answered. As Weiler J.A. noted, if in fact damages are assessed "beyond the pleadings" then the defendant will not have had true notice of what would take place in the proceedings and will have been deprived of the opportunity to make an informed decision as to whether to participate (at p. 676).

241 Authority for the proposition that natural justice comprises substantive principles of justice, as well as minimum procedural standards, is to be found in the judgment of the English Court of Appeal in *Adams v. Cape Industries Plc* (1989), [1991] 1 All E.R. 929 (Eng. C.A.), the leading English case on the enforcement of foreign judgments. The judgment sought to be enforced in that case originated in Texas and arose from a complex asbestos-poisoning action involving numerous plaintiffs and defendants. Damages were assessed in a rather unconventional way. On the suggestion of plaintiffs' counsel, the judge arrived at a global amount of damages to be distributed among the plaintiffs in fixed amounts which were not based on proof of the damages suffered by each individual plaintiff. This method of calculating damages was held by the English court to be contrary to natural justice because it was "not the result of a judicial assessment of the individual entitlements of the respective plaintiffs" and because no proper judicial hearing had been held on the quantum of damages (*Adams*, supra, at p. 1042). Slade L.J. held that it was a principle of substantive justice that unliquidated damages must be assessed "objectively by the independent judge on proof by the plaintiff of the relevant facts" (p. 1050).

242 *Adams* sets out a flexible and pragmatic approach to the natural justice defence which is appropriate for the Canadian context following *Morguard*. I agree with the English Court of Appeal that the defence can be triggered by principles of substantive justice, such as the proposition that damages should be based on objective proof and judicial assessment. In Weiler J.A.'s words, "the ultimate guidepost in deciding whether the defence of natural justice may be raised is procedural fairness based on underlying fundamental principles of justice" (at p. 675). The category is not closed. If a defendant can establish that the process by which the foreign judgment was obtained was contrary to the Canadian conception of natural justice — because the process itself is flawed, by reason of the way the plaintiff manipulated the process, or both — then the foreign judgment should not be enforced.

243 Weiler J.A. understood La Forest J.'s allusion to "fair process" in *Morguard* to refer to the rules of natural justice (p. 671). My colleague Major J. also appears to be of this opinion when he states, under the heading of " The Defence of Natural Justice", that the enforcing court must ensure that the judgment originates from a fair legal system (at para. 61). While these concepts are certainly related, in my view there is a meaningful distinction between the fairness of the legal system from which the judgment came and the fairness of the procedure followed in the particular case. Slade L.J. underlined this distinction in *Adams*, supra, when he observed that the Texas judgment originated from "an unimpeachable system of justice within one of the great common law jurisdictions of the world" (p. 1048). The defendants in *Adams* argued not that the judgment was a product of an unfair system of justice, but that the judge's method of assessing damages did not comply with the rules of that system.

244 I would also note that La Forest J. expressly stated, in *Morguard*, supra, at p. 1103, that "fair process is not an issue within the Canadian federation". I would not take this to mean that the defence of natural justice can never be available against enforcement of a Canadian judgment. Although the justice system in Canada is fair, it is possible for failures of the system to occur in individual cases. For these reasons, I would hold that the "fair process" referred to in *Morguard* means a legal system that is free from corruption and bias — a requirement which, it seems to me, is relevant to the questions of whether the foreign court's jurisdiction should be recognized at all. The defence of natural justice, on the other hand, is concerned with whether the procedural steps followed in the particular case ensured that the defendant was treated with basic fairness.

245 Finally, the obligation of a defendant to pursue remedies available in the originating jurisdiction must be addressed. In *Adams*, supra, Slade L.J. held that opportunities for correcting a denial of natural justice that existed in the originating jurisdiction should be taken into account in assessing whether the defence of natural justice has been made out. It does not follow that the existence of such remedies automatically cures a failure of natural justice. Slade L.J. also recognized that the significance and weight of the fact that remedies were available in the originating forum must be assessed in light of all the relevant factors, including "the reasonableness in the circumstances of requiring or expecting that [the defendants] made use of the remedy in all the particular circumstances" (p. 1052-53).

D. Application of the Impeachment Defences to the Facts of this Case

(1) Public Policy

246 If the defence of public policy is understood as a bar to enforcing immoral or unjust foreign laws, it is not met here. The enforcement of such a large award in the absence of a connection either to harm suffered by the plaintiffs and caused by the defendants or to conduct deserving of punishment on the part of the defendants would be contrary to basic Canadian ideas of justice. But there is no evidence that the law of Florida offends these principles. On the contrary, the record indicates that Florida law requires proof of damages in the usual fashion. Treble damages are only available by statute to victims of crimes. There is no indication that punitive damages are available where the defendant's conduct is not morally blameworthy.

247 In my view, the defects in the judgment, while severe, do not engage the public policy defence.

(2) Fraud

248 Under the rule that an allegation of fraud can only be considered if based on fresh evidence, the defence of fraud is not made out. All the facts that the appellants raise in this connection were known to them or could have been discovered at the time of the Florida action.

249 A further issue arises as to whether evidence of deliberate deception would be enough to vitiate the judgment. In my opinion, this is the kind of case for which a more lenient interpretation of the fraud defence would, in principle, be appropriate, because the appellants' decision not to attend the Florida proceedings was a reasonable one. Full participation in the Florida action would have been expensive, time-consuming and difficult. The appellants' own knowledge of the facts convinced them that the claim was frivolous, to say the least; they were amazed that it even resulted in a lawsuit. They thought, and they had every reason to think, that even if the claim succeeded they would be liable for no more than about US$8,000. Their conclusion that "the game was not worth the candle" was reasonable in the circumstances. Mr. Mulock testified that the defendants' non-participation might well have qualified as "excusable neglect" under Florida law due to the weakness of the claim and the fact that the defendants were foreign residents, among other factors. I see no reason why our law should deem these factors to be irrelevant.

250 If, in these circumstances, the plaintiffs took advantage of the opportunity to deceive the court by putting forward perjured or misleading evidence in order to obtain a higher award of damages, it would be unfair and contrary to the interests of the Canadian justice system for our courts to be obliged to enforce the judgment in spite of the fact that it was obtained by deception. Such conduct by counsel for the Florida plaintiffs would be contrary to the ethical obligations of Ontario lawyers to pursue their clients' interests by fair and honourable means and without misrepresentation of the facts, and Ontario courts should not be put in the position of having to reward that conduct handsomely when the perpetrator is a lawyer in another jurisdiction.

251 The difficulty the appellants face is that there is no evidence that anything of this kind happened, because no record exists of the evidence and arguments put forward in the Florida damages hearing. Given the jury's findings, it is certainly a possibility, perhaps a strong possibility, that they were deliberately misled, but there are other possible explanations — for example, the plaintiffs may have presented only true facts and the jury might have misunderstood how the law applied to those facts. The allegation of fraud is a serious one, and the onus remains on the appellants to support it. It is significant that the appellants did not use their opportunity to question Mr. Beals or Mr. Groner, either in discovery or at trial, as to what was said in the damages hearing. Given the lack of evidence, even on the view that this judgment could be vitiated by proof of intentional fraud, the defence has not been made out. I agree with Major J. that the trial judge's findings of fact that the plaintiffs deliberately

misled the jury are unsupported by the evidence and should not be upheld. The defence of fraud therefore does not apply. Natural justice, though, is a different matter.

(3) Natural Justice

252 The Ontario defendants were not given sufficient notice of the extent and nature of the claims against them in the Florida action. The claimants failed to give the defendants proper notice of the true nature of their claim and its potential ramifications. Furthermore, there was no notice as to the serious consequences to the defendants of failure to refile their defence in response to the claimant's repeatedly amended pleadings. As a result, the notice afforded to the defendants did not meet the requirements of natural justice.

253 The amount of damages claimed was not stated in the Amended Complaint. The only mention of a monetary amount was the formulaic reference to damages over $5,000 required to give the Florida Circuit Court monetary jurisdiction. This form of pleading did not give the defendants a clear picture of what was at stake. Indeed, Mr. Groner testified that as a matter of Florida practice they were expected to find out exactly what was being claimed through discovery.

254 Nor did the Amended Complaint set out with any precision the allegations on the basis of which damages, beyond the sale price of the land, were claimed. There is reference to construction costs and lost revenue, but none to the plaintiffs' assertion that the planned model home was to be rented to their company, Fox Chase Homes, and used to obtain further construction contracts. In fact, there is no mention at all of Fox Chase Homes. As Weiler J.A. noted, the plaintiffs could easily have provided the defendants with a copy of Mr. Beals's deposition, where he explained these matters, and thus ensured that the defendants were aware that significant business losses were being claimed (at p. 677). But the plaintiffs failed to alert the defendants to the peril they faced in this or any other way.

255 Perhaps the most important failure of natural justice in this case is the fact that the defendants were not given notice of the consequences of failing to continue to file new defences to the repeated changes to the Amended Complaint. There was nothing on the face of the Amended Complaint that would alert them to the need to refile, especially since the allegations against them remained unaltered. The annulment of their defence resulted from a technicality of Florida procedure of which defendants from a foreign jurisdiction could hardly be expected to be aware. Again, the plaintiffs could easily have advised them that a new defence was required, but they did not. The defendants had no warning of the danger in which they placed themselves simply by assuming that their initial defence was, as it appeared to be, an adequate response to the Amended Complaint. Not only did they lack the information they needed to assess whether or not they should defend; their failure to defend was not in any genuine sense a product of their own volition.

256 A foreign plaintiff who expects to have a judgment in his or her favour enforced by a Canadian court has a responsibility to ensure that the defendant is in a position to make an informed decision about how to respond. If the defendant can show that the plaintiff failed to discharge that responsibility, the court should refuse to enforce the judgment on the basis that the defendant was deprived of proper notice, a basic condition of natural justice. In this case, the Florida claimants should have notified the appellants of the steps they could take after new versions of the Amended Complaint were filed and, more importantly, of the consequences of not taking those steps. Because they failed to do so, the appellants were unaware of the danger that their defence would lapse.

257 I would also note that in this case it appears that the judgment may have offended substantive principles of natural justice of the kind addressed in *Adams*, supra. It seems likely that the quantum of damages was fixed without proof that damages flowed from harm suffered by the plaintiffs as a result of the defendants' actions, and that punitive damages were awarded without demonstration of conduct on the defendants' part that was deserving of punishment. The problem, again, is that we do not know what was offered in evidence in the damages hearing in Florida. The conclusion seems all but inescapable that one of two things happened: either the Florida court was presented with false evidence on the damages issue, or it reached its conclusion without a proper judicial assessment of the conditions required, both by Florida law and as a matter of natural justice, to support an award of unliquidated damages. But because there is no transcript of the damages hearing and no other clear evidence of what took place there, neither scenario has been proven.

258 A deficiency in the fairness of the procedure by which the Florida court reached its decision having been established, the availability of remedies for that deficiency in Florida falls to be considered. The defendants did have options for correcting the problem in Florida. They could have moved for relief based on excusable neglect, or appealed. They did not avail themselves of those remedies.

259 What this means for the appellants' entitlement to rely on the natural justice defence must be ascertained by considering the reasonableness in all the circumstances of requiring them to make use of the remedies available in Florida. We must look at the reasons why they decided not to go to Florida to attack the judgment, but chose instead to trust that the Ontario courts would not enforce it.

260 The defendants' main reason for deciding as they did was that they were following the advice (which turned out to be erroneous) of legal counsel. They were told that if they went to Florida to challenge the judgment, Ontario courts would regard them as having attorned to Florida's jurisdiction and would be more likely to enforce the judgment against

them. Given the information they had, the decision not to take steps in Florida was not only understandable but the only sensible option.

261 The majority appears to be of the view that the appellants are not entitled to any relief from the consequences of relying on mistaken legal advice. In my view, the mere fact that a defendant has received mistaken legal advice should not operate to relieve the claimant entirely of the consequences of a significant or substantial failure to observe the rules of natural justice, and it should not, in itself, bar the appellants from relying on this defence. I agree with Weiler J.A. that the reasonableness of expecting a defendant to use a remedy in a foreign jurisdiction must be assessed from that person's point of view. If the defendants were under a misapprehension as a result of reasonable reliance on the advice of counsel as to the relative risks of the options open to them, their assessment of the risks should not for that reason be discounted. This Court recognized in *Gauthier Manufacturing Ltd. v. Pont Viau (City)*, [1978] 2 S.C.R. 516 (S.C.C.), that a party should not be penalized for an error which is solely that of counsel, where the party itself has acted with diligence. This is not to say that a lawyer's mistake will always be an excuse for not participating in foreign proceedings. The totality of the circumstances must be examined. In this case, the appellants did their best to deal with the dispute conscientiously. In retrospect, it seems that applying for relief in the Florida court would have been a wiser choice, but no reasonable person in their position would have thought so at the time the choice was made.

262 A second factor relevant to the appellants' decision not to make use of remedies in Florida is their knowledge of the circumstances that would entitle them to such a remedy. In *Adams*, supra the defendant's failure to appeal the judgment in Texas was not dispositive, because the procedural irregularities that would have formed the basis of an appeal were not apparent on the face of the judgment. The only way that the defendant could have known about those defects was if it had participated in the proceedings. The court did not consider it fair to charge the defendants with knowledge of procedural irregularities that they would have known about had they attended the proceedings. The plaintiffs had the responsibility of avoiding procedural errors that would prevent enforcement in England. I agree with this reasoning, which in my view is also applicable to the present case. When the appellants received the Florida judgment, all they knew was the amount awarded against them. There was nothing to inform them of the method by which the Florida court reached its conclusion or to alert them to problems with that method that might form the basis of an appeal or a motion to set the judgment aside.

263 Finally, the appellants' perception of the quality of justice they were likely to receive in Florida must be taken into consideration. The evidence at trial was that Florida's legal system provides all the appropriate protections for judgment debtors in the appellants' position, and probably would have afforded them a remedy in these circumstances. But at the relevant time the appellants did not know this; they only knew that Florida's legal system had produced a

judgment against them for an astronomical amount, a verdict that was difficult to reconcile with the simple facts they had set out in their defence. Their apprehensiveness about going back to that very legal system to seek relief was, in the circumstances, understandable.

(4) Residual Concerns

264 The facts of this appeal raise very serious concerns about the fairness of enforcing the Florida judgment which do not fit easily into the categories identified by the traditional impeachment defences. I have stated my conclusion that the facts do trigger the defence of natural justice, if it is interpreted in a purposive and flexible manner. Even if the natural justice defence did not apply, however, I would hold that this judgment should not be enforced.

265 The circumstances of this case are such that the enforcement of this judgment would shock the conscience of Canadians and cast a negative light on our justice system. The appellants have done nothing that infringes the rights of the respondents and have certainly done nothing to deserve such harsh punishment. Nor can they be said to have sought to avoid their obligations by hiding in their own jurisdiction or to have shown disrespect for the legal system of Florida. They have acted in good faith throughout and have diligently taken all the steps that appeared to be required of them, based on the information and advice they had. The plaintiffs in Florida appear to have taken advantage of the defendants' difficult position to pursue their interests as aggressively as possible and to secure a sizeable windfall. In an adversarial legal system, it was, of course, open to them to do so, but the Ontario court should not have to set its seal of approval on the judgment thus obtained without regard for the dubious nature of the claim, the fact that the parties did not compete on a level playing field and the lack of transparency in the Florida proceedings.

266 On this last point, I would add that their failure to obtain a record of the proceedings in the Florida court does not reflect well on the respondents. In this case, the appellants, who had the burden of proving that one of the impeachment defences applied, failed to pursue their opportunity to investigate what transpired in the damages hearing by questioning those who were there. As a result, it would be inappropriate to draw any negative inference in their favour from the lack of evidence about the Florida proceedings. But defendants will not always have such an opportunity. When one party entirely controls whether there will be a transcript of the proceedings in the foreign court and chooses not to get one, thus depriving the enforcing court of a full record of what happened and an opportunity to verify that there was no fraud and no procedural irregularities, Canadian courts should be highly circumspect about giving effect to the judgment.

V. Conclusion

267 In my view, this judgment should not be enforced in Canada. I would allow the appeal with costs to the appellants.

Appeal dismissed.

Pourvoi rejeté.

Footnotes

* A corrigendum was issued by the court on January 22, 2004, and has been incorporated herein.

TAB 3

1989 CarswellBC 104
British Columbia Court of Appeal

B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.

1989 CarswellBC 104, [1989] B.C.W.L.D. 1688, [1989] C.L.D. 939, [1989] B.C.J. No. 1032, 15 A.C.W.S. (3d) 410, 37 B.C.L.R. (2d) 258, 43 B.L.R. 67, 4 R.P.R. (2d) 74, 60 D.L.R. (4th) 30

B.G. PREECO I (PACIFIC COAST) LIMITED v. BON STREET HOLDINGS LTD. et al.

Seaton, Esson and Wallace JJ.A.

Judgment: May 31, 1989
Docket: Vancouver CA009889

Counsel: *T.R. Braidwood, Q.C.*, and *G.W.K. Scarborough*, for appellants.
J.M. Webster and *P.M. Daykin*, for respondent.

Subject: Property; Corporate and Commercial; Contracts; Torts

Table of Authorities

Cases considered:

Covert v. Min. of Fin. of N.S., [1980] 2 S.C.R. 774, (sub nom. *Re Jodrey; Covert v. Min. of Fin. (N.S.)*) 8 E.T.R. 69, [1980] C.T.C. 437, 41 N.S.R. (2d) 181, 76 A.P.R. 181, (sub nom. *Jodrey Estate v. N.S.*) 32 N.R. 275 — *distinguished*

DHN Food Distributors Ltd. v. Tower Hamlets London Borough Council; Bronze Invt. v. Tower Hamlets London Borough Council; DHN Food Tpt. v. Tower Hamlets London Borough Council, [1976] 1 W.L.R. 852, [1976] 3 All E.R. 462 (C.A.) — *considered*

De Salaberry Realties Ltd. v. M.N.R., [1974] C.T.C. 295, 74 D.T.C. 6235, 46 D.L.R. (3d) 100 (Fed. T.D.) — *considered*

Gilford Motor Co. v. Horne, [1933] Ch. 935 (C.A.) — *considered*

Ind. Equity Ltd. v. Blackburn (1977), 137 C.L.R. 567 (Aust. H.C.) — *considered*

Jones v. Lipman, [1962] 1 W.L.R. 832, [1962] 1 All E.R. 442 (Ch. D.) — *considered*

Kosmopoulos v. Constitution Ins. Co., [1987] 1 S.C.R. 2, 36 B.L.R. 233, 22 C.C.L.I. 296, [1987] I.L.R. 1-2147, 34 D.L.R. (4th) 208, 21 O.A.C. 4, 74 N.R. 360 — *considered*

Lockharts Ltd. v. Excalibur Hldg. Ltd. (1987), 47 R.P.R. 8, 83 N.S.R. (2d) 181, 210 A.P.R. 181 (T.D.) — *considered*

Manley Inc. v. Fallis (1977), 2 B.L.R. 277, 38 C.P.R. (2d) 74 (Ont. C.A.) — *considered*

Pac. Rim Installations v. Tilt-Up Const. Ltd. (1978), 5 B.C.L.R. 231 (Co. Ct.) — *distinguished*

Pepper v. Litton, 308 U.S. 295, 84 L. Ed. 281 (1939) — *referred to*

Salomon v. Salomon & Co., [1897] A.C. 22 (H.L.) — *referred to*

Woolfson v. Strathclyde Regional Council, [1978] S.C. (H.L.) 90 — *referred to*

Rules considered:

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App. B., s. 8 [re-en. B.C. Reg. 57/85]

Authorities considered:

Gower, Modern Company Law, 4th ed. (1979), pp. 126, 138.

Pickering, "The Company as a Separate Legal Entity" (1968), 31 Modern L. Rev. 481.

Welling, Corporate Law in Canada, p. 129.

Appeal from judgments of Paris J., [1988] B.C.W.L.D. 3121 and [1989] B.C.W.L.D. 786, awarding damages and costs on a higher scale; Cross-appeal by plaintiff from award of damages.

The judgment of the court was delivered by *Seaton J.A.*:

1 This litigation arises out of a contract by which the plaintiff agreed to sell property to Bon Street Developments Ltd. for $4,220,000. The sale was to close on 25th September 1985, but on 5th September 1985 the purchaser repudiated the agreement and offered $3,000,000. Later it offered $3,300,000. When a Mr. Ortt, the realtor involved, pointed out that the purchaser would be liable on the agreement the defendant Kaplan responded that they could "walk away from the deal because their lawyer had some angle".

2 The "angle" only became apparent after these proceedings were launched. The Bon Street Developments Ltd. with whom the original discussions were held was a different company than the Bon Street Developments Ltd. that entered into the contract. The new Bon Street Developments Ltd. was a shell company. It had no assets. The company with whom they had originally dealt had changed its name to 262098 B.C. Ltd. and is now Bon Street Holdings Ltd. The defendants Kaplan and MacDonald are directors and the beneficial owners of the shares of each company.

3 The new Bon Street Developments Ltd. was found liable for breach of contract and judgment for $1,746,336.40 was awarded against it. That company has no assets and does not appeal.

4 The focus of the lawsuit, the appeal and the cross-appeal is on the liability of the defendants Bon Street Holdings Ltd. (the original Bon Street Developments Ltd.), Kaplan and MacDonald and the finding of the trial judge that "their actions constituted a deceit, a fraudulent misrepresentation". Damages for fraud were assessed against those three defendants in the amount of $400,000.

5 The plaintiff was anxious to dispose of property near Granville Island and hoped that it could be sold at a good price during the "window of opportunity" created by the imminence of Expo '86. There was reason to believe that this property could benefit from Expo if construction started during the summer of 1985.

6 Knowlton Realty Ltd., with whom Ortt worked, had a listing. The first step in selling the property was a letter dated 25th March 1985 from Ortt to "Mr. Brian MacDonald, President, Bon Street Developments Ltd." pointing out that the site was available.

7 Bon Street Developments Ltd. was known to Ortt as a successful development company. He had been told of a substantial project in downtown Vancouver which had recently been completed and was being operated by Bon Street Developments Ltd. Because the major tenant of the property was London Drugs, it was referred to throughout the case as the "London Drugs property". Ortt had also been told that Kaplan and MacDonald had been known to renege on commitments and that he should not do a "handshake deal" with them.

8 At the beginning of April 1985 Ortt met with Kaplan and MacDonald in the offices of Bon Street Developments Ltd. The business cards of Kaplan and MacDonald bore that name. That was the name on the offices, on the letterhead and in the telephone book. That was all proper at the beginning of April. Ortt was in truth dealing with the Bon Street Developments Ltd. that he thought he was.

9 In mid-April Bon Street Developments Ltd. changed its name to 262098 B.C. Ltd. and the shell company, 286357 B.C. Ltd., on the same day changed its name to Bon Street Developments Ltd. Everything else remained the same: the business cards, the letterhead, the telephone number and the office premises. The land registry office records showing the London Drugs property owned by Bon Street Developments Ltd. remained the same. Even the banking arrangements remained the same. The cheques which were later paid in this transaction were in the name of Bon Street Developments Ltd. though that was the account of the original company of that name and no account has been opened for the new company.

10 In May an interim agreement was entered into by the new company offering a $100,000 deposit and a $4,200,000 price. If accepted by the plaintiff, the property would not be available for sale to others during the "Expo window". Therefore, the plaintiff was anxious that the sale be firm and required Ortt to ensure that this was a "recourse purchase". That meant that it was to a buyer who was bound to buy and who had sufficient assets so that it would either complete the contract or be able to bear the loss that would flow from a breach of the contract. Ortt made inquiries of the defendants and of others and he searched the land registry records. As a result he was able to tell the plaintiff that this was indeed a recourse purchase. Of course, he did not know of the name change. The plaintiff executed the interim agreement.

11 It was the original company that the plaintiff dealt with at the beginning and thought it was dealing with throughout. It knew of no other company. It was the original company through its officers that led the plaintiff to that belief. It was the original company that paid the deposit of $100,000. It was the original company that bore all the expense of inquiring into the feasibility of the project. That the original company bore all the expense was said to be an accounting slip.

12 The trial judge, with ample justification, did not accept the evidence of Kaplan and MacDonald where it conflicted with that of Ortt.

13 The purposes of the corporate name changes were several. A memorandum prepared by an accountant listed as the first objective: "(1) the protection of successful projects from losses arising as a result of unsuccessful projects".

14 According to Kaplan one of the principal functions of the corporate restructuring was to "tie down" properties. The idea was to enter into agreements using the shell company. If a project proved not to be feasible, it could be abandoned without risking the assets of the original company or the individuals. That is what was done here.

15 In the course of his judgment the trial judge said:

> However, it was felt that there was a certain amount of goodwill attached to the company name so a different company (the (new) company) was given that name to use for the next new project to be undertaken.

In my view, the company and its name cannot be separated in that way. The purpose of the name changes was to pass on the goodwill of the company by pretending that the new company was the old. That is what was done here.

16 I turn to the arguments that question that the appellants should be found liable in fraud.

17 An argument was mounted because the trial judge distinguished between misleading Ortt as to who the purchaser was and misleading Ortt as to what assets the purchaser had. Of course, the two concepts are related. Ortt was led to believe that he was dealing with the original Bon Street Developments Ltd. with all of the assets that it held. But the trial judge did find a difference and one of the arguments was based on that difference. He said:

> On all the evidence and, in particular, because of the circumstances I have outlined, I am satisfied that the conversations suggested by Ortt about the substance of the purchaser and about specific assets took place.
>
> What flows from that? Plaintiff's counsel, as I have indicated, has submitted that there was a misrepresentation as to the identity of the company making the offer, that is, that it was represented that the (original) company rather than the (new) company was making the offer. That is not quite my conclusion.
>
> My interpretation of what transpired is that Kaplan and MacDonald deliberately induced Ortt to assume, or at least deliberately permitted him to assume, that the company making the offer — the (new) company — owned assets that were in fact

> owned by the (original) company, knowing very well that that fact was important to and would influence the plaintiff's decision as to the acceptance of their offer. *It was not the specific identity of the offering party that Ortt was inquiring about, but rather what assets that company owned, whichever it was.* About that issue Kaplan and MacDonald were being deliberately deceitful. Whether they made an explicit misrepresentation in that regard or whether they simply omitted to tell him what the circumstances called for, namely, that the offering company was a shell company and did not own the assets he was inquiring about, the result is the same. Their actions constituted a deceit, a fraudulent misrepresentation.
>
> It is central to my findings that, as I have said, the misrepresentation was not as to the identity of the company making the offer but rather as to what assets that company, whichever it was, owned. *Ortt was essentially interested in the latter, not the details of the corporate organization of the defendants' development enterprise.* That distinction is particularly important both as to the remedy of rectification and as to the issue of damages, to which issues I shall return later.

I have emphasized the sentences that appear to have led to the conclusions of the trial judge.

18 All that Ortt was concerned with was that he was dealing with a buyer of substance against whom a claim could successfully be made in the event of a breach of contract. His investigations and inquiries were directed to that concern. The defendants sought to have the plaintiff contract with a buyer without assets and succeeded by deceiving Ortt into thinking he was dealing with a company with substantial assets.

19 The appellants argued that the fraud found was not the fraud alleged in the pleadings. The statement of claim included this allegation:

> 16. Prior to the execution of the May 21st Agreement negotiations were carried on between the plaintiff, Knowlton and all of the Defendants. During these negotiations each of the Principals represented to Knowlton and the Plaintiff as follows:
>
> (a) that the [new Bon Street Developments Ltd.] had substantial assets available;
>
> (b) in particular, that the [new Bon Street Developments Ltd.] was the registered owner of the London Drugs Property as well as other real estate holdings;
>
> (c) that if the [new Bon Street Developments Ltd.] did in fact default under the Offer that there would be substantial assets available to the Plaintiff.

20 I reject the argument that the trial judge found a different fraud than that alleged in the pleadings. I think that the pleadings are broad enough to encompass the fraud found.

21 One of the arguments of the appellants focused in the use of the terms "we", "us", "they" and "them" which MacDonald and Kaplan, according to the argument, used to refer to themselves and their several companies. Ortt understood them to be referring to the one company of which he was aware. On many occasions during the trial such terms were used to mean a company. I take this from the evidence of Tanner, an officer of the plaintiff:

> ... he [Ortt] had gone to, I think, unusual lengths to try to identify just who he was dealing with and the nature and the quality and substance of the purchaser and he stressed that he had made a thorough investigation of the company and he was satisfied that *they* indeed were who *they* said *they* were and *they* were a company of substance. [emphasis added]

There is no doubt that the term "they" meant "the purchasing company".

22 If MacDonald and Kaplan used "we" to mean the two companies called Bon Street Developments Ltd., that was part of the deception. They knew that Ortt was asking about the Bon Street Developments Ltd. that was buying the property, not some other company. When he asked about financial statements and was told they would not be given to him, MacDonald and Kaplan knew that he meant statements of the purchasing company, not some other company. They also knew that the purchasing company had been in existence for a limited period and had no assets. When he explored in depth the ownership of the London Drugs property with them, they knew that he thought that the purchasing company was the Bon Street Developments Ltd. that owned that property and that appeared on the certificate of title that Ortt had had searched. If they said "we" on such occasions, that was simply part of the fraud. I do not think the appellant can take any comfort from the loose usage of the words "we", "us", "they" and "them".

23 The appellants argued that the trial judge found something short of fraud when he said:

> My interpretation of what transpired is that Kaplan and MacDonald deliberately induced Ortt to assume, or at least deliberately *permitted him to assume* that the company making the offer — the (new) company — owned assets that were in fact owned by the (original) company, knowing very well that that fact was important to and would influence the plaintiff's decision as to the acceptance of their offer. [emphasis added]

24 The argument is that this does not disclose fraud. The term "permitted", if it includes encourage, describes much of what took place following the substitution of the shell company for the original company. Having deceived Ortt and his client by changing corporate names, the defendants encouraged them to remain deceived.

25 Ortt thought he knew what company he was dealing with, Bon Street Developments Ltd., and he asked about the assets of that company. He did not know, and it was apparent to Kaplan and MacDonald that he did not know, of the switch of company names. On the evidence the conclusion is inescapable that Ortt was intentionally misled by the conduct and the statements of the defendants into believing he was dealing with the company that had the London Drugs property and other assets about which they were speaking.

26 This argument cannot succeed.

27 Several arguments were based on the need for proof of an intention to defraud. The evidence permits no conclusion other than that the defendants intended to do what they succeeded in doing. I do not think these arguments have merit.

28 The plaintiff cross-appealed. It sought to recover judgment for $1,746,336.40 against all of the defendants, not just against the new company. Alternatively, it sought to have us increase the damages awarded for fraud against Kaplan, MacDonald and the original company.

29 In one of its arguments the plaintiff sought to fix liability on the individual defendants for inducing breach of contract. When the new company breached its contract it had little choice. It had no assets. It held this one contract.

30 I agree with the trial judge that the conduct of the directors does not make them liable for inducing breach of contract.

31 The plaintiff also sought in the cross-appeal to fix liability for damages for breach of contract on the individuals and possibly the original Bon Street Developments Ltd. by an argument entitled "Lift the Corporate Veil". The plaintiff says that company law does not protect principals of a company who acted fraudulently or dishonestly, and that in such cases, the corporate veil should be lifted to fix liability on the principals.

32 The trial judge dealt with this question in this way:

> **Sham**
>
> Plaintiff's counsel also made a submission expressed in rather general and sweeping terms that the (new) company were a mere "device and a sham" and the court should "pierce the corporate veil" to hold the individual defendants liable on the agreement. However, the (new) company was a properly incorporated legal entity whose principals intended to operate through it for specific purposes which I have described. It had no significant assets — it was a "shell" company — but of course that per se does not mean it did not have the power to contract to purchase real estate. Indeed, I was told that that

was not uncommon in the real estate industry. Furthermore, the fact that the principals of the company may have intended even at the time of undertaking the obligation on behalf of the company to take advantage of the limited liability of the company if it suited their purposes does not per se make the company a sham, i.e., does not expose its principals to liability for the company's obligations.

33 There are cases in which the law will fix liability on the principals but they do not support the broad proposition put forward on the cross-appeal.

34 A number of cases, including *Covert v. Min. of Fin. of N.S.*, [1980] 2 S.C.R. 774, (sub nom. *Re Jodrey; Covert v. Min. of Fin. (N.S.)*) 8 E.T.R. 69, [1980] C.T.C. 437, 41 N.S.R. (2d) 181, 76 A.P.R. 181, (sub nom. *Jodrey Estate v. N.S.*) 32 N.R. 275, relied on by the plaintiff, turn on particular legislation and do not assist this argument.

35 Some of the cases referred to by counsel used corporate veil language but in truth seem to have been based on holding out, estoppel or agency.

36 The judicial expletives that demonstrate want of clear propositions in this area have been gathered by Professor Pickering in "The Company as a Separate Legal Entity" (1968), 31 Modern L. Rev. 481.

37 I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair: see *Pepper v. Litton*, 308 U.S. 295, 84 L. Ed. 281 (1939). That doctrine and the doctrine laid down in *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon's* case would have afforded a good example for the application of that approach.

38 In *Kosmopoulos v. Constitution Ins. Co.*, [1987] 1 S.C.R. 2 at 10-11, 36 B.L.R. 233, 22 C.C.L.I. 296, [1987] I.L.R. 1 - 2147, 34 D.L.R. (4th) 208, 21 O.A.C. 4, 74 N.R. 360, there is an obiter dictum that might be thought to support the "Deep Rock doctrine":

> **(a) "Lifting the Corporate Veil"**
>
> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112. I have no doubt that theoretically the veil could be lifted in this case to do justice,

> as was done in *American Indemnity Co. v. Southern Missionary College*, [260 S.W. 2d 269], cited by the Court of Appeal of Ontario. But a number of factors lead me to think it would be unwise to do so.

The concluding words in the chapter in L.C.B. Gower, Modern Company Law, 4th ed. (1979), from which Wilson J. quoted are these (at p. 138):

> The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules.

Professor Welling in Corporate Law in Canada (1984), put it more firmly. He referred to the American cases that apply the fair play rationale and said (at p. 129):

> Little need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of "fair play and good conscience," at least in Canadian corporate law.

39 In *Kosmopoulos* the court was considering an insurance question where a shareholder claimed an insurable interest in the assets of the company. That raises somewhat different problems and the court did not lift the corporate veil in the course of its decision.

40 Cases in which courts have ignored the corporate entity fall under a number of headings only one of which could warrant consideration here. In Gower's Modern Company Law, at p. 126, that heading is stated as "Fraud or improper conduct". None of the cases cited there has any similarity to this one.

41 The cases in which the corporate veil is pierced on the ground of "fraud or improper conduct" deal with instances where a corporation is used to effect a purpose or commit an act which the shareholder could not effect or commit.

42 In *Gilford Motor Co. v. Horne*, [1933] Ch. 935 (C.A.), the plaintiff sought an injunction to prevent the defendant, through a newly incorporated company, from breaching a restrictive covenant. The injunction was granted against both the individual and the company on the basis that the company was merely a device by which the individual defendant breached his restrictive covenant.

43 Similarly, in *Jones v. Lipman*, [1962], 1 W.L.R. 832, [1962] 1 All E.R. 442 (Ch. D.), the plaintiff was granted specific performance of a contract entered into with the first defendant. In an attempt to avoid the contract, the first defendant sold the property in question to the

second defendant, a company in which the first defendant and a clerk of his solicitor were sole shareholders.

44 In *Lockharts Ltd. v. Excalibur Hldg. Ltd.* (1987), 47 R.P.R. 8, 83 N.S.R. (2d) 181, 210 A.P.R. 181 (T.D.), a plaintiff was granted a declaration that its judgment against one company was binding on another company owned by the same individual, as assets had been conveyed to the second company in order to avoid the plaintiff's judgment.

45 The courts have also pierced the corporate veil so as to ignore the separate legal existence of related companies. This has been done in income tax cases. For example, see *De Salaberry Realties Ltd. v. Minister of National Revenue*, [1974] C.T.C. 295, 74 D.T.C. 6235, 46 D.L.R. (3d) 100 (Fed. T.D.), where the character of the company's business was determined from a look at the business of its associated companies.

46 The group enterprise theory has also been extended to other types of cases. This version of piercing the corporate veil was used in *Manley Inc. v. Fallis* (1977), 2 B.L.R. 277, 38 C.P.R. (2d) 74 (Ont. C.A.), to find an employee of one company liable for breach of fiduciary duty by setting up a business in competition with his employer's parent company. In *DHN Food Distributors Ltd. v. Tower Hamlets London Borough Council; Bronze Invt. v. Tower Hamlets London Borough Council; DHN Food Tpt. v. Tower Hamlets London Borough Council*, [1976] 1 W.L.R. 852, [1976] 3 All E.R. 462, the English Court of Appeal held that a related group of companies was entitled to compensation for disturbance from its business and land, despite the fact that no one company both owned the land and carried on business. This decision, which purports to expand the group enterprise theory, has been limited to its facts by the House of Lords in *Woolfson v. Strathclyde Regional Council*, [1978] S.C. (H.L.) 90. The idea of treating related companies as one entity, absent some specific statutory requirement, has also been disapproved of by the Australian High Court in *Indust. Equity Ltd. v. Blackburn* (1977), 137 C.L.R. 567.

47 While the group enterprise theory may be successful on certain facts, no cases were cited which would, through this theory, make one company liable for its associated company's contracts.

48 One case cited by the plaintiff does appear to fix liability on a company for a contract entered into by an associated company on the basis that the contracting party was misled as to the identity of the company with whom he had contracted: *Pac. Rim Installations v. Tilt-Up Const. Ltd.* (1978), 5 B.C.L.R. 231 (Co. Ct.). Although that case cites the corporate veil cases, both defendant companies were held liable in contract on the grounds that the non-contracting company had held itself out as the contracting party and was therefore estopped from denying that it had entered into a contract with the plaintiff. The case is of no assistance

to this plaintiff as the trial judge expressly found that the plaintiff was not mistaken as to the identity of the contracting company, merely its assets.

49 In this case the plaintiff knew it was dealing with a company. The fraud found by the trial judge caused the plaintiff to believe that the company had assets that it, in fact, did not have. That has nothing to do with the corporate veil. The use of a company as a means of avoiding bearing business losses is neither unusual nor a basis for lifting the veil.

50 In my view, the proper remedy is not to lift the corporate veil, but to award damages for fraud against the individuals and the company that committed the fraud. That is what the trial judge did.

51 That leaves the question whether there are other grounds upon which the original Bon Street Developments Ltd. should be held liable for the full contractual measure of damages rather than the damages directly caused by the fraud. The plaintiff's argument in this respect was included in the argument under the heading, "The Learned Trial Judge erred in failing to 'lift the corporate veil'". The heading is unfortunate. Lifting the veil is no help — when it is lifted the old company is not to be seen. Neither company had shares in the other.

52 Headings seem to have confused this matter at trial as well. Cases fixing liability where the person was said not to have contracted with the person he thought he was contracting with are found are the heading "Rectification". The trial judge disposed of the argument under that heading and under the heading "Estoppel" with this statement:

> However, those authorities and the principles set out therein do not apply because of the findings of fact I have made. As I have indicated, the misrepresentations by the defendants and the mistaken belief of the plaintiff in this case were not as to the identity of the party making the offer but rather as to the assets owned by the company making the offer.

53 The plaintiff did not challenge that finding on the appeal; yet a successful challenge would appear to be the first step in a claim that the original company was liable for the damages assessed in contract. Counsel might have considered that if he succeeded in fixing liability on the old company for the contract damages there would be no loss arising out of the fraud and therefore no judgment against the individual defendants.

54 There may be routes that would lead to the original company being bound by the contract entered into by the new company. I have not searched for such routes. The issues and arguments at trial and on this appeal were chosen by counsel who knew much more about the evidence that was available and the evidence that was called than I can know. I have therefore thought I should restrict myself to a consideration of the arguments raised in the factums and argued before us.

55 The arguments of the plaintiff that would make the individual defendants or the old company liable for the damages assessed against the new company cannot succeed.

56 I turn to arguments in the appeal and cross-appeal respecting the amount awarded for damages for fraud.

57 The proper award of damages for fraudulent misrepresentation is the amount required to place the innocent party in the position it would have been in if the representation had not been made. The trial judge found that if the representations had not been made, the plaintiff would have declined to enter into the interim agreement with a deposit of less than $500,000. He subtracted the $100,000 that was originally deposited and awarded damages against MacDonald, Kaplan and Bon Street Holdings Ltd. of $400,000.

58 The difficulty in this reasoning is that we do not know whether the defendants would have made a deposit of $500,000. It is difficult to know what would have happened if there had been no fraudulent misrepresentation, but on the evidence accepted by the trial judge there are two possibilities. Either a deposit of $500,000 would have been paid, or there would have been no agreement entered into. The trial judge favoured the first of those possibilities and awarded damages accordingly. It would be difficult to assess the damage incurred under the second possibility. The plaintiff might have been made a good sale while the Expo window was open in the summer of 1985. The property did not sell until February 1987 and then for $2,800,000. If, under the second possibility, it is concluded that the property might have been sold for $3,300,000, an amount offered by the new company after the repudiation, then the damages would be the same amount as the trial judge awarded.

59 On the appeal it was said that the award was too high. That is based on the premise that the purchaser would not have paid a deposit of $500,000 and that there would, therefore, have been no agreement. But that would have brought into effect the second possibility that I have referred to, that there would have been a sale to another purchaser. The evidence suggests that the plaintiff could have sold at that time for $3,300,000.

60 On the cross-appeal the plaintiff said that the damages should be higher, equal to the loss in value of the property between the summer of 1985 and the time that it was ultimately sold, taking the amount in the interim agreement as the value in 1985. But that amount is artificially high because the defendants did not intend to pay it if the feasibility study was discouraging. It is also seen to be high by the fact that no other buyer could be found who would offer a sum in that range.

61 On the whole I think that the trial judge's figure of $500,000, less the $100,000 on hand, was an appropriate assessment of the loss sustained as a result of the fraud.

62 The appellants raised a question about costs. The trial judge made a special order pursuant to s. 8, App. B, of the Rules of Court, to allow a higher level to the plaintiff than otherwise would have been permitted. He said:

> In my view, "special reason exists" in this case. The litigation was complex and a large amount of money was involved. There were many issues of fact and law to be resolved. The trial took 11 days and there were many interlocutory applications. My essential finding was one of fraud against the defendants. In my view, it is an appropriate case for an order under s. 8 that the bill of costs not be limited by the schedule of maximum costs but be taxed on the basis of $50,000 under s. 3 as suggested by counsel for the plaintiff.

63 There were many issues. Included in the reasons for judgment were sections entitled, "Rectification", "Inducing Breach of Contract", "Section 130 of the Company Act", "Partnership Liability" and "Sham". On each of those issues the plaintiff lost. Raising numerous issues that fail should not entitle a plaintiff to costs on a higher scale. If anything it should tell against the plaintiff in costs. I think that this finding of special reason cannot stand.

64 I would allow the appeal respecting costs, dismiss the appeal in all other respects, and dismiss the cross-appeal.

Appeal allowed as to costs; cross-appeal dismissed.

TAB 4

2013 BCSC 209
British Columbia Supreme Court

Burg Properties Ltd. v. Economical Mutual Insurance Co.

2013 CarswellBC 336, 2013 BCSC 209, [2013] B.C.W.L.D. 3901, [2013] B.C.W.L.D. 3965, [2013] B.C.W.L.D. 3979, [2013] B.C.W.L.D. 3984, [2013] B.C.W.L.D. 3986, 224 A.C.W.S. (3d) 611

Burg Properties Ltd., Plaintiff and Economical Mutual Insurance Company, Roy Garnet Briscoe and VVV Engineering Ltd., Defendants

Gerow J.

Heard: November 26, 2012; November 27, 2012; November 28, 2012; December 3, 2012
Judgment: February 12, 2013
Docket: Vancouver S088644

Counsel: P. Kravchuke, for Plaintiff
M.J. Libby, for Defendant / Applicant, VVV Engineering Ltd.
S.B. Twining, for Defendant / Applicant, Economical Mutual Insurance Company
D.K. Magnus, N. Randhawa (Articling Student), for Defendant / Applicant, R.G. Briscoe

Subject: Civil Practice and Procedure; Contracts; Property; Torts; Insurance; Corporate and Commercial; Public

Related Abridgment Classifications
For all relevant Canadian Abridgment Classifications refer to highest level of case via History.

Civil practice and procedure

XVIII Summary judgment
XVIII.5 Requirement to show no triable issue

Insurance

VII Extent of risk (exclusions)
VII.2 Causation
VII.2.c Casualty insurance
VII.2.c.i Property insurance

Professions and occupations

X Engineers
X.6 Professional negligence
X.6.c Supervision

Real property

IV Real estate agents
IV.11 Fraud and misrepresentation by agent
IV.11.b Misrepresentation
IV.11.b.i Fraudulent misrepresentation

Torts

VII Fraud and misrepresentation

VII.3 Negligent misrepresentation (Hedley Byrne principle)
VII.3.b Detrimental reliance

Headnote

Civil practice and procedure --- Summary judgment — Requirement to show no triable issue

Plaintiff claimed damages from defendants as result of alleged defects in commercial and residential building it purchased — Plaintiff alleged defendant vendor of property was negligent in carrying out repairs to roof and building, and negligently misrepresented condition of roof — Plaintiff alleged that defendant engineer negligently misrepresented condition of roof during pre-purchase inspection and report — As well, plaintiff alleged that engineer's inspector was negligent in its inspection and failed to warn purchaser about defects in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Defendants had each brought summary trial applications to have plaintiff's claim dismissed — Application granted in part — Issue of liability in this matter was suitable for determination by way of summary trial — Parties all agreed that liability could be determined separately from damages and it was appropriate to determine issues of liability separately in circumstances of this case — There were no third party claims being advanced and plaintiff's claim against each of defendants was separate and distinct — Determination of damages in this case did not rely on credibility issues and therefore, this was not case where there was potential for contradictory findings on liability and quantum as result of credibility issues — Inconsistencies pointed to by plaintiff were not of such nature that necessary facts to determine liability could not be found — Facts were not particularly complex and legal issues were well established — Cost of 20-day trial was not proportionate to amount in issue as it would exceed amount claimed — Proceeding summarily on liability would either resolve issue of quantum, or else significantly assist in settlement of quantum issue .

Real property --- Real estate agents — Fraud and misrepresentation by agent — Misrepresentation — Fraudulent misrepresentation

Plaintiff entered into contract to purchase commercial and residential building — Plaintiff claimed damages from defendants as result of alleged defects — Plaintiff alleged defendant vendor of property was negligent in carrying out repairs to roof and building, and negligently misrepresented condition of roof — Plaintiff alleged that defendant engineer negligently misrepresented condition of roof during pre-purchase inspection and report — As well, plaintiff alleged that engineer's inspector was negligent in its inspection and failed to warn purchaser about defects in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Action dismissed — Plaintiff admitted that he relied on engineer's report regarding condition of roof more than any representation by vendor — It was obvious from engineer's report that roof had number of deficiencies which were noted in report as requiring repair or completion, none of which vendor did — It was also clear from that plaintiff was aware of number of deficiencies in building and attempted to obtain reduction in price because of them — When vendor refused to reduce price, plaintiff went ahead and completed purchase — Contract drafted by plaintiff contained entire agreement clause, and there was no vendor warranty regarding condition of building or roof — Further, plaintiff's letter to vendor prior to removing subjects clearly acknowledged that he knew that building and roof were not in good condition — Engineer was retained to conduct visual building inspection — Report provided to plaintiff outlined visible problems with roof, including fact it had not been installed to current roofing standards, and it had observable deficiencies — It was clear from plaintiff's own evidence that defects it complained of were not visible at time of engineer inspection, and that engineer reported visible defects — Plaintiff failed to establish that engineer did not meet requisite standard of care of reasonably prudent roof inspector, or that it was negligent in manner in which it carried out pre-purchase inspection — There was no suggestion in engineer's

report that roof was adequate — To contrary, report clearly set out number of deficiencies and that remedial work had to be undertaken to roof, and that it would require ongoing inspection and maintenance — It is apparent from plaintiff's own evidence that it did not rely on engineer report to its detriment .

Insurance --- Extent of risk (exclusions) — Causation — Casualty insurance — Property insurance

Plaintiff entered into contract to purchase commercial and residential building — Plaintiff claimed damages from defendants as result of alleged defects — Plaintiff alleged defendant vendor of property was negligent in carrying out repairs to roof and building, and negligently misrepresented condition of roof — Plaintiff alleged that defendant engineer negligently misrepresented condition of roof during pre-purchase inspection and report — As well, plaintiff alleged that engineer's inspector was negligent in its inspection and failed to warn purchaser about defects in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Action dismissed — Plaintiff attempted to use deficiencies outlined in report, including fact that roof was unfinished, as bargaining tool to reduce purchase price for property — When vendor refused to reduce price, plaintiff removed subjects and completed purchase — Plaintiff appeared to be seeking declaration that Economical breached its contract of insurance with vendor in not carrying out adequate repairs to roof — However, plaintiff had not established it had any standing to seek that declaration — Nor had plaintiff established that there was any coverage under vendor's policy of insurance for roof damage — To contrary, plaintiff admitted on his examination for discovery that damage to roof in 2005 was not covered under vendor's insurance policy, and that damage to roof was outside of scope of repair work that Economical would have undertaken — Plaintiff failed to establish that Economical knew of any structural defect or that it failed to warn plaintiff of structural defects — There was no evidence that there were any structural defects at time plaintiff purchased building — Defects in roof plaintiff complained of were not discoverable except by destructive testing — There was no evidence of any requirement on Economical to carry out destructive testing of roof — Plaintiff's own evidence was that Economical had no obligation to repair roof under its policy of insurance with vendor .

Torts --- Fraud and misrepresentation — Negligent misrepresentation (Hedley Byrne principle) — Detrimental reliance

Plaintiff entered into contract to purchase commercial and residential building — Plaintiff claimed damages from defendants as result of alleged defects — Plaintiff alleged defendant vendor of property was negligent in carrying out repairs to roof and building, and negligently misrepresented condition of roof — Plaintiff alleged that defendant engineer negligently misrepresented condition of roof during pre-purchase inspection and report — As well, plaintiff alleged that engineer's inspector was negligent in its inspection and failed to warn purchaser about defects in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Action dismissed — Plaintiff admitted that he relied on engineer's report regarding condition of roof more than any representation by vendor — It was obvious from engineer's report that roof had number of deficiencies which were noted in report as requiring repair or completion, none of which vendor did — It was also clear from that plaintiff was aware of number of deficiencies in building and attempted to obtain reduction in price because of them — When vendor refused to reduce price, plaintiff went ahead and completed purchase — Contract drafted by plaintiff contained entire agreement clause, and there was no vendor warranty regarding condition of building or roof — Further, plaintiff's letter to vendor prior to removing subjects clearly acknowledged that he knew that building and roof were not in good condition — Engineer was retained to conduct visual building inspection — Report provided to plaintiff outlined visible problems with roof, including fact it had not been installed to current roofing standards, and it had observable deficiencies — It was clear from plaintiff's own evidence that defects it complained of were not visible at time of engineer inspection, and that engineer reported visible defects — Plaintiff failed to establish that engineer did not meet requisite standard of care of reasonably prudent roof inspector, or that it was negligent in manner in which it carried out pre-purchase inspection — There was no suggestion in engineer's report that roof was adequate — To contrary, report clearly set out number of deficiencies and that remedial work

had to be undertaken to roof, and that it would require ongoing inspection and maintenance — It is apparent from plaintiff's own evidence that it did not rely on engineer report to its detriment .

Professions and occupations --- Engineers — Professional negligence — Supervision

Plaintiff entered into contract to purchase commercial and residential building — Plaintiff claimed damages from defendants as result of alleged defects — Plaintiff alleged defendant vendor of property was negligent in carrying out repairs to roof and building, and negligently misrepresented condition of roof — Plaintiff alleged that defendant engineer negligently misrepresented condition of roof during pre-purchase inspection and report — As well, plaintiff alleged that engineer's inspector was negligent in its inspection and failed to warn purchaser about defects in building — Plaintiff alleged defendant Economical breached duty of care to plaintiff by failing to ensure roof was properly repaired after it was damaged in 2005, and by failing to warn plaintiff of structural defects and poor workmanship in building — Action dismissed — Plaintiff admitted that he relied on engineer's report regarding condition of roof more than any representation by vendor — It was obvious from engineer's report that roof had number of deficiencies which were noted in report as requiring repair or completion, none of which vendor did — It was also clear from that plaintiff was aware of number of deficiencies in building and attempted to obtain reduction in price because of them — When vendor refused to reduce price, plaintiff went ahead and completed purchase — Contract drafted by plaintiff contained entire agreement clause, and there was no vendor warranty regarding condition of building or roof — Further, plaintiff's letter to vendor prior to removing subjects clearly acknowledged that he knew that building and roof were not in good condition — Engineer was retained to conduct visual building inspection — Report provided to plaintiff outlined visible problems with roof, including fact it had not been installed to current roofing standards, and it had observable deficiencies — It was clear from plaintiff's own evidence that defects it complained of were not visible at time of engineer inspection, and that engineer reported visible defects — Plaintiff failed to establish that engineer did not meet requisite standard of care of reasonably prudent roof inspector, or that it was negligent in manner in which it carried out pre-purchase inspection — There was no suggestion in engineer's report that roof was adequate — To contrary, report clearly set out number of deficiencies and that remedial work had to be undertaken to roof, and that it would require ongoing inspection and maintenance — It is apparent from plaintiff's own evidence that it did not rely on engineer report to its detriment .

Table of Authorities

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Bramwell v. Greater Vancouver Transportation Authority (2008), 2008 BCSC 1180, 2008 CarswellBC 1836 (B.C. S.C. [In Chambers]) — referred to

Chun v. Smit (2011), 2011 BCSC 412, 2011 CarswellBC 763, 11 C.P.C. (7th) 17 (B.C. S.C.) — considered

Inspiration Management Ltd. v. McDermid St. Lawrence Ltd. (1989), 36 B.C.L.R. (2d) 202, 36 C.P.C. (2d) 199, 1989 CarswellBC 69 (B.C. C.A.) — considered

North Vancouver (District) v. Lunde (1998), 162 D.L.R. (4th) 402, (sub nom. *North Vancouver (District) v. Fawcett)* 110 B.C.A.C. 137, (sub nom. *North Vancouver (District) v. Fawcett)* 178 W.A.C. 137, 1998 CarswellBC 1438, 60 B.C.L.R. (3d) 201 (B.C. C.A.) — considered

Novin v. Novin (2004), 2004 CarswellBC 2250, 2004 BCCA 527 (B.C. C.A. [In Chambers]) — referred to

Parmar v. Blenz the Canadian Coffee Co. (2007), 2007 BCSC 1190, 2007 CarswellBC 1801 (B.C. S.C. [In Chambers]) — considered

Queen v. Cognos Inc. (1993), 1993 CarswellOnt 801, 1993 CarswellOnt 972, D.T.E. 93T-198, 45 C.C.E.L. 153, 93 C.L.L.C. 14,019, 99 D.L.R. (4th) 626, 60 O.A.C. 1, 14 C.C.L.T. (2d) 113, [1993] 1 S.C.R. 87, 147 N.R. 169 (S.C.C.) — followed

Rules considered:

Supreme Court Civil Rules, B.C. Reg. 168/2009
R. 9-7(15) — considered

App. B, s. 2(2)(b) — referred to

Gerow J.:

1 Burg Properties Ltd. claims damages from the defendants as a result of alleged defects in a building it purchased located at 9103 Glover Road, B.C. Burg's main complaint is about defects located under one of the building's roofs ("Roof 2").

2 Burg alleges the defendant, Roy Briscoe, the vendor of the property, was negligent in carrying out repairs to Roof 2 and the building, and negligently misrepresented the condition of Roof 2. Burg alleges that the defendant, VVV Engineering Ltd., negligently misrepresented the condition of Roof 2 during a prepurchase inspection and report. As well, Burg alleges that VVV Engineering's inspector was negligent in its inspection and failed to warn the purchaser about defects in the building. Burg alleges the defendant Economical Mutual Insurance Company breached a duty of care to Burg by failing to ensure Roof 2 was properly repaired after it was damaged in 2005, and by failing to warn Burg of structural defects and poor workmanship in the building.

3 The defendants have each brought summary trial applications to have Burg's claim dismissed. They take the position that the resolution of liability should take place summarily prior to the determination of damages, as that would be the most effective and efficient use of the parties' resources and court time. They say determining the issue of liability summarily is also proportionate to the amount in issue.

4 Burg agrees liability should be severed from quantum. However, Burg says the determination of liability should not be done summarily because there is contradictory expert evidence, there are inconsistencies in Mr. Briscoe's evidence, and there is a gap in the documents of Economical Mutual that requires exploration. As well, Burg says this matter is unsuitable for a determination summarily because it seeks to bring an application for a declaration that Economical Mutual should have repaired the roof and the interior of the building under Mr. Briscoe's insurance policy and Economical Mutual objects to that application being heard at the same time as these applications.

5 The issues are:

1) Is this matter suitable for summary trial?

2) If so, are any of the defendants liable to Burg as a result of making negligent misrepresentations and/or failing to warn Burg about defects in the building?

3) Is VVV Engineering liable for negligent inspection?

4) Are Mr. Briscoe and/or Economical Mutual liable to Burg for negligent construction?

Background

6 The claim arises from the purchase of a commercial and residential building located at 9103 Glover Road, Richmond, B.C., on April 28, 2006. Mr. Briscoe was the vendor of the property, Economical Mutual was his insurer, and VVV Engineering was retained by Peter Kravchuke to do a pre-purchase inspection of the building. At the time the contract to purchase the property was entered into, Mr. Kravchuke, who is the now the sole shareholder of Burg, was the purchaser.

7 The building located on the property is a mixed-use residential and commercial two-storey building. The ground floor is approximately 5,000 square feet and contains commercial units, including unit 104. The second storey is approximately 4,000 square feet and contains residential units, including unit 205. Roof 2 is above units 104 and 205 and is the roof in issue.

8 Mr. Kravchuke entered into a contract to purchase the property on January 12, 2006, for $850,000 from Mr. Briscoe (the "Contract").

9 The Contract was drafted by Mr. Kravchuke, who is a lawyer, and an officer and director of Burg, as well as the sole shareholder. Burg was not incorporated when the Contract was entered into. Mr. Kravchuke is identified as the purchaser in the Contract and signed the Contract as the purchaser. Burg is not a party to the Contract.

10 The relevant terms in the Contract provide:

> 1. The vendor agrees to sell and the purchaser agrees to purchase a clear title fee simple interest (as defined below) in the property on or before April 30, 2006 ... for the sum of eight hundred and fifty thousand ($850,000)
>
> . . .
>
> 2. ... In order to assist the purchaser in obtaining financing and building inspection, the vendor agrees to allow the purchaser and his appraiser and building inspector reasonable access to the property from time to time. The vendor hereby agrees to provide the purchaser with authority to access municipal and assessment and any other records held by any public body with respect to subject building. This condition is for the sole benefit of the purchaser.
>
> 3. This agreement is further subject to the condition that the purchaser obtain a building inspection, appraisal and title search satisfactory to the purchaser on or before March 31, 2006 and the purchaser removes this condition on or before that date, failing which this agreement shall be null and void. This condition is for the sole benefit of the purchaser.
>
> . . .
>
> 13. The vendor warrants that there are no outstanding municipal work orders or deficiency orders against the property and the vendor is not aware of any environmental concerns.
>
> . . .
>
> 15. The Property shall be and remain at the risk of the vendor until 12:01 A.M. on the completion date. After that time, the property and all included items shall be at the risk of the purchaser.
>
> . . .
>
> 17. This agreement is the entire agreement between the parties and there are no representations, warranties, guarantees, promises or agreements between the parties other than those set out in this agreement and the terms of this agreement shall survive the completion of the purchase and sale contemplated in this agreement.
>
> . . .

> 19. This agreement may only be varied by a court order or by a written agreement duly executed by each of the parties and witnessed.
>
> . . .
>
> 22. This agreement shall bind and enure to the benefit of the parties and their respective heirs, successors, executors, administrators and assigns.

11 At the time the Contract was entered into, Mr. Kravchuke was aware that Mr. Briscoe had constructed most of the building himself. Mr. Kravchuke also knew that Mr. Briscoe had repaired Roof 2 in 2005.

12 Mr. Briscoe noticed water entering into unit 205 on October 20, 2005. He thought Roof 2 was leaking so he applied a new roof membrane and cleaned the drains. His evidence is that water stopped entering unit 205 after he applied the new roofing material and cleaned the drains so he believed that he had fixed the water ingress problem.

13 In March 2006, Mr. Kravchuke retained VVV Engineering to conduct a prepurchase building inspection. VVV Engineering provided a letter to Mr. Kravchuke setting out the terms of the inspection which he accepted on March 10, 2006.

14 The relevant portions of the letter provide:

> As per our telephone conversation of yesterday afternoon, VVV Services Ltd. has had the opportunity to put together a team of Professional Engineers and Inspectors to conduct the pre-purchase inspection of the above 8000 sq. ft. building.
>
> Our pre-purchase inspection will include a visual assessment of the structural elements of the building, including a seismic review, electrical, mechanical and roof assessments....No destructive testing of any building, electrical and mechanical element will be conducted.

15 On March 16, 2006, VVV Engineering provided an inspection report to Mr. Kravchuke. The report states: "No destructive testing was performed; the inspections were of a visual nature only." The portion of the report entitled "Review of Roof Membrane and Roof Components" noted a number of deficiencies in the roofs over the building.

16 The report contained the following observations about Roof 2:

> The existing building has three levels of roofs, of which two levels comprise of a built-up roof (BUR) membrane and the middle level roof comprising of a two-ply SBS modified bitumen membrane.
>
> The following were recorded for these flat roofs and should be read in conjunction with the photographs and annotations in Appendix A-1:
>
> **1. OBSERVATIONS**
>
> .3 Generally, the perimeter flashing details are poorly constructed or, in some areas, non-existent on all three roofs.
>
> .4 Drainage of water from the roofs are inadequate as there are not enough drains, and the roofs are not sloped enough to the original and added drains for effective removal of the water. All roofs do not have emergency overflow provisions if the existing drains get plugged.
>
> .5 The 2nd Level roof membrane over the Owner's unit is a two-ply SBS modified bitumen membrane manufactured by IKO Industries. The subject membrane is a well-recognized product used in the roof industry, however, the membrane, generally, is not installed to acceptable roofing trade standards, as it was installed by the Owner. The IKO membrane is not properly detailed over the edges of the roof, improper laps, burned-out sections were noted as

the major installation errors. The writer suspects that a certified roofer can repair the deficiencies, but there will be no manufacturer's or workmanship warranties granted. This type of roof membrane is designed to have a serviceable life of over 20+ years if installed by qualified roofers.

.6 Generally, the venting of the roofs appear adequate, however, any deficiencies, i.e. missing soffit vent sections, should be replaced as soon as possible.

2. CONCLUSIONS

.3 The two-ply SBS modified bitumen membrane roof on the 2nd Level will not be warranted by the product manufacturer, however, with some remedial repairs to the membrane and properly installed details, i.e. flashings/ drainage, the subject roof membrane can last 10+ years, with proper maintenance and inspection.

.4 As with many aspects of the building, some of the roofing work has been performed with good intentions and a certain goal of waterproofing, however, the required knowledge of performing the proper job to gain the best performance out of the products has not been demonstrated.

.5 A budget figure of $25,000 - $30,000 to maintain and replace, as necessary, the existing roofs/roof accessories over the next 5-7 years should be taken into consideration.

17 On April 19, 2006, Mr. Kravchuke wrote to Mr. Briscoe seeking a reduction in purchase price from $850,000 to $800,000 on the basis that there were deficiencies in the building, including the requirement to finish Roof 2. Mr. Briscoe refused to lower his price.

18 Mr. Kravchuke removed all subject clauses in the Contract on March 31, 2006. Burg was incorporated on March 31, 2006, and the Contract was assigned from Mr. Kravchuke to Burg prior to completing the purchase on April 28, 2006.

19 Economical Mutual insured the property under a multi-peril policy when Mr. Briscoe owned the property. After Mr. Kravchuke entered into the Contract, he approached an insurance broker to arrange for insurance coverage to continue after he purchased the property. Economical Mutual issued a new policy of insurance to Burg for the property effective April 28, 2006. Mr. Kravchuke did not speak with any representatives of Economical Mutual, or the contractor that did the repairs to the building following Mr. Briscoe's 2005 claim, Edenvale Restoration Specialists Ltd., prior to purchasing the property.

20 Burg took no steps to effect any of the work to Roof 2 recommended by VVV Engineering during 2006.

21 Mr. Briscoe continued to live in unit 205 after the completion date. Mr. Kravchuke deposes that he became aware of a wet spot on the ceiling of unit 205 in October 2006, about a month after Mr. Briscoe had moved out. Mr. Kravchuke's evidence is that he contacted Economical Mutual and they sent out an individual from Edenvale in November 2006. According to Mr. Kravchuke, that individual advised him the water damage could be from condensation or a roof leak and to call Fraser Valley Roofing. Mr. Kravchuke's evidence is that he called Fraser Valley Roofing and was told they were too busy to repair the roof at that time. Mr. Kravchuke did not contact any other roofers or undertake any repair to the building. He wrote to Economical Mutual on February 23, 2007, asking that an adjustor be sent out to view the damage.

22 In May 2007, Edenvale sent a letter to Mr. Kravchuke with a cheque for $5,291 for work not completed under Mr. Briscoe's claim, to be used to complete the repairs to the building.

23 In July or August 2007, Mr. Kravchuke contacted a different roofing company, Flynn Roofing Maintenance Ltd. Flynn Roofing replaced Roof 2 and invoiced Burg $23,500 plus HST. Mr. Kravchuke deposed on April 10, 2012, that Burg has not completed the repairs to the interiors of units 104 and 205, and that those units have remained unoccupied since Mr. Briscoe moved out in 2006.

24 Mr. Kravchuke had further dealings with Economical Mutual through 2007 and 2008. In November 2007, Mr. Kravchuke provided a report from IRC Building Sciences BC Inc. to the insurance broker. In its report, IRC stated that the photographs of the SBS system on Roof 2 exhibited poor detailing of membrane flashing and field laps. In the observer's opinion, the poor detailing of the SBS roof likely allowed water entry beneath the system onto the underlying tar and gravel roof, creating a number of related problems.

25 In March 2008, Economical Mutual denied coverage for replacing Roof 2 and fixing the interior water damage.

Analysis

Is the issue of liability suitable for determination by summary trial?

26 For the following reasons, I conclude the issue of liability is suitable for determination by summary trial.

27 There is authority for the proposition that in a summary trial application where a party seeks to proceed only on liability, a two step approach should be followed: the first step is to determine whether there should be severance, and the second step is to determine if a summary trial on the issue of liability is appropriate: *Chun v. Smit*, 2011 BCSC 412 (B.C. S.C.) at paras. 8-9. In *Chun*, the court stated that the test for severance is whether there are extraordinary, exceptional or compelling reasons for the severance. A compelling reason to order severance is a likelihood of a significant savings in time and expense realized by a summary trial: *Bramwell v. Greater Vancouver Transportation Authority*, 2008 BCSC 1180 (B.C. S.C. [In Chambers]) at para. 12.

28 The parties all agree that liability can be determined separately from damages. In my view, it is appropriate to determine the issues of liability separately in the circumstances of this case. There are no third party claims being advanced and Burg's claim against each of the defendants is separate and distinct. In my view, those factors are in favour of severance.

29 The determination of damages in this case does not rely on credibility issues and therefore, this is not a case where there is the potential for contradictory findings on liability and quantum as a result of credibility issues. This factor favours severance.

30 Counsel are all of the view that the trial of both liability and quantum will take approximately 20 days. If the issue of liability was determined summarily it would likely result in significant savings in time and expense over a conventional trial.

31 The damages Burg claims is the amount it spent on repairing the roof, i.e. $23,500 plus tax, and the loss of rental income for units 104 and 205 from April 30, 2006, until present. It appears at this point that Burg has not mitigated its loss of rental income by carrying out the interior repairs to those units, despite receiving monies from Economical Mutual to carry out any repairs outstanding from Mr. Briscoe's claim. Therefore, it is likely that the defendants will argue that the rental income loss being claimed is a result of Burg's failure to repair the suites and rent them in a timely manner following the loss, rather than any fault of the defendants. In my view, the time necessary for a conventional trial in relation to the amount in issue is a factor that favours severance.

32 The question of severance is to a degree intertwined with the question of whether the issue is suitable for determination by way of summary trial.

33 The test for granting summary relief pursuant to a summary trial is set out in Rule 9-7(15) of the *Supreme Court Civil Rules*. The court may grant judgment in favour of any party, either on an issue or generally, unless the court is unable to find the facts necessary to decide the issues of fact or law, or if it would be unjust to decide the issues on the application.

34 In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (B.C. C.A.), a case dealing with the former rule for summary trial, the Court of Appeal set out a number of factors a judge should consider in

determining whether a determination by way of summary trial is appropriate. These factors include the amount involved, the complexity of the matter, the cost of a conventional trial in relation to the amount involved, and the course of the proceedings.

35 Cases since *Inspiration Management* have enunciated additional factors to be considered in deciding whether a matter is suitable for determination by summary trial. The factors to be taken into account in determining whether a case is suitable include:

- is litigation extensive and will the summary trial take considerable time;
- is credibility a crucial factor and have the deponents of the conflicting affidavits been cross-examined;
- will a summary trial involve a substantial risk of wasting time and effort and producing unnecessary complexity; and
- does the application result in litigating in slices.

See: *Novin v. Novin*, 2004 BCCA 527 (B.C. C.A. [In Chambers]), and *Bacchus Agents (1981) Ltd. v. Philippe Dandurand Wines Ltd.*, 2002 BCCA 138 (B.C. C.A.).

36 In *North Vancouver (District) v. Lunde* (1998), 162 D.L.R. (4th) 402 (B.C. C.A.), the court held that where an answer to an issue sought to be tried summarily will only resolve the whole proceeding if one answer is given but not if a different answer is given, the applicant should be required to demonstrate and the judge should be expected to decide that the administration of justice will be enhanced by dealing with the issue as a separate issue. It cannot be enough simply that the parties have agreed to a summary trial of one or more issues raised in the proceedings without any consideration for the effective use of the court time or the efficient resolution of the proceedings. The court held that in making that determination expense is also a relevant factor.

37 In this case, the hearing of the summary trial took four days; November 26-28 and December 3, 2012.

38 As stated earlier, Burg takes the position that it is appropriate to sever liability from quantum. Burg submits that although it would be beneficial to determine the issue of liability summarily, there are a number of problems with the evidence that may impact the ability of the court to make the findings of fact necessary to decide the issues of fact or law.

39 Burg points to the fact that Mr. Kravchuke disagrees with certain statements Mr. Briscoe deposes that he made to him about the building. In particular, Mr. Kravchuke disagrees that Mr. Briscoe told him that he was selling the building "as is and where is" and that he was not providing any warranties or guarantees. As well, Burg submits that there are conflicts in the expert evidence which it says will be difficult to resolve on affidavit evidence.

40 The issue is whether the necessary facts to determine the case can be found despite the conflicts in the evidence. None of the pertinent facts appear to be in dispute. The vast majority of the evidence relied on by the defendants is evidence taken from Mr. Kravchuke's examination for discovery and the documents.

41 Having considered all of the evidence, it is my view that the inconsistencies pointed to by Burg are not of such a nature that the necessary facts to determine liability cannot be found. The conflicts between the evidence of Mr. Briscoe and Mr. Kravchuke and the conflicts between the experts' reports can be resolved by reviewing the documents and Mr. Kravchuke's evidence.

42 None of the parties suggests that determining liability first will have an impact on a subsequent quantum assessment if the defendants are found liable.

43 Burg submits that another factor that militates against liability being determined summarily is that Economical Mutual has objected to Burg's application for a declaration Economical Mutual did not fulfil its insurance obligations to

Burg or Mr. Briscoe. However, Burg's application to add a pleading against Economical Mutual for insurance coverage for Burg was dismissed, and Economical Mutual's application striking the pleadings against it seeking a declaration for insurance was granted. Economical Mutual argued that the limitation period for bringing a coverage claim had expired four years before the allegations were added to the pleadings. Burg did not provide any authority supporting its position that it had standing to seek coverage on behalf of Mr. Briscoe. As a result, it is my view that the insurance issue is not a factor which precludes liability being determined summarily.

44 Burg submits the matter should not proceed until it conducts a further examination for discovery of a more informed representative of Economical Mutual. However, it has had plenty of time to take steps to conduct such a discovery. The hearing dates for the summary trial had been adjourned in the past. This matter has been outstanding since 2008. Burg has had ample time to do all the investigations and conduct all the examinations for discovery it deemed necessary to prosecute its claims. Burg cannot rely on its own inaction to deny the defendants the right to have this matter determined.

45 In my opinion, the facts are not particularly complex and the legal issues are well established. The cost of a 20-day trial is not proportionate to the amount in issue as it would exceed the amount claimed. Proceeding summarily on liability will either resolve the issue of quantum, or else significantly assist in the settlement of the quantum issue.

46 In the circumstances, I conclude that the issue of liability in this matter is suitable for determination by way of summary trial.

The claim against Mr. Briscoe

47 Burg's claim against Mr. Briscoe is that:

1) Mr. Briscoe breached a duty of care to Burg to ensure that Roof 2 was repaired in a workmanlike manner.

2) Mr. Briscoe breached a duty of care to Burg to ensure the interiors of units 205 and 104 were repaired in a workmanlike manner.

3) Mr. Briscoe breached a duty to warn Burg of structural defects in Roof 2.

4) Mr. Briscoe negligently misrepresented to Mr. Kravchuke that Roof 2 was good, and Burg relied on that misrepresentation to its detriment.

48 The evidence regarding the repairs to the roof and interior of building is uncontroversial. Mr. Briscoe noticed water coming into the living room of unit 205, where he lived, on October 20, 2005. Mr. Briscoe contacted Economical Mutual and also took steps to repair Roof 2.

49 Mr. Briscoe's evidence is that he installed new roofing using the following process:

1) He swept the gravel away, then screwed strapping to the roof.

2) He screwed plywood to the strapping.

3) He rolled out and applied a torch on membrane using a torch to heat the membrane as it was rolled out. He overlapped the rolls and installed them in accordance with the manufacturer's instructions on the roll, including sealing the edges.

4) He installed some new vents and cleaned the drain pipes.

50 Mr. Briscoe does not know whether the water was coming in through a blocked drain or a leak in the roof, but the water ingress stopped after he performed the maintenance and repairs to Roof 2. He believed the repairs were done well and he used a good product.

51 Edenvale came to the building after Mr. Briscoe had repaired the roof. Edenvale dried out unit 205 and did some repairs to the interior of the building.

52 Mr. Briscoe did not do any repairs to the interior of the building. Mr. Kravchuke knew Mr. Briscoe performed the repairs to Roof 2. He also knew that Mr. Briscoe was not a roofer.

53 The repairs to the interior of the building were not finished when Mr. Kravchuke inspected the building or when the sale of the building completed. Burg accepted a cash payment of $5,291 as a final settlement of any obligation on the part of Economical Mutual to complete those repairs.

54 Mr. Kravchuke admitted at his examination for discovery that Mr. Briscoe told him he had repaired the roof, there had been an insurance claim, and the repairs were incomplete. It is clear from Mr. Kravchuke's letter to Mr. Briscoe seeking a reduction in price that Mr. Kravchuke was aware there were a number of deficiencies in the building. He states in the letter "the building is in desperate need of upgrades and repairs" including finishing the roof.

55 Mr. Kravchuke received a report from VVV Engineering specifically stating that Roof 2 had been installed by the owner and was not installed to acceptable roofing standards. He was advised that some remedial repairs were necessary to the membrane and that flashing and drainage had to be properly installed. Burg did not undertake any work to Roof 2 after it purchased the building in the spring of 2006 despite being told the repairs were necessary and the details, including flashing and drainage, had to be installed.

56 There is no evidence as to the cause of the water damage Mr. Kravchuke noted in October 2006, or that if Roof 2 had been completed as outlined in VVV Engineering's report, the water damage in October 2006 and attendant problems which were noted by the roofers in the summer of 2007 would have occurred.

57 There is no evidence that Mr. Briscoe was involved in the repair of the interior of units 205 and unit 104. Edenvale was undertaking the repairs to unit 205 and Mr. Kravchuke was aware the repairs were incomplete at the time Burg purchased the building. Although Burg accepted money to complete the repairs in unit 205, Mr. Kravchuke's evidence is that the repairs to the unit were not completed. There is no evidence that there was any damage to unit 104 at the time of the Contract and that Mr. Briscoe undertook any repairs to that unit.

58 In the circumstances, I find Burg has not satisfied the onus on it of establishing that Mr. Briscoe is liable for negligently repairing Roof 2 or units 104 and 205.

59 I turn next to the issue of whether Mr. Briscoe breached a duty of care to Burg by failing to warn it of structural defects to Roof 2. There is insufficient evidence to establish that there were any structural defects to Roof 2 at the time the Contract was entered into. Given that there is no evidence that there were structural defects to Roof 2 at the relevant time, Burg has not established that Mr. Briscoe is liable for a failure to warn of such defects.

60 Finally, Burg asserts that Mr. Briscoe negligently misrepresented the condition of Roof 2 to Mr. Kravchuke in that he said the "roof was good," and Burg relied on that misrepresentation to its detriment.

61 The elements for establishing a claim in negligent misrepresentation are set out in *Queen v. Cognos Inc.*, [1993] 1 S.C.R. 87 (S.C.C.) at para. 34, as follows:

1) there must be a duty of care based on a special relationship between the representor and the representee;

2) the representation of fact must be untrue, inaccurate or misleading;

3) the representor must have acted negligently in making the representation;

4) the representee must have reasonably relied on the representation; and

5) the reliance must have been detrimental to the representee in the sense that damages resulted.

62 In *Parmar v. Blenz the Canadian Coffee Co.*, 2007 BCSC 1190 (B.C. S.C. [In Chambers]) at para. 35, a pleading alleging a misrepresentation to a company that did not exist at the time the representation was made was struck. The allegation was found to be unsustainable because the impugned representations could not be relied upon by a party that was not legally in existence at the material time.

63 In this case, the representations were made to Mr. Kravchuke prior to Burg being incorporated. The evidence is that Burg was not incorporated until after the subjects were removed from the Contract.

64 As well, the Contract drafted by Mr. Kravchuke contains the following entire agreement clause: "This agreement is the entire agreement between the parties and there are no representations, warranties, guarantees, promises or agreements between the parties other than those set out in this agreement and the terms of this agreement shall survive the completion of the purchase and sale contemplated in this agreement."

65 The Contract further provides that the purchaser would have access to the building to complete any inspections he deemed necessary. The vendor did not provide any warranties as to the condition of the building. If Mr. Kravchuke wanted to rely on a statement by Mr. Briscoe as to the condition of the building, he could have included it in the Contract as a warranty by the vendor.

66 Mr. Briscoe's evidence is that he believed the roof was good because his repairs stopped water coming into the building and he used a good roofing material. However, his evidence is also that he advised Mr. Kravchuke that he was selling the building "as is and where is." He did not guarantee the condition of the building.

67 Although Mr. Kravchuke says that Mr. Briscoe told him Roof 2 was good and he relied on that statement, it was obvious from VVV Engineering's report that it was not. Roof 2 had a number of deficiencies which were noted in the report as requiring repair or completion, none of which Burg did.

68 On his examination for discovery, Mr. Kravchuke admitted that he relied on VVV Engineering's report regarding the condition of Roof 2 more than any representation by Mr. Briscoe regarding the condition of Roof 2. Mr. Kravchuke also admitted at his examination for discovery that he relied on VVV Engineering's report in removing the subjects.

69 Further, Burg has not established that relying on the statement resulted in detriment to it. It is clear from Mr. Kravchuke's letter to Mr. Briscoe that he was aware of a number of deficiencies in the building and attempted to obtain a reduction in price because of them. When Mr. Briscoe refused to reduce the price, Mr. Kravchuke went ahead and had Burg complete the purchase.

70 Mr. Kravchuke's letter also supports Mr. Briscoe's version that he had advised Mr. Kravchuke that he was selling the building as is and where is. Mr. Kravchuke acknowledges in his letter that Mr. Briscoe told him not to buy the building. It was apparent during Mr. Kravchuke's visits to the building that the work in unit 205 had not been completed. As well, he knew Roof 2 had not been completed and there were defects in the manner in which it had been installed.

71 Mark Emanuel, an expert retained on behalf of VVV Engineering, provided an opinion that if the deficiencies outlined in the report had been corrected in accordance with the recommendations set out, there is a possibility that the roof could have performed adequately for the time period stated by VVV Engineering.

72 Even if Burg was entitled to rely on Mr. Briscoe's statement to Mr. Kravchuke that Roof 2 was good, it is my view that Burg has failed to establish that it relied on any representations made by Mr. Briscoe regarding Roof 2 to its detriment. The Contract drafted by Mr. Kravchuke contained an entire agreement clause, and there is no vendor warranty regarding the condition of the building or Roof 2. Mr. Kravchuke's letter to Mr. Briscoe prior to removing the subjects clearly acknowledges that he knew that the building and Roof 2 were not in good condition.

73 Accordingly, I am dismissing Burg's claim against Mr. Briscoe.

The Claim against VVV Engineering

74 Burg is advancing a claim against VVV Engineering that it negligently carried out its inspection services; that it made negligent misrepresentations regarding the condition of Roof 2; and that it failed to warn Burg of defects in the building.

75 Burg relies on a report from a roofing inspector, J.P. Jansen of Roof Tech 2000 Consultants Ltd. Mr. Jansen is not a professional engineer. He is a principal of a company that performs roof inspections and is designated as a Registered Roofing Observer or RRO. Mr. Jansen's report of June 5, 2012, suffers from a number of defects. It does not set out the documents he has reviewed, the factual assumptions on which his opinions are based, or the instructions he received.

76 The evidence is that VVV Engineering was retained to conduct a visual building inspection. The report provided to Mr. Kravchuke outlined visible problems with Roof 2, including the fact it had not been installed to current roofing standards, and it had observable deficiencies. The report specifically notes that repairs and properly installed details, such as the flashing and drainage, need to be completed in order to maximize the life of the roof. Mr. Kravchuke chose to have Burg proceed with the purchase of the building in spite of his knowledge about the deficiencies in Roof 2 and other deficiencies in the building. Burg did not do any of the work recommended by VVV Engineering after purchasing the building in 2006.

77 Mr. Kravchuke admitted on his examination for discovery that VVV Engineering was to provide him with a visual inspection of the roof and that the inspectors were not given any information about what was below the torch on membrane. He agreed that VVV Engineering was not expected to comment on what was below the roof membrane as that was outside its mandate. Mr. Kravchuke's evidence is that he was relying on VVV Engineering report problems or issues that could be seen during their walk around, and that he and Burg were not relying on VVV Engineering to report or identify problems that could not have been seen. Mr. Kravchuke further admitted at his examination for discovery that he did not ask VVV Engineering to do any destructive testing and that he knew that Mr. Briscoe would not have allowed it.

78 The standard of care VVV Engineering has to meet is based on what a reasonably prudent roof inspector would have recommended in the circumstances. It is not based on a standard of perfection.

79 VVV Engineering relies on the report of Mr. Emmanuel that VVV Engineering met the standard of care for an engineer doing a pre-purchase inspection. Mr. Emmanuel sets out the assumed facts and the documents he has reviewed in his report. In his opinion, pre-purchase inspections are normally of a visual nature as vendors are not expected to allow destructive testing by a potential purchaser. The visual inspection is to identify visible deterioration and poor details resulting from workmanship or materials. In his opinion, VVV Engineering's report contained detailed and considerable warnings to a prospective purchaser as to the condition of Roof 2.

80 Burg relies on Mr. Jansen's opinion that VVV Engineering failed to provide an inspection or report that would meet the normal standards for roofing inspectors in B.C. Mr. Jansen does not set out what standards or criteria he is referring to. Instead, he states that it would have been apparent to an experienced roofing inspector during a visual inspection that there were flaws in the roof, and that it was necessary to recommend a cut test, i.e. a destructive test, to the purchaser.

81 However, none of the other roof experts Burg had to the site recommended a cut test before doing repairs. Mr. Kravchuke confirmed other roofers who attended the site to recommend repairs did a visual inspection of Roof 2 and the water damage in unit 205. The defects Burg complains of were not discovered until the roofers repairing Roof 2 cut a hole in the roof to install a stove vent at the request of Mr. Kravchuke in August 2007. At that time, Burg became aware that Mr. Briscoe had reroofed over the prior roof.

82 Accordingly, I do not accept Mr. Jansen's opinion that a reasonably prudent roof inspector would have noted defects on a visual inspection that would have made the recommendation of a cut test necessary. Mr. Jansen's opinion in that regard appears to be based on hindsight and a standard of perfection.

83 Burg complains that Mr. Lee, the individual who carried out the inspection, was not an engineer. However, VVV Engineering's letter setting out the scope of the assignment makes it clear that both professional engineers and inspectors will be utilized in carrying out the inspection. The roofing portion of VVV Engineering's report is signed and issued by a professional engineer as well as Mr. Lee.

84 Mr. Jansen states in his report that the membrane on Roof 2 is one-ply; however, there is no evidence to support that statement. The statement is based on his premise that ridges in the membrane would have been visible if the roof membrane was two-ply. Mr. Jansen appears to base his opinion on photographs he reviewed.

85 Mr. Emmanuel disagrees with Mr. Jansen's statement that it would have been apparent that the membrane was one-ply from a visual inspection of the roof. Mr. Emmanuel states that it is not possible to determine whether a torch on roofing membrane consists of one-ply or two-ply without destructive testing, and further it is not possible to make the determination on the basis of the photographs attached to Mr. Jansen's reports. Ridges are not necessarily visible through the cap sheet. Burg's evidence that other roofers, including the roofer it retained to repair the roof did not note that as a deficiency, supports Mr. Emmanuel's opinion.

86 As well, in his report Mr. Jansen states that a one-ply system would not be acceptable over a living space. However, Mr. Jansen does not set out any basis for this statement or point to any criteria or standards that support the statement.

87 Mr. Emmanuel provides an opinion that one-ply membranes which are correctly installed and maintained can provide water tight performance. In his opinion, whether the roofing membrane of Roof 2 is one-ply or two-ply, it could have provided continued service if repaired and maintained as recommended in the VVV Engineering report. This is supported by the statement in the IRC report that the poorly detailed membrane flashings and field laps likely allowed water entry onto the underlying tar and gravel roof, creating a number of related problems. Those deficiencies are identified in the VVV Engineering's report, and a recommendation was made that those deficiencies needed to be repaired in order to maximize the life of the roof.

88 Mr. Jansen is critical in his report of the inspector failing to notice the lack of visual buildup of material around the vents or roof stacks. However, there is no evidentiary basis to support that criticism. The photographs Mr. Jansen refers to are of other buildings and there is no indication as to who took the photographs, when they were taken, or the purpose for which they were taken.

89 Mr. Jansen made statements in his report about what is normally done in respect of vents; however, there is no evidence as to what would have been visible when VVV Engineering carried out its inspections. Burg's evidence that the defects were only found accidentally when the roofers cut a hole for a stove vent supports VVV Engineering's position that there were no visible indications of the roof system underlying the torch on membrane being defective.

90 While Mr. Jansen opines that the repairs to Roof 2 would have been cost prohibitive compared to replacement of the roof, he does not set out the scope of work he says would have been necessary, or the cost of that work. As such his statement in that regard amounts to argument in the guise of opinion, and purports to make findings of fact with no evidence.

91 In my view, the opinions set out in Mr. Jansen's reports are not based on facts Burg has proven. It is clear from Burg's own evidence that the defects it complains of were not visible at the time of the VVV Engineering inspection, and that VVV Engineering reported the visible defects. There is no basis in the evidence for Mr. Jansen's conclusion that there were visible defects that would result in a reasonably prudent building inspector performing a pre-purchase inspection recommending a cut test. As a result, little weight can be placed on Mr. Jansen's report in that regard.

92 As well, there is no evidence to support Mr. Jansen's statements that the repairs recommended by VVV Engineering would not have resulted in Roof 2 having a life span set out in the report, or that the repairs would have been cost prohibitive compared to the replacement cost. Little weight can be placed on Mr. Jansen's report in that regard as well.

93 In the circumstances, I am of the view that Burg has failed to establish that VVV Engineering did not meet the requisite standard of care of a reasonably prudent roof inspector, or that it was negligent in the manner in which it carried out the prepurchase inspection.

94 As well, I am of the view that Burg has not established that VVV Engineering made a negligent misrepresentation that the plaintiff relied upon to its detriment.

95 Burg alleges it relied on VVV Engineering's representation that the roof was in adequate condition and this induced it to enter into the Contract. There is no suggestion in VVV Engineering's report that the roof is adequate. To the contrary, the report clearly sets out a number of deficiencies and that remedial work has to be undertaken to Roof 2, and that it will require ongoing inspection and maintenance. The evidence is that Burg did not undertake any work on Roof 2 until the summer of 2007, even though it purchased the building in the spring of 2006 and became aware of water damage in October 2006.

96 It is apparent from Burg's own evidence that it did not rely on the VVV Engineering report to its detriment. Mr. Kravchuke attempted to use deficiencies outlined in the report, including the fact that Roof 2 was unfinished, as a bargaining tool to reduce the purchase price for the property. When Mr. Briscoe refused to reduce the price, Mr. Kravchuke removed the subjects, and caused Burg to complete the purchase.

97 Burg also advances claims concerning certain structural, mechanical and electrical components of the buildings. However, Burg has not pointed to any evidence which establishes the defects, or that VVV Engineering was negligent in inspecting those components or made any negligent misrepresentations in regards to those components.

98 Finally, Burg alleges that VVV Engineering breached its duty to warn it of structural defects in the building. However, there is no evidence of the breach of such a duty. VVV Engineering detected problems in Roof 2 that were visible. Burg complains that it should have warned it of defects which were not visible. Burg has the onus to establish that there were dangerous defects in Roof 2 that VVV Engineering was aware of and failed to warn Burg of. It has not done so. As stated earlier, Burg has not established there were structural defects at the time the Contract was entered into.

99 Accordingly, I am dismissing Burg's claim against VVV Engineering.

The Claim against Economical Mutual

100 Burg's claim against Economical Mutual is that it breached a duty of care to Burg to ensure that Roof 2 and the interiors of units 104 and 205 were repaired in a workmanlike manner; that it breached a duty to warn Burg of structural defects in Roof 2 and poor workmanship in units 104 and 205; that it breached a duty of care to Burg to inspect Roof 2; and that it misrepresented that the water damage in unit 205 was the result of condensation and Burg relied on that representation to its detriment.

101 Burg's claim that Economical Mutual breached its duty to ensure that Roof 2 and the interiors of units 104 and 205 were repaired in a workmanlike manner is based on the fact that Edenvale performed repair work to the building after Mr. Briscoe made a claim in 2005. However, there is no evidence that Edenvale did any repair to Roof 2. As I have already set out, the evidence is that Mr. Briscoe repaired Roof 2.

102 Burg appears to be seeking a declaration that Economical Mutual breached its contract of insurance with Mr. Briscoe in not carrying out adequate repairs to Roof 2. However, Burg has not established it has any standing to seek that declaration. Nor has Burg established that there was any coverage under Mr. Briscoe's policy of insurance for roof damage. To the contrary, Mr. Kravchuke admitted on his examination for discovery that the damage to Roof 2 in 2005

was not covered under Mr. Briscoe's insurance policy, and that the damage to Roof 2 was outside of the scope of repair work that Economical Mutual would have undertaken.

103 As well, Mr. Kravchuke admitted that none of the work performed by Edenvale was deficient. His claim against Edenvale is that it installed ceiling insulation and drywall without checking to see if Roof 2 had been fixed, thereby hiding the problem.

104 Although Burg argued that the defects in Roof 2 would have been visible from inside unit 205 prior to Edenvale installing the insulation and drywall, there is no evidence to support that argument. There is no evidence that any defects in Roof 2 would have been visible during the repair work done by Edenvale. As noted earlier, the repair work in unit 205 was not completed at the time Burg purchased the property and it accepted a cheque in lieu of Economical Mutual completing the interior work under Mr. Briscoe's claim. There is no evidence that unit 104 sustained any damage in the 2005 windstorm, or that Edenvale carried out repairs in an unworkmanlike manner.

105 Accordingly, it is my view that Burg has failed to satisfy the onus on it of establishing that Economical Mutual breached a duty to Burg of ensuring that the work to Roof 2 and units 205 and 104 was done in a workmanlike manner.

106 As well, Burg has failed to establish that Economical Mutual knew of any structural defect or that it failed to warn Burg of structural defects. As stated earlier, there is no evidence that there were any structural defects at the time Burg purchased the building. The defects in Roof 2 Burg complains of were not discoverable except by destructive testing. There is no evidence of any requirement on Economical Mutual to carry out destructive testing of Roof 2. Burg's own evidence is that Economical Mutual had no obligation to repair Roof 2 under its policy of insurance with Mr. Briscoe.

107 Burg says it relied on a negligent misrepresentation made by a representative of Economical Mutual in October 2006 that the water damage in unit 205 was caused by condensation. However, Mr. Kravchuke admitted on his examination for discovery that the representative told him that the problem could be connected to a roof problem and recommended to Mr. Kravchuke that he hire a roofer.

108 Mr. Kravchuke agreed on his examination for discovery that the representative of Economical Mutual would not have been able to identify the cause of the water damage in 2005 without cutting through the exterior membrane.

109 In the circumstances, Burg has failed to establish that Economical Mutual made a negligent misrepresentation that it relied upon to its detriment.

110 Finally, Burg asserts that Economical Mutual breached its duty to inspect Roof 2 and warn it about the defects prior to the purchase of the building. However, the evidence is that Mr. Kravchuke retained VVV Engineering and relied on its inspection, not on any advice from Economical Mutual. As stated earlier, Burg's evidence is that Economical Mutual was not responsible for repairing Roof 2. Mr. Kravchuke was aware of deficiencies in the roof as a result of the VVV Engineering report. As a result, Burg has failed to establish that Economical Mutual breached any duty in this regard.

111 Accordingly, I am dismissing Burg's claim against Economical Mutual.

Conclusion

112 Burg's claims are dismissed against all of the defendants. The defendants are entitled to their costs at Scale B, subject to submissions.

End of Document

TAB 5

1 of 2 DOCUMENTS: Judgments

Concept Oil Services Ltd (a company incorporated in Hong Kong) v En-Gin Group LLP (a limited liability partnership under the law of Kazakhstan) and others

Tort - Deceit - Conspiracy - Claimant company purchasing refined oil from Ninth Defendant pursuant to framework agreement and addenda - Claimant suffering losses in respect of monies paid pursuant to addenda for oil which was never delivered and loss under tax loan agreement - Claimant claiming damages for deceit and conspiracy - Claimant seeking declaration that various transactions void and of no effect and/or or relief under statute - Whether claims made out - Insolvency Act 1986, ss 423, 425

[2013] EWHC 1897 (Comm), 2012 Folio 416, (Transcript)

QBD, COMMERCIAL COURT

FLAUX J

11 JUNE, 5 JULY 2013

5 JULY 2013

This is a signed judgment handed down by the judge, with a direction that no further record or transcript need be made pursuant to Practice Direction 6.1 to Pt 39 of the Civil Procedure Rules (formerly RSC Ord 59, r (1)(f), Ord 68, r 1). See Practice Note dated 9 July 1990, [1990] 2 All ER 1024.

P Stanley QC for the Claimant

The Defendants did not appear and were unrepresented

Watson, Farley & Williams LLP

FLAUX J:

INTRODUCTION AND BACKGROUND

[1] The Claimant company (to which I will refer as "COS") is incorporated in Hong Kong and carries on business trading crude and refined oil products and conducting related activities, including transportation. Between October 2008 and November 2010 it purchased refined oil from the Ninth Defendant ("EG UK"), an English registered company, pursuant to a Framework Agreement and addenda under that Agreement, in circumstances described in more detail below. At the time that the Agreement was entered into, the directors and shareholders of EG UK were the third and fourth Defendants, Mr Kontsevoy and Mr Buratov. EG UK in turn owned the First Defendant ("EG Group") a Kazakh limited liability partnership, which in turn owned the Second Defendant, another Kazakh limited liability partnership which owned and operated an oil refinery in Kazakhstan.

[2] COS has suffered losses in terms of monies paid pursuant to the addenda for refined oil which was never delivered and for other related matters and loss under a tax loan agreement pursuant to which COS lent the group money to meet tax liabilities. COS' case is that it was induced to enter these various agreements by representations made by Mr Kontsevoy which proved to be fraudulent. It claims damages against him, Mr Buratov and EG UK in deceit. It also claims damages against all the Defendants except two (the tenth Defendant which has not been served with the proceedings and the eleventh Defendant which was not incorporated until February 2011) for conspiracy, the essence of the case being that the Defendants conspired to change the corporate structure of the group with the consequence that EG UK became a hollow shell with no assets and EG Group was deprived of its assets for no consideration. COS also seeks a declaration that the various transactions by which this alteration of corporate structure were effected are void and of no effect and/or orders under ss 423 and 425 of the Insolvency Act 1986.

[3] On 16 March 2012 on the without notice application of COS, Cooke J granted a freezing injunction against the first eight Defendants and made a separate order for service of the proceedings on the first to fourth and sixth to Eighth Defendants outside the jurisdiction (A subsequent order was made by Hamblen J on 1 May 2012 for service out of the jurisdiction on the tenth and eleventh Defendants.). All the Defendants save the tenth were duly served with the proceedings. Some of the Defendants (the first four Defendants and the sixth to Eighth Defendants) originally instructed English solicitors (initially Norton Rose and subsequently Zaiwalla & Co) to make applications to set aside the freezing injunction and to set aside service of the proceedings, challenging the jurisdiction of the English Court. The Defendants served evidence in support of that application, specifically affidavits of Mr Kontsevoy taking issue on the facts with a number of the points made in COS' evidence, specifically in the affidavit of Mr Michael Zeligmans, the principal shareholder in COS.

[4] Those applications were set down for hearing on 10 October 2012, but the day before the hearing, Zaiwalla & Co came off the record and ceased to act for any of the Defendants. Andrew Smith J dismissed the applications when no-one from the Defendants attended, having given them a

period of time before his order took effect to come to court if there had been some misunderstanding. Following the dismissal of the applications, none of the Defendants filed fresh acknowledgments of service as required by the Civil Procedure Rules.

[5] It would then have been open to COS to obtain default judgment pursuant to CPR Pt 12 but the enforcement of such a judgment is notoriously difficult in international cases, because such a judgment is not a determination on the merits. Accordingly, at a case management conference before Gloster J (as she then was) on 8 March 2013, approval was given by the court to proceed with a trial on the merits. The court has inherent jurisdiction to order that there be a trial on the merits where the Defendant has failed to acknowledge service, so that the Claimant can seek to obtain a judgement that, if given, would be far more likely to be enforceable than a default judgement: see per Colman J in *Berliner Bank AG v Karageorgis* [1996] 1 Lloyd's Rep 426 and per Field J in *Habib Bank Ltd v Central Bank of Sudan* [2006] EWHC 1767 (Comm), [2007] 1 All ER (Comm) 53, [2006] 2 Lloyd's Rep 412.

[6] Directions for that trial were made by Gloster J which were complied with by COS. The Defendants were given notice that the trial was taking place but chose not to attend. Mr Paul Stanley QC, who represented COS, called Mr Zeligmans to give evidence. Mr Zeligmans gave oral evidence about the various representations made to him by Mr Kontsevoy and the reliance on those representations by COS and Mr Zeligmans. I had an opportunity to ask Mr Zeligmans questions to clarify one or two points. He otherwise confirmed on oath the truth of his various affidavits and witness statements. He was a clear and straightforward witness of whom I formed a favourable impression and I am satisfied his evidence was truthful.

[7] Although the Defendants did not attend the trial, throughout the hearing Mr Stanley was careful to draw to my attention any points, factual or legal which might be of assistance to the Defendants, following the practice commended by Field J in Habib Bank at 9, applied more recently in *United Trust Bank v Dohil* [2011] EWHC 3302 (QB), [2012] 2 All ER (Comm) 765, a decision of Mr Simon Picken QC, sitting as a deputy High Court judge.

FINDINGS OF FACT

[8] Mr Zeligmans is a Russian speaking Latvian, although he also speaks good English, having been educated in this country. He set up COS in 2003 to carry on the business of the purchase and transportation of crude oil and refined oil products throughout Europe, Russia and the CIS countries, including Kazakhstan, where he has built up a good network of business relationships. This includes a relationship with Lukoil, the Russian oil company. It was through Lukoil that in 2007 COS came across the refinery at Zhem in Kazakhstan which was owned by EG Production.

EG Production was owned by EG Group, which in turn was owned by EG UK, incorporated in 2003. The challenges faced by EG at the time were the sourcing of crude oil for the purposes of refining and financing those purchases. This presented COS and Mr Zeligmans with an opportunity to provide the means of finance and onward supply to Lukoil which was interested in buying refined product from Zhem in substantial quantities. To receive sufficient crude oil at the Zhem refinery for those purposes, it would need to be exported from Russia to Kazakhstan. There were tax advantages at the time in exporting crude oil from Russia to Kazakhstan, refining it there and then exporting the refined product to third countries, rather than exporting it direct from Russia to other countries as crude oil or refining it in Russia.

[9] Mr Zeligmans was introduced to Mr Kontsevoy of EG by Lukoil in early 2008 and attended a meeting with him at Aktobe in Kazakhstan. Lukoil was not interested in providing finance, so Mr Zeligmans was looking elsewhere but knew that, in what was becoming a difficult financial environment, he would only be able to provide finance for a reputable entity with substantial assets. He asked Mr Kontsevoy to explain the structure of the EG group. Mr Kontsevoy explained EG UK was the parent company and trading entity for the EG group and that EG UK owned EG Group, which in turn owned (i) EG Production which owned the Zhem refinery and (ii) another Kazakh limited liability partnership Ostyurk Munai, which had a licence to develop an oilfield in Kazakhstan. Mr Zeligmans explained in evidence that he was not particularly interested in the latter entity, since it is common enough to own licences to exploit oil in that part of the world and the assets of that entity were in any event pledged to the bank. From the outset, Mr Zeligmans' particular interest was in the fact that EG UK had through its subsidiary a 100% interest in the refinery and, because it was an English registered company, it would be subject to the strict corporate governance required of English companies and their directors by English company law.

[10] The following day Mr Zeligmans had a tour of the refinery and of the related facilities, including the rail network by means of which refined product was loaded onto railcars for onward transport. Following these meetings, as Mr Zeligmans said in his witness statement, Mr Kontsevoy was keen to verify what he had told Mr Zeligmans about the EG group. Accordingly he provided Mr Zeligmans with a valuation report on EG UK and its subsidiaries from KPMG dated 5 October 2007. This report, which Mr Zeligmans read, confirmed what he had been told by Mr Kontsevoy, that EG UK was the ultimate owner of EG Production which owned the refinery. Mr Zeligmans confirmed the significance of this in oral evidence, saying that COS would only do business with a company that owned the refinery, not with a trading company with no assets. He also confirmed that this was something that he made clear to Mr Kontsevoy in his discussions with him. Because the essence of what was being proposed was financing an operation to bring in crude oil from Russia and refine it into refined products at the refinery, the importance of the fact that the company with which COS was dealing, EG UK, owned the refinery through its 100% owned subsidiaries, was emphasised to Mr Kontsevoy.

[11] In about August 2008, negotiations began with TNK-BP (which owned the nearest group of Russian oilfields to the Zhem refinery and with which Mr Zeligmans had a good trading relationship) for it to supply crude oil to the refinery. The EG group had no previous relationship with TNK-BP and, accordingly, gave Mr Zeligmans a power of attorney to negotiate with TNK-BP, with which a deal in principle was agreed by mid August. However, it was still necessary to obtain finance. Because Mr Zeligmans had a pre-existing relationship with BNP Geneva, it was agreed with Mr Kontsevoy that Mr Zeligmans would approach BNP with a proposal for it to provide trade finance.

[12] During the discussions Mr Zeligmans had with BNP, it emerged that one of their biggest concerns was to understand the substance and structure of the EG group. Mr Zeligmans conveyed those concerns to Mr Kontsevoy on the telephone and Mr Kontsevoy confirmed that the corporate structure remained as he had told Mr Zeligmans, that EG UK was 100% owner of EG Group which, in turn, wholly owned EG Production that owned the refinery. Mr Kontsevoy also told Mr Zeligmans on the telephone that this structure would not change unless, at some point in the future EG UK decided to sell its interest, which would only occur if it could procure a substantial price. Having asked Mr Zeligmans during his oral evidence to clarify when those assurances and representations were made over the telephone by Mr Kontsevoy, I am quite satisfied that it was during the negotiations Mr Zeligmans had with BNP and so before the Framework Agreement was entered on 6 October 2008. Furthermore, I am quite satisfied that, because the request for this information was passing backwards and forwards as information and documents were supplied to BNP, Mr Kontsevoy was well aware of the importance which Mr Zeligmans attached to the assurances as to the corporate structure and that it would not change unless EG UK decided to sell its interest.

[13] Ultimately, BNP was not prepared to provide finance to the EG group, in part no doubt because these negotiations coincided with the turmoil in the financial markets following the collapse of Lehman Brothers in September 2008. However, Mr Zeligmans had been considering whether COS itself might not finance EG. A structure was set up pursuant to the Framework Agreement dated 6 October 2008 (which was expressly subject to English law and London arbitration) under which EG UK would sell and COS would buy refined oil products in quantities and at prices determined by subsequent addenda. As explained in his witness statement by Mr Zeligmans, the way in which the Agreement was intended to operate and did operate was that COS would pay in advance for the refined product. Such advance payments would finance the purchase of crude oil by EG UK and its subsidiaries from TNK-BP and the refining of that oil at the refinery, although COS only acquired title to the refined oil upon delivery onto railcars at Zhem station. COS then sold the refined oil to Litasco, a wholly owned trading subsidiary of Lukoil.

[14] Mr Zeligmans made it quite clear in his evidence that, in entering the Framework Agreement, he relied upon the assurances and representations from Mr Kontsevoy as to the EG corporate

structure and that it would not change unless EG UK decided to sell its interest in the refinery. He understood that in practical terms, as he put it in his witness statement, the real value of EG (ie the refinery) was locked away in EG UK which, as an English company could not give away its assets or dispose of them other than at market value, and that directors of an English company were under a duty to act in the best interests of the company. It is quite clear that it was on the basis of those representations that COS entered into the Framework Agreement and the subsequent addenda. Mr Zeligmans' evidence was that the representation by Mr Kontsevoy that the corporate structure would not be changed unless EG UK sold its interest in the refinery was repeated by Mr Kontsevoy at a restaurant in Moscow, possibly after the Framework Agreement was signed.

[15] On dates from 6 October 2008 onwards a series of addenda were entered into between COS and EG UK, under which COS purchased the refined oil products, making prepayments which financed the purchase of the crude oil by the EG group. Until about November 2009, the arrangements ran smoothly. However, unbeknownst to COS and Mr Zeligmans, changes were made in that period to the structure of the EG group. First, in April 2009 EG Production was moved within the group so that it became a direct subsidiary of EG UK. Although this was a change in the structure of which COS should have been informed, it does not make any specific complaint about this change.

[16] Far more significant is the filing in Anguilla on 18 September 2009 of a certificate of continuation and articles of continuation under the Anguillan International Business Companies Act 2000 in respect of EG UK. This procedure purported to have the effect of "continuing" EG UK as an Anguillan company, EG Anguilla, the Sixth Defendant. As Mr Stanley rightly submitted, this is a remarkable piece of legislation, the effect of which purports to be that the company continues as an international Anguillan company and ceases to be incorporated under the law of its place of incorporation, namely England. Clearly, as I elaborate in more detail at 70 - 74 below, under English law, which is the relevant applicable law as the law of the place of incorporation of EG UK, this purported continuation is void and of no effect.

[17] In his first affidavit Mr Kontsevoy said that this "transfer" to Anguilla was for tax reasons. He claimed that there had been advice previously given that EG UK would not need to pay UK tax so long as it did not trade in the UK, but that this advice was subsequently changed and the decision taken to go to Anguilla. He produced no documents to support that contention and so far as the limited material available about the affairs of EG UK demonstrates, no attempt was ever made by the directors of EG UK (Mr Kontsevoy and Mr Buratov) to declare or pay any tax due on EG UK's pro[#64257]ts. Instead dormant company accounts were [#64257]led and Mr Kontsevoy and Mr Buratov simply disregarded their obligations to [#64257]le tax returns. Moreover, if such advice had been given, that does not explain why, at a later stage of the restructuring of the group, they went back to using English registered companies to hold assets (see below). I agree with Mr Stanley that the tax explanation, whilst not impossible, is vague and inconsistent with other aspects of the

restructuring. It seems to me that the real explanation for this "transfer" is that it was the first step in an overall restructuring the effect of which was to remove the refinery from the ownership of EG UK, ultimately to the detriment of creditors of the group. I deal with the "transfer" to Anguilla in more detail at 59 - 62 below.

[18] At all events, whatever the real reason for the "transfer" to Anguilla, what is of critical significance is that, as Mr Kontsevoy accepted in his affidavit, he did not tell COS about what he describes as the "redomicile", he said because he did not think it was relevant to COS. I reject that explanation. He knew very well that he had represented to Mr Zeligmans, before the Framework Agreement was entered, that the refinery was ultimately owned by the English company and that he had said the corporate structure would not be changed unless EG UK sold its interest. Yet he and Mr Buratov were divesting the English company of its assets and purporting to "continue" it in a foreign jurisdiction whose corporate governance, if any, was an unknown, without informing Mr Zeligmans, as an honest person would have done, that the representations made before the Framework Agreement was entered were no longer true. As I set out later in the judgment, the representations made at the outset were continuing representations for so long as they were being acted upon by COS and, at this point of transfer to the Sixth Defendant, they became false and thus misrepresentations.

[19] Matters did not end there, because far from telling Mr Zeligmans about the "transfer" to the Sixth Defendant, Mr Kontsevoy continued to sign all the addenda and the Tax Loan Agreement as a director of EG UK, on the basis the other contracting party remained EG UK and using the same stamp, which was marked "En-Gin Ltd United Kingdom", as he had on the Framework Agreement and the addenda signed before the purported transfer to the Sixth Defendant. In those circumstances, Mr Kontsevoy positively misled Mr Zeligmans and continued to do so, knowing that he was doing so. In fact, Mr Zeligmans and COS did not find out about the existence of the Anguillan company until receipt of a letter dated 10 May 2011, after the monies with which this claim is concerned had been expended.

[20] In November 2009, the Kazakh and Russian tax authorities began an investigation alleging that the oil had not been refined to the extent required for export from Kazakhstan. They detained a total of 126 railcars of refined product at the Kazakh border, some of which were later returned to Zhem. In about June 2010, COS discovered that EG was attempting to sell to a third party a large amount of refined product financed by COS which was already on railcars at Zhem. COS was able to contact the third party and block the sale. Eventually, in August 2010, the tax authorities concluded that there had been no contravention of the export rules and shipments resumed.

[21] Whilst the investigations were being carried out, and again unbeknownst to COS and Mr Zeligmans, further corporate changes were made by Mr Kontsevoy and Mr Buratov. In June 2010,

the shares in EG Production which owned the refinery, were transferred to Akkert SA, the seventh Defendant ("Akkert"), a British Virgin Islands company owned by Mr Kontsevoy and Mr Buratov. No consideration was paid by Akkert. This is said to have been done to simplify investment in the refinery. This is an implausible explanation which I reject for the reasons given at 62-63 below.

[22] Then, in July 2010, a 49% interest in EG Production was transferred to Orion Global LLP ("Orion"), apparently a genuine third party investor. Mr Zeligmans accepts that, in the summer of 2010 in Almaty, he was introduced to Mr Hamitov as the representative of an outside investor, but says (and I accept) that he had no idea about the corporate changes. Specifically, he did not know about the transfer to Akkert, as a consequence of which, of course, EG Production was no longer part of the EG group at all.

[23] Mr Zeligmans dealt with the impact of outside investment by Orion in his oral evidence, which I accept:

> "I was, starting from midsummer, aware that there was an investor, but investor to me meant somebody that is coming into the company and not somebody who has been involved in taking the assets out of the company . . . who was investing into the company as opposed to being involved in the scheme to take the assets out of the company.
>
> MR STANLEY: Did the fact that there was an investor lead you to believe that the company with which you were dealing, the UK company, was no longer a UK company?
>
> A Not at all.
>
> Q Did it lead you to believe that it no longer owned the refinery?
>
> A Not at all. I was actually - we were quite positive about the fact that there was a new investor into the company. We were quite pleased with it.
>
> FLAUX J: I think the point you are making is that if Orion had taken shares in the English parent or any of the subsidiaries, there is nothing to concern you in the slightest, indeed quite the reverse?
>
> A Exactly, yes."

[24] The revenue investigation led to complaints on both sides about the expenses that had been incurred, including demurrage on the railcars and agreement was reached on the basis of a 50/50 split, as recorded in Addendum 35 dated 29 July 2010. A little later on 1 October 2010 a Reconciliation Agreement was made setting out the agreed position as at the end of September 2010, that there was a net balance in favour of COS of US$7,624,010.13. Again, both documents

were signed by Mr Kontsevoy using the same stamp of EG UK.

[25] Mr Zeligmans described in his affidavit evidence how EG UK would need further working capital to enable them to buy more crude oil and produce more refined product. He wanted to re-engage trade finance banks to provide some of that working capital. Accordingly, he arranged a meeting with BNP in Geneva on 11 October 2010, attended by BNP representatives, himself, Mr Kontsevoy and Mr Hamitov representing Orion. The meeting was conducted in English, of which Mr Kontsevoy speaks very little, so Mr Zeligmans translated for him.

[26] As on the previous occasion when Mr Zeligmans had approached BNP for finance, the bank was interested in whether the refinery was within the structure of the group. Their representatives asked whether the structure of the group was the same as it had been at the time of the earlier discussions in August and September 2008. Mr Zeligmans translated that question into Russian for Mr Kontsevoy, who confirmed that the structure was the same, that the group owned the refinery. In view of the transfers which had taken place, of which Mr Kontsevoy was well aware, that confirmation was a lie on his part. As he knew, EG UK was in fact an empty shell, the assets of which had purportedly been moved to Anguilla and the refinery had been taken out of EG Anguilla and given to Akkert which was in fact outside the corporate structure altogether. In his affidavit, Mr Kontsevoy denies that he gave this confirmation at the meeting with BNP, but I am quite satisfied that he did.

[27] BNP remained unwilling to finance EG, so it became clear to Mr Zeligmans that COS would have to continue financing EG in order to enable it to work off the outstanding balance. He did so believing, as he said in his evidence, that he was dealing with a UK registered company which held substantial assets, in particular (through EG Production) the refinery, as had been represented by Mr Kontsevoy at the outset and as he had represented again at the meeting with BNP. In fact, as Mr Zeligmans did not know, but Mr Kontsevoy did, that was very far from the truth. Three addenda, 36, 37 and 38 were made in November 2010 and, in reliance on those representations, COS advanced monies to EG. Once again these addenda were signed by Mr Kontsevoy as a director of EG UK, using the same EG UK stamp.

[28] At around the same time, COS agreed to make a loan to EG UK to enable the group to meet its tax liabilities. On 2 November 2010, Mr Kontsevoy emailed to Mr Zeligmans a draft of the proposed agreement, which contained at art 5 a provision that the agreement was governed by English law and that, "in case an agreement is not reached by the parties", in other words, in the event of a dispute, such a dispute would be subject to the exclusive jurisdiction of the English High Court. The draft also stated expressly in the recital that an affiliate of EG UK owned the refinery, which was untrue. The agreement (containing that recital and jurisdiction provision) was made and dated 1 December 2010. Although that was not signed, an addendum no 1 to that agreement dated 2

December 2010 and said to constitute an integral part of that agreement dated 1 December 2010 was signed by both parties, Mr Kontsevoy once again signing on behalf of EG UK and using the same stamp as before. Under that agreement COS advanced US$682,944.

[29] In his affidavit Mr Kontsevoy says, untruthfully, that it was Mr Zeligmans who sent him the draft tax loan agreement. In fact the truth is the opposite. Mr Kontsevoy also asserts that they discussed the jurisdiction clause, that he, Mr Kontsevoy, wanted an arbitration clause as in the Framework Agreement and that Mr Zeligmans assured him that they could treat the arbitration clause in the Framework Agreement as applying to the tax loan agreement. Given that it was Mr Kontsevoy who sent a draft agreement containing the English jurisdiction clause, this version of events is inherently implausible. I accept Mr Zeligmans' evidence that it is preposterous because they never discussed jurisdictional points. I am quite satisfied that the jurisdiction clause did form part of the tax loan agreement and was agreed by the parties.

[30] Shortly after this, later in December 2010, a second customs investigation began which resulted in the supply of refined oil products to COS drying up again. In the event supply was never restored. Mr Zeligmans pressed for supplies to resume and in that context received a letter dated 19 May 2011 from Mr Kontsevoy putting forward a claim for sums said to be due to EG. That letter was signed by Mr Kontsevoy over the stamp, as usual, of EG UK although at the bottom of the letter an address in Anguilla was given. This was the first Mr Zeligmans was aware of the involvement of the Sixth Defendant.

[31] In fact, unbeknownst to COS or Mr Zeligmans at the time, the refined oil which was for supply to COS pursuant to the outstanding addenda was sold by EG to third parties. That was carried out using two further corporate vehicles controlled by Mr Kontsevoy and Mr Buratov. First the fifth Defendant ("Skyagra"), an English registered company incorporated in June 2009. Although the shareholders are two Belize companies, it is clear that it is controlled by Mr Kontsevoy and Mr Buratov, as to which see 53 - 56 below. Between May and July 2011, Skyagra purchased refined products from the refinery, which it presumably sold on to third parties. In fact Skyagra purchased the products from a Kazakh limited liability partnership, Akkert Kazakhstan, the Eighth Defendant. That entity was incorporated in September 2009 and its sole member was Akkert SA, to which of course the refinery had been ostensibly transferred for no consideration and of which the founders and directors are Mr Kontsevoy and Mr Buratov. In other words these two entities were used by Mr Kontsevoy and Mr Buratov as a conduit to divert product from the refinery destined for COS and for which COS had prepaid.

[32] The final change to the corporate structure of the EG group involved the use of the eleventh Defendant, Larson. This is another English registered company incorporated on 14 February 2011, of which the directors and shareholders are Mr Kontsevoy and Mr Buratov. At some point between

February 2011 and February 2012 (Mr Kontsevoy asserts in February 2012) EG Group was transferred to Larson for no consideration. The effect of this transfer was that the oilfield was now an asset of Larson. It is striking that Mr Kontsevoy and Mr Buratov used a new English company to hold that asset, rather than using their existing English company, EG UK.

[33] There is no doubt that these various changes in the corporate structure of the EG group were engineered and organised by Mr Kontsevoy and Mr Buratov; indeed, Mr Kontsevoy admits as much in his affidavit, although he seeks to justify their actions. The effect of the changes was to leave the English company EG UK, which Mr Zeligmans understood (as a consequence of the representations made to him) to be the ultimate owner of the refinery through its subsidiaries, as an empty shell with no assets. In February 2010, it was nearly struck off the record for failure to file accounts, but was reprieved following an objection from an unknown source. It was in fact struck off the register in February 2011. It was restored to the register on COS' application under s 1029 of the Companies Act 2006 by order of Mr Registrar Jones dated 5 April 2012.

DECEIT

[34] The claim in deceit is advanced against the Third, Fourth and Sixth Defendants, Mr Kontsevoy, Mr Buratov and EG Anguilla. If Mr Kontsevoy is liable in deceit, given that, at least from September 2009, he asserts he was acting on behalf of EG Anguilla rather than EG UK, the vicarious liability of EG Anguilla for his tort must inevitably follow. I should add that COS has also claimed in deceit against EG UK on the same basis of vicarious liability, but in arbitration because of the London arbitration clauses in all the contracts save for the Tax Loan Agreement. That arbitration has not been progressed far given that EG UK has been stripped of its assets. The position of Mr Buratov is more complex and I will return to it below, when I have considered the position of Mr Kontsevoy.

[35] The elements of the tort of deceit require:

(i) a representation which is

(ii) false

(iii) dishonestly made and

(iv) intended to be relied upon and in fact relied upon: see per Rix LJ in *The Kriti Palm*

[2007] EWCA Civ 1601, [2007] 1 Lloyd's Rep 555 at 251.

As I have found, Mr Kontsevoy made representations to Mr Zeligmans, before and after the Framework Agreement was entered in October 2008, that the refinery was ultimately owned by the English company EG UK and that the corporate structure would not be changed unless EG UK sold its interest. Those representations may have been true when made, but they were continuing representations. The general principle is that a representation will be regarded as continuing until fully acted upon. The classic example of that principle in the commercial context is that of a misrepresentation made to an insurer on a proposal form for marine insurance which was accepted and the insurance was then renewed the following year without a fresh proposal form. The original misrepresentation was held to have continuing effect in the second year so as to entitle the insurer to avoid the policy: see *The Moonacre* [1992] 2 Lloyd's Rep 501 at 521 per Mr Anthony Colman QC (as he then was) sitting as a deputy High Court judge; *Spencer Bower, Turner & Handley: Actionable Misrepresentation 4th edition* 75.

[36] In the present case, COS and Mr Zeligmans continued to act upon the representations made, on each occasion that an addendum to the Framework Agreement was entered under which COS prepaid for refined oil in order to finance purchases of crude oil by the EG group and when the Reconciliation Agreement and the Tax Loan Agreement were entered into in October and December 2010 respectively. COS' case, confirmed by Mr Zeligmans' evidence, which I accept, is that if COS had been informed by Mr Kontsevoy in September 2009 of the "transfer" of EG UK and its assets to EG Anguilla, it would not have advanced any further sums. In fact all the outstanding sums which comprise COS' loss relate to the period after September 2009: see 74 and 75 of the Amended Particulars of Claim and the section of the judgment on loss and damage at 67-68 below.

[37] In their evidence filed in support of their application to challenge the jurisdiction and set aside the freezing injunction, the Defendants sought to answer the point about the representations made before the Framework agreement was entered being continuing representations, in two ways. First, they sought to rely upon cl 11.4 of the Framework Agreement which provides: "After signing of this Contract all previous negotiations and correspondence between the parties in such connection will be considered as null and void" as negativing any prior representations. As Mr Stanley submitted, this is a lawyer's point, and a bad one. That provision is an "entire agreement" clause focusing on the fact that any previous agreement or contractual negotiations will be superseded by the Framework Agreement. It says nothing about whether the Framework Agreement has been induced by a representation let alone about whether the representation continues to have effect after the Framework Agreement, as each addendum is entered.

[38] The second purported answer was that, even if the representation was made, there could be no guarantee the corporate structure would not change, there was no obligation to maintain the

structure. This is not disputed by COS but it misses the point. Having made the original representations, intending that Mr Zeligmans would rely upon them and knowing that he would do so, it was incumbent upon Mr Kontsevoy, when he knew that the representations previously made were no longer true (because, for example EG UK had been "continued" into EG Anguilla or because the refinery had been transferred to Akkert) to inform COS and Mr Zeligmans about the changes to the corporate structure.

[39] Mr Kontsevoy did not inform Mr Zeligmans about the changes in the corporate structure and I find that his failure to do so was quite deliberate. He was well aware, from the earlier conversations that he had had with Mr Zeligmans, of the importance the latter attached to the fact that COS was dealing with an English registered company which was the ultimate owner of the oil refinery and that Mr Zeligmans, and thus COS, were relying upon what had been represented about the corporate structure, in continuing to advance monies to the EG group. I find that Mr Kontsevoy also knew that, if he informed Mr Zeligmans of these changes to the corporate structure, the chances were that COS would not advance any further prepayments. In the circumstances, the elements of the tort of deceit are made out against Mr Kontsevoy, in respect of his dishonest failure to correct what had become misrepresentations with the changes in the corporate structure.

[40] In fact the deceit did not consist just of the failure to correct the continuing representations. Mr Kontsevoy made a series of additional positive misrepresentations which he knew were false. First, at the meeting with BNP on 11 October 2010, he represented expressly to BNP and Mr Zeligmans that the structure of the EG group was the same as at the time of the previous negotiations with BNP in August and September 2008, that the group owned the refinery, whereas the truth was, as he well knew, that EG UK was an empty shell, the assets of which had purportedly been moved to Anguilla and the refinery had been taken out of EG Anguilla and given for no consideration to Akkert, which was in fact outside the corporate structure altogether.

[41] Second, he continued to sign all the addenda after the purported "transfer" to EG Anguilla and, thereafter, the Reconciliation Agreement and the Tax Loan Agreement on behalf of EG UK, using the same stamp marked "En-Gin Ltd United Kingdom" as had been used prior to the "transfer". Mr Kontsevoy claims in his affidavit that this was an oversight. That might be an explanation if the wrong stamp had been used on only one document, but addenda 31 to 38 were all signed with that stamp after the "transfer", quite apart from the other contractual documentation. This is hardly explicable as an oversight and I agree with Mr Stanley that, if Mr Kontsevoy had been an honest director, when he came sign and stamp the first of these addenda he would surely have said to his staff, this is the wrong stamp, we need a stamp for EG Anguilla.

[42] That this was not an oversight but deliberate misleading of COS and Mr Zeligmans, is demonstrated by the third positive and dishonest misrepresentation, that contained in the first recital

to the Tax Loan Agreement, which, as I have held above, was drafted by EG not COS. That stated expressly: "Whereas the Company [EG UK] and the group of companies is engaged in the crude oil business, and its affiliate owns oil refinery located at . . . Zhem". As Mr Kontsevoy well knew, that statement was untrue: the company EG UK was by that time in December 2010 an empty shell with no assets, the parent company was now an Anguillan company and the refinery was no longer owned by any affiliate within the group but by Akkert and Orion.

[43] As with the original representations which he failed to correct when the corporate structure changed, so with these subsequent positive and fraudulent misrepresentations, Mr Kontsevoy made them intending that they would be acted upon and knowing that Mr Zeligmans and COS were acting upon them. Mr Zeligmans was asked in oral evidence about the fact that the Framework Agreement was signed by Mr Kontsevoy, as a director of EG UK, with a stamp stating "En-Gin Ltd United Kingdom" and that the same stamp was subsequently used for all the addenda, the Reconciliation Agreement and the Tax Loan Agreement. He confirmed that if he had been told before entering the addenda or the other agreements that the company with which he was dealing was now an empty shell and that the refinery was no longer owned by the group, he would have been very concerned and would not have advanced further monies. I see no reason not to accept that evidence of reliance on the fraudulent misrepresentations and I conclude that the tort of deceit is amply made out against Mr Kontsevoy. The loss suffered by COS in consequence of the deceit is dealt with below.

[44] So far as Mr Buratov is concerned, he did not personally make any of the misrepresentations made by Mr Kontsevoy. However, I agree with Mr Stanley that he was engaged in a common design with Mr Kontsevoy to deceive COS and Mr Zeligmans. He said and did nothing at the time to correct the deliberately misleading impression about the corporate structure which Mr Kontsevoy was giving Mr Zeligmans. His affidavit simply confirmed Mr Kontsevoy's evidence. He therefore essentially adopted and repeated the evidence of Mr Kontsevoy, which I have already held was untruthful. It is clear that he was making common cause with Mr Kontsevoy and that they were engaged in a common design to deceive COS and Mr Zeligmans, albeit that Mr Kontsevoy was the principal active participant in the deceit.

[45] As Mr Stanley pointed out, there is a surprising dearth of authority on liability for joint participation in a tort, as opposed to joint participation in a criminal enterprise. Nonetheless, there are two decisions of the Court of Appeal concerned with infringements of patent or copyright, but which establish principles applicable to joint participation in torts generally. The first is the judgment of Mustill LJ in *Unilever plc v Gillette (UK) Ltd* [1989] RPC 583 at 602:

> "In a case such as the present, where the infringement alleged includes (for example) the sale of the patented product made up into marketable form, and the importation of the product, a literal interpretation of the section might lead to the conclusion that only the person who has actually sold the product and imported it can be an infringer - apart, perhaps, from the exceptional case, contemplated by Sir George Jessel MR in *Townsend v Haworth* (1875) 48 LJ Ch 770 at 772 where the direct infringer is the 'mere cat's-paw' of someone else. This is not however the way the law has developed. It has gone further than this, in two stages.

> The first stage concerned a general question in the law of tort, arising where two persons were acknowledged or found to have committed tortious acts which led to the same damage. The question was whether these persons had committed individual wrongs for which they were individually liable, or whether they had joined together in committing the same wrong. This was formerly of great importance, for there could only be one action in relation to one tort, so that judgment against one tortfeasor A would release any claim against the other tortfeasor B; and so also with any accord and satisfaction of the liability of A. The severity of this rule was mitigated by statute in 1935, but by then a jurisprudence had grown up concerning the distinction between joint and several tortfeasors. The most celebrated example of this is to found in the judgment of Scrutton LJ in *The Koursk* [1924] P 140 at 156 where three situations are identified where A might be jointly liable with B: ie, where A was master and B servant; where A was principal and B agent; and where the two were concerned in a joint act done in pursuance of a common purpose. This list may not be exhaustive, but it forms the basis for all subsequent statements of the law.
>
> Thus far, the cases were concerned with the question whether A and B, acknowledged or found to be joint tortfeasors, were responsible individually or jointly for what had been done: *The Koursk* being a particularly acute case of such a dispute. In *Brooke v Bool* [1928] 2 KB 578 however a bold step was taken, by applying the gist of *The Koursk* to determine, not whether the two acknowledged tortfeasors A and B were responsible for the same tort, but whether in a case where B was undeniably liable, A could be held liable as well. In that case A and B had set out together to investigate the source of a gas leak which was B's direct concern alone. A had come with him to help. Because B was too old to carry out a particular task, A carried it out instead. The means of investigation were ill-chosen, and an explosion ensued. A was plainly liable. The Divisional Court held that B was liable too, as a joint tortfeasor engaged in a common venture with A.
>
> *Brook v Bool* has engendered curiously little in the way of subsequent reported authority, but no doubt has been cast in the intervening 60 years on the proposition that participation in a common venture may cause someone to become directly liable as a tortfeasor, together with the person who actually did the damage."

[46] Having analysed earlier cases on whether there was a tort of procuring breach of copyright which are not relevant for present purposes, Mustill LJ continued at 608:

> "I have set out these cases in some detail in deference to the care with which they were analysed during the argument on this appeal. In truth, however, I believe that they do little more than illustrate how in various factual situations the courts have applied principles which are no longer in doubt, save perhaps as regards the relationships between indirect infringements by procuring and by participation in a common design. There may still be a question whether these are distinct ways of infringing, or different aspects of a single way. I prefer the former view, although of course a procurement may lead to a common design, and hence qualify under both heads. We need not however explore this question . . . . I use the words 'common design' because they are readily to hand, but there are other expressions in the cases, such as 'concerted action' or 'agreed on common action' which will serve just as well. The words are not to be construed as if they formed part of a statute. They all convey the same idea. The idea does not, as it seems to me, call for any finding that the secondary party has explicitly mapped out a plan with the primary offender. Their tacit agreement will be sufficient. Nor, as it seems to me, is there any need for a common design to infringe. It is enough that the parties combine to secure the doing of acts which in the event prove to be infringements."

[47] That judgment was applied and approved by Chadwick LJ (with whom Simon Brown and Tuckey LJJ agreed) in *MCA Records Inc v Charly Records Ltd* [2001] EWCA Civ 1441, [2003] 1 BCLC 93, [2002] FSR 401 at 31 - 36. The principle which emerges from these cases is not dissimilar to that applicable in the criminal law: parties will be liable in tort as joint tortfeasors if they are "in it together" pursuant to a common design.

[48] In the present case, Mr Stanley relies upon three matters as demonstrating that Mr Kontsevoy and Mr Buratov were acting together, were "in it together", so as to make Mr Buratov liable in deceit even though the misrepresentations were made by Mr Kontsevoy: (i) that wherever you find

Mr Kontsevoy in the various entities you find Mr Buratov, they are directors or shareholders or ultimate beneficial owners or controllers together; (ii) the deceit is being committed for the benefit not just of Mr Kontsevoy, but of both of them and (iii) the adoption by Mr Buratov of Mr Kontsevoy's evidence leads to the inference that Mr Kontsevoy is not acting alone but with at least the tacit agreement of Mr Buratov. I agree with Mr Stanley that the material before the court, and those three matters in particular, does demonstrate that Mr Kontsevoy and Mr Buratov were acting together pursuant to a common design and that that is sufficient to make Mr Buratov liable in deceit as well.

CONSPIRACY

[49] As Mr Stanley readily admits, the purpose of the additional claim in conspiracy is essentially to widen the net of Defendants who are liable to COS and thus to improve the prospect of enforcement of this judgment against the assets of one or more of the Defendants. This is said to be a conspiracy to cause loss to COS by unlawful means. That is a tort which is committed where two or more persons agree to perform unlawful acts, which need not be torts, with the intention, whether or not it is the sole or dominant intention, of causing loss to the Claimant: see *Revenue and Customs Commissioners v Total Network SL* [2008] UKHL 19, [2008] 1 AC 1174 at 44, [2008] 2 All ER 413 per Lord Hope of Craighead; 56 per Lord Scott of Foscote; 91 per Lord Walker, 116 per Lord Mance and 226 per Lord Neuberger.

[50] In the present case, Mr Stanley submits that all the Defendants (with the exception of the tenth Defendant who has not been served and the twelfth Defendant Larson against whom no allegation of conspiracy is made) are liable for this unlawful means conspiracy. I accept that submission in relation to all the Defendants and that, on analysis, all the Defendants, including Skyagra, (to whose position I will return in more detail below) were involved in the conspiracy at all material times. In terms of the unlawful means, the deceit itself is sufficient unlawful means and it is not therefore strictly necessary to decide whether entering a transaction defrauding creditors within the meaning of s 423 of the Insolvency Act 1986 is sufficient unlawful means as well, although I see no reason in principle why it should not be.

[51] Furthermore, it is well established that, as in criminal conspiracy, it is not necessary to show that there is anything akin to an express agreement to constitute the tort of conspiracy. That point was made by Nourse LJ in *Kuwait Oil Tanker Co SAK v Al Bader and others* [2000] 2 All ER (Comm) 271 at 111 giving the judgment of the Court of Appeal:

> "A further feature of the tort of conspiracy, which is also found in criminal conspiracies, is that, as the judge pointed out at page 124, it is not necessary to show that there is anything in the nature of an express agreement, whether formal or informal. It is sufficient if two or more persons combine with a common intention, or, in other words, that they deliberately combine, albeit tacitly, to achieve a common end."

[52] That case also demonstrates, from a consideration of one of the conspirators, Captain Stafford, that a party can be party to a combination or conspiracy to use unlawful means even if he does not himself commit some or all of the relevant unlawful acts: see 133 of the judgment of the Court of Appeal quoting with approval the judgment of Moore-Bick J at first instance.

[53] It is also well established that a director can conspire with his company: see *Clerk & Lindsell on Torts 20th edition* 24-93 and *Barclay Pharmaceuticals Ltd v Waypharm AP* [2012] EWHC 306 (Comm) at 220 - 229. As Mr Stanley correctly submitted, applying the analysis of Chadwick LJ in *MCA Records* at 49 - 52 there is no impediment to the liability of a director unless he is acting strictly and solely via the constitutional organs of the company concerned, which Mr Kontsevoy and Mr Buratov were not doing here, so their liability for conspiracy is not affected by the fact that they were directors of the various companies.

[54] So far as Skyagra is concerned, it was incorporated in June 2009 but was not ostensibly used actively by Mr Kontsevoy and Mr Buratov until it was used as a conduit for the disposal of the refined oil products in the period May to July 2011, which is right at the end of the conspiracy period. Initially, I had some concern that it was difficult to say that it should be party for all the losses suffered by COS throughout the conspiracy period. However, there is material before the court which demonstrates that, although the shareholders in Skyagra are two Belize companies, it is controlled by Mr Kontsevoy and Mr Buratov and is their creature so that the court can and should draw the inference that Skyagra was involved in the conspiracy throughout.

[55] Of particular significance in this context is the breach of the freezing orders which occurred in about May 2012 when Skyagra divested itself of one of its assets Projector Kazakhstan LLP, another trading vehicle of Mr Kontsevoy and Mr Buratov. Watson Farley & Williams sought an explanation in correspondence with Zaiwalla & Co acting then for the Defendants as to how this breach had come about, pointing out that Mr Kontsevoy and Mr Buratov were the ultimate beneficial owners or at least controlling minds of Skyagra. That elicited the reply from Zaiwalla & Co in their letter of 26 June 2012 on instructions, that Mr Kontsevoy and Mr Buratov had no control or interest in Skyagra. That was simply untrue.

[56] The charter of Projector Kazakhstan LLP dated 25 June 2011 was signed by Mr Kontsevoy on behalf of Skyagra and in the notarisation on it, the notary describes Mr Kontsevoy as director of Skyagra. Furthermore, in a letter to Watson, Farley & Williams dated 20 April 2012 from B2B Company Secretary Ltd which supplied secretarial and administrative services to Skyagra, it is stated:

> "Please further note that according to our records [Skyagra] is managed by Mr Alexander Kontsevoy . . . . We have contacted Mr

> Kontsevoy who has confirmed that he is aware about this matter and has already undertaken necessary steps on behalf of [Skyagra] as well."

Yet, two months later Zaiwalla were saying on instructions that Mr Kontsevoy and Mr Buratov had no control or interest in Skyagra. It is also striking that Mr Kontsevoy says nothing about Skyagra at all in his affidavit evidence.

[57] In the circumstances and given the absence of any explanation about Skyagra, which clearly is one of the corporate creatures of Mr Kontsevoy and Mr Buratov, I accept Mr Stanley's submission that the court can and should draw the inference that Skyagra was involved in the conspiracy at all material times from its incorporation in June 2009.

[58] The question then is what was it that the Defendants agreed to do and whether the intention of the conspiracy was to cause damage to COS. Mr Stanley submits that he does not have to show (and is not alleging) that, at some point in 2009, Mr Kontsevoy and Mr Buratov sat down and planned meticulously every step they were going to take. There was, as he puts it, an element of improvisation, as there often is in such cases, but he submits that, if one looks at the pattern, from 2009 onwards, steps are being consistently taken to put these companies in the position they have achieved, of putting their assets out of the reach of COS and that, in the absence of any reasonable explanation to the contrary, it is perfectly legitimate for the court to infer that all this did not happen by accident, but by design, pursuant to the conspiracy. I accept those submissions.

[59] The first of the transactions which COS seeks to impugn and says occurred pursuant to the conspiracy is the "transfer" or "continuation" of EG UK to EG Anguilla. In his affidavit, Mr Kontsevoy explained that the original decision to have the holding company incorporated in the United Kingdom was taken on the advice of Parex Bank, the advice being that providing that no trading took place in the United Kingdom and that company money did not pass through bank accounts here, there would be no liability to UK tax. He then said that Parex bank was dissolved in 2008. Mr Zeligmans said it was acquired by a state bank. Mr Kontsevoy said that he became concerned that the advice was incorrect, he thought during due diligence carried out by CITIC, a Chinese conglomerate which had some interest in buying an oilfield. A memorandum of understanding was signed with CITIC in June 2008, so presumably the concern of which he speaks must have manifested itself by then and yet it was not until September 2009 that the transfer to Anguilla took place. He fails to explain that delay at all and I agree with Mr Stanley that, if the real explanation for the transfer was a concern about the tax position with a UK holding company, something would have been done to move the holding company offshore in June 2008 and Mr Kontsevoy and Mr Buratov would not have waited until September 2009.

[60] The implausibility of the "tax" explanation for the "transfer" is further demonstrated by the explanation Mr Kontsevoy gave for deciding to choose Anguilla, itself said to be a decision based on advice from a representative from Parex Bank, which is odd, given that it was their advice to have a holding company in the United Kingdom. The explanation is said to be that, under Anguillan law, the company could be transferred in a way which would result in a continuation of the same legal entity. That explanation makes no sense whatsoever. If the concern really was that, if the holding company remained English, there would be a liability to UK tax, the obvious thing to do would be to incorporate a wholly new holding company in a tax haven, not to do something which purports to continue the same legal entity.

[61] As Mr Stanley submitted, the real significance of using Anguilla is that it is a trap for the unwary dealing with EG UK such as Mr Zeligmans and COS, who think they are dealing with the same contracting party, but unbeknownst to them, it has transformed itself into an Anguillan entity. The Defendants have produced not one piece of paper to evidence the alleged tax advice. Furthermore, there seems to have been no attempt to ascertain what tax liabilities had been incurred in the United Kingdom given the alleged concern. No accounts were filed and no tax return was made. This omission is hardly consistent with the actions of honest businessmen. Equally, if the real explanation for the transfer was a fiscal one, why did Mr Kontsevoy not explain all that to Mr Zeligmans? The answer is obvious, he knew what Mr Zeligmans' reaction would be, that he would be reluctant to provide financing for an offshore entity, in much the same way as, a little later in the story, Allianz was not prepared to refinance the group with EG Anguilla in the structure and required its replacement by an "onshore" entity, in the event, Larson, another English registered company.

[62] In my judgment the real reason for the "transfer" to Anguilla was nothing to do with fiscal concerns, legitimate or otherwise, but was an attempt to disguise from COS and Mr Zeligmans that the holding company was being moved offshore, as a first step to divesting it of its assets, which was the next stage of the corporate changes, in June 2010. The overall purpose of these corporate changes was to put those assets beyond the reach of the creditors of the EG group, specifically COS. Before leaving the transfer to Anguilla, I should note that, in a number of places in his affidavit evidence, Mr Kontsevoy seeks to suggest that COS' case, that the steps taken in 2009 were pursuant to some common design to put the assets of the group beyond the reach of COS, cannot be right because the tax investigation in Russia and Kazakhstan did not start until later in 2009, so that the parties had yet to fall out with one another. As Mr Stanley rightly submitted, that is a complete non-sequitur. What went on was not motivated by a breakdown in the relationship but was opportunistic.

[63] In June 2010, again unbeknownst to COS and Mr Zeligmans, 100% of the shares in EG Production, owner of the refinery, were transferred for no consideration to Akkert a company of which Mr Kontsevoy and Mr Buratov were the directors and shareholders. The explanation

provided by Mr Kontsevoy for this transfer in his affidavit evidence is that they wanted to obtain new investment in the refinery but not the oilfield, that it is harder to arrange outside investment in an oilfield because of restrictions under Kazakh law as to who can own an oilfield and that the transfer to Akkert was simply to separate the ownership of the oilfield and the refinery, to simplify investment in the latter.

[64] As Mr Stanley rightly pointed out, this is no explanation at all, since the oilfield and the refinery were already owned by separate companies, as a consequence of the previous change in the structure in 2009, of which COS does not complain, whereby EG Production became a direct subsidiary of EG UK, whereas Ostyurk Munai which owned the oilfield remained a subsidiary of EG Group. Furthermore, when Orion did invest in the refinery, it did so not by investing in Akkert, the separate company allegedly set up to simplify such investment, but by investing directly in EG Production. In my judgment, the real reason for the transfer to Akkert was to remove the refinery from the group and further alienate EG UK (with whom all COS' contractual arrangements were) from this valuable asset formerly owned by the group.

[65] The final change in the corporate structure was one made at some stage between February 2011 and February 2012 and thus after the loss which COS suffered, but it sheds some light on the plausibility or otherwise of Mr Kontsevoy's explanation for the changes in the corporate structure. This is the transfer of EG Group which owned Ostyurk Munai, the owner of the oilfield, to Larson, another English registered company of which Mr Kontsevoy and Mr Buratov were the directors and shareholders. Mr Kontsevoy says that this was required by Allianz who were financing the oilfield, as a condition of restructuring loans. They in fact required EG Anguilla to be removed from the structure, because it was an "offshore" company and they wanted an "onshore" English, Russian or Kazakh company as the holding company instead. The obvious question, if that is correct, is why it was necessary to use Larson and why Mr Kontsevoy and Mr Buratov did not simply revert to EG UK for that purpose, but rather allowed it to be struck off. The real explanation in my judgment, is that they did not want to clothe EG UK with assets in circumstances where a dispute had already arisen with COS which would then be able to enforce any judgment against the assets.

[66] The fact that, at the behest of the financing institutions, the oilfield was ultimately returned to an English registered company albeit not EG UK, demonstrates in my judgment the falsity of the attempts by Mr Kontsevoy to characterise the earlier corporate changes involving EG Anguilla and Akkert as having a legitimate fiscal or investment purpose. The true purpose of those changes was to put the assets of the group, specifically the refinery, out of reach of COS. I consider that COS' claim in conspiracy is made out against the First to Ninth Defendants.

LOSS AND DAMAGE

[67] The losses suffered by COS as a consequence of the deceit and of the conspiracy are the same. The principal loss is the US$7,624,010.13 agreed to be due to COS under the Reconciliation Agreement dated 1 October 2010, but still unpaid. I accept Mr Zeligmans' evidence that that sum comprises advances made by COS after 18 September 2009 when the transfer to EG Anguilla was made and the representations made became untrue. COS made subsequent advance payments in November 2010 for refined product which EG has never supplied, consisting of US$4.5 million under Addendum 37 and US$249,549 under Addendum 38. However, in November 2010 COS did receive refined product under Addendum 33 with a value of US$1,454,315.31, for which COS gives credit against the outstanding sums under Addenda 37 and 38 leaving a balance due of US$3,295,233.69.

[68] In addition to those losses suffered in respect of advance payments, COS has suffered a loss of US$682,944 paid out to EG under the Tax Loan Agreement and a small sum of US$55,000 paid out under Addendum 39 on 13 December 2010 in respect of ancillary costs of the refinery. The total loss suffered by COS is thus US$11,657,187.82 and COS is entitled to judgment for damages in that amount. COS is also entitled to interest on that sum from 31 January 2011 at 1% over LIBOR.

RESCISSION OF THE TAX LOAN AGREEMENT

[69] As I have already stated in accepting Mr Zeligmans' evidence as to the misrepresentations made, that the Tax Loan Agreement was induced by misrepresentation, quite apart from any other misrepresentation, by that set out in the recital, that an affiliate of EG UK owned the refinery. In those circumstances, COS is entitled to rescind the Tax Loan Agreement. Furthermore, despite the "transfer" to EG Anguilla (which was in any event ineffective as a matter of English law for the reasons set out in the next section of the judgment), on its objective construction that Agreement was with EG UK so that it is against EG UK that COS is entitled to rescind the Tax Loan Agreement and recover the US$682,944 paid under it.

INEFFECTIVE TRANSFER

[70] Albeit that as I have recorded earlier, the relevant Anguillan statute is extraordinary, at least from an English lawyer's perspective, Mr Stanley accepts that, under Anguillan law, the effect of what was done on 18 September 2009 was to transfer the assets and liabilities of EG UK into EG Anguilla. However as a matter of English conflicts of laws rules, the validity of this purported amalgamation or continuation of the one company in the other is governed by the law of the place of incorporation. The relevant part of r 174 in *Dicey, Morris and Collins on the Conflict of Laws 15th edition* at 30-011 provides as follows:

> "Whether a corporation has been amalgamated with another corporation must also be determined by the law of its place of incorporation. If that law provides for a *successio in universum jus* then the amalgamated company will be recognised in England

> as succeeding to the assets and liabilities of its predecessors. The law of the place of incorporation must, however, provide for a true universal succession and, further, it is possible that the successor corporation may be so radically different from its predecessor that it cannot be properly described as the same legal entity."

[71] Footnote 50 to this passage provides as follows:

> "If companies incorporated in different countries are amalgamated it would seem that the law of the place of incorporation of each company must permit or recognise the amalgamation with the other: *Global Container Lines Ltd v Bonyad Shipping Co* [1999] 1 Lloyd's Rep 287 although in this case the capacity of the predecessor corporation to continue to proceed with litigation after the amalgamation was recognised since it was found to exist under the law of the place of incorporation of that corporation."

[72] It seems to me that this view must be right as a matter of first principle, since the critical question here must be whether the transfer is valid under the law of incorporation of the first company, EG UK, in other words English law, otherwise Anguillan law could trump and render effective a transfer which English law would not recognise. English law knows nothing of this Anguillan concept of "continuation" and, so far as English law is concerned, EG UK the English registered company continued in existence unless and until dissolved and has returned to existence following its restoration to the register under s 1029 of the Companies Act 2006. Clearly, as a matter of English law, the party with whom COS was contracted remained EG UK throughout and what occurred was a purported transfer of assets and liabilities from the English company to another entity for no consideration, which is not recognised by English law. I agree with Mr Stanley that the transfer was simply a nullity.

[73] At an earlier stage of the proceedings, when the Defendants were legally represented, they were seeking to argue that the flaw in this analysis was that English law did not apply, but that the validity of the transfer of EG UK's shareholding was governed by the law with which the right transferred had its most significant connection, which is Kazakh law. Quite apart from the fact that the Defendants have never adduced any evidence to show that Kazakh law is different from English law, this approach is simply wrong as a matter of conflicts of laws rules. The correct approach is that cited from *Dicey, Morris & Collins* above.

[74] I also agree with Mr Stanley that, as a matter of first principle, if the transfer to EG Anguilla was a nullity, made for no consideration, then there is a presumed resulting trust back in favour of EG UK. For the present, COS limits itself to seeking a declaration in these terms: that (i) the purported substitution or succession of EG Anguilla for EG UK under the Framework Agreement is void and of no effect; (ii) the purported transfer to EG Anguilla of EG UK's property and/or the succession of EG Anguilla to that property is void and of no effect and (iii) that property so transferred and its fruits and proceeds was held on trust by EG Anguilla for EG UK. I will grant a declaration in those terms.

RELIEF UNDER S 423 OF THE INSOLVENCY ACT 1986

[75] Strictly speaking the claim for relief under s 423 only arises if the court determines that the transfer of assets to EG Anguilla did take effect, whereas I have held that transfer was a nullity. Nonetheless, given the importance to COS of as fully reasoned a judgment as possible to assist enforcement, I propose to consider the claim for relief under the section and to grant such relief as appropriate.

[76] The section which is headed "Transactions defrauding creditors" provides as follows:

> "(1) This section relates to transactions entered into at an undervalue; and a person enters into such a transaction with another person if -
>
> (a) he makes a gift to the other person or he otherwise enters into a transaction with the other on terms that provide for him to receive no consideration;
>
> . . .
>
> (c) he enters into a transaction with the other for a consideration the value of which, in money or money's worth, is significantly less than the value, in money or money's worth, of the consideration provided by himself.
>
> (2) Where a person has entered into such a transaction, the court may, if satisfied under the next subsection, make such order as it thinks fit for -
>
> (a) restoring the position to what it would have been if the transaction had not been entered into, and
>
> (b) protecting the interests of persons who are victims of the transaction.
>
> (3) In the case of a person entering into such a transaction, an order shall only be made if the court is satisfied that it was entered into by him for the purpose -
>
> (a) of putting assets beyond the reach of a person who is making, or may at some time make, a claim against him, or
>
> (b) of otherwise prejudicing the interests of such a person in relation to the claim which he is making or may make.
>
> (4) In this section 'the court' means the High Court . . .
>
> (5) In relation to a transaction at an undervalue, references here and below to a victim of the transaction are to a person who is, or is capable of being, prejudiced by it; and in the following two sections the person entering into the transaction is referred to as 'the debtor'."

[77] The provision is a quite general one, not linked only to transactions which take place in this

jurisdiction. It is well-established that s 423 can have extra-territorial effect: see most recently on this, my own judgment in *Fortress Value Recovery Fund 1 LLC v Blue Skye Special Opportunities Fund LP* [2013] EWHC 14 (Comm), [2013] 1 All ER (Comm) 973 at 113-114 citing the principle laid down by Sir Donald Nicholls V-C in *Re Paramount Airways (No 2)* [1993] Ch 223 at 239-240, [1992] 3 All ER 1, [1992] BCLC 710. As I said at 114 the question whether there is sufficient connection with England to justify relief under s 423 is a matter which depends upon all the circumstances of the case. This is not a threshold question of jurisdiction, but a question of discretion. In the present case, there can be no doubt that there is a sufficient connection with England to justify the exercise of the discretion, since the starting point for the transactions said to be at an undervalue which are sought to be impugned is the transfer of assets out of EG UK an English registered company and the other impugned transactions all flow from that.

[78] The three transfers which COS seeks to impugn are (i) the transfer of the assets and liabilities of EG UK to EG Anguilla in September 2009; (ii) the transfer of the interest in EG Production to Akkert in June 2010 and (iii) the transfer of the interest in EG Group to Larson at some point after 14 February 2011 when Larson was incorporated. In support of his submission that the first of these, the "continuation" in Anguilla was a "transaction" within the meaning of s 423, Mr Stanley referred me *Feakins v DEFRA* [2005] EWCA Civ 1513, [2007] BCC 54, [2006] BPIR 895. That case is extremely complex, but for present purposes, only a brief summary of the relevant transaction is necessary. Mr Feakins' farm was mortgaged to the bank. He persuaded the bank to sell the farm to his girlfriend at a price which took account of the subsisting agricultural tenancy. That tenancy was then promptly terminated. The judge at first instance, Hart J, held that the tenancy had been maintained by Mr Feakins purely as a device to depress the value of the farm and induce the bank to sell it to his girlfriend at an undervalue. He held that was a relevant transaction for the purposes of s 423. His decision was upheld on appeal.

[79] At 7 Jonathan Parker LJ refers to the definition of "transaction" in s 436 of the Act: "[it] includes a gift, agreement or arrangement". Later in his judgment at 76 he gives a wide meaning to the word "arrangement" in these terms:

> "However that may be, the question remains whether the 'arrangement' which the judge found is a 'transaction' for the purposes of section 423. I agree with the judge that it clearly is. As the judge pointed out, 'transaction' includes an 'arrangement' (see section 436); and 'arrangement' is, on its natural meaning and in the context of section 423, apt to include an agreement or understanding between parties, whether formal or informal, oral or in writing. In my judgment the wide definition of 'transaction' in the context of section 423 is entirely consistent with the statutory objective of remedying the avoidance of debts . . . ."

[80] Even without the assistance of that judgment, it seems to me unarguable that the transfer to EG Anguilla is not an arrangement which falls fairly and squarely within the definition of "transaction". Once one has reached that conclusion, given that there was no consideration for the transfer, the next question is whether the transaction was made by the person for the purpose of putting assets beyond the reach of a person who is making, or may at some time make a claim against him or

otherwise to prejudice the interests of such a person. The better view is that it is only necessary to show that was a substantial purpose of the transaction, not the dominant purpose: see most recently the decision of Sales J in *4Eng Ltd v Harper* [2009] EWHC 2633 (Ch), [2010] Bus LR D58, [2010] 1 BCLC 176 at 5 - 8 citing the decision of the Court of Appeal in *IRC v Hashmi* [2002] EWCA Civ 981, [2002] 2 BCLC 489, [2002] BCC 943.

[81] In the light of my conclusion at 62 above in the context of the conspiracy case that the "continuation" in Anguilla was the first step of a series of changes to the corporate structure, the overall purpose of which was to put those assets beyond the reach of the creditors of the EG group, specifically COS, I am quite satisfied that the transaction had as a substantial purpose (and probably, in actual fact, its dominant purpose), putting the assets outside the reach of the creditors or otherwise prejudicing the creditors, including COS. COS was therefore a fortiori a "victim" of that transaction within the meaning of s 423(5) since, as David Richards J stated in *Clydesdale Financial Services Ltd v Robert Smailes* [2009] EWHC 3190 (Ch), [2010] BPIR 77 at 73:

> "Section 423(5) defines a victim of a transaction as a person 'who is, or is capable of being, prejudiced by it'. In choosing the term 'victim' and this definition, it is I think clear that it was intended to be a wider category than simply creditors. The words used are ordinary English words with no technical meaning and the correct approach in any given case is to ask whether, on the facts of the case, the Claimant is a person who is, or is capable of being, prejudiced by the transaction. The fact therefore that Focus is not a creditor does not decide the case against it."

[82] In the circumstances, COS is plainly entitled to relief under s 423 in respect of the first impugned transaction, the "transfer" to Anguilla. Once that conclusion is reached, the other two transactions which are sought to be impugned which were equally for no consideration, follow on from that first transaction as part of the same change of corporate structure with the dominant or at least a substantial purpose of putting the assets of the group beyond the reach of the creditors or otherwise prejudicing the creditors, including COS and must also be unravelled under the section. Once the first transaction goes, the others follow like a house of cards.

[83] In the circumstances, COS is entitled to the relief it seeks under s 423 and 425 of the Insolvency Act 1986 in the following terms. First, I will grant a declaration in the same terms as in 74 above. COS is also entitled to an order:

> (i) requiring EG Anguilla to take steps to revest in EG UK all the property acquired by it pursuant to the purported transfer; and/or
>
> (ii) requiring the shares and/or interest in EG Production held by Akkert SA to be revested in EG UK (alternatively in EG Group) absolutely or for the benefit of COS; and/or

(iii) requiring the shares and/or interest in EG Group held by Larson to be vested in EG UK absolutely or for the benefit of COS; and/or

(iv) requiring Mr Kontsevoy and/or Mr Buratov and/or EG Anguilla to revest in EG UK any property representing the proceeds of sale of the property transferred and/or to make payment to EG UK in respect of any benefits received from EG UK in such sum as directed hereafter by the court.

CONCLUSION

[84] In all the circumstances, COS is entitled to judgment as follows:

(1) Against the third, fourth and Sixth Defendants, damages for deceit in the sum of US$11,657,187.82 and interest on that sum from 31 January 2011 at 1% over LIBOR.

(2) Against the First to Eighth Defendants, damages for conspiracy in the sum of US$11,657,187.82 and interest on that sum from 31 January 2011 at 1% over LIBOR.

(3) Against the Ninth Defendant, US$682,944 consequent upon rescission of the Tax Loan Agreement.

(4) Against the First to Ninth and Eleventh Defendants, a declaration in the terms set out at 74 above.

(5) Against the First to Ninth and Eleventh Defendants, orders under s 423 of the Insolvency Act 1986 in the terms set out at 83 above.

[85] COS is also entitled to an order that the First to Ninth and Eleventh Defendants do pay COS' costs of the action, to be assessed if not agreed. Subject to any submission I may receive from the Defendants by 9 July 2013, I shall order that those Defendants make an interim payment to COS on account of those costs in the sum of £225,000 within 21 days of the date of this judgment.

[86] As a consequence of this judgment in favour of COS, it is also appropriate that I make an order extending and continuing the freezing injunction ordered by Cooke J on 16 March 2012 and extended and continued by Hamblen J on 1 May 2012, until further order of the court in aid of execution.

Judgment accordingly.

TAB 6

2008 BCCA 505
British Columbia Court of Appeal

Edgington v. Mulek Estate

2008 CarswellBC 2664, 2008 BCCA 505, [2008] B.C.J. No. 2397, [2009] 3 W.W.R. 440, [2009] B.C.W.L.D. 310, [2009] B.C.W.L.D. 337, [2009] B.C.W.L.D. 338, [2009] B.C.W.L.D. 339, [2009] B.C.W.L.D. 340, [2009] B.C.W.L.D. 452, [2009] B.C.W.L.D. 455, 173 A.C.W.S. (3d) 1085, 266 B.C.A.C. 56, 449 W.A.C. 56, 54 B.L.R. (4th) 165, 86 B.C.L.R. (4th) 78

Ronald Edgington, suing on behalf of himself, and on behalf of all those persons listed in Schedule "A" [to the Amended Writ of Summons] (Appellant / Plaintiff) And Julie Barbara Trache and Bruce Sembaliuk, Executors of the Estate of George Mulek, Brian Hitchon, Violet Hitchon and Westpark Investments Ltd. (Respondents / Defendants)

Low, Lowry, Chiasson JJ.A.

Heard: November 6, 2008
Judgment: December 9, 2008
Docket: Vancouver CA035634

Proceedings: affirming *Edgington v. Mulek Estate* (2007), 2007 BCSC 1712, 2007 CarswellBC 3234 (B.C. S.C.)

Counsel: A.D.C. Ross for Appellant
L.M. Candido for Respondents

Subject: Property; Corporate and Commercial; Civil Practice and Procedure

Table of Authorities

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Freedman v. Mason (1958), *(*sub nom. *Mason v. Freedman)* [1958] S.C.R. 483, *(*sub nom. *Mason v. Freedman)* 14 D.L.R. (2d) 529, 1958 CarswellOnt 73 (S.C.C.) — referred to

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Pierce v. Empey (1939), 1939 CarswellOnt 97, [1939] S.C.R. 247, [1939] 4 D.L.R. 672 (S.C.C.) — considered

Sail Labrador Ltd. v. Navimar Corp. (1998), 235 N.R. 201, *(*sub nom. *Sail Labrador Ltd. v. "Challenge One" (The))* 169 D.L.R. (4th) 1, *(*sub nom. *Sail Labrador Ltd. v. Challenge One (The))* [1999] 1 S.C.R. 265, 44 B.L.R. (2d) 1, 1998 CarswellNat 2690, 1998 CarswellNat 2691 (S.C.C.) — considered

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Zhilka v. Turney (1959), [1959] S.C.R. 578, 18 D.L.R. (2d) 447, 1959 CarswellOnt 81 (S.C.C.) — referred to

APPEAL by representative plaintiff from judgment reported at *Edgington v. Mulek Estate* (2007), 2007 BCSC 1712, 2007 CarswellBC 3234 (B.C. S.C.), dismissing application for declaration that owners of company were required to convey freehold interest in residential building units pursuant to options.

***Lowry J.A.*:**

1 The question raised on this appeal is whether the purchasers of leasehold interests in a residential building are entitled to exercise options they acquired to purchase corresponding freehold interests. On an application for declaratory relief on a summary trial of what is a representative action, Mr. Justice Cohen concluded a condition upon which the options were granted had not been fulfilled such that they could not be exercised: 2007 BCSC 1712 (B.C. S.C.). The purchasers appeal, contending the nature of the transactions under which the leasehold interests and the options were acquired was such that, upon purporting to exercise the options as they did, they were entitled to the conveyance of the freehold interests despite the condition not having been fulfilled.

The Transaction

2 In 1969, Westpark Investments Ltd. purchased property on which there were three apartment buildings, one of which was the "The Blue Haven Apartments", the subject of the appeal. Westpark is owned by George Mulek (now his estate), Brian Hitchon, and Violet Hitchon, who I refer to collectively as the "owners". In 1971, Westpark transferred the property to the owners and, in 1974, the owners granted a 99-year lease to Westpark whereby 50 of the 51 suites in the building were leased to Westpark.

3 Westpark began selling its leasehold interest in each of the suites in 1974 and, by the end of 1976, had sold, by way of assignment, its interest in 49 of the units — all but one. It never made any attempt to sell the last unit and continues to retain its leasehold interest in that unit.

4 While there were apparently 49 separate transactions completed on terms that were not entirely consistent, for the purposes of the action it is necessary to consider only the sale to one of the purchasers, Ronald Edgington, who is the representative plaintiff. Exception to this being a representative action was taken before the judge, but it was unsuccessful and there is no appeal in respect of that part of his judgment.

5 The transaction was structured to afford the purchaser of the leasehold interest in a unit the option of purchasing an undivided interest in the freehold reversion held by the owners to facilitate the purchasers ultimately assuming the management of the building. The agreement between Westpark and the purchaser is headed "Offer to Purchase Leasehold

Estate and Option to Purchase Undivided Interest in Freehold Reversion" and, as set out in the agreement regarding the representative purchase, provides:

> (7) The Vendor agrees to cause the Lessor [the owners] to grant to each Purchaser of Suites an option to purchase an undivided interest in the freehold reversion of the Lessor at the price and on the terms set forth in the Option in the form attached hereto and on completion of the sale of the freehold reversion the Management Board of Lessees shall be entitled to exercise and perform all of the powers and duties of the Lessor, as set forth in the Schedule hereto.

6 The form of Option to have been attached thereto is headed "Option to Purchase". It is stated to be an "Agreement" between the owners, as vendor, and the purchaser, but it is executed, and intended to have been executed, only by the owners. It is a grant of an option to purchase. In material respects it provides:

> B. The Purchaser has purchased from the Lessee [Westpark] named in the Lease the unexpired leasehold estate of the Lessee in Suite Number *** (the "Suite") and the Vendor has agreed to grant to the Purchaser an Option to Purchase an undivided interest in the freehold reversion of the Vendor in the Land and Premises.
>
> NOW THIS AGREEMENT WITNESSETH THAT:
>
> 1. The Vendor hereby grants unto the Purchaser an Option to Purchase an undivided interest in the freehold reversion of the Vendor in the Land and Premises for the purchase price of $1,000.00. The said undivided interest shall be in percentage terms *** per cent (being the same percentage as is set forth with respect to the Suite in Schedule "A" to the Lease).
>
> 2. This Option shall not be exercisable by the Purchaser unless 100% per cent of the leases of Suites in the Building demised and leased by the Lease have been assigned by the Lessee named in the Lease and may be exercised by the Purchaser (save as aforesaid) (i) at any time after the 1st day of January, 2000 and prior to the 31st day of October, 2000 or ....

7 On the terms on which it was granted, the option could be exercised during an eight-month period in 2000, but only if Westpark had by then assigned the leasehold interest in all 50 of the units it held.

8 The representative agreement included a schedule consisting of two parts: the first pertained to the transfer of management of the building and the second pertained to the owners' grant of a parking space. The agreement was executed by the purchasers and

Westpark. It and the schedule were also signed by one of the owners for himself and the other two owners.

9 During the period open in 2000 for the exercise of the options, the purchasers of the 49 units tendered $1,000 each to the owners to exercise their respective options. After they had done so, they were informed the owners would not convey the freehold interest described. Westpark had not assigned 100% of the leasehold interest it held.

10 Against this factual background, the representative purchaser seeks a declaration the purchasers were entitled to exercise their options, the options were properly exercised, and the owners are required to convey the freehold interest described. The relief sought is premised on the following allegation contained in the amended statement of claim:

> 27. The [Purchasers] say that the Defendant Owners either expressly or by implication at law were required to use their best efforts to cause the Defendant Westpark to assign 100% of the Leased Suites and that the Defendant Owners cannot rely on the failure / refusal of the Defendant Westpark to assign one of the Leased Suites as legal justification for avoiding their obligations under the Options to Purchase.

The Trial Judgment

11 The judge took the view the purchasers' entitlement to exercise the option was governed by the line of authority emanating from the Supreme Court's decision in *Pierce v. Empey*, [1939] S.C.R. 247, [1939] 4 D.L.R. 672 (S.C.C.). At para. 35 of his reasons, he quoted Chief Justice Duff, at 252, as follows:

> It is well settled that a plaintiff invoking the aid of the court for the enforcement of an option for the sale of land must show that the terms of the option as to time and otherwise have been strictly observed. The owner incurs no obligation to sell unless the conditions precedent are fulfilled or, as the result of his conduct, the holder of the option is on some equitable ground relieved from the strict fulfilment of them (*Cushing v. Knight* [(1912) 46 Can. S.C.R. 555.]; *Hughes v. Metropolitan Rly. Co.* [(1877) 2 App. Cas. 439.]; *Bruner v. Moore* [[1904] 1 Ch. 305.]).
>
> [Emphasis of Cohen J.]

12 He also quoted from the concurring reasons for judgment of Binnie J. in *Sail Labrador Ltd. v. Navimar Corp.* (1998), [1999] 1 S.C.R. 265, 169 D.L.R. (4th) 1 (S.C.C.), and concluded, at para. 37 of his reasons:

> Applying this law, I find that the plaintiffs are not relieved from strict fulfillment of the condition precedent to their exercise of the Options. It is apparent to me that there is no

> certainty when the Options could be exercised, if at all. It is possible that the defendants would not be able to assign all the suites within the time prescribed. I find that the defendants had no obligation to assign all of the suites and the court cannot imply such a term which would contradict the express terms of the Options.

13 The judge then considered whether the owners had conducted themselves in a way that on some equitable ground precluded their reliance on the fact the condition on which the options could be exercised was not fulfilled:

> [38] Moreover, the plaintiffs have failed, in my opinion, to establish conduct on the part of the defendants such as to relieve the plaintiffs on some equitable ground from compliance with the strict construction of the Options.
>
> . . . . .
>
> [40] ... there is no evidence from either side going to the issue of the conduct of the defendants. The thrust of the plaintiffs' argument is that the defendants had no difficulty assigning 49 of the 50 suites and no evidence that any difficulty assigning all of the suites should have been in the plaintiffs' minds when they entered into the Options. However, I find that the plaintiffs have failed to prove that the defendants have engaged directly or indirectly in conduct designed to stand in the way of the plaintiffs exercising their Options.

14 The application for the declaration sought by way of a summary trial was then dismissed.

The Appellant's Case

15 The purchasers' contention is the sale transactions were bilateral agreements between the purchaser in each instance, on one hand, and the respondents — Westpark and the owners — on the other. The option was only a component of each agreement. The judge is said to have erred in concluding the terms of the options required strict compliance with a condition precedent as would normally only be the case where an option is a unilateral contract, citing *Sail Labrador* at paras. 41-42. This, the purchasers say, hampered the judge in undertaking a proper interpretation of the terms of the representative sale agreement.

16 The purchasers say the proper interpretation of the agreement as a whole is that as a matter of legal implication the respondents were required to use their best efforts to sell the leasehold interest in all of the units in order to be in a position to give effect to their obligation under the options. It is said the respondents could not then by their own default preclude the purchasers from exercising their options, citing a line of authority following *Freedman v. Mason*, [1958] S.C.R. 483, 14 D.L.R. (2d) 529 (S.C.C.). To the contrary, they were bound to do all they could to permit the purchasers to exercise their options which were agreements for the sale of an interest in land, citing *Dynamic Transport Ltd. v. O.K. Detailing Ltd.*, [1978]

2 S.C.R. 1072 (S.C.C.), and *Hutchingame v. Johnstone*, 2007 BCCA 74, 279 D.L.R. (4th) 177 (B.C. C.A.). The purchasers further say the condition to the exercise of the options was not a "true" condition precedent in any event because its fulfilment was entirely within the control of the respondents, citing *Zhilka v. Turney*, [1959] S.C.R. 578, 18 D.L.R. (2d) 447 (S.C.C.), and *Barnett v. Harrison* (1975), [1976] 2 S.C.R. 531, 57 D.L.R. (3d) 225 (S.C.C.).

17 All of this, the purchasers say, is consistent with what is said to be the expressed intention of the parties to the sale agreements found in the schedule that provides for the transfer of the management of the building. The purchasers made no election under that schedule but they attach particular significance to the wording of the preamble:

> It is the intention of the Lessor [owners] that there shall be a progressive transfer to the Lessees of Suites in the Building of all of the rights, powers, responsibilities and obligations of the Lessor, with the object that the Lessees collectively shall own the development subject only to their individual Leases of Suites and shall exclusively have the powers, rights and duties of the Lessor under the Lease. The progressive transference of these rights and obligations shall take place in the following manner:

Provision is then made for the election, after the leasehold interest in 75% of the units had been sold, of an Advisory Board comprised of from three to seven lessees, to which the owners would have certain stipulated obligations. On the completion of the purchase of the freehold interest, the Advisory Board would continue as a Management Board entitled to exercise and perform the powers and duties of the owners.

18 Thus, what the purchasers contend is that the leasehold interest in all of the units had to be sold by the time the options would have been exercisable in 2000. The purchasers accept nothing turns on the fact the leasehold interest in only one unit remained to be sold. Their position would be the same if the interest in only one-half or one-third of the units had been sold. Thus, they would say that, from the time the first sale was made in 1974, the leasehold interest in all 50 units had to be sold by 2000, regardless of what market or other considerations may have dictated.

Discussion

19 The purchasers do not distinguish between Westpark and the owners. The purchasers say the owners owned the fee simple interest in the land and they controlled Westpark. There was no arm's length relationship between them. The purchasers maintain that in such a relationship an obligation of one creates an obligation of the other to direct the obligation of the first to be carried out, particularly so here because each purchaser entered into an agreement with both. No authority is cited for this proposition; it is simply stated as undeniable. I understand the contention to be Westpark bore an implied obligation to sell its interest in all of the units by the time the options could have been exercised in 2000 and,

because they controlled Westpark, the owners had an obligation to cause that to happen. The basis of the owners' liability is then said to be the control they exercised over Westpark.

20 I consider the position taken by the purchasers largely ignores the longstanding principle that a corporation is in law an entity distinct and separate from its shareholders: *Salomon v. Salomon & Co.* (1896), [1897] A.C. 22 (U.K. H.L.). Parties to transactions employ the use of corporate vehicles for a reason, as they are entitled to do. Shareholders, despite being in a position of control, do not, as a rule, incur liability for the breach of their corporation's contractual obligations. It is not a matter of control; the shareholders of a closely held company like Westpark invariably have control of the company.

21 The separate legal personality of the corporation will not be lightly disregarded. As recognized in *Big Bend Hotel Ltd. v. Security Mutual Casualty Co.* (1980), 19 B.C.L.R. 102 at 108 (B.C. S.C.), respect for the corporate form is strict:

> On the whole, Canadian and English courts rigidly adhere to the concept set out in *Salomon*, supra, that a corporation is an independent legal entity not to be identified with its shareholders.

22 There are certain circumstances in which what the authorities state to be the "corporate veil" will be "pierced" or "lifted", or where the separate legal personality of the corporation will be disregarded. Such circumstances generally arise where the corporate form has been abused — that is, it has been used for fraudulent or illegitimate purposes (see *Big Bend Hotel*).

23 In *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2 (S.C.C.) at 10, (1987), 34 D.L.R. (4th) 208 (S.C.C.), Wilson J. recognized that in certain circumstances a court will pierce the veil where failing to do so would result in unfairness, which would appear to be the suggestion that underlies the purchasers' contention on this appeal:

> As a general rule a corporation is a legal entity distinct from its shareholders: *Salomon v. Salomon & Co.*, [1897] A.C. 22 (H.L.). The law on when a court may disregard this principle by "lifting the corporate veil" and regarding the company as a mere "agent" or "puppet" of its controlling shareholder or parent corporation follows no consistent principle. The best that can be said is that the "separate entities" principle is not enforced when it would yield a result "too flagrantly opposed to justice, convenience, or the interests of the Revenue": L.C.B. Gower, *Modern Company Law* (4th ed. 1979), at p. 112.

24 This Court has, however, been clear that lifting the corporate veil does not extend to circumstances where declining to do so would simply be unfair. As was said in *B.G. Preeco I (Pacific Coast) Ltd. v. Bon Street Holdings Ltd.* (1989), 60 D.L.R. (4th) 30 (B.C. C.A.) at 37, (1989), 37 B.C.L.R. (2d) 258 (B.C.C.A.), in commenting on a principle apparently found in American law:

I do not subscribe to the "Deep Rock doctrine" that permits the corporate veil to be lifted whenever to do otherwise is not fair: see *Pepper v. Litton*, 208 U.S. 295, 84 L.Ed. 281(1939). That doctrine and the doctrine laid down in *Salomon v. Salomon & Co., Ltd.*, [1897] A.C. 22 (H.L.), cannot co-exist. If it were possible to ignore the principles of corporate entity when a judge thought it unfair not to do so, *Salomon's* case would have afforded a good example for the application of that approach.

25 Further, after considering what was said in *Kosmopoulos*, the following was stated at 38:

The concluding words in the chapter in L.C.B. Gower, Modern Company Law, 4th ed. (London: Stevens & Sons, 1979), from which Wilson J. quoted are these (at p. 138):

> The most that can be said is that the courts' policy is to lift the veil if they think that justice demands it and they are not constrained by contrary binding authority. The results in individual cases may be commendable, but it smacks of palm-tree justice rather than the application of legal rules.

Professor Welling in *Corporate Law in Canada* (Toronto: Butterworths, 1984), put it more firmly. He referred to the American cases that apply the fair play rationale and said (at p. 129):

> Little need be said about this rationale, other than that it simply will not do. There are, so far as we know, no such broadly enforceable standards of "fair play and good conscience," at least in Canadian corporate law.

26 It follows that any argument to the effect this Court must disregard the separate legal personality of Westpark because a failure to do so will result in "unfairness" cannot stand. The strict recognition of Westpark as an entity distinct from its owners does not yield a result that comes anywhere near being flagrantly opposed to justice. A corporation and its shareholders are separate legal entities. While a narrowly held corporation or a corporation with a sole shareholder may appear to be the "alter ego" of its shareholders, the two entities remain legally distinct and must be treated as such.

27 In my view, the representative sale transaction was not the subject of a bilateral but a trilateral agreement between the purchasers, Westpark, and the owners. Each assumed separate obligations. No party guaranteed the obligations of any other.

28 The focus of the purchasers' submission is on what they say was the obligation borne by the owners: to cause Westpark to sell the whole of its interest. They do not plead Westpark assumed any implied independent obligation to sell its leasehold interest in all of the units, nor do they advance any basis now upon which it could be said such an obligation arose.

Indeed, if Westpark was obligated to sell 100% of its interest, it is difficult to see why the purchasers would not have sued Westpark for specific performance when they sought to exercise their options in 2000, given there would then seem to have been no question of the owners' obligation to convey their freehold interest pursuant to the terms of the options. In any event, the disposition of this appeal does not, in my view, require a determination of whether Westpark had any obligation to sell its interest in all of the units.

29 Even if Westpark bore an obligation to sell 100% of its interest by the time the options could have been exercised in 2000, there is no basis on which it can be said the owners bore an obligation to cause the company to do so. The fact they controlled the company would not render them liable on the options because the company failed to discharge its obligations. The owners might well have sold Westpark before 2000 and would not then have had the control which is said to be what burdened them with an obligation giving rise to a liability on the options. The owners and Westpark are separate entities; neither guaranteed the obligations of the other. As between the purchasers and the owners, the sale of all of Westpark's leasehold interest was a true condition precedent to the exercise of the options.

30 It is evident from the schedule to the sale agreements (quoted in para. 17 above) the owners' expressed intention was management of the building would ultimately be transferred to the purchasers with the object they would own the building, but the owners assumed no obligation to ensure that occurred. Significantly, the form which the owners' grant took provided the options would not be exercisable *unless* 100% of Westpark's leasehold interest was sold — not when 100% of the interest was sold.

31 There is no agreement between the purchasers and the owners that the leasehold interest held by Westpark in all of the units would be sold and there is no other basis upon which it could be said the owners incurred a liability because they did not cause Westpark to fulfil any obligation it may have had to sell all of its interest.

Disposition

32 I would dismiss the appeal.

Low J.A.:

I agree.

Chiasson J.A.:

I agree.

Appeal dismissed.

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TAB 7

1953 CarswellQue 9
Supreme Court of Canada

Finestone v. R.

1953 CarswellQue 9, [1953] 2 S.C.R. 107, 107 C.C.C. 93, 17 C.R. 211

Finestone v. The Queen

Taschereau, Rand, Kellock, Estey and Locke JJ.

Judgment: June 26, 1953

Counsel: *A. Tourigny, Q.C.* and *J. Drapeau*, for accused.
G.W. Hill, Q.C. and *J.G. Ahearn, Q.C.*, for the Crown.

Subject: Criminal; Evidence; Corporate and Commercial

Appeal by accused to the Supreme Court of Canada from the dismissal of his appeal to the Quebec Court of Queen's Bench (Appeal Side), 16 C.R. 41.

The judgment of the Court was delivered by *Rand J.*:

1 The charge against the accused was for exporting tin plate from Canada to an ultimate destination not authorized by the permit for the export, and the substantial question in the appeal concerns a rule of evidence.

2 The goods were shipped from Montreal to New York for furtherance by water to a country in South America on bills of lading showing the accused to be the shipper. For admittance to the United States at the border point, what is called a customs bill of lading is made out by the railway on behalf of the shipper from the information furnished on the bill of lading; and since, on such a transit through the United States, the goods must be in bond, the customs bill of lading, supplemented, undoubtedly, by an official seal placed on the car, evidenced the receipt of the goods from the customs authorities and committed them to the Collector of Customs at New York. The document was produced in court from the records of the collector by his assistant solicitor. Endorsed on it was a signed entry that the goods had been shipped from the United States destined to a European country.

3 That control of the goods by the customs department of the government, effected by the customs bill of lading, was required by the law of the United States. In order that the transit be cleared, it was necessary that the goods should be exported and the entry to that

effect on the records of the customs collector made in the course of public duty authenticates that fact. The document accepted in evidence contained such a record, and the question is whether it was admissible.

4 The argument made to us somewhat confused the admissibility of an entry made strictly in the course of business and one made pursuant to a public duty. The rule in relation to the latter does not seem ever to have been doubted. As early as 1785 in *Rex v. Aickles*, 1 Leach 390 at 392, 168 E.R. 297 at 298, it is said:

> The law reposes such a confidence in public officers, that it presumes they will discharge their several trusts with accuracy and fidelity; and therefore whatever acts they do in discharge of their public duty may be given in evidence, and shall be taken to be true, under such a degree of caution as the nature and circumstances of each case may appear to require.

5 In *Doe d. France v. Andrews* (1850), 15 Q.B. 756, 117 E.R. 644, Erle J. says:

> It depends upon the public duty of the person who keeps the register to make such entries in it, after satisfying himself of their truth.

6 In *Irish Society v. Bishop of Derry* (1846), 12 Cl. & F. 641, 8 E.R. 1561, Parke B. says:

> ... the Bishops in making the return, discharged a public duty, and faith is given that they would perform their duty correctly; the return is therefore admissible on the same principle on which other public documents are received.

7 In *Richardson v. Mellish* (1824), 2 Bing. 229 at 240, 130 E.R. 294, in admitting a list showing the names, capacities and descriptions of all persons embarked on a ship, Best C.J., overruling an objection, said:

> For the purpose of proving the damage, the plaintiff put in a list returned by a captain under the authority of 53 Geo. III, c. 155. It is contended that that paper was not evidence against third parties. I am decidedly of opinion that there is no foundation for that objection. This is a public paper made out by a public officer, under a sanction and responsibility which impel him to make that paper out accurately; and that being the case, it is admissible in evidence, on the principle on which the sailing instructions, the list of convoy, and the list of the crew of a ship are admissible.

8 The grounds for this exception to the hearsay rule are the inconvenience of the ordinary modes of proof and the trustworthiness of the entry arising from the duty, and that they apply much more forcefully in the complex governmental functions of today is beyond controversy. They have equal force in the case of an entry made pursuant to a duty under a foreign as

well as a domestic law; *People v. Reese*, 258 N.Y. 89 (Cardozo C.J.). In the infinite variety of commercial relations we have with the United States, it would be virtually impossible in such a case as that before us to establish proof if this long accepted rule could not be invoked; and since the Court retains a discretion in admitting the document, any special circumstances tending to qualify the dependability of the entry would be subjected to judicial scrutiny.

9 It was urged by Mr. Tourigny, however, that for two of the shipments there was no evidence that the ultimate destination had been other than that authorized by the permit. The original documents in the office of the customs collector in New York had been mislaid and were not available and photostat copies tendered were rejected; there is, therefore, no evidence of the destination of export from New York before the Court. It is necessary, then, to consider, first, the precise requirement of the permit that is alleged to have been violated and the extent to which that violation can be said to be shown by the documents before us.

10 Section 5 of The Export and Import Permits Act, as reenacted by 1948, c. 16, s. 2 reads:

> No person shall export or attempt to export from Canada any goods included in a list established pursuant to subsection one of section three of this Act, or any goods to a country named in a list established pursuant to subsection two of such section except under the authority of and in accordance with a permit issued under this Act.

11 The permit given the accused is headed "Application for permit to export war materials and other goods"; the name of the consignee is Charles Brauner, New York; the country of ultimate destination is stated to be Peru; and the application is granted "subject to the conditions entered on the reverse side of this permit." No such conditions are shown.

12 All that can be deduced from this, as the charge laid shows, is that to be exported in accordance with the permit, the goods must have as their ultimate destination a point in Peru.

13 The first of these two counts, No. 6, is supported by bill of lading for Car No. 29107 stated to have been shipped in bond to New York City for export "under T. & E. entry to Callao, Peru."; the second, No. 7, by bill of lading for Car No. 144541, shipped likewise in bond to New York for export "under T. & E. entry to Callao, Peru." The former is endorsed "intended for SS. Copgapo, Chilean Line"; the latter "intended for SS. Santa Louisa (Grace Line)." I am unable to see how it can be contended that these acts of the accused in Canada contained in the directions and entries on the bill of lading can be taken to evidence a shipment in violation of the permit.

14 A further point was taken that the notice of appeal by the Crown was insufficient. There was admittedly an error in the description of the charges from the acquittal on which the appeal was being taken; but the references to the Court and to the dates of the adjudications made clear to the accused both the error in the description and the judgments against which

the appeal was being taken. Mr. Tourigny frankly conceded that the accused was in no way misled.

15 Under s. 1018(2) of The Criminal Code the time within which notice of appeal may be given may be extended at any time by the Court of Appeal. The point was considered by that Court in this case, but was rejected, which can only mean that the notice was dealt with in such a manner as brought the appeal properly before the Court. There is no question of the jurisdiction to do that and we would not interfere with a discretion so exercised.

16 I would, therefore, allow the appeal as to counts 6 and 7 and dismiss it as to the others.

Judgment accordingly.