SUPREME COURT OF NOVA SCOTIA

Citation: *Pentacap LLC v. ACI Capital Partners Inc.*, 2024 NSSC 5

Date: 20240105
Docket: 512528
Registry: Halifax

Between:

Pentacap LLC

Plaintiff

and

ACI Capital Partners Inc., a body corporate and Terry Taylor

Defendants

DECISION ON JURISDICTION MOTION

Judge:	The Honourable Justice Ann E. Smith
Heard:	May 23, 2023, in Halifax, Nova Scotia
Additional Written Submissions:	Defendants: June 29, 2023 Plaintiff: July 17, 2023
Counsel:	James D. MacNeil, for the Plaintiff Derek B. Brett, for the Defendants

By the Court:

Introduction

[1] The Defendants, ACI Capital Partners Inc. (“ACI”) and Terry Taylor, move for an order against the Plaintiff, Pentacap LLC (“Pentacap”), dismissing the action against them for want of jurisdiction (the “jurisdiction motion”).

[2] ACI and Terry Taylor have also filed a motion for summary judgment on the pleadings in respect of Pentacap’s claim against Terry Taylor in his personal capacity. Counsel for the parties agreed that that motion should be held in abeyance depending on the Court’s decision on the jurisdiction motion.

[3] ACI and Terry Taylor rely on the affidavit of Terry Taylor, President of ACI, sworn on March 10, 2022. Pentacap relies on the affidavit of Samantha Gray, then an articled clerk at BoyneClarke LLP, sworn on December 16, 2022.

[4] Neither affiant was cross-examined.

[5] Following the hearing of the jurisdiction motion on May 23, 2023, the Court and counsel participated in a conference call where the Court requested counsel’s comments on whether ACI and Terry Taylor had attorned to the jurisdiction of the Nova Scotia Supreme Court by filing the motion for summary judgment on the

pleadings. In that regard, the Court received additional written submissions from ACI and Terry Taylor on June 29, 2023, and from Pentacap on July 17, 2023.

Issues:

1. Does the Court have jurisdiction over the subject matter of this Action, which is framed in breach of contract and negligent misrepresentation?

   (a) Territorial Jurisdiction at common law

   (b) The Forum Selection Clause in a Contract between Pentacap, ACI, Taylor

   (c) The Application of the *Court Jurisdiction and Proceedings Transfer Act*, S.N.S., 2003, c. 2 (the "CJPTA")

2. Have ACI and Terry Taylor attorned to the jurisdiction of the Nova Scotia Supreme Court by filing the motion for summary judgment on pleadings with respect to Pentacap's claim against Terry Taylor?

[6] The Court notes that these issues are not watertight categories, so while this decision deals with each issue, it may not entirely deal with each issue consecutively.

The Pleadings:

[7] Pentacap filed a Notice of Action and Statement of Claim against the Defendants, ACI and Terry Taylor, on February 9, 2022, and an Amended Notice of Action and Amended Statement of Claim on December 16, 2022. ACI and Terry Taylor have not filed a defence.

[8] According to Pentacap's Amended Statement of Claim, Pentacap is a company incorporated in the United States, having its office located in Omaha, Nebraska. The Claim provides that Pentacap raises capital with a corporate mandate to purchase multi-residential buildings with a focus on affordable and environmentally friendly units. Pentacap pleads that:

> 2. ACI Capital Partners~~,~~ Inc. (hereinafter "ACI") holds itself out as a company incorporated in Florida, however, it has an office operating at Suite 402, 1595 Bedford Highway, Bedford, Nova Scotia. ACI's letterhead lists its "corporate head office" as the Bedford Highway address. ACI purports to have "Investor Offices in USA and Canada". It is unknown if ACI actually has any Florida offices or any USA offices. ACI is ~~not~~ incorporated in the Province of Nova Scotia.
>
> 3. Terry Taylor is an individual who resides at […] Fall River, Nova Scotia. Mr. Taylor is an individual who has held himself out to the Plaintiff as the owner and operator of the Defendant, ACI.

[9] Pentacap also pleads that it was contacted by Terry Taylor who advised and represented that he could find investors for Pentacap and its projects. Pentacap pleads that Terry Taylor advised that ACI would provide the investment money directly to Pentacap and discussed having ACI assist Pentacap with raising equity for the acquisition of a 235-unit complex in Fort Worth, Texas.

[10] According to Pentacap, Terry Taylor held out that he had both the experience and the connections to assist Pentacap with raising capital to purchase the apartment complex in Texas. Based on these representations, Pentacap agreed to retain ACI.

[11] Pentacap says that ACI and Terry Taylor provided a form of agreement that it was required to sign. Pentacap pleads that it reviewed the form of agreement and negotiated several changes. One such change related to ACI's requirement of a deposit of $50,000 USD before commencing work. Pentacap refused to provide the deposit unless the agreement stipulated that the deposit was fully refundable if the agreement was terminated or ACI did not perform its obligations under it. The parties executed the agreement on May 21, 2021.

[12] Pentacap pleads that it provided the requested $50,000 USD deposit but ACI failed to perform its obligations under the agreement. Pentacap says ACI failed to produce any investors or investments and that ACI and Terry Taylor ignored Pentacap's attempts to communicate with them. Pentacap says it repeatedly demanded repayment of the deposit, but ACI has not returned the funds. Pentacap claims that it was able to purchase the Texas property without any assistance from ACI or Terry Taylor.

[13] Pentacap claims against ACI for breach of contract "for failing to meet the requirements of the contract, including but not limited to introducing Pentacap to investors, securing investments for Pentacap's project and for failing to complete the contract as contemplated in the agreement between the parties" Pentacap also claims

against ACI for negligent misrepresentation "with respect to the promises that they could deliver investors and investments to the Plaintiff".

[14] Pentacap claims against Terry Taylor for negligent misrepresentation and/or fraudulent misrepresentation on the basis that he "knowingly misrepresented the ability of the Defendant, ACI, to complete the work contemplated in the contract and by such representations induced the Plaintiff to sign the agreement with the Defendant, ACI." Pentacap further pleads:

> 17. The Plaintiff notes that the contract has a clause referencing that any disputes under the contract are governed by the laws of Illinois. The Plaintiff states that, at all material times, neither the Plaintiff nor either Defendant has ever resided in the State of Illinois, conducted business in the State of Illinois or had any real of substantial connection to the State of Illinois. The Plaintiff states that at the time of signing the contract, they did not obtain legal advice, nor did either Defendant suggest that they should have legal advice.

[15] Rather than defending the Action, ACI and Terry Taylor bring a motion pursuant to *Civil Procedure Rule* 4.07 to dismiss the Action for want of jurisdiction. As noted previously, ACI and Terry Taylor also filed a motion for summary judgment on the pleadings in relation to the claims against Terry Taylor in his personal capacity.

Evidence

The Evidence of the Moving Parties, ACI and Terry Taylor

[16] ACI and Terry Taylor rely on the affidavit of Terry Taylor.

[17] According to Terry Taylor, ACI is a valid company incorporated in the state of Florida, in the United States of America ("U.S.") registered in 2017. ACI transacts its business exclusively in the U.S., serving U.S. companies and interests. It specializes in equity and financing for multi-family/multi-unit residential and senior housing commercial industries. Terry Taylor states in his affidavit that ACI exists to provide capitalization for those clients looking to attract and secure financing for construction of such U.S. based project.

[18] Terry Taylor attaches a copy of the results of an online search of "sunbiz.org", to his affidavit which is a website of the Florida State Division of Corporations, confirming that ACI Capital Partners Inc. is an active Florida Profit Corporation. That corporation's registered agent's name and address are listed as "Incorp Services, Inc., 17888 67th Court N, Loxahatchee, FL 33470." Terry Taylor is listed under "Title President, Treasurer, Director, Secretary". His address and the corporation's mailing address are both identified as "402-1595 Bedford Highway, Bedford, NS B4A374, CA."

[19] Terry Taylor states in his affidavit that ACI entered into a contract (the "Contract") with Pentacap LLC, "an established, U.S.-based company, to assist

Pentacap with raising capital to purchase a multi-residential complex in Texas". Terry Taylor attaches a copy of the Contract as an exhibit to his affidavit.

[20] The letterhead on the first page of the Contract (which is referred to as "Term Sheet", but which the parties agree constitutes the Contract) states:

ACI Capital Partners, Inc. (A Florida Corporation)
Corporate Head Office: Suite #402, 1595 Bedford Highway, Bedford NS Canada
B4A 3Y4
Tel: (888) 755-8355 Fax: (902) 484-7081
www.acicapitalpartners.com
With Investor Offices in USA and Canada

[21] The Contract is dated May 21, 2021. The other party, or "Sponsor", is identified as:

> PentaCAP LLC
> P.O. Box 540491
> Omaha, NE 68154

[22] The Contract relates to "Equity for the acquisition of the 235-Units Apartment Property Known as Woods of Ridgmar Property Located in Forth Worth, TX." The Contract indicates at page 2 that the "Total Equity Requirement" for the project is approximately $9,000,000, and that ACI will bring in approximately 89% of the equity, equalling $8,000,000. Pentacap will be responsible for bringing in the other $1,000,000. The Contract also states that the "Total Debt Financing" for the project will be $20,000,000, or 70% of the total project costs of $29,000,000.

[23] The deposit is addressed at page 4 of the Contract:

> **ACI Investment and Investor Engagement Fee:** $50,000 on signing this term sheet. This is a refundable engagement fee if we do not commit, and not an up-front fee and will be used for ACI's costs to process, underwrite, and finalize the Investment and includes ACI underwriting, processing, administration, management and legal that covers our cost to get to commitment. It costs us $200,000 to get to commitment. This amount will be deducted from our commitment fee below at closing. In the event ACI fails to commit such fee shall be refundable to PENTACAP LLC. In addition, in the event ACI fails to provide all financial terms satisfactory to PentaCap LLC, the full $50,000 engagement fee will be returned to PentaCap LLC within 3 business days from the date PentaCap gives email notice to ACI.

[24] On page 6, the Contract provides:

> **Conditions to ACI's Obligation to Close:** ACI or its assigns shall not be obliged to make the Investment unless the results of ACI's due diligence and documentation negotiations with Sponsor are satisfactory to ACI, in ACI's sole discretion. …

[25] The governing law and jurisdiction are addressed at page 7 of the Contract:

> Governing Law: This Letter of Interest / Term Sheet shall be governed by Illinois laws, with Illinois jurisdiction, without regard to conflict of law principles and or such State that the assignee holds a head office.
>
> [Emphasis added]

[26] Page 7 of the Contract also includes the following list of conditions:

> This Proposal is conditional upon and subject to:
>
> 1. There being, in ACI [sic] sole opinion, no material change or prospect thereof in Sponsor's structure, ownership, financial condition, or operating trends between the date of the most recent financial statement received by ACI and the date of the funding of the transaction.
> 2. Negotiation of documentation in form and substance in all respects satisfactory to all parties to the transaction and their respective Legal Counsel.
> 3. Receipt of satisfactory third-party reports and Sponsor documentation.

4. Executed Purchase Contract
5. Receipt of final budget
6. Receipt of Senior Loan documents.
7. Sponsor understanding that:
    a. It will be a single-purpose, bankruptcy-remote US entity acceptable to the ACI or its assigns in its sole discretion (i.e. LLC, Ltd., partnership, corporation, etc.)

[27] The governing law of the Contract is addressed again on page 8:

> This agreement shall be construed and governed in all respects according to the laws of the State of Illinois and or such State that the assignee holds a head office.
>
> [Emphasis added]

[28] The Contract is signed by Terry Taylor on behalf of "ACI Capital Partners, Inc. (a Florida Corporation)", and Owen Barrett on behalf of Pentacap LLC.

[29] Terry Taylor states in his affidavit that Pentacap is owned by a group of experienced and knowledgeable businessmen. He attaches biographies of each partner of Pentacap as an exhibit to his affidavit. The original source of these one-page biographies is unknown to the Court.

[30] According to Terry Taylor, before ACI could perform its obligations under the Contract, it required Pentacap to provide information for ACI's due diligence checklist. Terry Taylor states that the information was never provided, and that Pentacap's failure to cooperate with ACI in its completion of the due diligence process resulted in the deterioration of the relationship between the parties.

[31] Terry Taylor concludes his affidavit by stating that at no point did he represent Pentacap's interests in the transaction in his personal capacity. Instead, he says, the services to be rendered to Pentacap were to be undertaken by him on behalf of ACI, in his role as its President.

The Evidence of Pentacap

[32] Pentacap's evidence is the affidavit of Samantha Gray, then an articled clerk at BoyneClarke LLP, the law firm representing Pentacap. In the affidavit, Ms. Gray states that she conducted an electronic search on the website for Nova Scotia's Registry of Joint Stock Companies ("RJSC") for "ACI Capital." She attaches the results as an exhibit to her affidavit. Based on the search results, Ms. Gray concludes that ACI is a limited company in Nova Scotia; ACI has "Active" status with RJSC; ACI has a registered office at 402-1595 Bedford Highway; Terry Taylor is a director of ACI; and Terry Taylor is the recognized agent of ACI, with a mailing address in Fall River, Nova Scotia.

[33] Ms. Gray further states in her affidavit that, based on an internet search for Florida companies named "ACI Capital Partners Inc.", she found a "2022 Florida Profit Corporation Annual Report" which suggested to her that "ACI Capital

Partners Inc." is also a corporation in Florida. She attaches the report as an exhibit to her affidavit.

[34] Neither affiant was cross-examined.

The Position of Pentacap on the Jurisdiction Motion

[35] Pentacap argues that the CJPTA overrides the forum selection clause. Pentacap submits that ACI carries on business in Nova Scotia, triggering a presumption of a real and substantial connection between Nova Scotia and the facts on which the proceeding is based (CJPTA, s. 11(h)). Accordingly, Pentacap says that ACI and Taylor have the onus of rebutting the presumption by demonstrating that a different forum is more appropriate, based on the factors identified in s. 12. Pentacap says ACI and Terry Taylor have failed to discharge this onus.

The Position of ACI and Terry Taylor on the Jurisdiction Motion

[36] ACI and Terry Taylor say that Pentacap's efforts to assert jurisdiction for the Action in Nova Scotia are improper, submitting that Pentacap's claims all relate to a contract based entirely in the U.S., which contains a forum selection and choice of law clause requiring that disputes be resolved in Illinois according to Illinois law.

[37] ACI submits that the parties to the Contract are both sophisticated commercial entities who each had an opportunity to review and negotiate the terms of the Contract prior to execution. The Defendants say there is no basis for the Court to disregard the forum selection clause.

The Position of ACI and Terry Taylor on the Question of Attornment

[38] On the issue of attornment, ACI and Terry Taylor submit that Terry Taylor's motion for summary judgment on the pleadings was filed as an alternative to the jointly filed motion for lack of jurisdiction and does not engage with the merits of the action.

[39] ACI and Terry Taylor also say the summary judgment motion was made as part of the procedure concerning the jurisdiction motion and cannot be considered attornment. They submit that the motion for summary judgment, like the jurisdiction motion, is a procedural motion to determine which parties are properly before the Court. Neither motion asks the Court to deal with the substantive merits of the claims themselves. In the alternative, ACI and Terry Taylor submit that only Terry Taylor can be found to have attorned, since the summary judgment motion relates only to the claims against Terry Taylor in his personal capacity.

The Position of Pentacap on the Question of Attornment

[40] As to attornment, Pentacap argues that the motion of ACI and Terry Taylor for summary judgment on the pleadings goes far beyond the confines of challenging jurisdiction. Instead, they say the motion asks the Supreme Court of Nova Scotia to engage with the substantive facts of the claim. Pentacap submits that although the motion for summary judgment was filed together with the motion for lack of jurisdiction, the issues are not inextricably intertwined. While a failure to establish jurisdiction would dispose of both motions, the reverse is not true. Pentacap further submits that each of ACI and Terry Taylor have attorned. In their post-hearing submissions, counsel for ACI and Terry Taylor states:

> The Pleadings were submitted against both parties and the Plaintiff maintains that both Defendants are properly before the Court. If the Court finds, after reviewing the facts of the case, that Defendant Taylor is not properly named then he can be removed as a party if and when that occurs. When the Summary Judgement [*sic*] Motion was filed by the Defendants, no such determination had been made, so both parties named on that Motion are privy to attorn due to the consequences of filing the Motion as per the arguments above.

Law and Analysis

[41] This motion is brought pursuant to *Civil Procedure Rule* 4.07:

> **4.07 Lack of jurisdiction**
>
> (1) A defendant who maintains that the court does not have jurisdiction over the subject of an action, or over the defendant, may make a motion to dismiss the action for want of jurisdiction.
>
> (2) A defendant does not submit to the jurisdiction of the court only by moving to dismiss the action for want of jurisdiction.

> (3) A judge who dismisses a motion for an order dismissing an action for want of jurisdiction must set a deadline by which the defendant may file a notice of defence, and the court may only grant judgment against the defendant after that time.

[42] As noted previously, the position of ACI and Terry Taylor is that the Supreme Court of Nova Scotia "lacks jurisdiction" over this proceeding due to the forum selection clause in the Contract.

[43] The leading authority on the enforcement of a forum selection clause is *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27. In *Pompey,* the Supreme Court of Canada confirmed that enforcement of a forum selection clause is a matter of discretion governed by the "strong cause" test first set out in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). The test in *The "Eleftheria"*, as cited in *Pompey* at para. 19, is as follows:

> (1) 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 the jurisdiction, is not bound to grant a stay but has a discretion whether to do so or not. (2) The discretion should be exercised by granting a stay unless strong cause for not doing so is shown. (3) The burden of proving such strong cause is on the plaintiffs. (4) In exercising its discretion the Court should take into account all the circumstances of the particular case. (5) In particular, but without prejudice to (4), the following matters, where they arise, may be properly 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.

[44] The Supreme Court of Canada, per Bastarache J., observed that forum selection clauses "are common components of international commercial transactions", have "been applied for ages in the industry and by the courts", and "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" (para. 20). Bastarache J. remarked that the "strong cause" test helps to promote order and fairness in international commerce by rightly imposing the burden on the plaintiff "to satisfy the court that there is good reason it should not be bound by the forum selection clause" (para. 20). Bastarache J. further stated at para. 20:

> 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.
>
> [Emphasis added]

[45] The Court in *Pompey* clarified that the test for a stay based on a forum selection clause is different than the test for a stay based on the doctrine of *forum non conveniens*:

> 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 considering whether to stay proceedings in "ordinary" cases applying the *forum non conveniens* doctrine: E. Peel in "Exclusive jurisdiction agreements: purity and pragmatism in the conflict of laws", [1998] L.M.C.L.Q. 182, at pp. 189-90. The latter inquiry is well settled in Canada: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897. 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. As *Peel*, *supra*, notes, at p. 190, I fear that such an approach would not ensure that full weight is given to the jurisdiction clause since not only should the clause itself be taken into account, but also the effect which it has on the factors which are relevant to the determination of the natural forum. Factors which may otherwise be decisive may be less so if one takes into account that the parties agreed in advance to a hearing in a particular forum and must be deemed to have done so fully aware of the consequences which that might have on, for example, the transportation of witnesses and evidence, or compliance with foreign procedure etc.
>
> In my view, a separate approach to applications for a stay of proceedings involving forum selection clauses in bills of lading ensures that these considerations are properly taken into account and that the parties' agreement is given effect in all but exceptional circumstances. …
>
> [Emphasis added]

[46] In *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351, the Ontario Court of Appeal reviewed the analysis required under *Pompey*:

> [11] Thus, even though the literal wording of the test in *"Eleftheria" (The)* may imply a conventional *forum non conveniens* analysis, *Pompey* makes clear that such an analysis is not to be used. Rather, the forum selection clause pervades the analysis and must be given full weight in the consideration of other factors. It is not enough for the plaintiff to establish a "strong" case that Ontario is the more convenient forum. The plaintiff must show "strong cause" that the case is exceptional and the forum selection clause should not be enforced.
>
> [Emphasis added]

[47] The Ontario Court of Appeal in *Expedition Helicopters* summarized the few factors that may justify departure from the general principle that parties should be held to their choice of forum:

> [24] A forum selection clause in a commercial contract should be given effect. The factors that may justify departure from that general principle are few. The few factors that might be considered include the plaintiff was induced to agree to the clause by fraud or improper inducement or the contract is otherwise unenforceable, the court in the selected forum does not accept jurisdiction or otherwise is unable to deal with the claim, the claim or the circumstances that have arisen are outside of what was reasonably contemplated by the parties when they agreed to the clause, the plaintiff can no longer expect a fair trial in the selected forum due to subsequent events that could not have been reasonably anticipated, or enforcing the clause in the particular case would frustrate some clear public policy. Apart from circumstances such as these, a forum selection clause in a commercial contract should be enforced.

[48] These factors have been applied in Nova Scotia: *Instrument Concepts-Sensor Software Inc. v. Geokinetics Acquisition Co*., 2012 NSSC 62; *Armoyan v. Armoyan*, 2013 NSCA 99; *Bull Run Productions Inc. v. Wild TV Inc.*, 2016 NSSC 315; and *3289444 Nova Scotia Ltd. v. RW Armstrong & Associates Inc*., 2016 NSSC 330.

[49] The Supreme Court of Canada revisited forum selection clauses in *Douez v. Facebook, Inc.*, 2017 SCC 33. In *Douez*, the majority explained the interaction between forum selection clauses and provincial legislation like the Nova Scotia *CJPTA*:

> [18] At common law, forum selection clauses and the *forum non conveniens* doctrine command different analyses: "Each class of case has its own onus, test and rationale" (*Momentous.ca Corp. v. Canadian American Assn. of*

> *Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, at para. 37, aff'd 2012 SCC 9, [2012] 1 S.C.R. 359). Our Court has confirmed that "the presence of a forum selection clause" is "sufficiently important to warrant a different test", and that "a unified approach to *forum non conveniens*, where a choice of jurisdiction clause constitutes but one factor to be considered" may not be preferable (*Pompey*, at para. 21).
>
> [19] Ms. Douez argues that the *CJPTA* provides a complete framework to determine the court's jurisdiction, and that forum selection clauses should be considered as another factor within the *forum non conveniens* analysis under s. 11.
>
> [20] In our view, the courts below rightly rejected Ms. Douez's proposed approach. Section 11 of the *CJPTA* "constitutes a complete codification of the common law test for *forum non conveniens* [that] admits of no exceptions" (*Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, [2009] 1 S.C.R. 321, at para. 22 (emphasis added)). It was never intended to codify the test for forum selection clauses. Not only does s. 11 make no mention of contractual stipulations, the comments on the uniform act that served as a basis for the *CJPTA* are also silent on this point (Uniform Law Conference of Canada, *Uniform Court Jurisdiction and Proceedings Transfer Act* (online)). The analysis of forum selection clauses thus remains separate, despite the enactment of the *CJPTA*.
>
> [21] Several Canadian provinces have adopted their own *CJPTA*, with identical or similar provisions. Their appellate courts have consistently held that the analysis of forum selection clauses remains distinct (see e.g. *Viroforce Systems Inc. v. R & D Capital Inc.*, 2011 BCCA 260, 336 D.L.R. (4th) 570, at para. 14; *Armoyan v. Armoyan*, 2013 NSCA 99, 334 N.S.R. (2d) 204, at para. 218). Even the Court of Appeal of Saskatchewan, which held that forum selection clauses should be considered as part of the *CJPTA* analysis, held that "*Pompey* continues to apply notwithstanding [its] enactment" (*Hudye Farms Inc. v. Canadian Wheat Board*, 2011 SKCA 137, 377 Sask. R. 146, at para. 10; see also *Frey v. BCE Inc.*, 2011 SKCA 136, 377 Sask. R. 156, at paras. 112-14).
>
> [22] In short, the *CJPTA* was never intended to replace the common law test for forum selection clauses. In the absence of legislation to the contrary, the common law test continues to apply and provides the analytical framework for this case.
>
> [Emphasis added]

[50] The majority in *Douez* restated the common law test for forum selection clauses as follows:

> [24] Forum selection clauses serve a valuable purpose. This Court has recognized that they "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" (*Pompey*, at para. 20). Forum selection clauses are commonly used and regularly enforced.

[25] That said, forum selection clauses divert public adjudication of matters out of the provinces, and court adjudication in each province is a public good. Courts are not merely "law-making and applying venues"; they are institutions of "public norm generation and legitimation, which guide the formation and understanding of relationships in pluralistic and democratic societies" (T. C. W. Farrow, *Civil Justice, Privatization, and Democracy* (2014), at p. 41). Everyone has a right to bring claims before the courts, and these courts have an obligation to hear and determine these matters.

[26] Thus, forum selection clauses do not just affect the parties to the contract. They implicate the court as well, and with it, the court's obligation to hear matters that are properly before it. In this way, forum selection clauses are a "unique category of contracts" (M. Pavlović, "Contracting out of Access to Justice: Enforcement of Forum-Selection Clauses in Consumer Contracts" (2016), 62 *McGill L.J.* 389, at p. 396).

[27] Of course, parties are generally held to their bargain and are bound by the enforceable terms of their contract. However, because forum selection clauses encroach on the public sphere of adjudication, Canadian courts do not simply enforce them like any other clause. In common law provinces, a forum selection clause cannot bind a court or interfere with a court's jurisdiction. As the English Court of Appeal recognized long ago, "no one by his private stipulation can oust these courts of their jurisdiction in a matter that properly belongs to them" (*The Fehmarn*, [1958] 1 All E.R. 333, at p. 335).

[28] Instead, where no legislation overrides the clause, courts apply a two-step approach to determine whether to enforce a forum selection clause and stay an action brought contrary to it (*Pompey*, at para. 39). At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Preymann v. Ayus Technology Corp.*, 2012 BCCA 30, 32 B.C.L.R. (5th) 391, at para. 43; see also *Hudye Farms*, at para. 12, and *Pompey*, at para. 39). At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[29] Once the party seeking the stay establishes the validity of the forum selection clause, the onus shifts to the plaintiff. At this second step of the test, the plaintiff must show strong reasons why the court should not enforce the forum selection clause and stay the action. In *Pompey*, this Court adopted the "strong cause" test from the English court's decision in *The "Eleftheria"*, [1969] 1 Lloyd's Rep. 237 (Adm. Div.). In exercising its discretion at this step of the analysis, a court must consider "all the circumstances", including the "convenience of the parties, fairness between the parties and the interests of justice" (*Pompey*, at paras. 19 and

> 30-31). Public policy may also be a relevant factor at this step (*Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustees of)*, 2001 SCC 90, [2001] 3 S.C.R. 907, at para. 91, referred to in *Pompey*, at para. 39; *Frey*, at para. 115).
>
> [30] The strong cause factors were meant to provide some flexibility. Importantly, *Pompey* did not set out a closed list of factors governing the court's discretion to decline to enforce a forum selection clause. Both *Pompey* and *The "Eleftheria"* acknowledged that courts should consider "all the circumstances" of the particular case (*Pompey*, at para. 30; *The "Eleftheria"*, at p. 242). And the leading authority in England continues to recognize that the court in *The "Eleftheria"* did not intend its list of factors to be comprehensive (*Donohue v. Armco Inc.*, [2001] UKHL 64, [2002] 1 All E.R. 749, at para. 24).
>
> [31] That said, the strong cause factors have been interpreted and applied restrictively in the commercial context. In commercial interactions, it will usually be desirable for parties to determine at the outset of a business relationship where disputes will be settled. Sophisticated parties are justifiably "deemed to have informed themselves about the risks of foreign legal systems and are deemed to have accepted those risks in agreeing to a forum selection clause" (*Aldo Group Inc. v. Moneris Solutions Corp.*, 2013 ONCA 725, 118 O.R. (3d) 81, at para. 47). In this setting, our Court recognized that forum selection clauses are generally enforced and to be encouraged "because they provide international commercial relations with the stability and foreseeability required for purposes of the critical components of private international law, namely order and fairness" (*GreCon Dimter inc. v. J.R. Normand inc.*, 2005 SCC 46, [2005] 2 S.C.R. 401, at para. 22).
>
> [Emphasis added]

[51] Accordingly, a forum selection clause does not oust the court's territorial jurisdiction where such jurisdiction otherwise exists. Rather, the court may decline to exercise jurisdiction where a valid forum selection clause points exclusively to another forum.

[52] The law with respect to the territorial jurisdiction of Nova Scotia courts has been codified in the CJPTA. Section 2(h) provides:

> 2(h) "territorial competence" means the aspects of a court's jurisdiction that depend on a connection between

> (i) the territory or legal system of the state in which the court is established, and
>
> (ii) a party to a proceeding in the court or the facts on which the proceeding is based.

[53] Section 4 outlines when a court will have territorial competence:

> 4 A court has territorial competence in a proceeding that is brought against a person only if
>
> (a) that person is the plaintiff in another proceeding in the court to which the proceeding in question is a counter-claim;
>
> (b) during the course of the proceeding that person submits to the court's jurisdiction;
>
> (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding;
>
> (d) that person is ordinarily resident in the Province at the time of the commencement of the proceeding; or
>
> (e) there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.

[54] In *IBC Advanced Technologies, Inc. v. Ucore Rare Metals Inc.*, 2019 NSCA 80, the Nova Scotia Court of Appeal observed that s. 4 "is disjunctive and the court will have territorial jurisdiction if any one of the circumstances exist in that section" (para. 61).

[55] Section 8 of the CJPTA addresses when a corporation will be "ordinarily resident" in the Province:

> 8 A corporation is ordinarily resident in the Province, for the purposes of this Part, only if
>
> (a) the corporation has, or is required by law to have, a registered office in the Province;

> (b) pursuant to law, it
>
> > (i) has registered an address in the Province at which process may be served generally, or
> >
> > (ii) has nominated an agent in the Province upon whom process may be served generally;
>
> (c) it has a place of business in the Province; or
>
> (d) its central management is exercised in the Province.

[56] Section 11 creates a rebuttable presumption of a real and substantial connection where the proceeding meets certain criteria:

> 11 Without limiting the right of the plaintiff to prove other circumstances that constitute a real and substantial connection between the Province and the facts on which a proceeding is based, a real and substantial connection between the Province and those facts is presumed to exist if the proceeding
>
> > (a) is brought to enforce, assert, declare or determine proprietary or possessory rights or a security interest in immovable or movable property in the Province;
> >
> > (b) concerns the administration of the estate of a deceased person in relation to
> >
> > > (i) immovable property of the deceased person in the Province, or
> > >
> > > (ii) movable property anywhere of the deceased person if, at the time of death, the person was ordinarily resident in the Province;
> >
> > (c) is brought to interpret, rectify, set aside or enforce any deed, will, contract or other instrument in relation to
> >
> > > (i) immovable or movable property in the Province, or
> > >
> > > (ii) movable property anywhere of a deceased person who, at the time of death, was ordinarily resident in the Province;
> >
> > (d) is brought against a trustee in relation to the carrying out of a trust in any of the following circumstances:
> >
> > > (i) the trust assets include immovable or movable property in the Province and the relief claimed is only as to that property,
> > >
> > > (ii) that trustee is ordinarily resident in the Province,
> > >
> > > (iii) the administration of the trust is principally carried on in the Province,

> (iv) by the express terms of a trust document, the trust is governed by the law of the Province;
>
> (e) concerns contractual obligations, and
>
> (i) the contractual obligations, to a substantial extent, were to be performed in the Province,
>
> (ii) by its express terms, the contract is governed by the law of the Province, or
>
> (iii) the contract
>
> (A) is for the purchase of property, services or both, for use other than in the course of the purchaser's trade or profession, and
>
> (B) resulted from a solicitation of business in the Province by or on behalf of the seller;
>
> (f) concerns restitutionary obligations that, to a substantial extent, arose in the Province;
>
> (g) concerns a tort committed in the Province;
>
> (h) concerns a business carried on in the Province;
>
> (i) is a claim for an injunction ordering a party to do or refrain from doing anything
>
> (i) in the Province, or
>
> (ii) in relation to immovable or movable property in the Province;
>
> (j) is for a determination of the personal status or capacity of a person who is ordinarily resident in the Province;
>
> (k) is for enforcement of a judgment of a court made in or outside the Province or an arbitral award made in or outside the Province; or
>
> (l) is for the recovery of taxes or other indebtedness and is brought by Her Majesty in right of the Province or of Canada or by a municipality or other local authority of the Province.

[57] If territorial competence is established, the court may decline to exercise it on the basis that there is a more appropriate forum in which to hear the proceeding.

[58] The court's decision is governed by s. 12, which codifies the common law *forum non conveniens* test:

> 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;
> >
> > (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.

[59] Another basis upon which the court may decline to exercise jurisdiction is that the parties have agreed to resolve their disputes in a different forum.

[60] The first question, then, is whether the Supreme Court of Nova Scotia has territorial jurisdiction over the proceeding. Pentacap relies on ss. 11(h) and 4(b) of the CJPTA to establish that the Court has territorial jurisdiction over the claims against ACI. Under s. 11(h), a presumption of a real and substantial connection between the Province and the facts of a proceeding exists where the proceeding concerns “a business carried on in the Province.” Relying on the affidavit of Samantha Gray, Pentacap says ACI is a Nova Scotia company, with a registered address in Nova Scotia, carrying on business in Nova Scotia.

[61] ACI and Terry Taylor deny that ACI is carrying on business in Nova Scotia. In Terry Taylor's affidavit, he states that ACI "is and remains a valid company incorporated in the State of Florida", and that it "exists purely as an American business entity." Terry Taylor's affidavit makes no mention of the Nova Scotia company's existence. During oral argument, counsel for ACI and Terry Taylor acknowledged that there is a Nova Scotia company, but said the Contract is between Pentacap and the Florida corporation. There is no evidence before the Court on the relationship between the two ACI entities.

[62] Under s. 4(b) of the CJPTA, territorial competence also exists where the person against whom the proceeding is brought has attorned to the Court's jurisdiction. Pentacap submits that ACI and Terry Taylor have attorned to Nova Scotia's jurisdiction by filing the motion for summary judgment. As noted previously, these Defendants deny that they have attorned. They argue in the alternative that only Terry Taylor can be found to have attorned because ACI did not participate in the motion for summary judgment.

[63] In the view of this Court, it is not necessary to rely on either s. 11(h) or s. 4(b) of the CJPTA to establish territorial jurisdiction in this case. Section 4(d) provides that a court has territorial competence in a proceeding that is brought against a person where that person is ordinarily resident in the Province at the time of the

commencement of the proceeding. Pursuant to s. 7(s) of the *Interpretation Act*, R.S.N.S. 1989, c. 235, "person" includes a corporation.

[64] There is no debate that the Court has territorial jurisdiction over the claims against Terry Taylor, who, by his own admission, is ordinarily resident in Fall River, Nova Scotia. With respect to the claims against ACI, s. 8(d) of the CJPTA states that a corporation is "ordinarily resident" in the Province where its central management is exercised in the Province. According to ACI's corporate registration information filed with the Florida State Division of Corporations, Terry Taylor is ACI's President, Treasurer, Director and Secretary. In other words, he is ACI's directing mind. Terry Taylor's address is listed as "402-1595 Bedford Highway, Bedford, B4A3Y4 CA". The Florida company's "Principal Address" and "Mailing Address" are both identified as "402-1595 Bedford Highway, Bedford, B4A3Y4 CA." Moreover, the letterhead on the Contract between Pentacap and ACI states that the "Corporate Head Office" of "ACI Capital Partners, Inc. (A Florida Corporation)" is located at "Suite #402, 1595 Bedford Highway, Bedford NS Canada B4A 3Y4."

[65] The only reasonable conclusion, based on ACI and Terry Taylor's own evidence, is that ACI's central management is exercised in Nova Scotia.

[66] Having found that the Supreme Court of Nova Scotia has territorial competence pursuant to s. 4(d) of the CJPTA, it is unnecessary to decide whether either or both ACI and Terry Taylor submitted to the Court's jurisdiction by filing the motion for summary judgment (s. 4(b)).

The Forum Selection Clause

[67] With territorial competence established, the Court must decide whether to decline jurisdiction based on the forum selection clause. The Court's exercise of discretion is governed by the two-step "strong cause" analysis. As noted in *Douez*, at para. 28:

> At the first step, the party seeking a stay based on the forum selection clause must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" … At this step of the analysis, the court applies the principles of contract law to determine the validity of the forum selection clause. As with any contract claim, the plaintiff may resist the enforceability of the contract by raising defences such as, for example, unconscionability, undue influence, and fraud.

[68] Again, the clause in the Contract between the parties states:

> **Governing Law**: This Letter of Interest / Term Sheet shall be governed by Illinois laws, with Illinois jurisdiction, without regard to conflict of law principles and or such State that the assignee holds a head office.

[69] This clause deals with both the parties' choice of law and their choice of forum. In *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis

Canada Inc., 2020), Geoff R. Hall explains the difference between choice of law and choice of forum clauses at pp. 308-309:

> The distinction between a choice of law and a choice of forum clause is important for two reasons. First, the function of the two clauses is different. A choice of law clause determines which law governs a contract, while a choice of forum clause determines the place or jurisdiction where the courts have either exclusive or concurrent jurisdiction to resolve disputes. Since a domestic court can apply foreign law, a determination that foreign law governs a contract is not at all determinative that a foreign court should be the one to adjudicate a dispute in respect of it, although it is a factor that can be taken into account. Second, a court has discretion not to apply a choice of forum clause (although there is a strong inclination not to exercise that discretion), while no analogous discretion exists with respect to a choice of law clause.

[70] The clause itself is clumsily drafted and leaves some doubt as to whether it is intended to create exclusive jurisdiction in Illinois, or in both Illinois "and or such State that the assignee holds a head office." Nothing turns on this, however. While "assignee" is not defined, the word "assigns" is used throughout the Contract, exclusively in relation to ACI. In other words, the Contract mentions only "ACI or its assigns." There is no reference to assigns of the Sponsor (Pentacap). In any event, there is no evidence that either party had any assignees. As a result, the clause dictates that the Contract "shall be governed" by Illinois law with Illinois jurisdiction.

[71] The Court notes that this language is somewhat unusual. Forum selection clauses often designate a specific jurisdiction for the adjudication of "disputes arising out of or related to" an agreement. In this case, the clause merely states that

the Contract "shall be governed" by Illinois law "with Illinois jurisdiction." However, in the view of this Court, this language is sufficient to capture Pentacap's claims against ACI for breach of contract.

[72] As noted earlier, Pentacap also claims against ACI for negligent misrepresentation "with respect to the promises that they could deliver investors and investments to the Plaintiff". Although negligent misrepresentation is a tort, and not a claim under the Contract, the success of Pentacap in negligent misrepresentation will depend on a finding that ACI breached the Contract. I will return to this point later.

[73] As to the validity and enforceability of the forum selection clause, there is no evidence that the clause is unenforceable under contractual doctrines such as public policy, duress, fraud, unconscionability or grossly uneven bargaining positions. Pentacap and ACI were both sophisticated parties, and, as Pentacap admits in its pleading, it had the opportunity to – and did – negotiate changes to the Contract. It had the ability to have negotiated, or proposed changes to the forum selection clause but there is no evidence that Pentacap did so. In those circumstances, the fact that Pentacap signed the Contract without having legal counsel is of no import.

[74] The analysis moves to the second step. Pentacap now has the burden to show "strong cause" that the case is exceptional, and the forum selection clause should not be enforced. In this case, with respect, Pentacap has misunderstood the analysis, including where the burden lies, and has filed no evidence which might support a finding of “strong cause”.

[75] For example, the Court has no evidence that Illinois has declined jurisdiction or is otherwise unable to deal with the claim; that circumstances have arisen which are outside of what was reasonably contemplated by the parties when they agreed to the clause; that Pentacap can no longer expect a fair trial in Illinois due to subsequent unexpected events; that Pentacap would be unable to enforce an Illinois judgment; that ACI and Terry Taylor seek to rely on the clause to gain an unfair procedural advantage; and so on. While there is evidence before the Court that neither ACI nor Pentacap are based in Illinois, that is insufficient, on its own, to conclude that ACI and Terry Taylor have improper motives for seeking to enforce the clause. There is simply no evidentiary basis upon which the Court could find that the forum selection clause should not be enforced in relation to Pentacap’s claims for breach of contract.

[76] With respect to the negligent misrepresentation claim against ACI, and the negligent and fraudulent misrepresentation claims against Terry Taylor, these claims do not fall within the scope of the forum selection clause. However, in this Court’s

view the Supreme Court of Nova Scotia should decline to exercise its jurisdiction over them on the basis that Illinois is the more convenient forum.

[77] Although the Court lacks specific evidence on some of the factors in s. 12 of the CJPTA, including the comparative convenience and expense for the parties and their witnesses in litigating in this Court or in Illinois, and the enforcement of an eventual judgment, it is a matter of common sense that it would be more inconvenient and more costly for the parties to litigate the Contract claims in Illinois and the tort claims against ACI and Terry Taylor separately in Nova Scotia.

[78] As noted previously, Pentacap's tort claim against ACI cannot succeed unless Pentacap first establishes that ACI breached its obligations under the Contract. In other words, for the Court to find that ACI misrepresented its ability to fulfill the promises it made under the Contract, the Court must first be satisfied that ACI failed to fulfill those promises. The same is true with respect to the fraudulent and negligent misrepresentation claims against Terry Taylor. The extra time and expense involved in re-tilling the same ground, and in the multiplicity of legal proceedings generally, would be avoided if Pentacap's claims were determined by an Illinois court in a single proceeding. A single proceeding in Illinois would also avoid conflicting decisions in different courts applying different laws. Based on the foregoing, declining jurisdiction over the tort claims would do more to promote the fair and

efficient working of the Canadian legal system than would adjudicating these claims in Nova Scotia.

Conclusions

[79] In conclusion, the forum selection clause is valid and applies to Pentacap's contract claims against ACI. Pentacap has failed to establish "strong cause" that the forum selection clause should not be enforced.

[80] The Court therefore grants a stay of the contractual claims. With respect to the remaining tort claims against ACI and Terry Taylor, the Court grants a stay on the basis that Illinois is the more appropriate forum.

[81] Having so found, it is unnecessary for the motion for summary judgment on the pleadings to be heard by this Court and it is dismissed.

[82] ACI and Terry Taylor are entitled to the costs of this motion. If the parties cannot agree on costs, the Court will receive written submissions from counsel within twenty (20) calendar days of their receipt of this decision.

Smith, J.