SUPREME COURT OF NOVA SCOTIA
Citation: Curves International, Inc. v. Archibald, 2011 NSSC 217

Date: 20110531
Docket: Tru No. 339137
Registry: Truro

Between:

Curves International, Inc.

Plaintiff

v.

Karen Eileen Archibald, Jill M. Bodak and 3245723 Nova Scotia Limited, carrying on business as FOR-EVE-RX Fitness

Defendants

Judge:	The Honourable Justice C. Richard Coughlan
Heard:	December 16, 2010 and May 17, 2011 (in Chambers), in Halifax, Nova Scotia
Decision:	May 31, 2011 (Orally)
Written Release of Decision:	June 7, 2011
Counsel:	Thomas P. Donovan, Q.C. and Joseph Burke, for the plaintiff Ian R. Dunbar, for the defendant, Karen Eileen Archibald

Coughlan, J.: (Orally)

[1] On November 9, 2010, Curves International, Inc. ("Curves") commenced action in this Court against Karen Eileen Archibald seeking a declaration the franchise agreement between Curves and Ms. Archibald dealing with a Curves' franchise in Truro, Nova Scotia, is terminated, save and except those provisions which survive termination; a permanent injunction restraining Ms. Archibald from doing certain enumerated activities; compelling Ms. Archibald to comply with her post termination obligations; special damages; general damages; and costs.

[2] On the same day, Curves applied for an interim and interlocutory injunction restraining Ms. Archibald from certain actions.

[3] Ms. Archibald moved for an order dismissing the action for want of jurisdiction. During the hearing of the motion on December 16, 2010, Ms. Archibald requested an adjournment in order to retain counsel. The adjournment was granted.

[4] Curves amended its notice of action on March 30, 2011, adding as defendants Jill M. Bodak and 3245723 Nova Scotia Limited, carrying on business as FOR-EVE-RX Fitness. Curves pleads the tort of conspiracy, intentional interference with the contractual relations between Curves and Ms. Archibald and inducement of breach of the Truro franchise agreement Curves had with Ms. Archibald, in addition to the claims originally pleaded.

[5] This decision deals with Ms. Archibald's motion for dismissal.

[6] Ms. Archibald has been the operator of a number of Curves franchises in Nova Scotia and Iceland.

[7] Curves, a Texas corporation, with its head office in Waco, Texas, United States of America, was incorporated in 1995 and has been offering franchises for over 14 years. Its franchise system currently consists of nearly 10,000 women's fitness centres in over five countries. Curves has been operating in Canada since 1995 and has 563 franchised fitness centres in Canada, including 20 franchises in Nova Scotia.

[8] Ms. Archibald entered into a franchise agreement with Curves dated June 26, 2001 for a Curves for women thirty minute fitness and weight loss system business in "the city limits of Truro in the Province of Nova Scotia, Canada". The agreement contained the following provision:

> M. **Governing Law and Jurisdiction**. Franchisee agrees that the relationship, rights and obligations of the parties of this Franchise Agreement shall be governed by the internal laws of the state of Texas, except to the extent governed by the United States Trademark Act of 1946 (Lanham Act, 15 U.S.C. Section 1051 et seq.) and *The Canadian Trade-Marks Act*, (R.S.C. c. T-10) and any provincial or federal legislation governing franchising which now exists or which may become law. Franchisee agrees that any action arising out of or relating to the relationship, rights, or obligations of the parties herein shall be brought in the Province or in any State or U.S. Federal court of general jurisdiction where Franchisor's principal business address is then located and Franchisee irrevocably submits to the jurisdiction of such courts and waives any objection it may have to either the jurisdiction or venue of such court.

[9] The term of the agreement was ten years from its date - June 26, 2001. In May or June, 2010, Ms. Archibald ceased operating the Curves' franchise in Truro.

[10] The agreement between the parties contain the clause abovementioned in which the parties select the province or state in which Curves' principal business address as the forum for actions arising out of the relationship of the parties to the franchise, which in this case is Texas.

[11] Forum selection clauses are encouraged by courts. In *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, Bastarache, J., in giving the Court's judgment, stated at para. 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": Décary J. A. in *Jian Sheng Co.*, *supra*, at para. 7. 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: La Forest J. in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077 (S.C.C.), at pp. 1096-97; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, [2001] 3 S.C.R. 907, 2001 SCC 90 (S.C.C.), at para. 71-72. 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 application of the "strong cause" test. This 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.

[12] The proper test for a stay of proceedings to enforce a forum selection clause was set out by Bastarache, J. at para. 39:

> I am of the view that, in the absence of applicable legislation, for instance s. 46(1) of the *Marine Liability Act*, the proper test for a stay of proceedings pursuant to s. 50 of the *Federal Court Act* to enforce a forum selection clause in a bill of lading remains as stated in "*Eleftheria*" (The), which I restate in the following way. Once the court satisfied that a validly concluded bill of lading otherwise binds the parties, the court must grant the stay unless the plaintiff can show sufficiently strong reasons to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause. In exercising its discretion, the court should take into account all of the circumstances of the particular case. See "*Eleftheria*" (The), at p. 242; *Amchem Products Inc.*, at pp. 915-22; *Holt Cargo Systems Inc.*, at para. 91. Disputes arising under or in connection with a contract may not be regarded by a court in determining whether "strong cause" has been shown that a stay should not be granted.

[13] The *Eleftheria*, [1969] 2 All E.R. 641 (P.D.A. Division) dealt with a forum selection clause. *Amchem Products Inc. v. British Columbia (Worker's Compensation Board*, [1993] 1 S.C.R. 897 dealt with a *forum non conveniens* argument. *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90 concerned the determination whether a maritime law proceeding by a United States' creditor against a Belgian ship in a Canadian court ought to be stayed in deference to a Belgian court dealing with the subsequent bankruptcy of the Belgian ship owner.

[14] Therefore the burden is on Curves to satisfy the Court there is good reason it should not be bound by the forum selection clause. The Court where there is a forum selection clause should grant a stay unless there is a "strong cause" for not

granting the stay is shown. In *The Eleftheria*, *supra*, which was quoted by Bastarache, J. in the *Pompey* case, Brandon J. stated at p. 645:

> The principles established by the authorities can, I think, be summarised as follows: (I) where plaintiffs sue in England in breach of an agreement to refer disputes to a foreign court, and the defendants apply for a stay, the English court, assuming the claim to be otherwise within its jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (II) the discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (III) The burden of proving such strong cause is on the plaintiffs. (IV) In exercising its discretion, the court should take into account all the circumstances of the particular case. (V) In particular, but without prejudice to (IV), the following matters, where they arise, may properly be regarded: (a) In what country the evidence on the issues of fact is situated, or more readily available, and the effect of that on the relative convenience and expense of trial as between the English and foreign courts; (b) Whether the law of the foreign court applies and, if so, whether it differs from English law in any material respects; (c) With what country either party is connected, and how closely; (d) Whether the defendants genuinely desire trial in the foreign country, or are only seeking procedural advantages; (e) Whether the plaintiffs would be prejudiced by having to sue in the foreign court because they would - (i) be deprived of security for that claim, (ii) be unable to enforce any judgment obtained, (iii) be faced with a time-bar not applicable in England, or (iv) for political, racial, religious or other reasons be unlikely to get a fair trial.

[15] In *Holt Cargo System Inc. v. ABC Containerline N.V. (Trustees of), supra,* in giving the Court's judgment, Binnie, J. stated at para. 91:

> The "natural forum" is the one to which the action has the most real and substantial connection (*Amchem*, at pp. 916 and 935). Relevant circumstances include not only issues of public policy (as in this case) but also the potential loss to the plaintiff of a juridical advantage sufficient to work an injustice if the proceedings were stayed, the place or places where the parties carry on their business, the convenience and expense of litigating in one forum or the other, and the discouragement of forum shopping. In short, within the overall framework of public policy, any injustice to the plaintiff in having its action stayed must be weighed against any injustice to the defendant if the action is allowed to proceed. What is required is that these factors be carefully weighed in the balance.

[16] The reference by Bastarache, J. in *Pompey*, *supra*, gives guidance as to the type of factors a court should consider in determining whether or not strong cause

exists in the circumstances of a particular case to satisfy the onus a party contesting the stay has to meet.

[17] In dealing with an application for a stay pursuant to a forum selection clause, the claim must otherwise be within the jurisdiction of the Nova Scotia court.

[18] The law with respect to the territorial jurisdiction of Nova Scotia courts has been codified in the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003 c. 2.

[19] In this case, this Court has territorial competence, in that the defendants are resident in or incorporated under the laws of Nova Scotia, and the agreement between Curves and Ms. Archibald relates to contractual obligations to be performed in Nova Scotia, a business carried on in Nova Scotia - a Curves' franchise in Truro, Nova Scotia; and a claim for an injunction ordering the defendants to refrain from doing something in Nova Scotia - operating a non Curves' women's fitness centre in Truro, Nova Scotia. This proceeding has a real and substantial connection to Nova Scotia.

[20] Having determined the claim is otherwise within the jurisdiction of the Nova Scotia court, the question arises whether Curves has shown there is a "strong cause" for not granting the stay, taking into account all the circumstances of the case.

[21] All defendants are residents of Nova Scotia. None of the defendants have a real and substantial connection to Texas. The action relations to activities carried out in Truro, Nova Scotia. Reviewing the affidavit of Johanne Neal, it appears many of the witnesses will be residents of Nova Scotia or other Canadian provinces. Consequently, it will be less costly for a trial to take place in Nova Scotia than in Texas.

[22] The causes of action set out in the notice of action are in contract and tort. Pursuant to the forum selection clause in the franchise agreement, Texas law applies to claims "arising out of or relating to the relationship, rights, or obligations of the parties" to the agreement. The law which would apply to Curves' claim against Ms. Archibald in contract is the law of Texas.

[23] Nova Scotia law applies to Curves' claims in tort. The forum selection clause only deals with claims arising from the contract. The substantive law to be applied to torts is the law of the place where the activity accrued. *Tolokson v. Jensen*, [1994] 3 S.C.R. 1022.

[24] Among the relief Curves is seeking is injunctive relief. Traditionally foreign injunctions were not recognized in Canada. As Deschamps, J. stated in giving the majority judgment in *Pro Swing Inc. v. Elta Golf Inc.*, 2006 SCC 52 at para. 10:

> The traditional common law rule is clear and simple. In order to be recognizable and enforceable, a foreign judgment must be "(a) for a debt, or definite sum of money (not being a sum payable in respect of taxes or other charges of a like nature or in respect of a fine or other penalty; and (b) final and conclusive, but not otherwise" (*Dicey and Morris* on the *Conflict of Laws* (13th ed. 2000), vol. 1, Rule 35, at pp. 474-75 (footnotes omitted)). Similarly, J.-G. Castel and J. Walker, in *Canadian Conflict of Laws* (6th ed. (loose-leaf)), at para. 14-6, state that "[a] foreign judgment *in personam* given by a court of competent jurisdiction is enforceable provided that it is final and conclusive, and for a definite sum of money."

[25] In *Pro Swing Inc.*, the majority acknowledged the need to move toward a more flexible rule with regard to equitable orders. Deschamps, J., in her judgment, set out considerations particular to equitable orders, such as comity and the need for an order to be final, stating at paras. 30 and 31:

> In contemplating considerations specific to the recognition and enforcement of equitable orders, courts can draw the relevant criteria from other foreign judicial assistance mechanisms based on comity. *Forum non conveniens* and letters rogatory are mechanisms that, like the enforcement of foreign judgments, rely on comity. For these mechanisms, as for the enforcement of equitable orders, the balancing exercise of comity requires a careful review of the relief ordered by the foreign court. ...
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> The evolution of the law of enforcement does not require me, at this point, to develop exhaustively the criteria a court should take into account. As cases come up, appropriate distinctions can be drawn. For present purposes, it is sufficient to underscore the need to incorporate the very flexibility that infuses equity. However, the conditions for recognition and enforcement can be expressed generally as follows: the judgment must have been rendered by a court of competent jurisdiction and must be final, and it must be of a nature that the principle of comity requires the domestic court to enforce. Comity does not

> require receiving courts to extend greater judicial assistance to foreign litigants than it does to its own litigants, and the discretion that underlies equitable orders can be exercised by Canadian courts when deciding whether or not to enforce one.

[26] Considering the foregoing, it is not possible to know whether a Nova Scotia court will enforce an injunction granted by a Texas court until the particular order is issued. This is not a situation such as a Texas order requiring a meeting of creditors or some other action in connection with a Texas insolvency, or where a Nova Scotia bank account was the subject of a Texas freezing order. In this case, any injunction will deal exclusively with activities in Nova Scotia - the operation of a fitness business in Truro, Nova Scotia.

[27] Prior to the decision of the Supreme Court of Canada in the *Pro Swing Inc.* case in 2006, it would not be in the contemplation of the parties that a claim for injunctive relief would be heard by a foreign court as the traditional rule did not allow for enforcement of foreign equitable relief, but only for a debt.

[28] The proceeding also seeks injunctive and other relief against third parties.

[29] If Curves was successful in its action in Texas, it would have to enforce any Texas judgment in Nova Scotia. The injunction it is seeking involves activity in Nova Scotia and any judgment for damages would have to be recovered from the defendants in Nova Scotia.

[30] If the matter was tried in Texas, rather than Nova Scotia, it would be much more expensive for the defendants.

[31] Considering the facts of this case, including the claim for equitable relief and the other factors present, I find Curves has shown there is strong cause why I should exercise my discretion and not dismiss or stay the action.

[32] I dismiss the motion to dismiss the action for want of jurisdiction.

[33] I award costs to Curves International, Inc. in the amount of $750.00, payable in any event of the cause.

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Coughlan, J.