

Date: 20201023  
Docket: CI 19-01-21068  
(Winnipeg Centre)  
Indexed as: *Kozak et al. v. Core Life Inc. et al.*  
Cited as: 2020 MBQB 149

## **COURT OF QUEEN'S BENCH OF MANITOBA**

### **B E T W E E N:**

JAMES DENNIS KOZAK, HEIDI KOZAK, CRAIG BABCOCK, CARLA BABCOCK, AND 4019947 MANITOBA LTD.,	)	<b>Appearances:</b>
	)	
	)	<u>Wayne M. Onchulenko and</u>
	)	<u>Leiba R. Feldman,</u>
	)	for the plaintiffs
plaintiffs,	)	
	)	<u>Thomas K. Reimer,</u>
- and -	)	for the defendants
	)	
CORE LIFE INC. AND ITALO FERRARI,	)	
	)	
defendants.	)	
	)	
	)	JUDGMENT DELIVERED:
	)	October 23, 2020

### **HARRIS J.**

[1] This is a motion by the defendants to dismiss or stay the plaintiffs' action on the basis that this court lacks jurisdiction *simpliciter* over the subject matter of the plaintiffs' action or alternatively, that Ontario, and not Manitoba, is the most convenient forum for the hearing of the action (*forum non conveniens*). For the reasons that follow, the defendants' motion is dismissed.

**FACTS**

[2] The essential facts are not contentious.

[3] The plaintiffs, James Dennis Kozak ("Kozak"), and Heidi Kozak, reside in East St. Paul, Manitoba. The plaintiffs, Craig Babcock and Carla Babcock, reside in Medicine Hat, Alberta. The plaintiff, 4019947 Manitoba Ltd., is a Manitoba corporation.

[4] The defendant, Core Life Inc. ("Core Life"), is an Ontario company which is not registered to carry on business in Manitoba. The defendant, Italo Ferrari ("Ferrari"), is the Chief Executive Officer and a Director of Core Life and resides in Ontario.

[5] Core Life had a business plan to raise money to construct a retirement residence in St. Thomas, Ontario. In accordance with appropriate securities regulations, an Offering Memorandum was developed and sent to prospective investors throughout Canada, one of whom was the plaintiff, Kozak, who carried on business as an investment advisor.

[6] After receiving the Offering Memorandum, Kozak, on behalf of himself and his co-plaintiffs, began discussing a significant investment in Core Life with an agent on behalf of Core Life. Kozak made one trip to Ontario to learn more about the investment, but for the most part, communications with respect to the investment took place primarily on the phone and by e-mail.

[7] On or about October 25, 2016, pursuant to a Subscription Agreement ("Subscription Agreement"), the plaintiffs purchased 450,000 shares from

Core Life for \$1.00 each. According to the Subscription Agreement, the shares purchased by the plaintiffs were to be redeemed on or before March 30, 2017 for a price of \$1.10 per share. As well, the plaintiffs were to be paid a two percent monthly interest payment on their original subscription amounts for six consecutive months from March 30, 2017.

[8] As security for the investment, Ferrari agreed to sign a Personal Indemnity ("Indemnity") pursuant to which he agreed to indemnify the plaintiffs should Core Life fail to pay in accordance with the Subscription Agreement.

[9] The original version of the Indemnity offered by Ferrari stipulated that it was to be construed in accordance with the laws of Ontario and that the Ontario courts had jurisdiction to deal with any legal action arising out of the Indemnity. The plaintiffs rejected this and as a result of negotiations, the Indemnity was amended such that it reads as follows:

[the Indemnity]...shall be construed in accordance with the laws of the province of Manitoba and the Indemnifier agrees that any legal suit, action or proceeding arising out of or relating to the Indemnity ["IN"] may be instituted in the courts of such province, the Indemnifier hereby accepts and irrevocably submits to the jurisdiction of said courts and acknowledges their competence and agrees to be bound by any judgment hereof, provided that nothing herein shall limit the Investors' right to bring proceedings against the Indemnifier elsewhere.

[10] Counsel for the plaintiffs stipulated that the investment funds were not to be released until the executed amended Indemnity was received by plaintiffs' counsel. That condition was satisfied and the \$450,000 was released.

[11] On April 4, 2017, the plaintiffs demanded payment in accordance with the Subscription Agreement and the Indemnity, but both Core Life and Ferrari have failed to make payment.

[12] On May 8, 2019, the plaintiffs commenced this action to recover the amounts owing pursuant to the Subscription Agreement and Indemnity. In addition, they seek relief pursuant to s. 234 of *The Corporations Act*, C.C.S.M. c. C225.

[13] On July 5, 2019, Ferrari's then counsel filed a Statement of Defence on his behalf, later amending it on July 11, 2019.

[14] On July 31, 2019, current counsel for both defendants filed the within motion. Core Life has not filed a Statement of Defence.

### **ISSUES**

[15] The issues are whether this court has jurisdiction *simpliciter* with respect to the subject matter of the litigation and if so, whether this court should decline to exercise that jurisdiction based on *forum non conveniens*.

### **Jurisdiction *Simpliciter***

[16] There are three well-established bases for a court to assert jurisdiction over an out-of-province party:

- (1) Presence-based jurisdiction;
- (2) Consent-based jurisdiction; or
- (3) Assumed jurisdiction.

(See ***Chevron Corp. v. Yaiguaje***, 215 SCC 42, [2015] 3 S.C.R. 69, at paras. 82 to 84).

[17] The defendant, Ferrari, has consented to Manitoba's jurisdiction by agreeing in the Indemnity that Manitoba is the appropriate forum for disputes arising out of the Indemnity and by filing a Statement of Defence.

[18] Core Life does not have a presence in Manitoba and it has not consented to this court's jurisdiction. The question then is whether there is any basis for this court to assert jurisdiction over Core Life?

[19] In ***Club Resorts Ltd. v. Van Breda***, 2012 SCC 17, [2012] 1 S.C.R. 572 ("***Van Breda***") at paras. 82 to 90, the court discussed four presumptive connecting factors which would enable a court to assert or assume jurisdiction over an out-of-province defendant:

- (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; or
- (d) a contract connected with the dispute was made in the province.

[20] However, that list is not closed and a court may identify new factors which also presumptively entitle a court to assume jurisdiction. In so doing, "a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the listed factors" (***Van Breda*** at para. 91).

[21] In this case, there are two contracts at the heart of the dispute. In my opinion, each agreement is integral to the other. It is clear from the Affidavit of James Dennis Kozak sworn October 9, 2019 that the \$450,000 would not have been released to Core Life if Ferrari did not execute the amended Indemnity. Manitoba clearly has jurisdiction with respect to the Indemnity. The integral connection of the Indemnity to the Subscription Agreement entitles the court to assert jurisdiction over that agreement as well. Moreover, assuming jurisdiction over one aspect of the dispute but not the other would be unfair to the litigants. Addressing this issue, in ***Van Breda***, LeBel J. said that, if “a real and substantial connection exists between the forum, the subject matter of the litigation and the defendant. ...the court must assume jurisdiction over all aspects of the case.” As well, LeBel J. says that, making the plaintiff litigate related claims in two different provinces “would be incompatible with any notion of fairness and efficiency” (para. 99).

***Forum non conveniens***

[22] The defendants next submit that even if Manitoba has jurisdiction *simpliciter*, that jurisdiction should be declined because Ontario is clearly a more convenient and appropriate forum for this dispute.

[23] Before considering whether Manitoba should decline jurisdiction, the defendants must establish that Ontario would have jurisdiction *simpliciter*. Here, both defendants are domiciled in Ontario, thus establishing presence-based jurisdiction.

[24] The burden is then on the defendants to show why this court should decline jurisdiction in favour of Ontario (***Van Breda*** at para. 103). The doctrine of *forum non conveniens* enables a court to “decline to exercise its jurisdiction in appropriate, but limited, circumstances in order to assure fairness to the parties and the efficient resolution of the dispute” (***Van Breda*** at para. 104).

[25] The court is required to consider the circumstances relative to the litigation and for this court to decline jurisdiction, I must find that the Ontario court is in a *better* position to dispose fairly and efficiently of the litigation. In ***Fernandes v. Wal-Mart Canada Corp.***, 2017 MBCA 96, the Court of Appeal considered factors which may be considered in making that determination:

[49] The factors that a court may consider may vary with the context of the case, and might include: the locations of the parties and witnesses; the cost of transferring the case to another jurisdiction or of declining a stay; the impact of a transfer on the conduct of the litigation or on related and parallel proceedings; the possibility of conflicting judgments; problems related to the recognition and enforcement of judgments; and the relative strengths of the connections to the two parties.

[26] The domicile of the parties and witnesses does not weigh in favour of Ontario over Manitoba. The defendants and their witnesses are in Ontario while the plaintiffs and their witnesses are in Manitoba and Alberta. The plaintiffs understand the defendants’ assets are in Ontario and there are processes that enable them to enforce judgment should they be successful.

[27] The fact that the defendants are facing lawsuits by other parties in Ontario has little bearing on this litigation. There is no evidence that this litigation is related to litigation in Ontario. It is a reasonably straightforward case based on a breach

of promises to pay. Both Manitoba and Ontario courts can apply the appropriate law to the litigation. There is nothing specialized about the litigation that should give rise to concerns about conflicting judgments.

[28] Furthermore, it would be unfair, after negotiating an agreement that litigation is to take place in Manitoba, for the plaintiffs to be required to do what they contracted not to do – litigate in Ontario. The strength of the case to establish jurisdiction *simpliciter* is strong and this reinforces the court's finding that the defendants have not met the onus of establishing that Ontario is in a better position to dispose fairly of the litigation.

[29] The plaintiffs will have their costs.

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Harris J.