NOVA SCOTIA COURT OF APPEAL

Citation: *3289444 Nova Scotia Limited v. R.W. Armstrong & Associates Inc.*, 2018 NSCA 26

Date: 20180320
Docket: CA 463909
Registry: Halifax

Between:

3289444 Nova Scotia Limited

Appellant

v.

R.W. Armstrong & Associates Inc. and MASDAR Abu Dhabi Future Energy Company

Respondents

Judges:	Fichaud, Bourgeois and Derrick, JJ.A.
Appeal Heard:	January 16, 2018 in Halifax, Nova Scotia
Held:	Motion to adduce fresh evidence dismissed, leave to appeal granted and appeal dismissed with costs, per reasons for judgment of Fichaud, J.A., Bourgeois and Derrick, JJ.A. concurring
Counsel:	Jasmine M. Ghosn for the appellant Scott Sterns for the respondent R.W. Armstrong & Associates Inc. Jane O'Neill, Q.C. and Ryan Baxter for the respondent MASDAR Abu Dhabi Future Energy Company

Reasons for judgment:

[1] High Performance Energy Systems ("HPES"), a Nova Scotian company, contracted to provide services and deliverables to a construction project in the United Arab Emirates. HPES encountered internal difficulties. Its United Arab Emirates contract was terminated by the other party. HPES entered a court receivership. The receiver assigned HPES' rights respecting the project to the Appellant, a numbered company. The numbered company sued in the Supreme Court of Nova Scotia, naming as Defendants the project's general contractor and owner, who were based in the United Arab Emirates. The Statement of Claim pleaded causes of action for breach of the contract, tortious conspiracy and unjust enrichment, and requested damages, an accounting and an injunction. The Defendants moved to stay the action on the basis that Nova Scotia was a *forum non conveniens*.

[2] The motions judge agreed that the Supreme Court of Nova Scotia had territorial competence, but declined to assume jurisdiction. Citing the criteria in s. 12 of Nova Scotia's *Court Jurisdiction and Proceedings Transfer Act*, the *forum non conveniens* doctrine and the forum preference provision in HPES' contract, he concluded that the United Arab Emirates was the more convenient forum.

[3] The numbered company offers fresh evidence in the Court of Appeal. It says the judge erred in his application of s. 12, the *forum non conveniens* doctrine and the contract's forum preference provision. The main issue is whether the judge erred in principle when balancing those criteria.

Background

[4] The Respondent MASDAR is a renewable energy company based in Abu Dhabi, United Arab Emirates ("UAE"). Its parent is wholly owned by the Government of Abu Dhabi.

[5] The Respondent R.W. Armstrong & Associates Inc. ("RWA") is a global construction management firm, headquartered in Abu Dhabi and with offices in the United States.

[6] Neither MASDAR nor RWA has a presence in Nova Scotia.

[7] In August 2008, MASDAR and RWA contracted that RWA would project manage the construction of the MASDAR Institute of Science and Technology Building in Masdar City, UAE ("MASDAR Contract"). This is termed the MIST Project. Masdar City is planned as a carbon free community that relies on renewable energy.

[8] The MASDAR Contract provided that disputes would be determined by arbitration according to the laws of Abu Dhabi and the UAE:

> 20. Governing Law and Jurisdiction
>
> 20.1 This Consultancy Agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the Emirate of Abu Dhabi and the UAE.
>
> 20.2 (a) The Parties shall endeavor to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy Agreement.
>
> (b) In case of failure to settle the dispute, difference, controversy or claim by such negotiation within thirty (30) days or such-other period as the Parties may agree, the claimant may notify the other Party of its intention to submit the dispute to arbitration. The arbitration shall be heard before three arbitrators. Each of the parties hereto shall appoint one arbitrator with the remaining third arbitrator to be chosen by agreement of the two arbitrators previously chosen. If either party fails to appoint its arbitrator or the two arbitrators are not able to agree on the person of the third arbitrator within 30 days from the date the last of the two were appointed, then, either party may approach the Abu Dhabi Chamber of Commerce and Industry (ADCCI) and request that the other party's arbitrator or the third arbitrator as the case may be shall be appointed by the Chairman of the ADCCI. All aspects of such arbitration shall be governed by the regulations of ADCCI in force at such time. All arbitration proceedings are to take place in Abu Dhabi in the English language. The decision of such arbitration shall be final and binding upon the parties hereto, without appeal to any court or any other party. Pending the decision or award, the parties shall continue to perform their obligations under this Consultancy Agreement. The provisions of the Consultancy Agreement relating to arbitration shall continue in force notwithstanding the termination of this Consultancy Agreement.

[9] The MASDAR Contract also said that RWA's subcontracts would conform to the MASDAR Contract's terms:

> 15.2 To the extent that the Company permits the Consultant to transfer, assign or subcontract the performance of any of the Services to a third party (the Sub-Consultant), the Consultant shall ensure that:

> (a) The Sub-Consultant enters into an appointment for the performance of the relevant Services in terms approved by the Company and similar in all applicable respects to the terms of this Consultancy Agreement;

[10] High Performance Energy Systems ("HPES") was an engineering firm that operated in Nova Scotia.

[11] On December 31, 2008, RWA and HPES contracted that HPES would provide services and deliverables for the MIST Project. This is termed the "Subconsultant Agreement". The services and deliverables included energy pile design, tri-cycle optimization design, design optimization of cooling systems, testing and site supervision. The Subconsultant Agreement's provisions on choice of law and dispute resolution said:

> 18. Governing Law and Arbitration
>
> 18.1 This agreement and the relationship between the Parties shall be governed by, and construed in accordance with, the laws of the United Arab Emirates except where it contravenes the laws of the United States and Canada.
>
> 18.2 The parties shall endeavour to settle by good faith negotiation any dispute, difference, controversy or claim of any kind arising between them out of or in connection with this Consultancy agreement.
>
> 18.3 R.W. Armstrong and the Company agree that they shall first submit and all unsettled claims, counterclaims, disputes and other matters in question between them arising out of or relating to this Agreement or the breach thereof (Dispute) to mediation by selection and direct private engagement of a neutral mediator without using a dispute resolution organization or administrative service. If no agreement is reached, then (1) the parties may mutually agree to a dispute resolution of their choice, or (2) either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E.

[12] HPES was not a party to the MASDAR Contract and MASDAR was not a party to the Subconsultant Agreement.

[13] HPES underwent some internal turmoil. Its difficulties have been reported in other decisions: 2012 NSSC 130, 2012 NSSC 191, 2012 NSSC 192, 2013 NSSC 11, 2013 NSSC 334, 2014 NSSC 342, 2015 NSSC 155, 2014 NSCA 32 and 2014 NSCA 106.

[14] By a letter of February 22, 2010, RWA terminated the Subconsultant Agreement. RWA's position was that HPES had failed to perform its contractual obligations.

[15] On September 5, 2013, HPES entered receivership by an Order of the Supreme Court of Nova Scotia (*Stewart v. Bardsley*, S.H. No. 328760). The Receivership Order was further to s. 5(3)(b) of the Third Schedule to the *Companies Act*, R.S.N.S., c. 81. Justice Moir also stayed 17 legal proceedings against HPES listed in Schedule A to the Order.

[16] By an instrument dated May 20, 2015, the Receiver assigned to the Appellant 3289444 Nova Scotia Limited ("Numbered Company") "all rights and claims of HPES under the R.W. Armstrong contract respecting the MASDAR project" ("Assignment"). The Numbered Company is owned by former stakeholders or creditors of HPES.

[17] On February 5, 2016, the Numbered Company filed a Notice of Action in the Supreme Court of Nova Scotia, naming MASDAR and RWA as Defendants. The Statement of Claim pleads that MASDAR and RWA (1) engaged in a tortious conspiracy with Mr. James Bardsley, HPES' project manager, to deprive HPES of benefits of the Subconsultant Agreement, (2) promised payment to HPES, but failed to pay amounts due under the Subconsultant Agreement, (3) acted in bad faith, and (4) were unjustly enriched. The action claims (1) unpaid fees of $171,946 USD plus pre-judgment interest, (2) an accounting and an order for disclosure, (3) an injunction to prevent MASDAR and RWA from using HPES' intellectual property, and (4) general, special, aggravated and punitive damages for bad faith.

[18] On May 17 and 26, 2016, respectively, RWA and MASDAR filed motions for dismissal of the action on the bases that the Supreme Court of Nova Scotia has no jurisdiction, or is a *forum non conveniens*. On June 9, 2016, Justice Joshua Arnold heard the motions. Affidavits were filed, without cross-examination.

[19] On December 8, 2016, Justice Arnold issued a Decision (2016 NSSC 330), followed by an Order on May 18, 2017. The Order said that the Supreme Court of Nova Scotia had jurisdiction *simpliciter*, but stayed the action because Nova Scotia was not the convenient forum.

[20] Justice Arnold's reasons referred to the real and substantial connection test and s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 (2nd Sess.), c. 2 ("*CJPTA*"). Section 11 lists criteria that may establish a rebuttable presumption of a real and substantial connection to Nova Scotia. The judge cited ss. 11(e)(i) ("contractual obligations … to be performed in the Province") and 11(h) (the contract "concerns a business carried on in the Province"). HPES had

its head office in Nova Scotia and carried on business here. Some of its work for the MIST project would be done in Nova Scotia. The judge held that these circumstances established a presumption of a real and substantial connection to Nova Scotia (Decision, para. 87).

[21] Section 12 of the *CJPTA* (quoted below, para. 45) lists the factors by which the presumption of a real and substantial connection may be rebutted. Justice Arnold held that RWA and MASDAR had rebutted the presumption according to the criteria in s. 12(2). The judge found support for this view in article 18.3 of the Subconsultant Agreement, which he characterized as "a non-exclusive forum selection clause that falls toward the exclusive end of the spectrum" (Decision, para. 66).

[22] The judge concluded:

> [141] Nonetheless, when the factors enumerated in s. 12(2) of the *CJPTA* are considered, it is clear that MASDAR and RWA have rebutted this presumption. Nova Scotia is *forum non conveniens* in relation to the Subconsultant Agreement. The overwhelming constellation of facts support the claim by MASDAR and RWA that it would be more fair and efficient to have this matter heard in the U.A.E. and the matter should be dealt with in the U.A.E. … .

[23] On May 29, 2017, the Numbered Company filed a Motion for Leave to Appeal and Notice of Appeal to the Court of Appeal. On August 31, 2017, the Numbered Company filed a Motion for leave to submit fresh evidence on the appeal. This Court heard the matter on January 16, 2018.

Issues

[24] The issues are whether (1) the fresh evidence should be admitted, (2) leave to appeal should be granted, and (3) the judge made an appealable error in his ruling that Nova Scotia was a *forum non conveniens* and his application of the criteria under s. 12 of the *CJPTA* and the contract's forum preference clause.

[25] I will address the standards of review with the analysis of each issue.

Fresh evidence

[26] The Numbered Company submitted, as fresh evidence, an affidavit of its director, Ms. Jasmine Ghosn. Ms. Ghosn also appeared as the Numbered Company's sole counsel on the appeal. The Affidavit and its exhibits cover three

issues: (1) the costs of the motion before Justice Arnold, (2) what Ms. Ghosn describes as the prohibitive cost of litigation in the UAE and (3) "clarification of findings made by the court below".

[27] Rule 90.47(1) permits this Court to admit fresh evidence on "special grounds". The test derives from *Palmer v. The Queen*, [1980] 1 S.C.R. 759, at p. 775. Under *Palmer*, the party seeking admission must establish each of the following: that (1) the party exercised due diligence to adduce the evidence at the trial or on the motion, (2) the fresh evidence is relevant, (3) the fresh evidence is credible and (4) the fresh evidence could reasonably be expected to affect the outcome. Further, the fresh evidence must be in admissible form. See *Nova Scotia (Community Services) v. T.G.*, 2012 NSCA 43, paras. 77-79, leave to appeal refused [2012] S.C.C.A. No. 237, and authorities cited, and *Armoyan v. Armoyan*, 2013 NSCA 99, leave to appeal refused [2013] S.C.C.A. No. 446, para. 131.

[28] I turn to the three categories of tendered fresh evidence.

[29] Justice Arnold has not yet issued an order on costs of the motion. There is no appeal of costs to the Court of Appeal. The tendered fresh evidence on costs of the motion is irrelevant to the appeal and cannot affect the outcome.

[30] Section 12(2)(a) of the *CJPTA* states that one of the factors in the judge's exercise of discretion is the "expense for the parties … in litigating in the court or in any alternative forum". The Numbered Company's affidavit to the motions judge referred to the expense of litigation in the UAE (Abbass Affidavit, paras. 29-30). The cost of litigation in the UAE was squarely before the motions judge, and due diligence would have elicited the pertinent evidence on the motion.

[31] The proposed "clarification" of findings is set out in para. 29 of Ms. Ghosn's affidavit. These are collateral items that are irrelevant to the issues on the appeal and cannot affect the outcome.

[32] I would dismiss the motion to adduce fresh evidence.

[33] RWA objects to the motion on the further basis that Ms. Ghosn, as counsel, should not be speaking to her own affidavit on matters of substance and contested fact. As I would dismiss the motion under the standard tests for fresh evidence, it is unnecessary to address this objection. The normal practice is that counsel in this situation would introduce an unassociated colleague who would speak to the affidavit.

Leave to appeal

[34] All the parties accept that the stay is an interlocutory ruling for which leave to appeal is required. Accordingly, I will not comment on whether the stay is a final order because it effectively ends any litigation in the Supreme Court of Nova Scotia.

[35] The test for leave is whether the appeal raises an arguable issue, meaning something more than a matter of mere academic interest, but rather an issue that actually arises on the facts and could result in the appeal being allowed: *Homburg v. Stichting Autoriteit Financiële Markten*, 2016 NSCA 38, para. 18; *Automattic, Inc. v. Trout Point Lodge Ltd.*, 2017 NSCA 52, para. 23.

[36] I am satisfied the appealed issues satisfy this standard.

[37] The Respondents urge that a *forum non conveniens* ruling is discretionary. That does not negate the existence of an arguable issue. The Appellant is entitled to a ruling on whether the motions judge committed an appealable error in the exercise of his discretion to balance the criteria.

Forum non conveniens/CJPTA, s. 12/forum preference clause

[38] On the standard of review, in *Armoyan* this Court said:

> [207] In *Éditions Écosociété Inc. v. Banro Corp.*, [2012] 1 S.C.R. 636, Justice LeBel for the Court described the appellate standard of review:
>
> > [41] The application of *forum non conveniens* is an exercise of discretion reviewable in accordance with the principle of deference to discretionary decisions: an appeal court should intervene only if the motion judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision (see *Young v. Tyco International of Canada Ltd.*, [2008 ONCA 709], at para. 27).

[39] In *Club Resorts Ltd. v. Van Breda*, [2012] 1 S.C.R. 572, Justice LeBel explained the common law principles of *forum non conveniens*:

> [101] As I mentioned above, a clear distinction must be drawn between the existence and the exercise of jurisdiction. This distinction is central both to the resolution of issues related to jurisdiction over the claim and to the proper application of the doctrine of *forum non conveniens*. *Forum non conveniens* comes into play when jurisdiction is established. It has no relevance to the jurisdictional analysis itself.

> [102] Once jurisdiction is established, if the defendant does not raise further objections, the litigation proceeds before the court of the forum. The court cannot decline to exercise its jurisdiction unless the defendant invokes *forum non conveniens*. The decision to raise this doctrine rests with the parties, not with the court seized of the claim.
>
> [103] If a defendant raises an issue of *forum non conveniens*, the burden is on him or her to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff. The defendant must identify another forum that has an appropriate connection under the conflicts rules and that should be allowed to dispose of the action. The defendant must show, using the same analytical approach the court followed to establish the existence of a real and substantial connection with the local forum, what connections this alternative forum has with the subject matter of the litigation. Finally, the party asking for the stay on the basis of *forum non conveniens* must demonstrate why the proposed alternative forum should be preferred and considered to be more appropriate.
>
> [104] This Court reviewed and structured the method of application of the doctrine of *forum non conveniens* in *Amchem* [*Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897] …. The doctrine tempers the consequences of a strict application of the rules governing the assumption of jurisdiction. As those rules are, at their core, based on establishing the existence of objective factual connections, their use by the courts might give rise to concerns about their potential rigidity and lack of consideration for the actual circumstances of the parties. When it is invoked, the doctrine of *forum non conveniens* requires a court to go beyond a strict application of the test governing the recognition and assumption of jurisdiction. It is based on a recognition that a common law court retains a residual power to decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute. The court can stay proceedings brought before it on the basis of the doctrine.
>
> …
>
> [109] … The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But a court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. …

To similar effect: *Breeden v. Black*, [2012] 1 S.C.R. 666, para. 23.

[40] The common law's principles have been codified by provincial statutes, including Nova Scotia's *CJPTA*.

[41] In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, [2009] 1 S.C.R. 321, Chief Justice McLachlin for the Court discussed the codification:

> [22] Section 11 of the *CJPTA* [of British Columbia] was intended to codify the *forum non conveniens* test, not to supplement it. The *CJPTA* is the product of the Uniform Law Conference of Canada. In its introductory comments, the Conference identified the main purposes of the proposed Act, which included bringing "Canadian jurisdictional rules into line with the principles laid down by the Supreme Court of Canada in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, and *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897" …
>
> Section 11 of the *CJPTA* thus constitutes a complete codification of the common law test for *forum non conveniens*. It admits of no exceptions.

[42] Despite the last statement, in *Douez v. Facebook, Inc.*, [2017] 1 S.C.R. 751, Justices Karakatsanis, Wagner, as he then was, and Gascon held that the effect of a contractual forum selection clause remains governed by the common law:

> [17] As we shall explain, the *forum non conveniens* test adopted in the *CJPTA* was not intended to replace the common law test for forum selection clauses. In our view, this case should be resolved under the strong cause analysis established by this Court in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450.

[43] Later, when discussing article 18.3 of the Subconsultant Agreement, I will return to the strong cause analysis, and the rulings in *Douez* and *Z.I. Pompey*. First, I will address Nova Scotia's statutory scheme, involving a presumption under s. 11 that is rebuttable under s. 12 of the *CJPTA*.

[44] The motions judge correctly held (paras. 89 and 99) that, given his findings under s. 11 of the *CJPTA*, RWA and MASDAR bore the onus to rebut the presumption of a real and substantial connection to Nova Scotia. That ruling is not challenged on the appeal.

[45] Sections 12(1) and (2) of Nova Scotia's *CJPTA* state the criteria that govern whether the presumption is rebutted, which would enable the court to decline the exercise of jurisdiction. Section 12 is equivalent to s. 11 of British Columbia's statute, the "complete codification" discussed in *Teck Cominco*. Nova Scotia's criteria are:

> 12 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the

> proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside the Province is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
>
> (b) the law to be applied to issues in the proceeding;
>
> (c) the desirability of avoiding multiplicity of legal proceedings;
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> (d) the desirability of avoiding conflicting decisions in different courts;
>
> (e) the enforcement of an eventual judgment; and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[46] I will discuss these factors in turn.

[47] **Section 12(2) – relevant circumstances:** Section 12(2) opens by saying the judge "must consider the circumstances relevant to the proceeding". Justice Arnold cited the following circumstances that, in his view, pertained to the balancing exercise (paras. 95-96, 135-39):

- the Subconsultant Agreement was executed in the UAE;
- both the Numbered Company and HPES are Nova Scotian;
- while some of HPES' work would be done in Nova Scotia, the deliverables and services were destined for the UAE;
- HPES invoiced RWA in the UAE;
- the MIST Project was in the UAE;
- RWA and MASDAR are based in the UAE, not Nova Scotia;
- the Numbered Company's witnesses would be from Nova Scotia, while those of MASDAR and RWA would be mostly from the UAE, with none from Nova Scotia;
- the assets of RWA and MASDAR for execution of a judgment are in the UAE, not Nova Scotia;

- article 18.1 of the Subconsultant Agreement said that UAE law would govern (unless it contravenes Canadian and American law), meaning that expert witnesses in UAE law would have to testify in a Nova Scotia court;
- article 18.3 of the Subconsultant Agreement referenced the courts of the UAE, not Nova Scotia;
- articles 18.2 and 18.3 of the Subconsultant Agreement required that the parties attempt good faith negotiation and mediation before suing, steps that the Numbered Company did not follow before commencing this action.

[48] The judge did not err by characterizing these circumstances as relevant. Later, I will expand on how article 18.3 pertains.

[49] **Section 12(2)(a):** According to the affidavits, all the Numbered Company's witnesses would be from Nova Scotia, all MASDAR's witnesses would be from the UAE, and RWA's witnesses would be from the UAE and the United States, with none from Nova Scotia. Overall, the number of potential witnesses from the UAE significantly exceeds those from Nova Scotia.

[50] The MIST Project is in the UAE, the Defendants' project activity and paperwork are in the UAE, and HPES' deliverables and invoices were destined for the UAE.

[51] Some of HPES' work would occur in Nova Scotia. According to Schedule 1 of the Subconsultancy Agreement, HPES would perform significant work in the UAE. This would include the detailed determination of local conditions at the MIST site, underground modelling, 9 weeks of site supervision from January to March, 2009 and on-site management for the later stages of construction. Whether HPES properly performed its work at the construction site would be a significant issue.

[52] The motions judge observed, reasonably in my view:

> [96] It seems logical that the comparative convenience and expense for the parties to the proceeding and for their witnesses would be best served by having the matter heard in the U.A.E.…

[53] **Section 12(2)(b):** The Subconsultant Agreement said that the law of the UAE governed unless the UAE law contravened the laws of the United States and Canada. The Numbered Company's Reply to the Demand for Particulars, para. 2(c), cites UAE law that proscribes corrupt practices in support of its claim. The

Numbered Company does not cite any contradictory law of Canada or the United States. At the trial, the Supreme Court of Nova Scotia would hear experts in UAE law and then apply that law refracted through the prism of their testimony. A UAE court, familiar with UAE law, would be better positioned to undertake that endeavour directly.

[54] **Sections 12(2)(c) and (d):** There is no prospect of concurrent proceedings in Nova Scotia and the UAE. However, Nova Scotia and the UAE do not have a mutual regime for the reciprocal enforcement of Nova Scotia judgments in the UAE. Consequently, the enforcement of a Nova Scotia judgment may well involve the renewed consideration of the merits by a UAE court, with the potential for multiplicity and inconsistency.

[55] **Sections 12(2)(e) and (f):** The Numbered Company's Notice of Action seeks damages and supervisory remedies – an accounting and an injunction. These can only be enforced where MASDAR and RWA have a presence. The remedies would be ineffectual in Nova Scotia.

[56] A long Nova Scotia trial that generates a hapless remedy is not the most efficient working of the Canadian legal system under s. 12(2)(f).

[57] **Section 12(2) – conclusion:** The Numbered Company has identified no error of principle, misapprehension of evidence or unreasonable conclusion in the judge's findings.

[58] **Forum preference clause:** On the appeal, much of the submissions addressed s. 18.3 of the Subconsultant Agreement (quoted above, para. 11).

[59] Justice Arnold interpreted article 18.3 as "a non-exclusive forum selection clause that falls towards the exclusive end of the spectrum". He reasoned:

> [62] … The Subconsultant Agreement prescribes the laws of the U.A.E. as paramount and contains a forum selection clause that allows the parties in dispute to litigate in a court of competent jurisdiction in the U.A.E. The word "may" in s. 18.3, as in "either party may seek to have the Dispute resolved by a court of competent jurisdiction in the U.A.E." could be interpreted to mean that parties to the contract do not have to litigate a dispute, but if they chose to litigate, any dispute should be litigated in the U.A.E. The Subconsultant Agreement does not contain the word "non-exclusive".
>
> [63] However, the Subconsultant Agreement could also be read as allowing disputes to be resolved in the U.A.E. and preferring disputes to be resolved in the

> U.A.E., but not exclusively limiting dispute resolution to the U.A.E. The Subconsultant Agreement does not specifically contemplate disputes being resolved in any jurisdiction other than the U.A.E., but also does not expressly exclude any jurisdiction other than the U.A.E. If s. 18.3 is a non-exclusive forum selection clause, considering the wording of s. 18 in its entirety, on the spectrum of non-exclusive clauses, s. 18.3 is much closer to the exclusive forum selection end of the scale than to a contract with no forum selection clause.
>
> [64] Since s. 20 of the Agreement between MASDAR and RWA is an exclusive jurisdiction clause, if this were a dispute involving those parties, not involving HPES, that would end the inquiry regarding the choice of forum. The plaintiff has not shown a strong cause why any dispute under the Agreement should not be heard in the U.A.E.
>
> [65] However, because it is the Subconsultant Agreement that is relevant, if s. 18.3 is deemed an exclusive forum selection clause then there is no need for an analysis of *forum non conveniens* or a need to consider the *CJPTA*, as the forum selection issue would be determined in favour of RWA (and MASDAR). The numbered company has not shown a strong cause (or much of any cause) why this dispute under the Subconsultant Agreement should not be heard in the U.A.E.
>
> [66] However, due to the ambiguous wording of s. 18.3, I conclude that it is best described as a clear dispute resolution clause containing a non-exclusive forum selection clause that falls towards the exclusive end of the spectrum. Therefore, the choice of forum (U.A.E.) under the Subconsultant Agreement is one of many factors to be considered during the analysis of *forum non conveniens* and the *CJPTA*.

[60] The motions judge then treated article 18.3 as a pertinent factor in the *forum non conveniens* analysis. He wrote:

> [97] According to Bastarache J. in *Z.I. Pompey*, a choice of forum provision in a contract carries significant weight when considering the most convenient forum. Therefore, even if dealing with a non-exclusive forum selection clause as in the Subconsultant Agreement, the choice of the U.A.E. is a significant factor when considering *forum non conveniens*. Contracting parties should be held to their bargains. A global consideration of s. 18 of the Subconsultant Agreement between RWA and HPES clearly steers the parties toward the U.A.E. to resolve any disputes under the contract.

[61] In the Court of Appeal, the issues are whether the motions judge erred by (1) concluding that article 18.3 applies to the Numbered Company's Notice of Action, (2) characterizing article 18.3 as falling "towards the exclusive end of the spectrum" of non-exclusive clauses, and then (3) giving that interpretation weight in the balancing exercise for *forum non conveniens* analysis.

[62] In my view, the judge did not err in any of these respects.

[63] On the first point, the Numbered Company's Statement of Claim relies on the Subconsultant Agreement, further to the Assignment from the Receiver. Before the Numbered Company took the Assignment, it knew the Subconsultant Agreement's terms, including article 18.3. I disagree with the Numbered Company's contention that its lawsuit in contract and tort exercises the administrative authority of a receiver or trustee accorded by receivership or bankruptcy legislation. The Numbered Company took an assignment of HPES' position under the Subconsultant Agreement, not of the Receiver's powers to manage the insolvency. Further, I reject the Numbered Company's proposition that it can use some of the Subconsultant Agreement's provisions, but eschew the inconvenient ones. I accept the motions judge's reasoning on these points (paras. 100-135).

[64] The Numbered Company, as an assignee, stands in the position of HPES, and takes the Subconsultant Agreement as it stands. This includes article 18.3.

[65] On the second point, article 18.3, stripped to its essentials, says:

> [The parties] **shall first** submit all unsettled claims … to mediation …, **then (1)** … dispute resolution of their choice, **or (2)** … a court of competent jurisdiction in the U.A.E. [emphasis added]

[66] The word "shall" modifies both "first … mediation" and "then … dispute resolution … or … court … in the U.A.E.", which are the only two sub-options after unsuccessful mandatory mediation. The phraseology leaves the impression that all the articulated avenues are encompassed by "shall", and there would be no unarticulated option. The only articulated judicial option is a court in the UAE. Article 18.3 has the trappings of exclusive judicial forum selection.

[67] However, article 18.3 did not expressly say that the dispute was for "no other court". So the motions judge gave the Numbered Company the benefit of what he saw as ambiguity, and interpreted clause 18.3 as non-exclusive. Neither MASDAR nor RWA filed a Notice of Cross-appeal or Notice of Contention to submit that article 18.3 should be interpreted as an exclusive forum selection clause. For that reason, I will assume that the clause is non-exclusive.

[68] The motions judge's view that article 18.3 falls "toward the exclusive end of the spectrum" of non-exclusive clauses is, if anything, generous to the Numbered Company.

[69] I will turn to the third point.

[70] In *Z.I. Pompey*, *supra*, Justice Bastarache for the Court described the effect of forum selection clauses:

> 20 Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts": [citation omitted]. These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law: [citations omitted]. The "strong cause' test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by the application of the "strong cause" test. The test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. There is no reason to consider forum selection clauses to be non-responsibility clauses in disguise. In any event, the "strong cause" test provides sufficient leeway for judges to take improper motives into consideration in relevant cases and prevent defendants from relying on forum selection clauses to gain an unfair procedural advantage.
>
> 21 There is a similarity between the factors which are to be taken into account when considering an application for a stay based on a forum selection clause and those factors which are weighed by a court in considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine: [citation omitted]. The latter inquiry is well settled in Canada: [citation omitted]. In the latter inquiry, the burden is normally on the defendant to show why a stay should be granted, but the presence of a forum selection clause in the former is, in my view, sufficiently important to warrant a different test, one where the starting point is that parties should be held to their bargain, and where the plaintiff has the burden of showing why a stay should not be granted. I am not convinced that a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered, is preferable. …
>
> …
>
> 29 Bills of lading are typically entered into by sophisticated parties familiar with the negotiation of maritime shipping transactions who should, in normal circumstances, be held to their bargain….

[71] The Numbered Company's submission relies heavily on *Douez*, *supra*.

[72] In *Douez*, para. 38, Justices Karakatsanis, Wagner and Gascon modified *Z.I. Pompey*'s "strong cause" analysis to account for "the gross inequality of bargaining power" in consumer transactions. *Douez* does not assist the Numbered Company. This Subconsultant Agreement was a freely negotiated business transaction between experienced commercial undertakings. Article 18.3 was not an adhesive term derived from grossly uneven bargaining power.

[73] Under *Z.I. Pompey*'s test, after the court determines there is a valid exclusive forum selection clause, the party who seeks to avoid the clause has the onus to prove "strong cause".

[74] Justice Arnold neither assigned an onus to the Numbered Company nor required the Numbered Company to show strong cause. He accepted that article 18.3 did not select an exclusive forum, but merely reflected a non-exclusive forum preference. This meant that RWA and MASDAR retained the onus to rebut the presumption of real and substantial connection under s. 12 of the *CJPTA*.

[75] The motions judge took the parties' non-exclusive contractual preference as one factor among others in the *forum non conveniens* balance.

[76] A non-exclusive forum preference provision should not be ignored. It is among the circumstances to be considered in the discretionary balance of *forum non conveniens* criteria: *Loat v. Howarth*, 2011 ONCA 509, paras. 29-31; *Mackie Research Capital Corp. v. Mackie*, 2012 ONSC 3890, para. 41. Janet Walker, *Castel & Walker, Canadian Conflict of Laws* (Markham, Ontario: LexisNexis Canada Inc., 2005), 6th ed., para. 11.2, citing authority, says:

> ***Non-exclusive jurisdiction agreements –*** Where the parties have agreed that some other court should have jurisdiction over their disputes on a non-exclusive basis, the court may nevertheless exercise its discretion to grant a stay. However, the court is less likely to do so where the defendant has close links with the forum. The plaintiff will more readily persuade the court to allow him or her to bring or continue an action locally in such case. In other words, a nonexclusive clause in favour of a foreign court is a less compelling reason to decline jurisdiction but it is still relevant to the overall assessment of *forum non conveniens*….

Similarly, Stephen G.A. Pitel and Nicholas S. Rafferty, *Conflict of Laws* (Toronto: Irwin Law Inc., 2016), 2nd ed., p. 128, says:

> Jurisdiction clauses play a major role in the issue of whether a court will exercise its discretion to stay proceedings... The heavy onus is typically imposed in cases involving exclusive clauses. Non-exclusive clauses are still given reasonably strong weight in the balancing process, but less weight than exclusive clauses.

[77] Non-exclusive clauses reflect a spectrum of degrees of preference: *e.g.*, *Sugar v. Megawheels Technologies Inc.*, [2006] O.J. No. 4493 (Sup. Ct. J.), para. 19. The weight merited by such a clause in the *forum non conveniens* analysis varies with the force of the wording that the parties have chosen for their contract.

[78] In my respectful view, given article 18.3's wording, the motions judge properly ascribed weight to the parties' contractual preference.

[79] The judge's conclusion that the Supreme Court of Nova Scotia would decline to exercise jurisdiction under s. 12 of the *CJPTA* as a *forum non conveniens* was reasonable. His reasoning neither erred in principle nor misapprehended or ignored material evidence. The judge engaged in a discretionary balancing exercise. It is not for the Court of Appeal to recalibrate the scale. The ruling did not offend this Court's standard of review under *Banro*'s test.

[80] I would dismiss the appeal.

Conclusion

[81] I would dismiss the motion to adduce fresh evidence, grant leave to appeal, but dismiss the appeal.

[82] I would order the Numbered Company to pay each of RWA and MASDAR $2,500 costs of the appeal. The costs should be paid forthwith.

Fichaud, J.A.

Concurred: Bourgeois, J.A.

Derrick, J.A.