IN THE GRAND COURT OF THE CAYMAN ISLANDS
HOLDEN AT GEORGE TOWN, GRAND CAYMAN
CAUSE NO. 428 of 1998

25-11-98

BETWEEN:	COMPAGNIE D'ESCOMPTES FINANCIERS CEF SA	Plaintiff
AND:	(1) GEORGIAN BAY HOLDINGS CORPORATION	
	(2) AUSTRALIA AND NEW ZEALAND BANKING GROUP LTD.	Defendants

BEFORE MURPHY, J.
IN CHAMBERS

19 November, 1998

APPEARANCES:

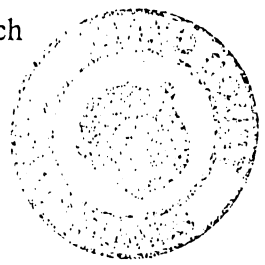
S. McCann for first defendant/applicant
A. Jones and W. Ebanks for plaintiff/respondent

REASONS FOR DECISION

This is an application brought by the first defendant, Georgian Bay Holdings Corporation (hereinafter, "GB"), by summons dated 10 August 1998 for an order setting aside the writ and for a declaration that this Court has no jurisdiction over either defendant. As there is no dispute that GB is a Cayman company and the second defendant, Australia and New Zealand Banking Group Ltd. (hereinafter, "ANZ"), is duly registered and licensed to do business in this jurisdiction, and that the plaintiff (hereinafter, "CEF") can sue them here as of right, the application has

proceeded on the basis that GB seeks a stay instead. The ground is forum non conveniens. GB takes the position that the most convenient forum is not the Cayman Islands, but the Province of Quebec.

This application first came before me on 17 September, 1998. Though counsel for the applicant initially indicated his readiness to proceed, I adjourned the application. I took the unusual step of inviting GB's counsel to seek an adjournment because I was not satisfied that the record before me, consisting of some preliminary affidavits filed on either side, was adequate to allow me properly to decide an application which turns largely on complex issues of Quebec substantive and procedural law. This was an extraordinary dispensation to the applicant, and not a step I would take in normal circumstances. In any case, I am convinced that it was a proper step as I now have before me a record consisting of 13 affidavits or affirmations addressing various issues, which afford me a sufficient basis upon which to decide this matter properly.



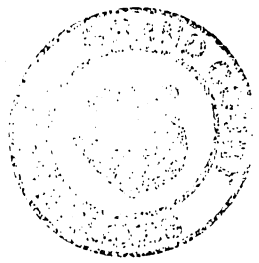
For GB there are two affirmations of Christopher Lund Richter (hereinafter, "Richter"), a young Quebec barrister and solicitor who is with a firm representing GB. His evidence relates to the Quebec proceedings, discussed below, and the balance of convenience issues. There are also three affidavits of Gilbert Chartrand (hereinafter, "Chartrand") who is a Montreal resident and a principal of, and clearly the guiding force behind, GB. His evidence addresses the balance of convenience issues and the Quebec proceedings, as well. GB also relies upon the evidence of Pierre Fournier (hereinafter, "Fournier"), a commercial litigation attorney from Montreal and a

member of the Bar of Quebec since 1968; and of Jeffrey Talpis (hereinafter, "Talpis") a professor at the Faculty of Law of the University of Montreal. Fournier and Talpis are put forth as independent expert witnesses as to Quebec law.

On CEF's side there is an affidavit of Christopher Johnson (hereinafter, "Johnson") of Price Waterhouse Coopers in Grand Cayman, one of the joint official liquidators of Metropolitan Real Estate Fund (hereinafter, "Metropolitan") (Cause No. 300 of 1996), and former joint official liquidator of Anchorage International Fund Limited (hereinafter, "Anchorage") (Cause No. 287 of 1996), and of Dome Investment Fund Limited (hereinafter, "Dome") (Cause No. 296 of 1996), the latter two of which are now dissolved. I will refer to Metropolitan, Anchorage and Dome below. Johnson was involved in investigating the facts giving rise to the present action. There are also two affidavits of Dominique Bellemare (hereinafter, "Bellemare") of Montreal, a Quebec solicitor who acts on behalf of a company related to CEF, which company will ultimately be the beneficiary of any recovery in this action. His evidence generally speaks to the same sorts of matters as does the evidence of Richter and Chartrand for GB. CEF also relies on independent expert evidence on the law of Quebec, in the form of two affidavits of Guy Gilbert, Q.C. (hereinafter, "Gilbert"), a member of the Quebec Bar since 1955; and an affidavit of Jean-Gabriel Castel, O.C, Q.C. (hereinafter, "Castel") a distinguished Canadian law professor currently at Osgoode Hall Law School in Toronto. Gilbert and Castel are CEF's answer to GB's Fournier and Talpis, respectively.

On the September appearance I was not asked to make any order as to attendance of witnesses to be cross-examined before me today. I left this to the attorneys to agree. In the end they agreed that no deponent need attend to be cross-examined so I am left with the task of weighing sometimes contradictory evidence that has not been tested by cross-examination.

The part of this case where the divergence in the evidence is most significant is the issue of Quebec law. As will become apparent, I am compelled to choose between the evidence of Fournier and Talpis on the one hand, and Gilbert and Castel on the other. I have examined their evidence with some care. I have considered various factors: i) qualifications and experience of the deponent; ii) thoroughness, directness and frankness (and the extent of any equivocation) in respect of all issues; iii) cogency and logic; iv) clarity of presentation; and v) the extent to which the opinion expressed is supported by authority. After this assessment I have concluded that where the evidence put forth by the experts for CEF and GB varies, I prefer the evidence of Gilbert and Castel for CEF.



I was particularly struck by the strength of the Castel opinion evidence. This is not surprising as Castel is Canada's foremost scholar in the area of conflict of laws - whether in the context of the civil law or the common law. Indeed his reputation extends worldwide. As Gilbert observes, Castel's books Canadian Conflict of Laws and Droit international privé quebecois are the seminal texts on the subject of private international law. I regard the Castel evidence as particularly valuable as he is a leading academic lawyer who can bridge the gap between the common law and civil

law systems. I was startled that, while not prepared to go so far as to submit that the Castel evidence be excluded, GB's counsel argued that I should give it diminished weight because Castel's resumé does not indicate that he is a member of the legal profession in Quebec. Not only do I reject this submission, but I make it clear that I place considerable weight on Castel's evidence. Castel's resumé discloses his intimate familiarity with, and expertise in, the law of Quebec through his university teaching, consulting and writing. He was apparently sufficiently regarded in this field to be called upon to assist in drafting portions of the Civil Code of Quebec. His many published works are constantly cited in Quebec courts.

The present Cayman Islands action

The present action is a proprietary tracing claim in respect of a total sum exceeding US$1.7 million which was allegedly misappropriated in 1995 from Dome and Anchorage's accounts maintained at the London branch of ANZ and transferred to the account of GB, also at the London branch of ANZ. (The facts giving rise to the claim involve only the London branch of ANZ; its Cayman branch was not involved at all. ANZ in the Cayman Islands is however the same corporate entity as ANZ in England). At all material times the non-voting participating shares of Anchorage and Dome were owned by CEF. Anchorage and Dome were put into voluntary liquidation, and ultimately, by orders of this Court on 10 June 1996, into court-supervised liquidation. It is specifically alleged that between June and August 1995 Chartrand and/or one Clive Munyard (hereinafter, "Munyard") transferred the disputed funds to the GB account. CEF's case is that the transfers of funds were made for no

consideration, without authority and in breach of fiduciary duties owed, and that as a result GB was liable, inter alia, as constructive trustee, Anchorage and Dome were entitled to trace the monies transferred, and ANZ also holds the monies upon constructive trust. By Deed of Settlement and Assignment made on 7 May 1998 between, inter alia, CEF and Anchorage and Dome (acting by their joint liquidators) all assets of these funds, including their rights of action against GB and ANZ, were assigned to CEF absolutely.

ANZ has been served with the writ of summons but has not filed any acknowledgment of service and notice of intention to defend. ANZ is plainly aware of this application but takes no part.

It is obvious to me, particularly from the chronology of correspondence between ANZ, Johnson and the lawyers for GB and CEF (included in the Chartrand evidence) that ANZ prefers to sit on the sidelines as a neutral until "a court to whose jurisdiction we are subject" (to quote from ANZ's letter of 23 April 1997 to Johnson, in a somewhat different context) orders it to do something, or the protagonists - now CEF and GB - agree. In some self-serving evidence in his third affidavit, Chartrand offers to "undertake to instruct [ANZ], on behalf of [GB], to act with respect to the ANZ funds in accordance with any judgment rendered by the Superior Court of Quebec... and to obey such judgment as if enforceable against [ANZ]". Clearly this has not happened and will not happen as long as the issues over the ownership of the funds at ANZ and the proper forum remain unresolved.

The Quebec proceedings

I will briefly describe the current proceedings in Cause No. 500-05-029765-979 in the Quebec Superior Court. GB argues that the Quebec action duplicates the present action so that the latter should be stayed on the basis of lis alibi pendens, or, alternatively, that the existence of the Quebec action at least suggests that Quebec is a more appropriate forum and that the present action should be stayed in any case.

In the Quebec action, apparently commenced in March 1997, Johnson and another in their capacities as liquidators of Metropolitan (not of Dome and Anchorage) along with other plaintiffs, seek various heads of relief including possession of certain books and records relating to various properties. The defendant is a property administrator. The subject matter of this action is property in Quebec; it is not related at all to monies in the ANZ account in London.

In April 1997 Chartrand, GB and others intervened in the action apparently to claim inter alia monies "held by ANZ Bank for and in the name of [GB]". This claim in the context of an "Intervention" is curious as it is not at all apparent to me that any existing party to the Quebec action (and in particular the liquidators of Metropolitan) make any competing claim to the funds at ANZ, though they are the targets of the Intervention. In evidence Bellemare regards "the claims made by Georgian Bay Holdings [as] nothing but an attempt to re-open the liquidation proceedings that were judged upon in the Cayman Islands". Indeed, virtually all the claims made by GB in its Intervention correspond to claims rejected by the liquidators in the Cayman Islands. In short, Bellemare testifies, Chartrand's "entire case in the

Intervention is based on claims which have already [been] adjudicated and rejected in the Cayman Islands". In the Intervention, an amount of $1.2 million at ANZ in London is shown in Intervention documents as a credit against monies claimed.

There was considerable legal debate in the affidavit evidence (particularly Richter, Fournier, Bellemare and Gilbert) as to the procedural significance of other steps in the Quebec proceedings - such as the plaintiff's unsuccessful motion to quash the Intervention, and the filing of a defence to the Intervention. I have looked at this evidence carefully, but at the end of the day I have concluded that it has no direct relevance to the issues I have to decide. The position of ANZ viz-a-viz the Quebec proceedings, however, has significance and I will discuss that below, under heads that relate more directly to the issues in this application.

Lis alibi pendens

GB will be in an advantageous position in this application if it can show that there is a comparable action pending in a foreign court. However, it must involve the same parties, and the same or substantially the same relief must be claimed: 37 Halsb. (4th) para 445. To quote from the speech of Lord Diplock in the leading case of the Abidin Daver [1984] 1 A.C. 398 at 411-12:

> "When a suit about a particular subject matter between a plaintiff and a defendant is already pending in a foreign court which is a natural and appropriate forum for the resolution of the dispute between them, and the defendant in the foreign suit seeks to institute as plaintiff an action in England

> about the same matter to which the person who is plaintiff in the foreign suit is made defendant, then the additional inconvenience and expense which must result from allowing two sets of legal proceedings to be pursued concurrently in two different countries where the same facts will be in issue and the testimony of the same witnesses required, can only be justified if the would-be plaintiff can establish objectively by cogent evidence that there is some personal or juridical advantage that would be available to him only in the English action that is of such importance that it would cause injustice to him to deprive him of it.
>
> Quite apart from the additional inconvenience and expense, if the two actions are allowed to proceed concurrently in the two jurisdictions the courts of the two countries may reach conflicting decisions...."

That is the theory, and it is well-established. However I am at a loss to see how the doctrine applies in this case.

There may well be some duplication in subject-matter insofar as some funds at ANZ are mentioned in the Intervention in the Quebec proceedings, but no other party in those proceedings appears to make a competing claim. It is simply a claim made there by GB in a vacuum. More to the point, CEF is not a party to the Quebec proceedings. It chooses not to be, and based upon my review of the expert evidence, there is no reason for it to join in. ANZ, the practical target of CEF's proprietary claim in the present action, is not a party in Quebec. Johnson is one of the plaintiffs in the Quebec action, but in his capacity as liquidator of Metropolitan. I do not accept Talpis' view that because CEF owns the shares of Metropolitan, it is to be treated as its alter ego for purposes of litigation.

In the present action CEF is not suing GB as assignee of Metropolitan. It sues as assignee of Dome and Anchorage who are not parties to the Quebec action. The plaintiffs in the Quebec action are Metropolitan (acting by its liquidators) and three of its subsidiaries. The defendant is the fund management company said to be controlled by Chartrand. It is a real action in which the plaintiffs seek declarations that they be entitled to recover books and records in the possession of the defendant and declarations that they are the sole owner of funds deposited in various bank accounts which constitute property located in Quebec.

By its Intervention, GB and others seek a declaration that it is the owner of the funds credited to the ANZ account. However, this declaration is sought against Metropolitan in spite of the fact that it has never made any claim to these funds. I accept Gilbert's evidence that the Quebec court will not adjudicate on this Intervention in any event. His well-supported reasons are that i) the fact of the location of the funds in London is a complete bar to an action entered in Quebec ii) the Quebec court will not allow an issue which is foreign to the dispute between the parties in the main action to be introduced by means of an Intervention, and iii) ANZ has not been summoned in the Quebec action. Based on the evidence, I accept counsel for CEF's submission generally that even if the Quebec court can grant some form of declaration, it cannot be said that the issue between CEF and GB is pending before the Quebec court. The intervention cannot result in a judgment enforceable by or against CEF, nor will it be enforceable against ANZ. The Quebec proceedings cannot result in a judgment inconsistent with a judgment this Court may pronounce in the present action.

The doctrine of lis alibi pendens simply does not apply here.

Forum non conveniens - the "balance of convenience" or "centre of gravity"

It is trite to say that the fundamental principle applicable to stays of proceedings on the ground that some other forum is the appropriate forum, is that the court should choose that forum in which the case can be tried more suitably for the interests of all the parties and for the ends of justice. The burden of proof lies on the defendant to show that the court should exercise its discretion to grant a stay. The defendant is required to show not merely that the initial forum chosen is not the natural or appropriate forum for the trial but that there is another available forum which is clearly and distinctly more appropriate than the forum chosen. In considering whether there is another forum which is more appropriate the court must look for that forum with which the action has the most real and substantial connection, in terms of convenience or expense, availability of witnesses, the law governing the relevant transaction, and the places where the parties reside or carry on business: Spiliada Maritime Corp v. Consulex Ltd. (The Spiliada) [1986] 3 All E. R. 843 (H.L.).

I tend to the view that in the context of modern international commercial litigation in respect of international transactions effected often by electronic means, the forum non conveniens doctrine is perhaps taking on less significance than it once had: Insurco Ltd v. Gowan Co. [1994-95] C.I.L.R. 210 (CA) per Kerr J.A. at 221;

Insurco International Ltd. v. Voluntary Purchasing Groups Inc. et al, Grand Court C450/91, 1 September 1998, unreported, at 15.

I have held that there are no parallel proceedings in Quebec, but GB would nonetheless assert that Quebec remains the appropriate forum. The fact that lis alibi pendens does not apply is of course not determinative of the issue.

My exercise here is a relatively straightforward one of balancing the "convenience" of the parties and identifying the true "centre of gravity" of the dispute, in accordance with the Spiliada principles.

The underlying factual allegations in the present action are quite simple. CEF alleges that GB wrongly caused funds to be transferred from one account to another at ANZ in London. How this was done may be in dispute. Chartrand deposes that he effected the "transactions giving rise to activity in both of these accounts" from Montreal.

The branch of ANZ involved is in London, but ANZ also has a branch in the Cayman Islands. It does not appear that ANZ has a presence in Quebec or in any Canadian province. The claim asserted by CEF was one assigned to it by the liquidators of Dome and Anchorage whose affairs were investigated, and which were wound up, in the Cayman Islands.

CEF can properly serve GB and ANZ in the Cayman Islands and has done so.

GB asserts that CEF is a Swiss company whose principals live in Quebec. This may be true but is largely irrelevant as 1) CEF clearly opts to sue in the Cayman Islands not Quebec, and 2) it appears that the evidence on CEF's behalf will be given substantially by Johnson, one of the Cayman liquidators who investigated the affairs of the assignors Dome and Anchorage. CEF per se had no involvement in the events giving rise to the claim. Johnson deposes that the claim is based upon "evidence and information" obtained by him, and that he has "intimate knowledge of all the relevant facts". He swears that he possesses relevant documentation but recognises that there may be more in the possession of Chartrand and ANZ.

As a term of the Deed of Settlement and Assignment Johnson is obliged to assist CEF in prosecuting its claim, though he must be reimbursed expenses and paid professional fees. Johnson frankly admits that he would travel to Quebec for purposes of giving evidence (it appears that he has already done so in the context of the existing Quebec action in which he represents Metropolitan), but he would have to be reimbursed.

Johnson takes the view based on his contact with and interviews of Munyard, that Munyard, a Cayman Islands resident, is a material witness whose evidence seems likely to support CEF's claim. Chartrand denies this, but his evidence seems contradicted by a letter sent "4/9/96" by Munyard as "director" of GB to ANZ instructing that assets be held to the order of the liquidators. There is no indication whether Munyard would travel voluntarily to Quebec.

GB is a Cayman company. Chartrand asserts that GB did not do business in the Cayman Islands but rather that its real office is in Quebec. Bellemare deposes that, on the basis of his searches, neither GB nor Dome nor Anchorage were or are registered to do business in Quebec. Dome and Anchorage were managed in the Cayman Islands through various management companies run by Munyard. This appears clear from Munyard's letter of 16/10/95 to the then Cayman Islands Financial Services Supervision Department; in fact it seems to contradict Chartrand's evidence.

On the evidence it appears that Chartrand and one Yvon Allard, a Canadian chartered accountant who acted as financial controller of GB, would be GB's main (and perhaps only) witnesses. There would be travel expense if they were obliged to come to the Cayman Islands for the trial of this action.

As to application of foreign law, it is not clear to me on this record why Quebec law would need to be received by a Cayman Court. If there should be a need to consider English law, that is not a practical problem for this Court as the applicable common law, given the issues, is effectively the same.

(I note, parenthetically, that of the expert witnesses, only Castel attempts to view the issue of forum non conveniens from the Quebec court's perspective. He concludes that:

> "Were CEF to bring its action against Georgian Bay and ANZ in the province of Quebec, and were ANZ

> to contest the jurisdiction on the basis of forum non conveniens, it is most likely that, in the circumstances, the Quebec Superior Court would declare itself forum non conveniens, as there is not a real and substantial connection between the parties and the subject matter of the action and Quebec".)

Having regard to all these factors, I conclude that GB has not discharged the burden of showing that the Cayman Islands is not the appropriate forum.

Juridical disadvantage to CEF of suing in Quebec

As I have concluded that the defendant has failed to show forum non conveniens, its application must be dismissed. However, in view of the expert evidence on the point, I also intend to address the question of whether, assuming CEF was obliged to bring this action in Quebec, it would be subject to an appreciable juridical disadvantage. The onus is of course on CEF to establish that this would be the case.

It is trite that a proviso to the forum non conveniens principle discussed in Spiliada and numerous other authorities is that the party against whom the stay is sought should not have his action stayed if to do so would mean he would not obtain justice in the foreign jurisdiction.

Many of the cases in which this proviso is considered involve perceived procedural advantages or disadvantages. In such situations the balancing process is often difficult, as a procedural advantage will carry with it a corresponding

disadvantage to the other side, quite irrespective of the substantive positions of the parties. I do take the view, however, that where a real disadvantage in terms of a party's substantive rights will result, the court must not be quick to stay an action. That substantive disadvantage must of course be established objectively by cogent evidence.

On the juridical disadvantage point, there is conflict in the evidence of the experts on either side. I do not think that in this context, given the issue involved, it is incumbent upon CEF to show on the balance of probabilities that its experts' views on the applicable Quebec law are to be preferred. Conceptually, it seems to me, if I were to find myself in a situation where I could not decide between the experts' opinions, CEF would still be entitled to argue that the state of the law was so uncertain - in ways directly affecting its ability to obtain the relief it seeks in Quebec - that that in itself would constitute a juridical disadvantage. In any case, I need not decide the point on that basis for, as indicated, I do prefer the evidence of CEF's experts.

CEF's counsel submits that CEF would be subjected to a substantial juridical disadvantage in a Quebec action because it simply could not prosecute a proprietary tracing claim as it could in this jurisdiction.

On the record before me it is by no means certain that ANZ would voluntarily submit to the jurisdiction of the Quebec court or interplead the amount in dispute. CEF asserts its right to a proprietary, not merely a personal, remedy. For that it must

be able to obtain a judgment against ANZ. A judgment against GB is not enough, CEF's counsel submits, as GB may be or may become insolvent. To be confined to a remedy against GB (admittedly possible in Quebec) CEF would lose the remedy of tracing. It would also lose the right of discovery against ANZ.

I accept the evidence of Gilbert and Castel that the Quebec court has no personal jurisdiction over ANZ because it has no domicile or residence in Quebec, and that the Quebec court cannot exercise subject matter jurisdiction as against ANZ because the subject matter is property located in England. Even if the Quebec court were to give some form of declaratory judgment on the Intervention, it would not be enforceable against ANZ.

On my review of GB's own experts' evidence I agree with CEF's counsel that they appear to accept that the Quebec court cannot exercise jurisdiction over ANZ in personal actions or real actions. Their argument it seems is that CEF does not need to join ANZ, though it is clear to me that this means CEF will be deprived of a proprietary remedy.

I also accept the evidence of Gilbert and Castel that the Quebec court cannot impose a constructive trust. In this regard I place considerable weight upon the opinion of Castel, for the reasons outlined above, and particularly because he is equally at home in the civil law and common law and well positioned to address this issue. I find his rebuttal of GB's experts' opinions in this area particularly cogent and convincing.

Even assuming a judgment can be obtained against ANZ in Quebec, it would appear that there is at best substantial uncertainty as to whether it would be recognised and enforceable in England. Castel concludes that "it may be difficult if not impossible to recognise and enforce in the U.K. a judgment in rem or in personam rendered in Quebec against Georgian Bay and ANZ, as Quebec has not signed and implemented the Convention between Canada and the U.K. for the Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters 1984, R.S.C. 1985, c. C-30". I also accept Castel's evidence on the inapplicability of the Brussels (1968) and Lugano (1988) Conventions on Jurisdiction and Enforcement of Judgments in Civil and Commercial Matters.

It is conceded that, if need be (and this seems unlikely given the presence of ANZ in the Cayman Islands), a judgment of this Court would be recognised and enforced in England.

I have no difficulty concluding that even if the "balance of convenience" dictated that CEF should pursue its claim in Quebec, there exist substantive juridical disadvantages that ought to preclude this Court from granting a stay of the Cayman Islands action.

Accordingly I order that:

1) leave be granted to the First Defendant to amend its summons dated 10 August 1998 to substitute, for the relief sought, a stay of this action;

2) the application of the First Defendant for a stay be dismissed; and

3) costs of today's application be against the First Defendant in the cause.

If there are any matters arising from the foregoing, I may be spoken to prior to my signing the formal order.

25 November, 1998

J. D. Murphy
Judge of the Grand Court