Claim No: SCCH - 465497

IN THE SMALL CLAIMS COURT OF NOVA SCOTIA

Cite as; Aguilar Capital Markets Ltd. v. Flatc Marine Offshore Ltd., 2017 NSSM 57

BETWEEN:

AGUILAR CAPITAL MARKETS LTD.

Claimant

- and -

FLATC MARINE OFFSHORE LTD.,
CAPTAIN FRANCIS BOAKYE and CAPTAIN MICHAEL NORTEYE

Defendants

PRELIMINARY RULING ON JURISDICTION

BEFORE

Eric K. Slone, Adjudicator

Hearing held at Halifax, Nova Scotia on September 7, 2017

Decision rendered on September 26, 2017

APPEARANCES

For the Claimant	Chika Chiekwe Counsel
For the Defendant	Geoff Franklin Counsel

BY THE COURT:

[1] This matter was originally scheduled for a hearing on the merits on September 7, 2017. Counsel for the Claimant asked for an adjournment on the basis that her client was still out of the country, specifically in Ghana, a country that figures prominently in this case. After some discussion, it was determined to be reasonable to deal with a discrete issue raised in the Defence, namely an argument that this court lacks jurisdiction to hear the case.

[2] For purposes of this ruling, there are several facts that are non-controversial and which provide a sufficient factual matrix to determine the jurisdictional question.

[3] For purposes of this ruling, the Claimant Aguilar Capital Markets Ltd. will sometimes be referred to as “Aguilar,” FlatC Marine Offshore Ltd. will be referred to as “FlatC”, Captain Francis Boakye is “Boakye” and Captain Michael Norteye is “Norteye.”

[4] Aguilar can be described as a financial advisory business that helps to raise money for business ventures. FlatC is a marine services business that operates in the petroleum sector. The claim arises out of a commercial transaction wherein Aguilar was engaged to help raise funds for a venture that FlatC was pursuing in the offshore petroleum industry off the coast of Africa; specifically, FlatC was in the process of acquiring an oil tanker.

[5] Aguilar is a Nova Scotia based company. FlatC is a Ghana-based company that is not registered to do business in Nova Scotia. FlatC’s principals are Boakye - who has a residence in Dartmouth, Nova Scotia as well as in

Ghana, and Norteye who lives in Ghana. They are called “Captain” because they are both qualified to captain ships such as oil tankers.

[6] On December 30, 2016, Aguilar and FlatC entered into a written agreement titled “Fund Raising Mandate Agreement” which will be referred to simply as the “agreement.” This is a 7-page agreement that, while not the most formal of documents, is still fairly comprehensive and probably owes its brevity to the fact that it is written in plain language.

[7] The agreement calls for certain payments to be made associated with certain milestones or accomplishments. These are specified as payments to be deposited directly by wire transfer into Aguilar’s bank account in Canada, which was later specified as an account in Dartmouth, Nova Scotia.

[8] Other pertinent provisions include:

a. Article 5 provides that either party may terminate the agreement on 30 days written notice.

b. Article 9 states that “any and all claims, disputes or differences arising out of or in connection with this Agreement shall be governed by and construed in accordance with the laws of the Province of Nova Scotia.”

c. Article 19 is an “entire understanding” clause which precludes any oral or collateral agreements.

[9] Some money was paid under this contract, but on April 13, 2017, a letter was authored by Norteye in Ghana, in his capacity as a director and officer, of FlatC, giving notice of termination of the contract. The contents of the letter are unimportant for present purposes, but it is sufficient to say that FlatC was

unhappy with Aguilar's progress in raising funds for the venture. As such, the letter said, no further money was going to be paid under the agreement.

[10] Aguilar takes a different view of its success, and believes that a further $15,000.00 US is owing under the agreement for its work. It is this amount, converted into Canadian dollars ($19,700.00) that is the subject of this claim.

[11] It is important to note that the Claim was drafted by the principal of Aguilar, Brian Mutale, and not by a lawyer. Only after the claim was issued did counsel appear in the case. This is important because the claim names Boakye and Norteye as Defendants, without any real explanation for why or how they could be personally responsible for the alleged default of FlatC. It was argued by counsel for the Defendants that the claim, on its face, does not raise any claim against the individual Defendants. At the hearing before me, counsel for the Claimant did not offer anything more than token resistence to that assertion.

[12] Directors and officers of a limited company are shielded from personal liability in the absence of special circumstances that might allow the "corporate veil to be pierced," as it is often expressed. The Claim states that *"FlatC management (Messrs Boakye and Norteye) willfully misread the clause pertaining to our compensation claim in order to avoid paying us the $15,000 USD owing."* It goes on to suggest that such management *"believe they can operate in this manner without consequence ...."*

[13] In my opinion, there is nothing in these statements or elsewhere in the Claim that would raise a personal claim against Boakye and Norteye. Corporations such as FlatC are legal entities. It is virtually impossible for a

corporation to take any type of action that does not have some human agency behind it. An employee or manager of the corporation necessarily makes a decision and the corporation then acts. If every decision - no matter how wrong - by an employee or manager exposed him or her to personal liability, there would be no such thing as a corporate veil.

[14] On its face, this claim is a garden variety case between companies. Naming the owners or management of the business, simply because they took the impugned decision and perhaps "wilfully misread" the agreement, does not elevate the claim to one where individual liability attaches.

[15] This is important because Boakye has a residence in Nova Scotia, although it is not his only residence. A claim against him could be brought on the basis of his "ordinary residence." But if we take the two individuals out of the equation, the question is whether there is jurisdiction to bring a claim, under this contract, against FlatC which, as noted, is a Ghanan corporation which is not legally registered to operate in Canada.

[16] The Small Claims Court is a statutory court that can hear only certain types of claims, in certain specified circumstances, as set out in sections 9 and 19 of the Small Claims Court Act, relevant portions of which are:

> 9 A person may make a claim under this Act
>
> (a) seeking a monetary award in respect of a matter or thing arising under a contract or a tort where the claim does not exceed twenty-five thousand dollars inclusive of any claim for general damages but exclusive of interest;
>
> .....

> 19 (1) A claim before the Court shall be commenced in the county in which
>
> (a) the cause of action arose; or
>
> (b) the defendant or one of several defendants resides or carries on business, ...

[17] To paraphrase, and insofar as it applies here, a claim may be brought for a breach of contract in the county in which the cause of action arose or where "one of several defendants resides or carries on business." If the inquiry focusses on this Act alone, and if the cause of action did not arise in Nova Scotia, then the only basis for jurisdiction would be if one of the Defendants resided or carried on business in Nova Scotia.

[18] As mentioned, Boakye is one of the named Defendants and he is resident in Nova Scotia. However, I believe it would frustrate the intention of the Act to allow a party to establish territorial jurisdiction by adding a party resident in the jurisdiction, against whom there is no reasonable cause of action. As such, if I dismiss the action against Boakye, as I am inclined to do, then - assuming that the *Small Claims Court Act* is the definitive code on the subject - the only basis for the action to be properly before the Small Claims Court in Halifax County, is to determine that the cause of action arose here or to find that FlatC is resident in Nova Scotia, even though it is not registered to do business in Nova Scotia.

Other statutes and principles

[19] The exercise for determining jurisdiction in the Nova Scotia courts also engages other statutes and common law principles that may supply jurisdiction,

such as the common law principle of “convenient forum” as codified in the *Court Jurisdiction and Proceedings Transfer Act,* a Nova Scotia Statute that provides certain guidelines for when Nova Scotia courts have jurisdiction in a given case. The applicable sections are 3 and 4:

> TERRITORIAL COMPETENCE OF COURTS OF NOVA SCOTIA
>
> **Territorial competence of court**
>
> 3 (1) In this Part, "court" means a court of the Province unless the context otherwise requires.
>
> (2) The territorial competence of a court is to be determined solely by reference to this Part.
>
> **Proceedings against persons**
>
> 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.

[20] One of the questions that I must decide is whether s.4(e) of that Act applies to actions brought in the Small Claims Court or only in the Supreme Court of Nova Scotia or other courts such as the Family Court. In other words, I must determine whether the Small Claims Court can take jurisdiction where

"*there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based."*

[21] Counsel for the Defendant argues that the *Court Jurisdiction and Proceedings Transfer Act* does not apply to the Small Claims Court, and that there is no jurisdiction unless a finding can be made that the cause of action arose in the county where the claim is sought to be brought.

Residence of a corporation

[22] Another question to consider is whether FlatC is resident in Nova Scotia, notwithstanding the fact that it has not taken any steps to be registered within the province under the *Corporations Registration Act*. For purposes of court jurisdiction, there is s.8 of the *Court Jurisdiction and Proceedings Transfer Act* which sets out how residency for a corporation is determined:

> **Ordinary residence of corporation**
>
> 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.

[23] As such, if this statute applies, then FlatC could be considered ordinarily resident in Nova Scotia if *"it has a place of business in the Province"* or *"its central management is exercised in the Province."*

[24] I will consider below the potential applicability of s.8.

Questions to answer

[25] There are three separate questions to answer, in no particular order:

a. Is FlatC resident in Nova Scotia?

b. Where did the cause of action arise?

c. Does the *Court Jurisdiction and Proceedings Transfer Act* apply, and does it supply another basis to find jurisdiction in the Small Claims Court, based upon the "real and substantial connection" test?

Is FlatC resident in Nova Scotia?

[26] The short answer is "maybe." FlatC's possible residence in Nova Scotia cannot be determined on the admitted facts before me. One of its two principals, Boakye, maintains a residence in Halifax County, in Nova Scotia. If he conducts FlatC business from his Nova Scotia home, which is not at all farfetched, then it might be established that FlatC has a place of business in the Province, or that its central management (or at least a significant part thereof) is exercised in Nova Scotia.

[27] It would be up to the Claimant to bring forth evidence to satisfy these requirements, either directly or through cross-examination of any of the Defendant's witnesses. That occasion has not yet occurred.

[28] This finding alone would be sufficient to dismiss the preliminary objection and allow the matter to proceed to be scheduled for a hearing. But I prefer not to base my finding on this possibility alone.

Where did the cause of action arise?

[29] This is not as easy a question as it might first appear.

[30] To approach it I must first try to identify what action or default on the part of FlatC arguably constituted actionable conduct. As set out above, FlatC wrote a letter purporting to terminate the contract. On its face the writing of the letter occurred in Ghana, and was communicated by email to Aguilar in Nova Scotia, where it was received. The payment that the Claimant says ought to have been made, was to have been wired to the account in Nova Scotia.

[31] There is a lengthy history in the law of contracts being formed through correspondence between parties in different jurisdiction. In simpler days, prior to electronic means of communication, the courts recognized something called the "mailbox doctrine" (see eg. *Nova Scotia v. Commercial Credit Corp. Ltd.*, 1983 CanLII 2994 (C.A.)) that held that a letter, once put in the post in a particular place, constituted the act of acceptance, or breach of a contract, as the case may be. The theory was that once a letter was entrusted to the official mail, it was as good as delivered. This was said to be an exception to the general rule

that held the act to have occurred when and where actually received. In an inquiry as to where a cause of action arose, it might be found that the cause of action arose when the document was mailed, although decisions applying the mailbox doctrine are mostly concerned with other questions, such as whether an offer was accepted in a timely fashion.

[32] The Defendant relied upon the decision of Haliburton Co. Ct. J., as he then was, in *Joan Balcom Sales Inc. v. Poirier*, 1991 CarswellNS 81, 1991 CarswellNS 81, [1991] N.S.J. No. 617, 106 N.S.R. (2d) 377, 288 A.P.R. 377, a decision on appeal from the Small Claims Court, as standing for the proposition - where the Defendant is not resident in Nova Scotia - that the Small Claims Court has no jurisdiction unless the cause of action occurred in the county where the Small Claims Court action is brought. A claim commenced in the wrong county would be a nullity, unlike the situation in the superior courts where the court has province-wide jurisdiction and the question of where the trial should be held is a secondary procedural question.

[33] I have no difficulty with the proposition that Small Claims Court jurisdiction depends upon the Claimant choosing the correct county to commence the claim, although the provisions of the *Court Jurisdiction and Proceedings Transfer Act* - which postdate the *Joan Balcom* decision, must be reconciled with the *Small Claims Court Act.*

[34] The *Joan Balcom* case is actually helpful to the Claimant's position, because the court also discussed the question of where the cause of action arose, where a document was executed in Ontario and faxed to Nova Scotia.

[35] Justice Haliburton at paragraphs 22 and 23 discussed why the mailbox doctrine was not applicable in a situation where communication is instantaneous:

22 The vendor, who would deny the jurisdiction of the Small Claims Court in Nova Scotia, argues that the acceptance of the facsimile signed in Ottawa is "accepted" in Ottawa by virtue of the "mailbox doctrine". After referring to the authorities, I am satisfied that the "mailbox doctrine" is an exception to the general rule. As a general rule, no contract is complete or executed until the acceptance of the offer is delivered and/or communicated to the offeror. If, as is argued, the plaintiff is the offeror, either with respect to the listing agreement or the purchase and sale agreement, then the acceptance was only effective if and when it was received by the plaintiff.

I find the following relevant quotations in John Morris, ed., Chitty On Contracts, 22nd ed., vol. 1 (London: Sweet & Maxwell, 1961), para. 72:

> It is a well-established rule that, subject to a waiver of this requirement which is considered below, the acceptance must be communicated to the offeror. Thus it may be said that not only is a mere mental assent insufficient but also that the evidence of acceptance which the law requires must generally be brought to the notice of the offeror Unquestionably, as a general proposition when an offer is made, it is necessary, in order to make a binding contract, not only that it should be accepted, but that the acceptance should be notified.

And at para. 75:

It is however well settled that, whatever form the reply takes, it must be communicated to the offeror. The general rule, subject to two special cases to be considered below concerning the post and telegrams, is that the risk of the acceptance not in fact being communicated is to be borne by the offeree.

[Emphasis added.] The text goes on to discuss the time when acceptance is complete where parties are in each other's presence, or where the contract is made by telephone and telex. In each case, the acceptance is effective only when received and understood by the offeror. Each of those cases deals with what might be termed "instantaneous" communication. In the context of facsimile machines, the telex is of peculiar interest. In dealing with such a case, Chitty observes at para. 76, p. 39:

> They (the Court of Appeal) emphasised the general rule that, apart from letters sent by post, an acceptance must be communicated in order to be effective. Birkett L.J. said (in *Entores Ltd v. Miles Far East Corporation*):

> In my opinion, the cases governing the making of contracts by letters passing through the post have no application to the making of contracts by Telex communications. The ordinary rule of law, to which the special considerations governing contracts by post are exceptions, is that the acceptance of an offer must be communicated to the offeror.
>
> 23 The writers then discuss the practical need of special rules to be applied to contracts entered into by post in the age when post was the primary method of commercial communication. The considerations which made it highly practical, if not imperative, in the interests of commerce, for the offeree to have knowledge in a timely fashion that he had a firm contract do not apply to facsimile transmissions. The communication is instantaneous. The offeree could easily have confirmed within minutes that they had a binding contract.

[36] He went on to conclude that the cause of action arose in Nova Scotia, and in Annapolis County in particular, where the fax was received.

[37] There is surprisingly little authority that brings this doctrine up to the present day, where so much of communication is instantaneous and occurs as much in cyberspace as it does in any particular place. To give an example, I may live in Nova Scotia but be travelling in Europe where I send an email out of my gmail account. The receiver has no way of knowing where I am when I send that email. Can it be assumed that the email originated from Nova Scotia, where I reside? Or is the crux of the matter where the email is received? Does it matter where the receiver is at the time of receipt?

[38] In an Ontario case, *Elguindy v. Core Laboratories Canada Ltd. et al.*, 1987 CanLII 4066 (ON SC), the headnote sums up the finding:

> The plaintiff alleged that his former employer had induced his new employer to breach the plaintiff's contract of employment and sued for damages in the Provincial Court (Civil Division). The defendants were resident outside of the jurisdiction and the alleged act inducing the breach of contract consisted of a telephone call emanating from outside the

> province. The trial judge held that the court lacked jurisdiction as the tort was not committed within the province. The plaintiff appealed to the Divisional Court.
>
> Held, the appeal should be allowed. Where it is alleged that the tort of inducing a breach of contract occurred in Ontario, the geographical source of the inducement is of no consequence. Accordingly, the Provincial Court (Civil Division) did have jurisdiction to deal with the action.

[39] I believe that the same considerations apply here, and that the cause of action arose when FlatC's repudiation of the contract was received in Nova Scotia, and specifically in Halifax County.

[40] I have also considered the case of *Bailey v Milo-Food & Agricultural Infrastructure & Services Inc*., 2017 ONSC 1789 (CanLII), cited by the Defendant on the question of when a cause of action arises. That was a wrongful dismissal case, and the court held that the contract of employment is breached "when the employer dismisses the employee without reasonable notice." I do not find the case helpful, as it does not venture into the question of where the breach occurred, only when.

Substantial connection to Nova Scotia under the Court Jurisdiction and Proceedings Transfer Act

[41] The case of *Bouch v. Penny*, 2009 NSCA 80 is a virtual Code on the application and interpretation of the *Court Jurisdiction and Proceedings Transfer Act.* Among the principles noted is that the Act is a codification of common law, and in particular certain Supreme Court of Canada cases, and that it was (then) one of several similar pieces of legislation in Canadian Provinces intended to harmonize the rules across the country. The point is also made that the Act is procedural in nature, not intended to change (but only codify) existing law.

[42] The already existing “substantial connection” test became s.4(e) which provides territorial jurisdiction where “ *there is a real and substantial connection between the Province and the facts on which the proceeding against that person is based.”*

[43] There is nothing on the face of that Act that suggests it does not apply to the Small Claims Court. Section 3(1) defines a "*court*" as *“a court of the Province unless the context otherwise requires.”* Had the Legislature intended that it only apply to certain courts, it could easily have said so.

[44] The Defendant argues that the substantial connection test cannot apply because of the interplay between s.4(e) of the *Court Jurisdiction and Proceedings Transfer Act* and s.19 (1) of the *Small Claims Court Act* which provides that claims “shall be commenced in the county in which ... the cause of action arose; or ... the defendant or one of several defendants resides or carries on business.” According to that logic, although there might be a substantial connection to the Province, unless the cause of action arose in Nova Scotia (in which case it would have arisen in a county) or the Defendant resides or carries on business in a county, then there is nowhere for the claim to be brought.

[45] To use an example, a foreign defendant may have entered into a contract in Nova Scotia, or engaged in some transactions involving or in Nova Scotia, which would satisfy the “substantial connection” test, but the Small Claims Court might lack jurisdiction because there is no clearly applicable county in which to commence the claim. In such a case, it is argued, the claim (regardless of its quantum) would have to be brought in the Supreme Court of Nova Scotia.

[46] The argument is not without its attraction, but in my opinion it would frustrate the intention of both Acts to create an orphan proceeding that can only be brought in an expensive forum. I am mindful of s.2 of the *Small Claims Court Act* that states:

> 2 It is the intent and purpose of this Act to constitute a court wherein claims up to but not exceeding the monetary jurisdiction of the court are adjudicated informally and inexpensively but in accordance with established principles of law and natural justice.

[47] In my view, where the substantial connection test is met, a claim can be brought in the Small Claims Court in the county which has the closest connection to the issues. Nova Scotia is a geographical entity, and matters that have a close connection to Nova Scotia necessarily have a close connection to some place in Nova Scotia.

[48] The necessity to choose the correct County can be best understood as a means to protect Defendants from having to travel at possibly great cost and inconvenience to a hearing in a place that may be convenient only to the Claimant. If every claim could be brought anywhere in the province, it would be open to abuse by Claimants who wish to expose Defendants to cost and inconvenience. This differs from the situation in Supreme Court where the Plaintiff may file the action anywhere and specifies a proposed place of trial. The Defendant has the right to move for a change of venue if they do not agree with the Plaintiff's choice. There is no parallel in the Small Claims Court procedure where trial dates are set at the time the Claim is issued.

[49] In a case such as here, there are many close connections to Nova Scotia. The Claimant company is based in Nova Scotia and its principal resides in Halifax county. The contract specifically provides that Nova Scotia law applies.

One of the principals of FlatC resides part of the time in Halifax county, Nova Scotia. The payment that is the subject of the claim was one that was supposed to have been made to a bank in Halifax County, Nova Scotia. The message to the effect that the contract was being terminated, though apparently authored in Ghana, was received in Halifax County, Nova Scotia.

[50] The two part analysis that follows a finding of a substantial connection is this, taken from the reasons of Justice Wright in *Bouch v. Penny*, adopted by the Court of Appeal (above) on appeal from Wright J.:

> That is to say, in order to assume jurisdiction, the court must first determine whether it can assume jurisdiction, given the relationship among the subject matter of the case, the parties and the forum. If that legal test is met, the court must then consider the discretionary doctrine of forum non conveniens, which recognizes that there may be more than one forum capable of assuming jurisdiction. The court may then decline to exercise its jurisdiction on the ground that there is another more appropriate forum to entertain the action.

[51] Here the substantial connection test is met.

[52] Following through with the analysis, there are only two arguable territorial jurisdictions where the case may be brought, namely Nova Scotia and Ghana.

[53] The parties entered into a contract that applies the law of Nova Scotia. While the clause is not a “choice of forum” clause, it does signal a preference for Nova Scotia. One of the principals of the Defendant FlatC resides in Nova Scotia, and it may yet be determined that FlatC carries on business in Nova Scotia. It was served in Nova Scotia by serving one of its directors, namely Boakye. No argument was made that such service was invalid.

[54] I find that Nova Scotia is a convenient forum and Halifax County is the place where there is a close connection to the facts of the case. There is nothing on the face of the claim, or in the admitted facts, that would favour Ghana as a more convenient forum.

Conclusion

[55] I am accordingly of the view that the Small Claims Court in Halifax County has jurisdiction over this claim. There are several bases for this finding. The cause of action arose in Nova Scotia. There is a substantial connection to Nova Scotia, and the balance of convenience favours Nova Scotia. Lastly, there is a possibility that the corporate Defendant FlatC may be found to be resident in Nova Scotia within the terms set out in s. 8 of the *Court Jurisdiction and Proceedings Transfer Act*.

[56] The claim against the two individual Defendants is dismissed, and the claim may proceed only against the Defendant FlatC.

[57] The preliminary motion is dismissed and the Claimant may obtain a fresh date for a Special Hearing from Court Administration. I encourage counsel to cooperate in selecting a date that suits all parties. I also direct them to consider whether one evening sitting will provide sufficient time. If they agree that two or more evenings is necessary, they may ask for hearings on consecutive nights.

[58] The hearing should be before me as I believe myself to be seized of jurisdiction.

Eric K. Slone, Adjudicator