

CITATION: Re Ghana Gold Corporation, 2013 ONSC 3284
COURT FILE NO.: CV-13-10107-00CL
DATE: 20130607

**SUPERIOR COURT OF JUSTICE – ONTARIO
COMMERCIAL LIST**

IN THE MATTER OF THE *COMPANIES' CREDITORS
ARRANGEMENT ACT*, R.S.C. 1985, C.C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF
GHANA GOLD CORPORATION, GHANA GOLD INC., COASTAL EXPLORATIONS
LIMITED AND ABURI GOLDFIELDS GHANA LTD.

BEFORE: Justice Newbould

COUNSEL: C. Michael Citak and G.F. Camelino, for Minatura (BVI) Ltd.

John T. Porter and Kyla E.M. Mahar, for Applicants

Ian Aversa, for FCMI Parent Co. and FCMI Financial Corporation

Greg Azeff and Asim Iqbal, for the Monitor Ernst & Young Inc.

HEARD: June 3, 2013

ENDORSEMENT

[1] On May 9, Ghana Gold Corporation, Ghana Gold Inc., Coastal Explorations Limited and Aburi Goldfields (Ghana) Ltd. applied for protection under the CCAA and an Initial Order was granted which included a provision for immediate DIP financing, and an Administration charge, a DIP lender's charge and a directors' charge. It also provided for a sale and investment solicitation process ("SISP") that called for letters of intent to be submitted by June 11, 2013, offers by July 15, 2013 and court approval and closing by July 31, 2013.

[2] There is litigation between the parties. On February 12, 2013 Coastal and Aburi sued Minatura and related companies for damages arising from an alleged breach of a shareholders' agreement which set up a joint venture between Coastal and Minatura pursuant to which Aburi

would develop and operate an alluvial gold mining operation in Ghana. Under the agreement, Minatura was to deliver certain equipment and cash and in return was to obtain 50% of the shares of Aburi. It had the right to nominate two of four directors of Aburi. It is alleged in the statement of claim that Minatura wrongfully failed to fulfill its obligations and damages of \$10 million plus punitive damages are sought.

[3] On April 11, 2013, Minatura commenced an action in Ghana against Coastal and Aburi for specific performance to compel the defendants to perform the shareholders' agreement, an injunction to restrain the defendants from carrying on the business of Aburi to the exclusion of the plaintiffs and an order to account to the plaintiffs the income of Aburi.

[4] Minatura (BVI) Ltd. applies for relief to remove Aburi from the proceedings. In its notice of motion, Minatura has requested a declaration that Aburi did not consent to being an applicant in this proceeding, an order that Aburi's application for relief under the CCAA is stayed or deemed withdrawn, a declaration that the property covered by the Initial Order does not include Aburi's property or in the alternative an order that the pending dispute between Coastal and Minatura should be determined in Ghana. In its factum, Minatura requests an order suspending Aburi's application as a debtor in this proceeding pending a determination of the dispute over the control of Aburi in the Ghanaian action or as directed by this court.

Terms of the JV Agreement

[5] Coastal and Minatura entered into the joint venture shareholders' agreement relating to Aburi dated April 27, 2012, and Aburi was subsequently incorporated on June 5, 2012. The regulations of Aburi named Robert Griffis as sole shareholder.

[6] Section 5.1 of the shareholders' agreement contemplated that the initial members of the board of directors of Aburi would be Joe Wojcik and Tod Turley as Minatura appointees and Robert Griffis and Tom Griffis as Coastal appointees. On June 19, 2012, the sole shareholder of Aburi, Robert Griffis, signed a resolution to effect such term of the shareholders' agreement. The sole shareholder of Aburi at that time remained Robert Griffis.

[7] Pursuant to section 3.1(a) of the shareholders' agreement, each of Coastal and Minatura were to receive an initial 50% participating interest in Aburi subject to the terms of the

agreement. In exchange for its 50% participating interest, Minatura was required to deliver, among other things, certain equipment to the Aburi property at Minatura's sole cost and expense as set out in Schedule 7.3 (c), without liens and encumbrances, in good condition and working order to the reasonable satisfaction of Coastal (the "contributed equipment").

[8] The contributed equipment: (i) was to be owned beneficially by Aburi and held for its benefit, and for its sole and exclusive use; (ii) was to be delivered by no later than the equipment delivery date; (iii) was not be rented or leased, except under certain temporary and narrowly circumscribed constraints; and (iv) was to be free and clear of all liens or encumbrances, except as specifically permitted in the shareholders' agreement.

[9] Section 3.1(b) of the shareholders' agreement contemplated that shares of Aburi would be issued to Minatura after it wire transferred \$480,000 to Ghana Rae Gold Mines Limited as contemplated by section 7.3(a). These shares were to be placed in escrow with an escrow agent and released to Minatura immediately once all of the contributed equipment arrived at the Aburi property as contemplated in section 7.3(a).

[10] Minatura made certain cash payments and delivered 2 of 11 specified pieces of the contributed equipment. Minatura never delivered the balance of the contributed equipment.

[11] The shareholders' agreement required the balance of the contributed equipment to be delivered by the "Equipment Delivery Date", which is defined as the date that is thirty days after delivery of a certificate, confirming that the Ghana Environmental Protection Agency ("EPA") had issued the environmental licence necessary to conduct production on the Aburi property and attaching a copy of such licence.

[12] Section 7.3(a) of the shareholders' agreement provides that if all of the contributed equipment has not arrived at the Aburi property by the equipment delivery date, the shareholders' agreement shall terminate and Minatura will not receive any shares of Aburi and will be reimbursed for the funds provided to the project. It provided that in the case of non-delivery of the contributed equipment by the equipment delivery date, Coastal was to provide Minatura with written notice that all the contributed equipment had not arrived and Minatura was to have a twenty day period from the date of such notice to cure the deficiency.

Issuance of EPA Certificate and dispute

[13] Romex Mining Ghana Limited holds the mining rights for the Aburi project. On October 24, 2012, it was granted an environmental permit to undertake the alluvial gold mining at the Aburi project from the Ghanaian EPA which was issued subject to the terms of the project environment impact statement submitted by Romex. The environment impact statement contemplated the mining at the Aburi project being conducted by mechanical means using rear-end tipper trucks.

[14] On October 29, 2012, the executed certificate was delivered to Minatura attaching the licence in accordance with the shareholders' agreement. The delivery of the certificate set the equipment delivery date as November 28, 2012, being thirty days after the issuance of the certificate.

[15] On November 14, 2012, Minatura advised Coastal that it had reviewed the EPA environmental permit and said that its terms appeared to contradict Coastal's ability to use mechanized equipment on the Aburi Project. Minatura took the position that Coastal needed to correct this as soon as possible as the joint venture would be in violation of the licence. Mr. Turley of Minatura said that he was confident that the mistake was an oversight and perhaps a clerical error but it needed to be corrected.

[16] Coastal contacted the EPA regarding the error in the licence. The EPA confirmed that it was simply a clerical error and provided Coastal with a replacement page which corrected the clerical error and confirmed that the licence was always valid and effective from its original date of issue. On November 15, 2012, the confirmed licence was provided to Minatura.

[17] At a meeting of the directors of Aburi held on November 16, 2012, it was agreed that Minatura and Coastal would each make \$50,000 available to the joint venture. There was no complaint raised by the Minatura nominees about the corrected EPA licence. Minatura committed to sending its \$50,000 before November 22, 2012. This amount was not paid by Minatura by that date or at any time subsequently. Coastal paid its \$50,000 to the joint venture.

[18] On November 26, 2012, Minatura took the position that the corrected licence was not valid and that the EPA had to follow a formal procedure in order to amend the licence. In

response, Coastal pursued the issue with the EPA by requesting clarification on the validity of the corrected licence in writing. The EPA advised Coastal that clarification was not necessary since the permit spoke for itself. The EPA offered to speak to Minatura about the issue and confirmed that the licence was valid as of October 24, 2012. Minatura has never contacted the EPA regarding this issue.

[19] Minatura did not deliver the balance of the remaining contributed equipment by the equipment delivery date of November 28, 2012 and has not delivered it since then. Minatura also did not deliver the \$50,000 cash call by the deadline agreed in the November 16th board meeting and has not done so since.

[20] Coastal gave written notice of default under the shareholders' agreement to Minatura on November 29, 2012, in which it notified Minatura that all of the contributed equipment had not arrived at the Aburi property by the equipment delivery date and that Minatura had 20 days to cure its default, otherwise the shareholders' agreement would terminate.

[21] Minatura did not take any steps pursuant to the notice of default delivered by Coastal. Coastal delivered a notice of termination to Minatura on December 20, 2012 notifying Minatura that the shareholders' agreement was terminated. Coastal took the position that based on section 7.3(a), the effect of this termination was that Minatura had no right to receive any shares of Aburi but was entitled to be reimbursed for the funds it provided to the project to the date of termination.

[22] On December 21, 2012, the two nominees of Minatura were removed as directors of Aburi and a third nominee of Coastal was appointed as a director of Aburi. On January 10, 2013, Coastal advised Minatura that their nominees had been removed as directors of Aburi.

[23] Minatura now takes the position that the licence from the EPA is not valid and that therefore there was no obligation on it to deliver the contributed equipment as the equipment delivery date has not yet occurred due to the failure to obtain a valid licence from the EPA. Therefore it says that the removal of its nominees as directors of Aburi was invalid.

[24] On May 8, 2013, the three directors of Aburi authorized Aburi to make the application under the CCAA that led to the Initial Order on May 9, 2013.

Issues

[25] Minatura raises several issues. It says there was a lack of proper disclosure of relevant facts to the court on the CCAA application. It says that Aburi cannot be a debtor company under the CCAA as it has no debts and that there was no valid consent to the CCAA application as its nominees to the board, improperly removed, did not consent. It says that the litigation regarding the removal of the directors should be tried in Ghana as the Ontario courts do not have jurisdiction and the appropriate forum for the resolution of the dispute is in Ghana.

[26] The applicants take a contrary position on all of these points. They also say that if Minatura is successful in its position on this motion, the restructuring of the applicants will not be possible as the cash from the DIP lender will run out by the end of July. The Monitor takes no position on the dispute but is of the opinion that if the relief sought by Minatura were granted, it would be highly detrimental to the prospects of a successful restructuring.

Lack of proper disclosure

[27] Rule 39.01(6) of the rules provide that where a motion or application is made without notice, the moving party or applicant shall make full and fair disclosure of all material facts, and failure to do so is in itself sufficient ground for setting aside any order obtained on the motion or application.

[28] In his text Sharpe, *Injunctions and Specific Performance*, looseleaf ed. (Toronto: Canada Law Book 2012) Canada Law Book, Sharpe J.A. stated at para. 2.45 that inflexible application of this rule is to be avoided and failure to make full disclosure is not invariably fatal. He referred to English authority that has held that a court has a discretion, notwithstanding proof of material non-disclosure which justifies or requires the immediate discharge of an *ex parte* order, nevertheless to continue the order, or to make a new order on the same terms. He also states that if dissolution would result in injustice to the plaintiff, the punitive rationale for dissolving the injunction may be outweighed. Justice Sharpe also referred to opinion that expressed concern that applications to dissolve for non-disclosure were becoming routine, a view which in recent experience in our courts is all too true. See *Univalor Trust S.A. v. Link Resource Partners Inc.* [2012] O.J. No. 5021.

[29] Minatura asserts that the material on the motion for the Initial Order failed to disclose that Minatura disputed the right of Coastal to terminate the Shareholders' agreement on the basis that a valid licence had not been obtained from the EPA and that Coastal had no right to remove the Minatura directors from the board of Aburi. It asserts that while the pleadings in the Ontario and Ghanaian litigation were made exhibits in the affidavit material, the reference in the affidavit of Mr. Griffis was insufficient.

[30] In my view, there was no failure to make material disclosure in the material that led to the Initial Order. The dispute and the reasons for it are quite apparent in the pleadings that were exhibits to the affidavit. It is a counsel of perfection to say what should have been said in the affidavit itself.

[31] Even if there had been a failure to make material disclosure, I would not exercise my discretion to set aside the Initial Order. That order, among other things, permitted necessary DIP financing that has been advanced and used to pay the indebtedness, interest and fees up to \$750,000 owed to the secured creditor, an affiliate of the DIP lender, who negotiated the DIP financing in a process that called for a very timely SISP. Without Aburi, the project would not be financeable or saleable. Aburi operates the project pursuant to an operating agreement between Aburi and Romex Mining Corp. It is Romex that holds the licence from the Ghanaian EPA.

Is Aburi an affiliated debtor?

[32] Minatura has asserted in its material that Aburi has no debts. It also asserts that Aburi is not an affiliated company to the other applicants within the meaning of the CCAA as it is not controlled by any of them. Section 3(3) of the CCAA provides that a company is controlled if more than 50% of its voting securities are held by another person or company.

[33] Aburi is a debtor. As of May 6, 2013, the applicants had accounts payable of approximately \$2.2 million apart from the US\$4 million owed to FCMI. The Monitor advises that Aburi is the debtor for approximately \$1.3 million of these accounts payable. As well, Aburi owed approximately \$1.6 million in intercompany debt to Coastal. The pre-filing cash available to the applicants was only \$165,000.

[34] Section 3.1(b) of the shareholders' agreement contemplated that 50% of the shares of Aburi would be issued to Minatura after it provided \$480,000 to the operator of the project, which it did. These shares were to be placed in escrow with an escrow agent and released to Minatura once all of the contributed equipment to be provided by Minatura was delivered to the Aburi property. After Coastal sent notice of termination of the shareholders' agreement to Minatura, Robert Griffiths transferred all of the shares of Aburi to Coastal, making Coastal the sole named shareholder of Aburi. It was this status that led to the applicants' position that they had more than 50% control of Aburi.

[35] At the time of the CCAA application, therefore, Aburi was a debtor and 100% of its shares were held by Coastal.

[36] The issue for Minatura is whether that control should be set aside by virtue of the alleged improper steps taken by Coastal in taking the position that the shareholders' agreement had been terminated by virtue of the failure of Minatura to deliver the balance of the equipment that it was to contribute to the project. That in turn depends on whether the corrected licence issued by the Ghanaian EPA is, as asserted by Minatura, invalid.

Should the CCAA be stayed as it relates to Aburi?

[37] In my view, it should not. It is clear from the record that Aburi did consent to being an applicant in this CCAA proceeding. Its board of directors authorized the proceeding. There is no basis for the declaration sought by Minatura that Aburi did not consent to the proceedings.

[38] What Minatura is asserting in the litigation it has commenced in Ghana is that the corporate steps that were taken by Coastal should be set aside. However, until a court set aside those corporate steps, they would stand. What Minatura therefore seeks, essentially, is some kind of interim injunction requiring the parties to act on the basis that the corporate steps that were taken by Coastal should be ignored. It would effectively be a mandatory injunction requiring the parties to temporarily set aside the removal of the Minatura nominees to the board of Coastal.

[39] The normal test for an interlocutory injunction is the tri-partite test contained in *R.J.R.-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311, which includes a consideration of whether there is a serious issue to be tried. A higher test of a strong *prima facie* case being

required to be established applies where a mandatory injunction is sought. See the discussion by Karakatsanis J. (as she then was) in *Bark & Fitz Inc. v. 2139138 Ontario Inc.* 2010 ONSC 1793.

[40] The higher test of a strong *prima facie* case is also required where the practical effect of an injunction will be to put an end to the action or impose such hardship on a party as to remove the potential benefit of the action. See *R.J.R.-MacDonald Inc. v. Canada (A.G.)* at paras. 56 and 57.

[41] In this case, it appears clear from the record that if the CCAA proceedings by Aburi are stayed, the strong likelihood is that the restructuring of the applicants business will fail. As stated by the Monitor, the Aburi project is a key asset of the applicants and is integral to its value and if the relief sought by Minatura is granted, it would be highly detrimental to the prospects of a successful restructuring. As well, the SISP could not possibly be successful if any party offering to finance or acquire the assets did not know if it was investing in 50% or 100% of Aburi.

[42] In the circumstances, I am of the view that Minatura is required to establish a strong *prima facie* case that it will succeed on the merits of its position. Be that as it may, I am not satisfied on the record before me that Minatura can establish either the stronger *prima facie* case or the weaker serious issue to be tried case.

[43] Minatura's case boils down to the assertion that a valid EPA licence has not been issued. It is a fact that the Ghanaian EPA issued a licence. The evidence of the applicants is that once the error in the licence was discovered, the EPA issued a correcting page to its issued licence, and informed the applicants that no further document was required as the licence was valid with the correcting page. Although an officer of Minatura asserted in e-mail correspondence that some formal procedure of the EPA was necessary, no evidence of Ghanaian law was filed by Minatura to support that position.

[44] The evidence of the applicants is that after they provided to Minatura the position of the EPA that no further steps were necessary to confirm the correction to the licence, Minatura was invited by the EPA and the applicants to contact the EPA to discuss it. During argument, counsel for Minatura said that Minatura did not contact the EPA to discuss the issue out of a concern of a possible fraud involving the EPA in the issuing of the correcting page for the licence, although

he was quick to say there was no evidence of such fraud but only a suspicion. On his cross-examination, Mr. Turley of Minatura speculated that it might be that Aburi had itself fraudulently drafted the correcting EPA page, although he had no evidence of that. If there was any such concern, one would think that the person with the concern would contact the EPA to find out if the correcting page was legitimate.

[45] On the cross-examination of Mr. Turley, counsel for Minatura took the position that questions as to whether there had been a breach of the shareholders' agreement were improper and constituted a breach of process. In light of the position now asserted by Minatura on this motion that a stay of the CCAA process regarding Aburi should be ordered, it is difficult to understand the position of counsel for Minatura on the cross-examination of Mr. Turley.

[46] What we are left with on the record is that the Ghanaian EPA issued a licence and a correcting document. There is no evidence that more from the EPA was required and no cogent evidence of any kind to establish a strong *prima facie* case, let alone any serious issue, of fraud. Thus there are no grounds for a stay to be granted.

[47] There is also an issue as to whether Minatura would be entitled to an order for specific performance. No evidence was provided by Minatura as to Ghanaian law, and on this motion it must be assumed that Ghanaian law is the same as Ontario law. See the discussion on this subject in *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 at para. 17.

[48] In this case, if it were established that there had been a breach of the shareholders' agreement by Coastal in taking the position that the shareholders' agreement had been breached by Minatura, it is highly problematical that the relief would be an order enforcing the shareholders' agreement and requiring two Minatura nominees to be two of the four directors of Aburi.

[49] Of obvious concern would be the deadlock in the board of Aburi, with each side opposing the other. Ontario courts are reluctant to say to the parties that they must continue to operate under the terms of an agreement in the face of the deterioration of their relationship. It would be difficult for such an order to be supervised in a way that would make sense given the commercial realities that exist between the parties. See the discussion in *Natrel Inc. v. Four Star Dairy Ltd.*,

1996 CarswellOnt 1205 at para. 13. See also R.J. Sharpe, *Injunctions and Specific Performance* looseleaf ed. (Toronto: Canada Law Book 2012) at paras. 7.340, 7.510.

[50] As well, a plaintiff deprived of an investment property does not have a fair, real or legitimate claim to specific performance unless it can show that money is not a complete remedy because the land has a peculiar and special value to it. Where an investment property's particular qualities are only of value due to their ability to further profitability, a claim for specific performance cannot be justified. See *Southcott Estates Inc. v. Toronto Catholic District School Board*, [2012] 2 S.C.R. 675 at paras. 40-41.

[51] It is not necessary to consider the second and third test in *R.J.R.-MacDonald Inc. v. Canada (A.G.)* of irreparable harm and balance of convenience. However, it is clear that the applicants would suffer irreparable harm given the negative impact of any stay on the success of the CCAA proceedings. Moreover, Minatura has no assets in Canada or the United States and has given no undertaking as to damages.

Jurisdiction to decide the litigation between the parties

[52] Minatura takes the position that Ontario lacks jurisdiction to deal with the dispute between the parties and that even if it did, the dispute should be dealt with in Ghana on a *forum non conveniens* analysis.

[53] The applicants say that Ontario has jurisdiction and that a forum selection clause in the shareholders' agreement directing the dispute to be litigated in Canada should be enforced.

[54] The starting point in the analysis is *Van Breda v. Village Resorts Ltd.* [2012] 1 S.C.R. 572, which dealt with the subject of both jurisdiction and *forum non conveniens* in the context of tort actions. It did not deal with a breach of contract case or a CCAA proceeding. In a lengthy judgment, LeBel J. for the Court confirmed the test of a real and substantial connection to ground jurisdiction in a Canadian court. He listed presumptive connecting factors for a tort case. In dealing with presumptive factors, he stated:

[82] Jurisdiction must - irrespective of the question of forum of necessity, which I will not discuss here - be established primarily on the basis of objective factors that connect the legal situation or the subject matter of the litigation with the

forum. The Court of Appeal was moving in this direction in the cases at bar. This means that the courts must rely on a basic list of factors that is drawn at first from past experience in the conflict of laws system and is then updated as the needs of the system evolve. Abstract concerns for order, efficiency or fairness in the system are no substitute for connecting factors that give rise to a "real and substantial" connection for the purposes of the law of conflicts.

[85] The list of presumptive connecting factors proposed here relates to claims in tort and issues associated with such claims. It does not purport to be an inventory of connecting factors covering the conditions for the assumption of jurisdiction over all claims known to the law.

(a) CCAA proceeding

[55] Aburi is one of the applicants in the CCAA proceeding. The evidence of Mr. Griffis is that the centre of main interest of all of the applicants, including Aburi, is Ontario. See paragraphs 18 to 20 of his affidavit sworn May 8, 2013. Included in the list of factors in his affidavit are (i) all corporate decision making occurs at the head office in Ontario, (ii) all treasury management functions, including a centralized cash management system, are conducted from the head office, (iii) the only financing available to the applicants is with FCMI, which manages its financing in Toronto and (iv) the board of directors' meetings are customarily held in Ontario. In his responding affidavit, Mr. Turley, the president of Minatura, made the bald allegation that Aburi's banking is done in Ghana. What banking he is talking about is not stated, and I do not take his statement to be contradicting the affidavit of Mr. Griffis that all treasury management functions, including a centralized cash management system, are conducted from the head office in Ontario. Mr. Turley may be talking about a bank account in Ghana used to pay suppliers or Ghanaian employees.

[56] In this case, it is critical to a restructuring that the entire group of applicants be included in the CCAA proceeding. Without Aburi, a restructuring is highly unlikely. The Monitor has made that clear. The evidence of Mr. Griffis is that the applicants' business is fully integrated, and that is apparent from the entire record. With the centralized cash management of all applicants, including Aburi, being conducted in Ontario, and the lender FCMI being in Ontario, this Court in my view has the jurisdiction to deal with this CCAA proceeding, including any issue as to whether Aburi consented to its commencement. There are, in the language of LeBel

J., objective factors that connect the legal situation or the subject matter of the litigation with the forum.

(b) Tort claim

[57] The statement of claim of Coastal and Aburi commenced in Ontario includes a claim in paragraph 19 that Minatura has misrepresented a number of things to “plaintiffs’ suppliers, operators, bankers, financiers and government regulators”. Where the misrepresentation took place is not pleaded in that paragraph, although in paragraph 22 it is alleged that the misrepresentations were disseminated in Ontario and elsewhere. In his affidavit, Mr. Griffis stated that the financier for the plaintiffs is FCMI in Ontario, and thus it can be taken that the pleading asserts misrepresentations being made to FCMI in Ontario.

[58] One of the presumptive connecting factors for a tort claim enunciated by LeBel J. in *Van Breda* is that the tort was committed in the province. Thus the presumption in this case is that Ontario has jurisdiction to deal with the misrepresentation claim as there is a sufficient basis to conclude that it is alleged that the misrepresentation took place in Ontario. The burden of rebutting the presumption of jurisdiction rests on Minatura, which must establish facts which demonstrate that the presumptive connecting factor does not point to any real relationship between the subject matter of the litigation and the forum or points only to a weak relationship between them. In this case, Minatura has not done so.

[59] Thus in this case Ontario has jurisdiction over the claim for misrepresentation. In such a situation, *Van Breda* directs that the entire case, including the breach of contract claim, should be dealt with in Ontario. LeBel J. stated:

[99] I should add that it is possible for a case to sound both in contract and in tort or to invoke more than one tort. Would a court be limited to hearing the specific part of the case that can be directly connected with the jurisdiction? Such a rule would breach the principles of fairness and efficiency on which the assumption of jurisdiction is based. The purpose of the conflicts rules 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.

(c) **Breach of contract claim**

[60] As stated, because an Ontario court has jurisdiction to deal with the misrepresentation case, it also has jurisdiction to deal with the entire case, including the claim for breach of contract. Apart from that, however, in my view on basis of the principles referred to and established in *Van Breda*, an Ontario court has jurisdiction to deal with the breach of contract case.

[61] In this case, the applicants rely on a choice of forum provision contained in the shareholders' agreement which provides:

If the cumulative amount of the claims of one Participant against the other Participant is greater than or equal to five million dollars (\$5,000,000) then the dispute or issue will be subject to adjudication in the Courts of Canada.

[62] Coastal and Aburi have claimed damages of \$10 million plus punitive damages, and thus their claim falls within the forum provision clause in the shareholders' agreement. Courts of Canada would include the Superior Court of Justice in Ontario in which Coastal and Aburi commenced their claim.

[63] In *Van Breda*, LeBel J. looked to rule 17.02 for guidance to discern factors that could be presumptive. He stated:

[83] At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. They are generally consistent with the approach taken in the *CJPTA* and with the recommendations of the Law Commission of Ontario, although some of them are more detailed. They thus offer guidance for the development of this area of private international law. (emphasis added)

[64] Rule 17.02 refers to the following in dealing with contract claims:

17.02 A party to a proceeding may, without a court order, be served outside Ontario with an originating process or notice of a reference where the proceeding against the party consists of a claim or claims,

Contracts

(f) in respect of a contract where,

(i) the contract was made in Ontario,

(ii) the contract provides that it is to be governed by or interpreted in accordance with the law of Ontario,

(iii) the parties to the contract have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract, or

(iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario.

[65] In *Van Breda*, LeBel J. did not deal with rule 17.02(f) other than to state “Claims related to contracts made in Ontario would also be properly brought in the Ontario courts (rule 17.02(f)(i))” and that a presumptive factor for a tort claim was if a contract connected with the dispute was made in the province. He did so presumably because in *Van Breda*, the contract was made in Ontario. He did not comment on rule 17.02(f)(iii) that deals with a contract in which the parties have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract.

[66] If one starts with rule 17.02 as directed with *Van Breda*, the issue arises as to whether rule 17.02(f)(iii) that deals with a contract in which the parties have agreed that the courts of Ontario are to have jurisdiction over legal proceedings in respect of the contract should be considered a presumptive connecting factor. In my view it should, as it is clear that judicial policy in Canada is that choice of forum provisions should be accorded great weight. See *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450 at para. 20.

[67] It is not necessary, however, to decide if a choice of forum clause should be considered to be a presumptive connecting factor in light of the following statement of LeBel J. in *Van Breda* and the dictates of traditional private international law. In *Van Breda*, LeBel J. stated:

[79] From this perspective, a clear distinction must be maintained between, on the one hand, the factors or factual situations that link the subject matter of the litigation and the defendant to the forum and, on the other hand, the principles and

analytical tools, such as the values of fairness and efficiency or the principle of comity. These principles and analytical tools will inform their assessment in order to determine whether the real and substantial connection test is met. However, jurisdiction may also be based on traditional grounds, like the defendant's presence in the jurisdiction or consent to submit to the court's jurisdiction, if they are established. The real and substantial connection test does not oust the traditional private international law bases for court jurisdiction. (emphasis added)

[68] What is the traditional private international law basis for court jurisdiction? It is clear that a prior agreement to submit disputes to the jurisdiction a domestic court will provide that jurisdiction. It is not only attorning to the jurisdiction by appearing in the action that will provide jurisdiction.

[69] In *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.), Sharpe J.A. stated:

[19] There are three ways in which jurisdiction may be asserted against an out-of-province defendant: (1) presence-based jurisdiction; (2) consent-based jurisdiction; and (3) assumed jurisdiction. Presence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court. Consent-based jurisdiction permits jurisdiction over an extra-provincial defendant who consents, whether by voluntary submission, attornment by appearance and defence, or prior agreement to submit disputes to the jurisdiction of the domestic court. (emphasis added).

[70] In *Loat v. Howarth* (2011), 89 B.L.R. (4th) 177 (O.C.A.), a forum selection clause in a contract was held to give an Ontario court jurisdiction over the dispute. The Court stated:

28. Further, on the plain language of the forum selection clause in the Service Agreement, the plaintiff and Storetech Ontario expressly attorned to Ontario's jurisdiction in respect of any disputes arising with respect to his employment. Under the clause, Ontario has jurisdiction *simpliciter* regarding such disputes.

[71] The text authorities also state clearly that a forum selection clause will provide the basis for jurisdiction. Castel & Walker, *Canadian Conflict of Laws*, 6th ed (April 2013) state at p. 11-6.1 that apart from attornment, "Parties who have entered into agreements nominating particular courts for the resolution of disputes between them may rely on those agreements to found jurisdiction." In Dicey, Morris and Collins on *The Conflict of Laws*, 14th ed. (2006), it is stated at para. 12R-086 that where a contract provides that all disputes between the parties are to be referred to the jurisdiction of the English courts, the court normally has jurisdiction to hear and

determine the proceedings. In Chesire and North's *Private International Law*, 13th ed. (1999), it is stated at p. 296 :

Further, any person may contract...to submit to the jurisdiction of a court to which he would otherwise not be subject. Thus, in the case of an international contract it is common practice for the parties, one or even both of whom are resident abroad, to agree to any dispute arising between them shall be settled by the English court... A party to such a contract, having consented to the jurisdiction, cannot afterwards contest the binding effect of the judgment.

[72] In Pitel and Rafferty, *Conflict of Laws*, (Irwin Law Inc.) it is stated at p. 67:

Finally, it is well recognized that a defendant can submit to the jurisdiction of a court by a contract or agreement to submit. Thus, parties to a contract may agree that all disputes arising thereunder are to be referred to the courts of, for example, Ontario. Such a choice of forum clause will bestow jurisdiction on the Ontario courts.

[73] Minatura contends that there is authority to the contrary. In 2249659 *Ontario Ltd. v. Sparkasse Siegen*, 2013 ONCA 354, Doherty J.A. stated:

[25] A forum selection clause applicable to the relevant litigation identifying a forum other than Ontario as the forum of choice cannot deprive Ontario of jurisdiction *simpliciter*. A forum selection clause is relevant to whether Ontario should exercise its jurisdiction and not whether Ontario has jurisdiction [1]: see *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467, at paras. 33-40, *aff'd* 2012 SCC 9, [2012] 1 S.C.R. 359. The motion judge should have considered the question of jurisdiction *simpliciter* before examining the forum selection clauses. Those clauses, even if applicable to this litigation, could not assist in determining jurisdiction *simpliciter*.

[74] However, footnote [1] referred to by Doherty J.A. stated:

The situation is quite different where the forum selection clause identifies Ontario as the forum of choice. In that situation, the clause arguably gives Ontario jurisdiction through the consent of the parties.

[75] It is clear from this footnote that the *Sparkasse Siegen* case is distinguishable from this case in which there is a forum selection clause identifying Canada, or Ontario, as the forum of choice. I do not therefore take the statement of Doherty J.A. to run counter to the authorities to which I have referred, including LeBel J. in *Van Breda*, Sharpe J.A. in *Muscutt v. Courcelles*, the Court in *Loat v. Howarth* and the text authorities, that a forum selection clause is recognized in

private international law to give jurisdiction to the court selected, in this case the courts of Canada. To the extent that the statement may run counter to these authorities, I am of course bound by *Van Breda*, and *Muscatt v. Courcelles* is concurrent authority to *Sparkasse Siegen*.

(d) **Summary**

[76] In summary, the Superior Court of Justice in Ontario has jurisdiction, referred to in some cases as jurisdiction *simpliciter*, over the CCAA application and the issue of whether Aburi consented to that application and to the misrepresentation and breach of contract claims commenced by Coastal and Aburi against Minatura in Ontario.

Forum non conveniens

[77] Minatura contends that Ghana is the more appropriate forum to decide the dispute between the parties. The burden, of course, rests on Minatura to establish that Ghana would be a more appropriate forum. See *Van Breda* at para. 103.

[78] The forum selection clause in this case looms large in a *forum non conveniens* analysis. In *Z.I. Pompey Industrie v ECU-Line N.V.*, [2003] 1 S.C.R. 450 it was held that strong cause must be shown before a forum selection clause will not govern. Bastarache J. for the Court stated:

Forum selection clauses are common components of international commercial transactions, and are particularly common in bills of lading. They have, in short, "been applied for ages in the industry and by the courts".... These clauses are generally to be encouraged by the courts as they create certainty and security in transaction, derivatives of order and fairness, which are critical components of private international law...The "strong cause" test remains relevant and effective and no social, moral or economic changes justify the departure advanced by the Court of Appeal. In the context of international commerce, order and fairness have been achieved at least in part by application of the "strong cause" test. This test rightly imposes the burden on the plaintiff to satisfy the court that there is good reason it should not be bound by the forum selection clause. It is essential that courts give full weight to the desirability of holding contracting parties to their agreements. ...

[79] In *Expedition Helicopters Inc. v. Honeywell Inc.* (2010), 100 O.R. (3d) 241 (C.A.), Jurianz J.A., in dealing with a forum selection clause in a *forum non conveniens* analysis, stated:

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

[80] None of the facts referred by Jurianz J.A. are present in this case. I see no basis to hold that in the circumstances the parties should litigate their dispute in Ghana.

[81] I mention only some of the grounds advanced by Minatura. One is that the shareholders' agreement provides that it shall be construed and governed by the laws of Ghana. Thus it is asserted by Minatura that it is appropriate that the dispute be litigated in Ghana. However, no evidence has been provided in this motion as to what the law of Ghana is so far as the construction of the shareholders' agreement is concerned. In the absence of any such evidence, it is to be assumed on this motion that Ghanaian law is no different than Ontario law. See the discussion on this subject in *Bank of Nova Scotia v. Wassef* (2000), 11 C.P.C. (5th) 338 at para. 17.

[82] Another is that it is contended by Minatura that persons from the Ghanaian EPA will need to be called as witnesses and that this favours Ghana as the best forum. However, this must involve speculation on the part of Minatura. Although invited, Minatura has not seen fit to contact anyone at the EPA to discuss the correcting document provided by it to deal with the mistake in the licence as first issued. Minatura can hardly assert with any confidence that someone from the EPA will necessarily be a witness. In any event, in dealing with an international situation today, parties must know that in the event of a dispute, people will need to travel to get to the location in which the dispute is heard. I note that Mr. Turley, the president of Minatura, resides in California and swore his affidavit in Washington D.C.

[83] Minatura has filed an affidavit of Mr. Amarteifio in which he swears that a judgment of a Canadian court will not be enforceable in Ghana, except where there is a reciprocal enforcement

agreement between Ghana and Canada, and as there is no such agreement, the matter would have to be re-litigated in Ghana.

[84] Mr. Amarteifio is litigation counsel for Minatura in the action commenced by it in Ghana. He is hardly non-partisan and it is admitted by Mr. Turley that Mr. Amarteifio is not impartial. Therefore he does not meet one of the requirements of rule 4.1.01 that an expert must be non-partisan. He has also failed to include the information required of an expert in rule 53.03(2.1), including his credentials to provide the opinion, other than to say he has been a lawyer in Ghana since 1979. What expertise he has in private international law is not stated.

[85] Mr. Amarteifio has provided no support for his statement that without a reciprocal enforcement agreement between Canada and Ghana, a judgment in Canada would not be recognized in Ghana. It is generally known that the Ghanaian legal system is based on British common law, and it would be surprising if there were no common law tests for recognition by Ghana of foreign judgments. The Dicey rule of English common law is that England will recognize a foreign judgment if the judgment debtor had before the commencement of the proceedings agreed to submit to the jurisdiction of the court in which the judgment debt was obtained. See *Rubin v. Eurofinance S.A. & Ors*, [2012] UKSC 46 in which the Dicey rule was confirmed. See also Dicey, Morris and Collins on *The Conflict of Laws*, 14th ed. (2006) at paras. 14R-048 and 14-069.

[86] Because Mr. Amarteifio is not non-partisan, his report should not be admissible. In any event, I do not give it any weight, both because of the partisan position of its author and because there is no indication of any expertise he has in the area and no support for his bald statements.

[87] There is also an issue of timing. It is critical that if there is to be litigation, it must be determined very quickly, as any restructuring must take place and be closed by the end of July, 2013. In our Commercial List in Toronto, accommodation can be made extremely quickly for a determination of disputes in real time. Counsel for the applicants points out that so far the action commenced by Minatura in Ghana has not moved quickly. After being instructed by Minatura on February 13, 2013 to expedite its intended action, it took two months until April 10, 2013 for Mr. Amarteifio to have the writ issued.

[88] I am advised by counsel for the applicants that their information is that it will take a year to get to trial in Ghana. Counsel for Minatura advises that his information is that it will take six to twelve months. If the restructuring were held up for that period of time, it would mean there would be no restructuring. Timing is an important factor that favours Ontario as the appropriate forum.

[89] Counsel for Minatura in argument said that Minatura wanted the dispute dealt with quickly. However when asked if in that case Minatura would agree to a fast trial in the Commercial list in Toronto, the answer was no. The answer leads to a concern that Minatura is taking the positions it is as tactics to obtain leverage against the applicants.

[90] In the circumstances, Minatura has not satisfied the onus of establishing that Ghana is the more appropriate forum for trying the issues raised in the litigation.

Conclusion

[91] The notice of motion of Minatura and the relief sought in it is dismissed. As well, the stay of the CCAA proceedings as they relate to Aburi as requested by Minatura in its factum is dismissed. The dispute between the parties is to be litigated in this Court.

[92] If either party wishes to have their dispute tried quickly, a 9:30 am appointment may be made to discuss the mechanics and timing. The Court will do all it can to accommodate a quick trial or a hybrid proceeding based on the material filed to date and any further evidence the parties may wish to call.

[93] The applicants are entitled to their costs. If costs cannot be agreed, brief written argument along with a proper cost outline may be delivered by the applicants within 10 days and Minatura shall have a further 10 days to deliver a brief written reply argument.



Newbould J.

Date: June 7, 2013