COURT OF APPEAL FOR ONTARIO

CITATION: Sinclair v. Amex Canada Inc., 2023 ONCA 142
DATE: 20230302
DOCKET: C69847

Tulloch, Nordheimer and Harvison Young, JJ.A.

BETWEEN

Duncan Sinclair and Michelle Sinclair

Plaintiffs
(Respondents)

and

Amex Canada Inc. c.o.b. Centurion Travel Service, Carey International, Inc., Medov S.R.L., Venezia Turismo, Venice Limousine S.R.L, Narduzzi e Solemar S.L.R., John Doe Corp. and Cristian Dordit

Defendants
(Appellants)

David Zuber and Patrick Essig, for the appellants

Neil Paris and Zach Parrott, for the respondents

Heard: September 6, 2022

On appeal from the order of Justice Audrey P. Ramsay of the Superior Court of Justice, dated August 16, 2021.

Nordheimer J.A.:

[1] Three Italian companies appeal from the order of the motion judge who dismissed their motion for an order dismissing this action, or alternatively staying the action, on the basis that the Ontario Superior Court of Justice lacks jurisdiction over them. For the following reasons, I have concluded that the motion judge erred

in her analysis. The appeal should be allowed, and the action stayed against the appellants.

BACKGROUND

[2] This action arises out of an accident that occurred on July 25, 2017 in Venice, Italy. The respondents, together with their son, were passengers on a water taxi that crashed into a wooden structure. The respondents were both injured, Duncan Sinclair seriously so. After returning to Canada, the respondents commenced this action seeking damages arising out of the accident.

[3] The respondents and their son were on a European holiday to celebrate their son's graduation from high school. They eventually arrived in Italy and travelled to Florence. On July 25, 2017, they flew from Florence to Venice.

[4] The day before flying to Venice, Mr. Sinclair booked transportation from the Venice Marco Polo Airport to their hotel in Venice, which included a water taxi ride.

[5] The next day, the respondents and their son travelled to Venice and were transported by van from the airport to the water taxi terminal where they boarded a water taxi owned by the appellant, Venice Limousine S.R.L. The water taxi was operated by the defendant, Cristian Dordit. Mr. Dordit has not responded to these proceedings. The accident occurred during the trip to their hotel.

[6] The respondents had arranged their travels through Amex Canada Inc. which operates under the name Centurion Travel Service. Amex Canada provides

travel-related services to individuals in Canada. Mr. Sinclair used his Centurion Card membership to book the trip.

[7] As pleaded by the defendant, Amex Canada, Centurion Card members enjoy benefits, including access to dedicated concierge and travel agent services for booking personalized travel services such as car services, flights, and hotel accommodations. All travel bookings are made through Centurion Travel Service. Centurion Travel Service routinely engages third-party travel suppliers, at the request and on behalf of Centurion Card members, for the provision of travel services to such Centurion Card members.

[8] As noted earlier, Mr. Sinclair requested a water taxi to take the respondents and their son from the Venice Marco Polo Airport to their hotel in Venice. Centurion Travel Service contacted the defendant, Carey International, Inc., who in turn contacted the appellant, Venezia Turismo, which is a water taxi dispatching company. As pleaded, Venezia Turismo then contacted the appellant, Venice Limousine S.R.L., which is the owner of the water taxi involved in the accident. Venice Limousine S.R.L. also employed the driver of the water taxi. At the same time, the appellant Medov S.R.L. sent an e-mail to Venezia Turismo confirming the booking for the water taxi. It is unclear, from the record, what role Medov S.R.L. had in this engagement.

ANALYSIS

[9] I begin my analysis by noting that the action commenced by the respondents is founded in negligence. It is not founded, nor is it pleaded, as a breach of contract action.

(1) Was a presumptive connecting factor established?

[10] The sole issue before the motion judge was whether the fourth presumptive connecting factor from *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, gave the Ontario Superior Court of Justice jurisdiction over the appellants with respect to the action started by the respondents. The motion judge concluded that it did. I find that the motion judge erred in so concluding.

[11] I start with the decision in *Van Breda*. At para. 90 of *Van Breda*, LeBel J., writing for the court, sets out four presumptive connecting factors. He said:

> To recap, in a case concerning a tort, the following factors are presumptive connecting factors that, *prima facie,* entitle a court to assume jurisdiction over a dispute:
>
> (a) the defendant is domiciled or resident in the province;
>
> (b) the defendant carries on business in the province;
>
> (c) the tort was committed in the province; and
>
> (d) a contract connected with the dispute was made in the province.

[12] In considering the application of *Van Breda* to this case, it is important to remember the factual foundation for the claims in that case. An accident occurred on a beach at a hotel managed by Club Resorts. Club Resorts was a company incorporated in the Cayman Islands. However, Club Resorts had a contractual arrangement with a travel agency based in Ottawa to provide tennis and squash professionals to Club Resorts, in return for which these professionals received bed and board at a Club Resorts hotel. Morgan Van Breda's spouse was one of these squash professionals. Pursuant to these arrangements, Ms. Van Breda and her spouse went to a Cuban resort managed by Club Resorts. Ms. Van Breda was injured in an accident while there and, on her return, sued Club Resorts in Ontario. Club Resorts challenged the jurisdiction of the Ontario court. In other words, the presence of Ms. Van Breda and her spouse was directly connected to the contractual relationships between the various parties.

[13] It was the contractual relationship between Club Resorts and the Ottawa-based travel agency that led the Supreme Court of Canada to conclude that the Ontario Superior Court of Justice had jurisdiction over Club Resorts. In so concluding, LeBel J. said, at para. 116:

> A contract was entered into in Ontario and a relationship was thus created in Ontario between [Ms. Van Breda's spouse], Club Resorts and Ms. Van Breda, who was brought within the scope of this relationship by the terms of the contract.

[14] There was a companion case decided at the same time as *Van Breda*. In the companion case of *Charron*, Dr. Claude Charron died during a scuba dive in Cuba while he, and his spouse, were staying at a resort managed by Club Resorts. Club Resorts again challenged the jurisdiction of the Ontario court. The Supreme Court also concluded that there was jurisdiction over Club Resorts in that case. However, in that case, the presumptive connecting factor was the second factor, that is, that Club Resorts carried on business in Ontario: *Van Breda*, at para. 122.

[15] A couple of salient facts should be mentioned from both *Van Breda* and *Charron* that distinguish those cases from the present case. One is that, in both cases, the actions were based both in contract and in tort. Another is that, in *Van Breda*, it appears that the defendants, other than the travel agency, were all companies related to Club Resorts. In contrast, in *Charron*, there were non-Ontario defendants, other than Club Resorts and a related company. In *Charron*, both the captain of the boat that the deceased had used for his fatal scuba dive and the diving instructor were defendants. Both of them were Cuban nationals and neither participated in the proceeding.

[16] It is also important to note that the contract in *Van Breda*, and upon which jurisdiction was found, directly connected the plaintiffs and the objecting defendants. The contract anticipated the hiring of Ms. Van Breda's spouse to visit, and work at, the resort run by Club Resorts.

[17] I have spent some time discussing *Van Breda* because it is recognized as the decision that established the test to be applied in deciding whether a Canadian court should assume jurisdiction over an out-of-province defendant. That test was not properly applied by the motion judge. Further, in my view, some authorities subsequent to *Van Breda*, have failed to apply the decision with the care and rigour that was intended. The analysis and conclusion in *Van Breda* began with the "real and substantial connection" test. That test was focussed on preventing jurisdictional overreach. In other words, it was intended to place limits on the assumption of jurisdiction by a province's courts: *Van Breda*, at para. 23.

[18] In furtherance of that focus, the application of the presumptive connecting factors is to be viewed from the perspective of the defendant who is disputing jurisdiction. Just because there is a presumptive connecting factor with respect to one defendant, who may not be disputing jurisdiction, does not mean that the court can avoid looking at the jurisdiction issue from the perspective of the defendant disputing jurisdiction. It is the failure to examine the jurisdiction issue from the position of the appellants that constitutes the error committed by the motion judge in her analysis.

[19] In this case, Amex Canada does not quarrel with being subject to the jurisdiction of the Ontario Superior Court of Justice with respect to this claim, nor could it, given its connections to Ontario. However, that fact does not mean that everyone else, who has some connection with the subject matter of the claim, are

then subject to that same jurisdiction. The position of each defendant must be looked at independently. As Fenlon J.A. said in *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2021 BCCA 182, 48 B.C.L.R. (6th) 106, at para. 10:

> A plaintiff must establish territorial competence against each party and cannot "bootstrap" its claim against the defendant by establishing jurisdiction against a different party: [citation omitted].

In other words, there must be a presumptive connecting factor that attaches to each individual defendant. If there is not, jurisdiction is not established with respect to that defendant. If there is, then that defendant may still be able to rebut the presumptive connecting factor. It is not an all or nothing approach.

[20] For example, there is nothing in the *Charron* side of the *Van Breda* decision to suggest that the Supreme Court’s conclusion, that there was jurisdiction over Club Resorts, would automatically mean that there was jurisdiction over the captain of the boat or the diving instructor, had they appeared and challenged jurisdiction. That question was simply not addressed in the decision, an understandable result since neither of those defendants were participating in the proceeding. Silence on that point from the court, however, does not establish that jurisdiction would have been found.

[21] The respondents submit, and my colleague accepts, that the *Van Breda* approach to jurisdiction has been significantly broadened by the subsequent decision of the Supreme Court in *Lapointe Rosenstein Marchand Melançon*

LLP v. Cassels Brock & Blackwell LLP, 2016 SCC 30, [2016] 1 S.C.R. 851. They urge the adoption of this broader scope based on the proposition set out by Abella J. in discussing the fourth presumptive connecting factor, where she said, at para. 44:

> It is sufficient that the dispute be "connected" to a contract made in the province or territory where jurisdiction is proposed to be assumed. This merely requires that a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract. [Citations omitted.]

[22] In addition, the respondents point to the observation made by Abella J. at para. 32:

> A "connection" does not necessarily require that an alleged tortfeasor be a party to the contract.

[23] In considering the respondents' submissions on this point, I first note that it seems to be a stretch for them to analogize the factual underpinnings for their claim with the factual underpinnings that were present in the claim advanced by Cassels Brock & Blackwell LLP in *Cassels Brock*, through their third-party claims against a large number of Canadian law firms. On that point, I repeat that the claim here is founded in tort. Any contractual relationship between the respondents and Amex Canada is not relied upon for the claim. The opposite was true in *Cassels Brock*. Indeed, it was the contractual relationship that was at the core of the dispute in that case and which drew the third-party law firms into that dispute. The contractual

relationships at issue "contemplated and required the involvement" of the third-party law firms in the process that gave rise to the claim: *Cassels Brock*, at para. 18. It was this salient fact that led to the conclusion that the third-party law firms were "within the scope of the contractual relationship between GM Canada and the dealers": *Cassels Brock,* at para. 47. I would add that, in considering the decision in *Cassels Brock*, one must keep in mind that it involved an inter-provincial dispute and not an international dispute.

[24] This case is significantly different on its facts. There is nothing in the contractual relationship between the respondents and Amex Canada that required the appellants' involvement. Even if one could give the contractual arrangements the type of emphasis that the respondents now attempt to do, it is hard to see how the conduct of any of the appellants could be said to be "within the scope of the contractual relationship" or that the "events that give rise to the claim flow from the relationship created by the contract": *Cassels Brock*, at para. 44. Simply put, the contract between the respondents and Amex Canada did not create a contractual relationship between the respondents and the appellants.

[25] I would add, on this point, that the analysis is not altered by the respondents' pleading that Amex Canada and Carey International, Inc. "are vicariously liable for the actions of the remaining defendants, who were or acted as its agents". Putting aside that no particulars of these alleged agency arrangements are pleaded, vicarious liability is itself a tort law concept: see e.g., *Bazley v. Curry*, [1999] 2

S.C.R. 534. It does not assist the respondents in terms of the contractual argument under which they now attempt to shelter or of their failure to plead any contractual claim against the appellants.

[26] There is nothing in *Cassels Brock* that suggests that the Supreme Court was intending to expand the fourth presumptive connecting factor to the extent that the respondents now submit. To do so would be inconsistent with the intention of *Van Breda* which was to limit the territorial reach of Canadian courts. To accomplish that goal, the Supreme Court sought to establish a process that would lead to "order, efficiency and predictability" in the determination of the jurisdiction question: *Van Breda*, at para. 30. To that end, it must be remembered that the presumptive connecting factors established in *Van Breda* were borne out of the "real and substantial connection" test. They were established in an effort to ensure that Canadian courts only assumed jurisdiction over a dispute that had a real and substantial connection to Canada on the facts and to prevent Canadian courts from assuming jurisdiction where that connection did not exist. As LeBel J. said in *Van Breda*, at para. 75:

> The development and evolution of the approaches to the assumption of jurisdiction reviewed above suggest that stability and predictability in this branch of the law of conflicts should turn primarily on the identification of objective factors that might link a legal situation or the subject matter of litigation to the court that is seized of it.

[27] The concern that arises from an overly expansive view of the fourth presumptive connecting factor in tort cases, such as we have here, was identified in the dissenting reasons of Côté J. in *Cassels Brock*. She said, at para. 87:

> In my view, the scope of *Van Breda*'s fourth connecting factor should be limited to claims in tort where the defendant's liability in tort flows immediately from his own contractual obligations, and where that contract was "made in" Ontario.

[28] On that point, and with particular application to the case here, Côté J. said, at para. 90:

> The fourth factor only provides jurisdiction over claims where the defendant's liability in tort flows immediately from the defendant's own contractual obligations.

[29] This view is consistent with the facts of *Van Breda* and the analysis undertaken by LeBel J. It is also consistent with avoiding the use of the presumptive connecting factors to justify what is, essentially, judicial overreach to only then place the burden on the objecting defendant to rebut it. Simply put, the appellants did not have any contractual obligations with the respondents, either directly or indirectly. The contractual arrangements that the respondents did have with Amex Canada (which are devoid of particulars in the pleadings) did not contemplate or require the involvement of the appellants. The appellants cannot be reasonably swept into the jurisdictional reach of Canadian courts based solely on the fact that the respondents had a contractual relationship with Amex Canada.

[30] However, even if I am in error in my analysis above, and in my view as to the proper interpretation and scope to be given to the decision in *Cassels Brock*, the appellants must still succeed in their appeal because, assuming that the fourth presumptive connecting factor can be invoked in this case on its facts, the appellants have rebutted that presumption, an issue to which I now turn.

(2) If the presumptive connecting factor is established, was it rebutted by the appellants?

[31] Another important point from *Van Breda* is that the mere presence of a presumptive connecting factor is not the end of the jurisdictional inquiry. As LeBel J. said, at para. 81, "[t]he presumption with respect to a factor will not be irrebuttable, however." I repeat that LeBel J. stressed, in his reasons, that the fundamental issue involved in deciding whether a court should assume jurisdiction is whether there was a "real and substantial" connection between the dispute and the court assuming jurisdiction. This requirement needed to be satisfied in order to provide legitimacy to the assumption of jurisdiction. He reiterated this fundamental point when he said, at para. 92:

> All presumptive connecting factors generally point to a relationship between the subject matter of the litigation and the forum such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum.

[32] The motion judge did not consider this second aspect of the jurisdictional inquiry. Assuming the fourth presumptive connecting factor applies, it is my view that the appellants have rebutted that presumption. They have rebutted it by demonstrating that the contract, that is the contract between the respondents and Amex Canada, has little or nothing to do with the subject matter of the litigation. As I have already said, there is nothing pleaded that would demonstrate that the contract contemplated the involvement of the appellants, unlike the situation in *Cassels Brock*. There is also nothing pleaded that would establish that the contract has any connection to the claim against the appellants. In other words, there is nothing in the contract that contemplated the involvement of the respondents with the appellants, unlike the situation in *Van Breda*. As I have alluded to above, the respondents urge a reading of the reasoning in *Cassels Brock* that is much too broad. In doing so, they ignore the admonitions in *Van Breda* about judicial overreach.

[33] It is to be remembered, on this point, that the accident which injured the respondents occurred in Venice, Italy. It is alleged that it was caused by the negligent actions of the driver of the water taxi, who is pleaded by the respondents to have been born in Venice and to reside in Venice. The water taxi is owned by an Italian company, which is, in turn, owned by another Italian company. It is not alleged that there were any ongoing contractual relationships between these Italian companies and Amex Canada or Carey International, Inc. It is also not alleged that

there was anything in the contractual relationship between Amex Canada and/or Carey International, Inc. and the respondents, that contemplated that the appellants would be engaged in the carrying out of that contractual relationship.

[34] Continuing on the point that the existence of a presumptive connecting factor is not irrebuttable, LeBel J. in *Van Breda* gave some examples of situations where the presumptive connecting factor could be rebutted. Of importance to the case here, he offered the following example, at para. 96:

> Some examples drawn from the list of presumptive connecting factors applicable in tort matters can assist in illustrating how the presumption of jurisdiction can be rebutted. For instance, where the presumptive connecting factor is a contract made in the province, <u>the presumption can be rebutted by showing that the contract has little or nothing to do with the subject matter of the litigation.</u> [Emphasis added.]

[35] In my view, the contract that was made in Ontario between the respondents and Amex Canada has little relevance to the subject matter of the litigation. Indeed, that lack of relevance is supported by the fact that the contract is not pleaded with any particularity. For example, there are no provisions from the contract that are pleaded and there is no breach of the contract pleaded. Rather, as I said earlier, this case is advanced strictly as a tort claim. I note, on that point, that the decision in *Van Breda* makes it clear that the issue of jurisdiction is to be determined on the basis of the pleadings: at para. 72.

[36] It also follows from the facts that none of the appellants would reasonably be expected to be called to answer legal proceedings in Ontario. They accepted a task to be undertaken in Italy. The events underlying the claim occurred in Italy. The companies are Italian companies. The driver of the water taxi is an Italian national. There is simply nothing that connects the events and the appellants to Ontario. The fact that the respondents used a credit card company, that happens to carry on business in Ontario, to make their travel arrangements does not establish a relationship between the respondents and the appellants that could sustain a finding of jurisdiction.

[37] Consequently, assuming that the fourth presumptive connecting factor could be established, the appellants have successfully rebutted it.

(3) Other authorities cited are distinguishable

[38] I will briefly address certain other cases that the respondents rely upon and that emanate from this court. One is *Kyko Global Inc. v. M/S Crawford Bayley & Co.,* 2021 ONCA 736, where the plaintiff sued an Indian law firm which had provided an opinion on the enforceability of a guarantee that had an Ontario law clause and an Ontario forum provision. This court upheld the decision of the motion judge that the Ontario court had jurisdiction over the Indian law firm. It is difficult to see how that case bears any resemblance to the case here, especially since the pleadings played a major role in the decision in that case. The pleadings

here do not bear out the foundation upon which the respondents now attempt to rest their case.

[39] Another is *Vahle v. Global Work & Travel Co. Inc.,* 2020 ONCA 224. Again, that case bears little resemblance to the case here. In *Vahle* it was found that the foreign defendants committed torts in Ontario, including negligent misrepresentation and negligence: at para. 8. If the appellants committed any torts in this case, they occurred in Italy.

[40] Yet another is *Dilkas v. Red Seal Tours Inc. (Sunwing Vacations),* 2010 ONCA 634, 104 O.R. (3d) 221. That case also does not mirror this one. In *Dilkas*, the foreign defendant voluntarily entered into two indemnity agreements over which it was agreed that Ontario would have exclusive jurisdiction. It was not a finding of this court, in that case, that the fact of a crossclaim would establish jurisdiction, as contended by the respondents. Indeed, the respondents advance what I consider to be the astonishing proposition that a defendant can clothe a court with jurisdiction over other defendants just because it exercises its rights, under Ontario's *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, to make a crossclaim against defendants that have been made parties by the plaintiff. I do not know of any case that would substantiate such a sweeping mechanism for conferring jurisdiction.

[41] Finally, is the decision in *Di Gregorio v. Sunwing Vacations Inc.,* 2018 ONCA 655. That case is distinguishable on two grounds. First, the motion judge there failed to address the jurisdiction argument, an error identified by this court on appeal: *Di Gregorio*, at para. 9. As a consequence, this court only briefly addressed the jurisdiction argument. Second, the contractual arrangements were much different than the ones in this case and bore a much closer relationship to Ontario, for the same reasons I have discussed when dealing with *Cassels Brock*.

(4) The standard of review

[42] Although little turns on it in this case, I will address the applicable standard of review. In *Kyko*, Hoy J.A., writing for the court, said, at para. 13:

> Whether or not a motion judge has erred in the application of the test for jurisdiction *simpliciter* is a question of mixed fact and law, reviewable for palpable and overriding error, unless an error in the application of the test can be attributed to an extricable question of law. [Citation omitted.]

[43] As I said earlier, the motion judge's failure to consider the jurisdiction question from the point of view of the appellants, who were disputing jurisdiction, as opposed to the other defendants who were not, was a legal error in the application of the *Van Breda* test. It is thus a question to which the standard of review of correctness applies.

(5) Summary

[44] If the decision of the motion judge were to be upheld, it would have sweeping implications. It would mean that any person who books a trip through a credit card company that provides travel services and carries on business in Ontario would, through that fact alone, extend the jurisdiction of this province's courts to anyone who may subsequently become involved in those travel arrangements, regardless of where in the world that involvement occurs. In my view, that result would constitute the very type of jurisdictional overreach that the decision in *Van Breda* was cautioning against.

CONCLUSION

[45] I would allow the appeal, set aside the order below, and stay the action against the appellants on the basis that the Ontario Superior Court of Justice does not have jurisdiction over them. The appellants are entitled to their costs of the appeal fixed in the agreed amount of $10,000, inclusive of disbursements and HST.

"I.V.B. Nordheimer J.A."
"I agree M. Tulloch J.A."

Harvison Young J.A. (concurring):

[46] I, too, would allow the appeal because I agree with my colleague that the presumptive connecting factor has been successfully rebutted. However, I disagree with my colleague's primary conclusion that there is no presumptive connecting factor of an Ontario contract connected to the dispute.

[47] As I will discuss, I am unable to agree with my colleague that the motion judge erred in finding that the respondents had successfully established a presumptive connecting factor.

[48] With respect, his reasons effectively recast the dissenting opinion of Côté J. in *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30, [2016] 1 S.C.R. 851 as the governing precedent on this court.

[49] While I agree with my colleague that the presumption of jurisdiction has been rebutted in this case, I am of the view that his reasons do not take sufficient account of the evolution of the approach to the establishment of a presumptive connecting factor as evidenced by *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572 and *Cassels Brock*, at least within the context of the fourth connecting factor, that is, whether there is an Ontario contract connected to the dispute. The Supreme Court of Canada, followed by other courts, have taken an increasingly functional approach to the question of whether there is a contract "connected to" the dispute. There is, however, very little case law which considers the question of

the considerations that apply to the rebuttal of a presumptive connecting factor. The reason for that may be that, before *Van Breda* and *Cassels Brock*, the issue of rebuttal rarely arose because of the more narrow and mechanical manner in which the question of whether a presumptive connecting factor was established. Put another way, the more broadly one approaches the question of the existence of a presumptive connecting factor, the more relevant is the question of what should be considered at the rebuttal stage.

There is an Ontario contract connected to the dispute

[50] My colleague concludes that the motion judge erred in treating the presumptive connecting factor as applying to all of the defendants instead of looking at the position of each defendant separately. I disagree with this conclusion. In my view, it arises from a mechanical rather than a functional reading of the motion judge's reasons. A functional reading of the reasons below, demonstrates that the motion judge did not "bootstrap" the respondents' claim against the appellants by establishing jurisdiction against a different party.

[51] I pause to note that this issue was not expressly argued by the appellants, either in their written materials or their oral submissions before us. That said, I agree that this issue fails to satisfy the high threshold required to be considered a "new issue": *R. v. Mian*, 2014 SCC 54, [2014] 2 S.C.R. 689; *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712. The issue of whether the motion judge erred by

treating the presumptive connecting factor as applying to all of the defendants instead of looking at the position of each defendant separately can reasonably be said to stem from the issues as framed by the parties: *Mian*, at para. 35. In other words, whether the motion judge erred by failing to look at each defendant individually is "rooted in" and a "component of" the larger issues as framed by the parties of whether the motion judge erred in her analysis that there was an Ontario contract connected to the dispute: *Mian*, at para. 33; *Cusson*, at para. 39; *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2021 BCCA 182, 48 B.C.L.R. (6th) 106, at paras. 6, 10.

[52] I agree that a plaintiff must establish territorial competence against each party and cannot "bootstrap" its claim against the defendant by establishing jurisdiction against a different party: see *Sakab Saudi Holding Company v. Jabri*, 2022 ONCA 496, at para. 67; *Forsythe v. Westfall*, 2015 ONCA 810, 128 O.R. (3d) 124, at para. 32; *Tamminga v. Tamminga*, 2014 ONCA 478, 120 O.R. (3d) 671, at para. 27; *Gajraj v. DeBernardo* (2002), 60 O.R. (3d) 68 (C.A.), at para. 20; *Hydro Aluminium*, at para. 10.

[53] The motion judge, however, committed no such error. It is trite law that a motion judge's reasons must be read functionally and in context: *Doyle v. Zochem Inc.*, 2017 ONCA 130, at para. 40; *Jabri*, at para. 67; *Hague v. Hague*, 2022 BCCA 325, at para. 20. This court recently rejected the argument that a motion judge must "expressly and mechanically run through the *Van Breda* factors with respect

to each defendant where the defendants are alleged to have acted in an interconnected way”: see *Jabri*, at para. 44. Appellate courts must not finely parse a motion judge’s reasons in a search for error: *R. v. G.F.*, 2021 SCC 20, 459 D.L.R. (4th) 375, at para. 69; *Dreesen v. Dreesen*, 2021 ONCA 557, at para. 16; *Hague*, at para. 20; *Kringhaug v. Men*, 2022 BCCA 186, at para. 53, *Henderson v. The Manitoba Public Insurance Corporation*, 2022 MBCA 57, at para. 14. Trial judges are presumed to know the law and are not required to “expound on features of [the] … law that are not controversial in the case before them”: *G.F.*, at para. 74; *Zhao v. Fang*, 2022 BCCA 227, at para. 23. Even where reasons are ambiguous, and I do not believe this to be the case here, interpretations that are consistent with a correct application of the law are to be preferred: *G.F.*, at paras. 78-79; *Hague*, at para. 22; *Kringhaug*, at para. 56.

[54] When the motion judge’s reasons are considered in their totality and read in light of the broad meaning of the term “connected to”, as well as the majority’s reasons in *Cassels Brock*, I am of the view that the motion judge did not fall into error.

[55] The motion judge correctly outlined the current state of the law on jurisdiction *simpliciter*. She identified that the only presumptive connecting factor relevant to this dispute was whether there was an Ontario contract connected to the dispute: *Van Breda*, at para. 90. There is also no dispute between the parties that the motion judge correctly identified that where a presumptive connecting factor

applies, the defendant has the burden of rebutting the presumption of jurisdiction: *Van Breda*, at para. 95. The motion judge also correctly held that the plaintiffs need only establish that “the events that give rise to the claim flow from the relationship created by” the Ontario contract and that the defendants’ negligence bring them “within the scope of the contractual relationship”: *Cassels Brock*, at para. 44.

[56] I would add that the majority in *Cassels Brock*, at para. 44, also affirmed that the analysis to be applied does not change even where the dispute involves a multiplicity of contracts or multiple parties:

> [N]othing in *Van Breda* suggests that the fourth factor is unavailable when more than one contract is involved, or that a different inquiry applies in these circumstances. Nor does *Van Breda* limit this factor to situations where the defendant’s liability flows immediately from his or her contractual obligations or require that the defendant be a *party* to the contract. [Emphasis in original.]

[57] One source of disagreement between the majority decision in *Cassels Brock* and Côté J.’s solo dissent was the issue of whether the fourth presumptive connecting factor analysis should be applied differently when there are multiple contracts and/or multiple tortfeasors: *Cassels Brock*, at paras. 84-87. Justice Côté’s dissent is not the law and in fact, this court has since embraced and adopted the *Cassels Brock* majority’s decision: *Di Gregorio v. Sunwing Vacations Inc.,* 2018 ONCA 655, at para. 11. The Court of Appeal for British Columbia has gone the extra step to explicitly reject Côté J.’s dissent: *Flying Frog Trading Co., Ltd. v. Amer Sports OYJ*, 2018 BCCA 384, 427 D.L.R. (4th) 483, at paras. 27-29.

[58] Post-*Cassels Brock* jurisprudence has followed the majority's decision in applying the proposition that the jurisdiction *simpliciter* analysis is not to be applied any differently when there are multiple contracts and/or multiple parties: see *Saskatchewan Power Corporation v Mitsubishi Power Canada Ltd.*, 2022 SKQB 147, at paras. 86-118; *Di Gregorio*, at para. 11; *Flying Frog Co., Ltd.*, at paras. 27-29; *Toews v. Grand Palladium Vallarta Resort & Spa*, 2016 ABCA 408, at paras. 9-13 [*Toews ABCA*].

[59] Central to this appeal is the broad and expansive interpretation that the term "connected to" has received in the jurisprudence. This court has repeatedly held that the phrase "in connection with" has a very broad meaning: *Mantini v. Smith Lyons LLP* (2003), 64 O.R. (3d) 505 (C.A.), at para. 19, leave to appeal refused, [2003] S.C.C.A. No. 344; *Lawrence v. Toronto Humane Society* (2006), 271 D.L.R. (4th) 329 (Ont. C.A.), at paras. 83-84. The term "connection" means "there is some relationship between two things or activities – that they have something to do with each other": *Lawrence*, at para. 85 (emphasis added), citing *Kitchener-Waterloo Real Estate Board Inc. v. Ontario Regional Assessment Commissioner, Region No. 21* (1986), 56 O.R. (2d) 94 (H.C.), at p. 103.

[60] The Court of Queen's Bench of Alberta has followed the Supreme Court's guidance in *Van Breda* by further interpreting the term "connected with" harmoniously with the term "relates to" as found in r. 11.25 (3)(b) of their *Alberta Rules of Court*, Alta Reg. 124/2010*: Toews v. First Choice Canada Inc (Signature*

Vacations), 2016 ABQB 130, at paras. 40-41, aff'd 2016 ABCA 408, leave to appeal refused, [2017] S.C.C.A. No. 66 ["*Toews ABQB*"]. The Court of Appeal of Alberta affirmed the Queen's Bench decision and importantly, held that "that the term 'connected' is to be given a broad meaning": *Toews ABCA*, at paras. 8, 9 (emphasis added).

[61] The Supreme Court has interpreted the term "relating to" as importing "the widest of any expression intended to convey some connection between two related subject matters": *Slattery (Trustee Of) v. Slattery*, [1993] 3 S.C.R. 430, at p. 445, citing *Nowegijick v. The Queen*, [1983] 1 S.C.R. 29, at p. 39.

[62] This broad judicial treatment of the term "connected to" should be read in light of *Cassels Brock*, at para. 32, where the Supreme Court states "[a] 'connection' does not necessarily require that an alleged tortfeasor be a party to the contract. To so narrow the fourth presumptive factor would unduly narrow the scope of *Van Breda*, and undermines the flexibility required in private international law". The court also indicates that the connection need not be "the strongest possible connection", nor does the threshold "connection" question concern itself with "whether another forum is more appropriate": *Cassels Brock*, at paras. 34-35. Instead, as the motion judge here correctly identified, all that is merely required to satisfy this threshold requirement is that "a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to

the claim flow from the relationship created by the contract": *Cassels Brock*, at para. 44.

[63] There are a number of post-*Van Breda* and post-*Cassels Brock* authorities which have grappled with the fourth *Van Breda* presumptive connecting factor within the holiday context, and which, particularly since *Cassels Brock*, have applied this broad interpretation to the question of whether there is a contract "connected with the dispute".

[64] The underlying rationale of the fourth presumptive connecting factor—a contract connected with the dispute was made in the province—is that "'but for' the contract made in the province the plaintiff would not have suffered the harm": Jean-Gabriel Castel & Janet Walker, *Castel & Walker: Canadian Conflict of Laws*, loose-leaf (2022-Rel. 96), 6th ed. (Markham, ON: LexisNexis Canada, 2005), at para. 4.01. This presumptive connecting factor has been held sufficient for the exercise of jurisdiction: see *Mitsubishi Power Canada Ltd.*, at paras 115-16; *Toews ABCA*, at para. 10; Jean-Gabriel Castel & Janet Walker, at para. 4.01. In *Castel & Walker: Canadian Conflict of Laws*, the authors cite this "but for" chain of analysis as being the basis for its reliance in *Van Breda*, and it has since been regarded as sufficient to support jurisdiction: Jean-Gabriel Castel & Janet Walker, at para. 4.01.

[65] This court in *Di Gregorio*, allowed an appeal from a motion judge who had stayed an action as against the defendants for lack of jurisdiction. This case also

concerned the fourth presumptive connecting factor in the holiday context. The appellants had purchased a vacation package to attend the Dreams Punta Cana Resort and Spa (“Dreams Resort”) over the winter holidays. They alleged that while standing on a hotel room balcony at the Dreams Resort, the balcony railing gave way, causing the two men to fall to the ground and sustain injuries.

[66] The appellants had purchased their vacation package through their travel agent, from Sunwing Vacations Inc. (“Sunwing”). Sunwing had a contract with Perfect Tours NV (“Perfect Tours”) with respect to bookings at the Dreams Resort. Perfect Tours was party to a hotel management agreement between AMR Resort Management, LLC. (“AMR”) and Inversiones Vilazel, a Dominican company that owned the Dreams Resort.

[67] Without addressing the jurisdictional argument, the motion judge first dealt with the limitation issue, calling this a “threshold issue”. She determined that the laws of the Dominican Republic applied, that the actions could only be in tort as the appellants had no contractual relationship with AMR or AM Resorts, LLC. (“AM”), and thus that the actions were statute-barred.

[68] This court reversed the motion judge’s decision relying on and adopting the Supreme Court’s reasoning in *Cassels Brock*, at para. 11, that:

> [A] contractual connection does not require that an alleged tortfeasor be a party to the contract or that its liability flows immediately from its contractual obligations. All that is required is that a defendant’s conduct brings it

> within the scope of the contractual relationship and that the events that give rise to the claim flow from the contractual relationship. [Citation omitted.]

[69] This court adopted the broad interpretation of the "connected to" requirement and rejected the narrower approach, which my colleague now seeks to resurrect from the jurisprudential graveyard.

[70] In *Toews ABQB*, the court grappled with the fourth presumptive connecting factor within the holiday context. An Alberta resident plaintiff purchased an all-inclusive vacation online through Selloffvacations.com. The vacation was at a hotel in Mexico which was owned by a company called Desarrollos. Desarrollos contracted with a company called Dominican to allot a block of all-inclusive rooms for Dominican to sell to its clients, who were tour operators located worldwide. Dominican, in turn, contracted with Signature Vacations of Mississauga to market and re-sell the rooms to Canadian customers through Selloffvacations.com. Both Desarollos and Dominican were wholly owned subsidiaries of a third corporation located in the Netherlands. The plaintiff was injured at the hotel in Mexico, and advanced claims against each of these companies. Desarollos filed an application for a stay of the action for lack of jurisdiction or, alternatively, a finding that Mexico was the proper forum.

[71] The Queen's Bench upheld the Master in Chambers' decision to dismiss the application and her finding that Alberta had jurisdiction over the action and was the more convenient forum. In her reasons, Master in Chambers S. L. Schulz

expressed criticism of the overly narrow approach taken when considering the "real and substantial" connecting factor in the pre-*Cassels Brock* Ontario decision of *Colavecchia v. The Berkeley Hotel*, 2012 ONSC 4747, 112 O.R. (3d) 287. In particular, she noted that *Van Breda* did not require such a stringent connectivity requirement:

> With the greatest of respect to the Ontario Supreme Court, the ***Colavecchia*** case is not binding on this Court. It appears to take a narrower view of the ***Van Breda*** principles than other Canadian court decisions. ***Colavecchia*** suggests that one must be a party to the contract, and engage in proper offer, acceptance and consideration to satisfy this presumptive factor, but nowhere in ***Van Breda*** does this appear to be required. The test for this presumptive factor has much broader and relaxed wording: *Toews v. First Choice Canada Inc (Signature Vacations and Selloffvacations.com)*, 2014 ABQB 784, at para. 46 [Emphasis in original.]

[72] In upholding the Master in Chambers' decision, the Queen's Bench first found that the chain of contracts was made in Alberta and that the term "relates" imposes a low threshold to meet. The Palladium Hotel, and its owner Desarrollos by implication, were clearly identifiable as foreseeable and potential defendants within contracts, and the alleged incident was not an intervening event or one brought about by a third-party contract – rather, the alleged wrongdoing occurred in the plaintiff's hotel room, in the course of her consuming the goods included in the all-inclusive vacation package under the contracts.

[73] The Queen's Bench also found that the chain of contracts led to the Toews' right to stay at the hotel for their vacation and receive the all-inclusive services, including the purported water bottle in the mini-bar. It concluded that the alleged tort was connected to the contracts and that the defendants fell within the scope of the relationships specifically contemplated in making both the booking and the holiday contracts – to provide an "all-inclusive" vacation, and the provision of services that flow as a result.

[74] Significantly, the Court of Appeal of Alberta's decision to uphold the appeal judge's decision followed the release of *Cassels Brock*. The Court of Appeal, at para. 11, noted that the Supreme Court in *Cassels Brock* affirmed and further clarified the flexibility of the *Van Breda* approach to the fourth presumptive connecting factor, namely that all that is required is a connection between the claim and a contract that was made in the province where jurisdiction is sought to be assumed.

[75] In further support of my conclusion, I would also observe that the Court of Appeal for British Columbia has, post-*Van Breda* and post-*Cassels Brock*, rejected the argument that jurisdiction under the British Columbia *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, should only be assumed in a narrow class of cases where the claim made is closely connected to contractual disputes, such as where a non-contracting party is expressly referred to in the contract that is the subject of the action: *Flying Frog Trading Co., Ltd.*, at paras. 11, 27.

[76] I now turn to the motion judge's application of *Van Breda*.

[77] The motion judge did not err in her application of the first *Van Breda* step to the record. She began by finding that the respondents' claim against AMEX Canada is based on their contractual obligations to them. The identity of the parties is fundamental to contract formation. The identity of the party with whom the respondents were dealing with was AMEX Canada for the Centurion card and for the booking of the water taxi in Venice Italy, and those contracts were formed in Ontario. The motion judge then found that a presumptive connecting factor between the subject of the litigation and the court's jurisdiction had been established.

[78] To reiterate, as the motion judge properly found here, the appellants' allegedly tortious conduct in their discharging of the water taxi services flowed from the Centurion Cardholder Agreement, a contract undoubtedly formed in Ontario, and which provided for the booking of services, such as the water taxi. As the Supreme Court set forth in *Cassels Brock*, this is the requisite threshold to establish the fourth presumptive connecting factor. As such, and as the motion judge found, it has been satisfied in this case.

[79] The motion judge then more specifically turned her mind to the particular defendants and concluded, at para. 31, that "the [respondents] have established a good arguable case that the contracts between AMEX Canada and the

[respondents], <u>and the contract with AMEX Canada and Carey International for the water taxi transportation</u>, has some connection with the dispute, for the court in Ontario to assume jurisdiction" (emphasis added).

[80] Apparent in the motion judge's reasons is the same chain of analysis used to justify the reasoning in *Van Breda*, which was employed by the Court of Appeal of Alberta in *Toews ABCA*. Namely, that "but for" the Centurion Cardholder Agreement, including the water taxi booking made under this Ontario contract, the respondents would not have suffered the harm. I see no error in her analysis of the first stage of the *Van Breda* analysis.

The appellants have rebutted the presumptive connecting factor

[81] I agree with my colleague's alternative position, that in the event there is a presumptive connecting factor, the motion judge erred in failing to consider whether it was rebutted, and I agree with his conclusion that in the circumstances, it has been successfully rebutted.

[82] However, I would note that this argument was not vigorously pursued before this court. The bulk of the appellants' submissions attempted to dispute the existence of an Ontario contract.

[83] I would also express my concern with the absence of jurisprudence in the holiday context that meaningfully grapples with the question of whether a presumptive connecting factor has been successfully rebutted. I would add that

the motion judge's error is understandable given the paucity of jurisprudence grappling with the rebuttal stage of the analysis and its relationship to the *forum non conveniens* analysis, which she did apply, but which was not a ground of appeal to this court.

[84] For these reasons, I would allow the appeal.

Released: March 2, 2023 "M.T."

"A. Harvison Young J.A."