COURT OF APPEAL FOR ONTARIO

CITATION: Knowles v. Lindstrom, 2014 ONCA 116
DATE: 20140213
DOCKET: C57226

Doherty, Goudge and Lauwers JJ.A.

BETWEEN

Nancy Evelyn Knowles

Applicant (Respondent)

and

James E. Lindstrom and Canada Realty LLC

Respondents (Appellants)

Patrick D. Schmidt and George Karahotzitis, for the respondents (appellants)

Philip Epstein, Q.C. and Melanie Kraft, for the applicant (respondent)

Heard: November 6, 2013

On appeal from the order dated May 15, 2013 made by Justice Craig Perkins of the Superior Court of Justice in Toronto, with reasons reported at 2013 ONSC 2818.

Doherty J.A.:

I

[1] The appellant (Mr. Lindstrom) and the respondent (Ms. Knowles) began living together in Florida in 2002. They separated in February 2012. They were never married.

[2] Ms. Knowles left Florida in February 2012 and flew to Toronto. She has lived in Toronto since the break-up. Shortly after her return, Ms. Knowles commenced an application in the Ontario Superior Court seeking spousal support under Part III of the *Family Law Act*, R.S.O. 1990, c. F.3, and a declaration that she was a beneficial owner of two Muskoka properties purchased by Mr. Lindstrom or his company, Canada Realty LLC ("Canada Realty") while he and Ms. Knowles were living together.

[3] Mr. Lindstrom responded with a motion seeking a stay of Ms. Knowles' application. He argued, first, that the Ontario Superior Court had no jurisdiction over the claims and, second, that if Ontario had jurisdiction, Florida was the *forum conveniens*. Alternatively, Mr. Lindstrom sought an order that, if the application proceeded in Ontario, Florida law should apply to the adjudication of the claims. Under Florida law, Ms. Knowles has no claim for support because she and Mr. Lindstrom were never married.

[4] In reasons released in May 2013, the motion judge held that Ontario had jurisdiction and that Ontario was the *forum conveniens*. He further held that Ontario law applied to the claims.

[5] Mr. Lindstrom appeals from all three holdings made by the motion judge. I would dismiss the appeal.

II

[6] Mr. Lindstrom is an American. Canada Realty is a Nevada corporation wholly owned and controlled by Mr. Lindstrom. Ms. Knowles was born in Canada and is a Canadian citizen. She lived and worked in Ontario for most of her life before 2002.

[7] Mr. Lindstrom and Ms. Knowles met in Florida in 2002. Both were married at the time, but those marriages ended in divorces in 2003. By late 2002, Mr. Lindstrom and Ms. Knowles were living together in Florida. They lived at various rented homes in Florida between 2003 and 2007. In 2008, Mr. Lindstrom purchased a mansion in Florida where the two lived until their break-up in February 2012.

[8] From early in their relationship, Mr. Lindstrom and Ms. Knowles vacationed in Muskoka, Ontario. In 2007, Mr. Lindstrom purchased a property in Muskoka for $4.2 million. He put title in the name of Canada Realty. In 2009, Mr.

Lindstrom purchased a second Muskoka property for $5.45 million. He put the first property up for sale, but that property had not sold at the time of separation.

[9] Mr. Lindstrom and Ms. Knowles vacationed in many places, including Muskoka. They spent more time in Muskoka after the purchase of the first cottage property in 2007. They disagreed as to exactly how much time they spent in Ontario and, more specifically, in Muskoka. Ms. Knowles estimated that between January 2007 and December 2011, she and Mr. Lindstrom spent about 60 per cent of their time in Muskoka or Toronto. Mr. Lindstrom estimated that he spent about 40 per cent of that time period in Muskoka. He also indicated that Ms. Knowles was with him for some, but not all, of the time he spent in Muskoka.

[10] In 2009, Mr. Lindstrom, through Canada Realty, purchased a house in Toronto as an investment. Ownership of that house was briefly transferred to Ms. Knowles in 2011. She immediately transferred ownership to her daughter from an earlier marriage.

[11] According to Ms. Knowles, she was involved in locating, arranging the purchase of, remodelling, and maintaining the Muskoka properties. She claimed an interest in those properties based on those contributions. Her application includes the following allegations:

> 15. The Applicant has contributed directly and indirectly to the two Lake Rosseau homes over the course of the ten-year relationship. The Applicant has a proprietary interest in both Lake Rosseau homes on the basis of

> constructive trust doctrine. Over the years, the parties have made improvements to both homes, and paid property taxes and utility expenses.
>
> 16. It was the Applicant's understanding that she and the Respondent beneficially owned both Lake Rosseau homes. The Applicant relied on this understanding.
>
> 17. If the Applicant's contribution in both properties is left in the hands of the Respondent, then the Respondent will be unjustly enriched and there would be a corresponding deprivation of the Applicant and an absence of any juristic reason for the enrichment of the Respondent.
>
> 18. The Applicant beneficially owns 50% of both Lake Rosseau homes.

[12] Mr. Lindstrom listed both Muskoka properties for sale shortly after the breakdown of his relationship with Ms. Knowles. Both properties were sold with scheduled closing dates in June 2012. Prior to closing, Ms. Knowles obtained certificates of pending litigation on both properties. To permit the sales to close, the parties agreed that the certificates would be discharged on the condition that the net proceeds of the sales (about $9,073,000) would be held in trust by Mr. Lindstrom's Ontario law firm. Subsequently, by consent order, $4,837,000 was released to Mr. Lindstrom. The remainder, about $4.2 million, remains in trust with his law firm.

[13] Ms. Knowles is 58 years old. She did not work when she was living with Mr. Lindstrom and was totally dependent upon him financially. He is a very wealthy man and they lived a lavish lifestyle. Ms. Knowles got a job as a

salesperson after she returned to Toronto in February 2012. She has very few assets.

[14] Mr. Lindstrom is 65 years old. He has been a very successful businessman with a variety of interests in different parts of the United States. The vast majority of Mr. Lindstrom's many assets are in the United States.

[15] There are no children from the relationship.

III

A. DOES ONTARIO HAVE JURISDICTION?

[16] The motion judge recognized that there are no statutory provisions governing Ontario's jurisdiction to hear the claims advanced by Ms. Knowles. He turned to the real and substantial connection test as explained in the leading case *Club Resorts Ltd. v. Van Breda*, 2012 SCC 717, [2012] 1 S.C.R. 572. The motion judge concluded, at para. 46:

> In summary, for the reasons discussed above, I find that Ontario has jurisdiction over this case because there is a real and substantial connection between the parties, issues and transactions in question in this case and Ontario. The presumptive factors establishing jurisdiction are that the case involves a claim to ownership of Ontario land, a claim for damage (the allegation of detriment incurred by the applicant in enriching the respondent) suffered in Ontario and a claim for support by a party who is ordinarily resident in Ontario. Further, the parties were both ordinarily resident in Ontario (as well as Florida) until their separation. Although their primary residence was in

> Florida, their customary pattern of life included residence for a substantial period each year in their Ontario home from 2007 through 2011 which made Ontario a "real home". From the date of separation, the applicant was ordinarily resident in Ontario and not elsewhere.

[17] The parties agree that the *Van Breda* analysis applies to the jurisdictional inquiry. As explained in *Van Breda*, at para. 99, that inquiry focuses on the connection between the forum and the subject matter of the litigation and the defendant. The inquiry looks to the claim as a whole:

> The purpose of the conflicts rule is to establish whether a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. If such a connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

[18] While the ultimate determination of jurisdiction looks to the "factual and legal situation" as a whole, it is helpful when applying *Van Breda* to examine each claim individually. The nature of each claim may affect which facts will be viewed as presumptive connecting factors for the purposes of the *Van Breda* inquiry.

[19] Ms. Knowles claims an interest in real property in Ontario based on the work she did in Ontario in relation to that property. She alleges that Mr. Lindstrom was unjustly enriched in Ontario by her efforts in relation to the

property and seeks a constructive trust in her favour as a remedy for that unjust enrichment. The motion judge held that the location of the property in Ontario, as well as the resulting damage to Ms. Knowles, which, in his view, occurred in Ontario, constituted presumptive connecting factors for jurisdictional purposes.

[20] The appellant does not dispute that, where the claim asserts a proprietary interest in property, the location of that property within Ontario is a presumptive connecting factor. He does, however, submit, relying on *Van Breda*, at para. 89, that damage occurring in Ontario is not a presumptive connecting factor. The appellant acknowledges that *Van Breda* involved a tort claim and that the factors considered in *Van Breda* as potentially presumptively connecting factors will not necessarily be characterized in the same way for the purposes of a restitution claim. He submits that the *situs* of the damage is, however, no more a presumptive connecting factor in a restitution claim than it is in a tort claim.

[21] The location of the property is, in my view, a presumptive connecting factor. If the subject of the claim is real property which is alleged to be the vehicle for the alleged unjust enrichment, I find it hard to think of any fact or factors that would provide a stronger presumptive connection than the location of the property within the jurisdiction. The analogy between the *situs* of the tort, a presumptive connecting factor in tort cases, *Van Breda*, at para. 88, and the location of the property in a property case is an apt one. Indeed, the argument in favour of the location of the property as a presumptive connecting factor is

stronger than the argument in favour of the *situs* of the tort. While a tort may occur in more than one jurisdiction, real property is permanently located in only one jurisdiction. The location of the property clearly links any dispute over ownership to the courts of that jurisdiction.

[22] In *Van Breda*, at para. 83, LeBel J. instructs courts to look to the rules governing service *ex juris* for guidance in determining the appropriate presumptive connecting factors for different claims. He describes those rules as expressing the "wisdom and experience drawn from the life of the law". Rule 17.02(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 permits service *ex juris* without a court order of a claim in respect of real property in Ontario. This rule reflects the obvious close relationship between real property in the province and the adjudication of claims relating to that property. It also supports the position that the location of the real property is a presumptive connecting factor in litigation involving a claim arising from that property.

[23] The sale of the property does not change the essential nature of the claim. Ms. Knowles' claim remains a claim arising from real property in Ontario. Because the property has been sold, her remedy, if she successfully establishes that claim, is now for the monetary value of the claim. To hold that the fundamental nature of Ms. Knowles' claim changed for jurisdictional purposes when the property was sold would be to tell persons in Ms. Knowles' position that they must resist the sale until the claim is determined. Clearly, Mr. Lindstrom

wanted the property sold. Ms. Knowles' willingness to allow the sale to go forward should not cost her access to an Ontario court for the determination of her claim with respect to the Muskoka properties.

[24] A single presumptive connecting factor, in the absence of any rebuttal of that presumption by Mr. Lindstrom, is sufficient to establish jurisdiction under the *Van Breda* analysis: *Van Breda*, at paras. 80-81. I need not consider whether the motion judge was correct in identifying the location of the damages flowing from the alleged unjust enrichment as an additional presumptive connecting factor. I note only that, in the context of an unjust enrichment claim, resort to damages as a presumptive connecting factor is potentially problematic. The essence of the unjust enrichment claim lies in the undeserved benefit to the defendant rather than in any damage to the plaintiff. Here, that benefit occurred in Ontario.

[25] I will, however, in deference to the arguments advanced by the appellant, address one other factor identified by the motion judge as a presumptive connecting factor. The motion judge concluded that Ms. Knowles and Mr. Lindstrom were ordinarily resident in Ontario and Florida between 2007 and their break-up in February 2012. He further held that their residence constituted a presumptive connecting factor in respect of both the property and the support claims.

[26] The finding that Ms. Knowles and Mr. Lindstrom were ordinarily resident in Ontario in the years between 2007 and 2012 was the primary target of the appellant's arguments in this court. The appellant contends that, for jurisdictional purposes, Ms. Knowles and Mr. Lindstrom could have only one residence and that, as the motion judge acknowledged, Florida was their primary residence.

[27] *Van Breda*, at para. 86, recognizes that the ordinary residence of the defendant is a presumptive connecting factor in tort cases. This court has held that the "real home" or "ordinary residence" of the parties is a presumptive connecting factor in litigation arising out of a marriage breakdown: *Wang v. Lin*, 2013 ONCA 33, at para. 47; and *Ghaeinizadeh v. Ku De Ta Capital Inc.*, 2013 ONCA 2, at para. 15.

[28] The motion judge, at para. 44, applying the ratio in *Thomson v. Minister of National Revenue*, [1946] S.C.R. 209, held that a person may have more than one ordinary residence at a given time. *Thomson* involved a taxing statute which provided that persons were liable for tax if "residing or ordinarily resident in Canada during such year". The individual challenging the tax assessment had two homes in the United States. He had built a summer home in Canada where he and his family routinely spent about five months a year during the spring and summer.

[29] There are five judgments in *Thomson*. Four of the judges agreed that a person could be ordinarily resident in more than one place and that, on the evidence, Mr. Thomson was ordinarily resident in Canada. Justice Estey, at pp. 231-32, said:

> This residence at East Riverside [Canada] was maintained in a manner that made it always at his disposal and available at any time. When there his activities of life were centred about that point. It was to and from there he made his visits to other places. He and his family were then living there. It would appear that the appellant was maintaining more than one residence to which he could and did come and go as he pleased. …
>
> The appellant selected the location, built and furnished the residence for the purpose indicated, and has maintained it as one in his station of life is in a position to do. In successive years his residence there was in the regular routine of his life acting entirely upon his own choice, and when one takes into consideration these facts, particularly the purpose and object of his establishing that residence, the conclusion appears to be unavoidable that within the meaning of this statute he is one who is ordinarily resident at East Riverside, New Brunswick.

[30] Justice Kellock, at p. 210, took the same view:

> There was no difference between the appellant's use of his Canadian home and that of his United States home or homes. The establishments were essentially of the same nature and were equally regarded by him as "homes" in the same sense. His residence in each was in the ordinary and habitual course of his life and there was no difference in the quality of his occupation, though he occupied each at different periods of the

> year. He came within the term “residing” and “ordinary resident” in Canada.

[31] There are clear similarities between the lifestyle enjoyed by Ms. Knowles and Mr. Lindstrom and that of the taxpayer described in *Thomson*. After acknowledging that the parties’ “primary home” had “always been in Florida”, the motion judge said, at para. 44:

> On the uncontested facts in this case, the parties had set up a pattern that included residence in Ontario, in a home owned by the respondent, on a regular basis for part of every year, for months at a stretch, for more than five years. That amounts to “ordinary residence”.

[32] I agree with the motion judge that *Thomson* establishes that a person can be “ordinarily resident” in more than one place at the same time. With respect, the contrary holding in *Derksen v. Insurance Corp. of British Columbia*, [1995] B.C.J. No. 2709, at paras. 20-21 (S.C.) misreads *Thomson*. I also find nothing in the judgments in *Thomson* that would justify limiting the court’s analysis to the taxation statute in issue. The definition of “ordinary residence” arrived at by the majority in *Thomson* is consistent with the plain meaning of the phrase and reflects the reality of the lifestyle that some people lead. The motion judge was satisfied that Ms. Knowles and Mr. Lindstrom had that kind of lifestyle. The record fully supports that finding.

[33] The *Family Law Act* is silent on the question of jurisdiction over Ms. Knowles’ support claim. The motion judge held that in the absence of legislative

direction to the contrary, that he was not limited to the concept of primary or principal residence, when considering the significance of residence to the jurisdictional question. I agree. In my view, if there is no controlling statutory provision, the concept of ordinary residence as defined in *Thomson* is appropriate when considering whether the parties' physical connection to a jurisdiction is sufficient to constitute a presumptive connecting factor for the purposes of the *Van Breda* analysis.

[34] I do not understand the appellant to argue that, if the motion judge properly determined that Ms. Knowles and Mr. Lindstrom were ordinarily resident in Ontario at the time of the break-up, that ordinary residence could not provide a basis for the assumption of jurisdiction in respect of both claims. Clearly, ordinary residence, especially where that residence is in the properties that are the subject matter of the property claim, constitutes a real and substantial connection for the purposes of the property claim. Similarly, ordinary residence at the time of break-up sufficiently connects the litigation and the parties to Ontario to warrant Ontario's jurisdiction over the support claim: *Ghaeinizadeh.*

[35] As I would not disturb the motion judge's finding that the parties were ordinarily resident in Ontario at the time of the break-up, and as I agree with the motion judge's finding that ordinary residence provides the necessary connecting factor to find that Ontario courts have jurisdiction over both the property and the support claims, I need not determine whether the motion judge erred in finding

that Ms. Knowles' residence at the time she commenced the application was sufficient to ground jurisdiction. I will, however, make three observations.

[36] First, Mr. Lindstrom's contention that jurisdiction premised upon the applicant's residence at the time of application opens the door to forum shopping has no application here. Ms. Knowles had very real connections to Ontario before, during, and after the time she lived with Mr. Lindstrom. The trial judge expressly found, at para. 41, that "there is no forum shopping here". In any event, in those cases that do smell of forum shopping, the doctrine of *forum non-conveniens* can relieve against the rigid application of a jurisdictional rule based upon residence where it is necessary to ensure a fair and efficient resolution of the litigation: *Van Breda*, at para. 104.

[37] Second, the motion judge's consideration of the *Interjurisdictional Support Orders Act, 2002*, S.O. 2002, c. 13 (*ISOA*) was appropriate in the context of the jurisdictional analysis even though the support application was not brought under that *Act*. It could have been: see *ISOA*, s. 5; and Regulation 53/03. *Van Breda*, at para. 91, instructs that, in considering whether a fact or factors should be treated as presumptive connectors for jurisdictional purposes, the court may look to the treatment of the proposed connecting factor in related statutes. In fact, LeBel J., in considering whether the *situs* of the tort should be treated as a presumptive connecting factor under the common law applicable in Ontario, looked to the treatment of the *situs* of the tort under legislation in other provinces.

The motion judge properly followed the lead provided in *Van Breda* when he looked to the *ISOA* for assistance in determining whether residence should constitute a presumptive connecting factor for the purposes of a support application brought under the *Family Law Act*.

[38] Third, the appellants point to *Van Breda*, at para. 86, as authority for the proposition that the residence of the applicant at the time of the application cannot be a presumptive connecting factor for the purposes of jurisdiction. The statement in *Van Breda* is made in respect of tort claims. No doubt, it will also apply to other kinds of claims, but it does not necessarily apply to all claims. Support claims are arguably quite different from tort or contract claims in that, absent appropriate support from the former partner, the burden of support may fall on the state where the party seeking support resides. As stressed in *Van Breda*, the list of presumptive connecting factors depends, in part, on the subject matter of the litigation. It follows that the factors may vary depending on the nature of the claim.

[39] For the reasons outlined above, I agree with the motion judge that Ontario has jurisdiction to hear Ms. Knowles' claims.

IV

B. IS FLORIDA THE *FORUM CONVENIENS*?

[40] A finding of jurisdiction is not the end of the analysis. The court must also consider the question of *forum non conveniens*. The motion judge, at paras. 47-55, held that the appellant had failed to demonstrate that Florida was the *forum conveniens*. That finding is properly viewed as an exercise in judicial discretion. This court will defer to the motion judge's assessment, absent an error in principle, a material misapprehension of the evidence, or if, in the circumstances, the exercise of that discretion is unreasonable: *Van Breda*, at para. 121.

[41] The motion judge, at para. 47, referred to the various factors relevant to the *forum conveniens* inquiry as identified in the controlling case law. He properly placed the burden on the appellant to demonstrate that it would be fairer and more efficient to adjudicate the claims in Florida than in Ontario. It is not enough to show that the Florida courts also have jurisdiction over the claims: *Van Breda*, at paras. 103, 109.

[42] Ms. Knowles would have suffered a loss of juridical advantage if Ontario declined jurisdiction in favour of Florida. Ms. Knowles had no right of support under Florida law because she and Mr. Lindstrom were not married. The appellant acknowledges this disadvantage but submits that the motion judge

gave undue weight to Ms. Knowles' loss of juridical advantage if Ontario declined jurisdiction.

[43] Loss of juridical advantage to one or the other of the parties is a relevant consideration in the *forum conveniens* analysis: *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, at p. 924. I do not read the motion judge as placing any undue weight on Ms. Knowles' loss of juridical advantage. He simply observed, at para. 52:

> Clearly if this court declines jurisdiction, the appellant will lose a legitimate juridical advantage, in that her claim would not be entertained by Florida.

[44] The motion judge's observation was made in the context of a review of several factors relevant to the *forum conveniens* inquiry. Most of those factors clearly favoured Ontario and fully justified the motion judge's conclusion that Mr. Lindstrom had failed to show that Florida was clearly the more appropriate forum.

V

C. IS ONTARIO LAW APPLICABLE?

[45] Mr. Lindstrom submits that Florida law should be applied to both the property-related claim and the support claim because Florida has the closest and most real connection to the issues and facts underlying the litigation. Mr. Lindstrom relies on the unchallenged evidence that the parties had their primary residence in Florida throughout their 10-year relationship. He contends that they

would reasonably have expected the law of Florida to apply to any legal issues arising should their relationship end.

[46] Mr. Lindstrom had the burden of demonstrating that Ontario law should not apply to the claims. Like the motion judge, I do not think Mr. Lindstrom met that burden.

[47] The property-related claim is clearly much more closely related to Ontario than any other jurisdiction. The property is in Ontario. The work done by Ms. Knowles said to justify the claim was done in Ontario. The unjust enrichment said to have flowed to Mr. Lindstrom is in the nature of an increase in the value of the property. That enrichment occurred in Ontario. All of those factors favour the application of Ontario law: Lawrence Collins, ed., *Dicey, Morris and Collins on the Conflict of Laws*, 14th ed. (London: Sweet & Maxwell, 1993), at p. 1863. Whether one applies by analogy the *lex loci delicti* rule, or one looks to the jurisdiction where the unjust enrichment occurred, Ontario law applies to the property claim.

[48] The argument in favour of applying Ontario law to the support claim is perhaps somewhat less powerful than the argument for applying Ontario law to the property-related claim. However, bearing in mind the finding that Mr. Lindstrom and Ms. Knowles were ordinarily resident in Ontario for the last five years of their relationship and that Ms. Knowles was resident in Ontario at the

time of the application, I think the motion judge properly found that there was no compelling reason to apply the law of another jurisdiction to the support claim.

[49] I would add that in considering the choice of law, I think it is relevant that the property-related claim and the support claim are closely connected. The determination of the property claim could affect the outcome of the support claim: see *Fisher v. Fisher* (2008), 88 O.R. (3d) 241, at para. 53. The interrelationship of the two claims is a further reason for applying the same law to both. The motion judge did not err in doing so.

VI

D. CONCLUSION

[50] I would dismiss the appeal. The parties agreed on the quantum of costs on the appeal. Ms. Knowles should have her costs of the appeal in the amount of $30,000, inclusive of disbursements and relevant taxes.

RELEASED: “DD” “FEB 13 2014”

“Doherty J.A.”
“I agree S.T. Goudge J.A.”
“I agree P. Lauwers J.A.”