IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Trends Electronics International Inc. v. Dana Innovations,* 2023 BCSC 1438

Date: 20230818
Docket: S229583
Registry: Vancouver

Between:

Trends Electronics International Inc.

Plaintiff

And

Dana Innovations doing business as Sonance

Defendant

Before: The Honourable Mr. Justice Coval

Reasons for Judgment

Counsel for the Plaintiff:	H.L. Jones
Counsel for the Defendant:	A.S. Boucher L.A. Wilson
Place and Date of Hearing:	Vancouver, B.C. June 2, 2023
Place and Date of Judgment:	Vancouver, B.C. August 18, 2023

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I. INTRODUCTION

[1] Trends Electronics International Inc. applies for a declaration that British Columbia is the proper jurisdiction for its claims against Dana Innovations. Its claims arise from Dana's termination of Trends' longstanding distribution of Dana's products in Canada.

[2] Dana argues that Trends should sue in California, where the United States District Court recently dismissed Trends' application to stay Dana's lawsuit against it relating to the same subject matter.

[3] For the reasons that follow, I find that British Columbia is the appropriate jurisdiction for the claims raised in this action, and so I do not exercise the discretion in R. 21-8(2) of the *Supreme Court Civil Rules* to decline jurisdiction in favour of California.

II. FACTS

A. The Parties

[4] Trends sells audio, video, lighting and related products to residential customers in Canada. In business since 1990, its head office, management team and main warehouse are in Burnaby, BC.

[5] Dana develops and sells audio equipment for residential and commercial use. Its head office is in San Clemente, California.

[6] Receiving Dana's products at its Burnaby warehouse, Trends distributed them to customers directly, or via Trends' other warehouses in Delta, Calgary, Montreal and Toronto.

[7] Trends alleges that it built Dana's brand in Canada, spending substantial amounts, and taking significant risks, to market and promote Dana's brand and products across the country. Its evidence is that it increased Dana's gross revenue from approximately $250,000 in 1995 to $4.436 million of projected revenue in 2022. At the time of Dana's termination, on November 1, 2022, Trends had eight agents,

two sales managers, and 21 support staff involved in selling Dana products in Canada, and those products represented approximately 40% of Trends' total gross sales revenue.

B. The 1997 Agreement

[8] From 1995–1999, Trends was Dana's exclusive distributor in Canada. From 1995–1997, they signed a series of one-year exclusive distributor agreements. The last such agreement, entitled "Exclusive Distributorship Agreement", was dated July 1, 1997 ("1997 Agreement").

[9] A key issue in dispute between the parties is the interpretation of the term clause in the 1997 Agreement. This issue is important to both this jurisdiction application and the merits of Trends' claims, because the 1997 Agreement contained a California choice of law and jurisdiction clause and a 30-day termination clause.

[10] Dana says, the 1997 Agreement remained in effect, pursuant to its term clause, until Dana's November 1, 2022 termination. It says the term clause, properly interpreted, automatically renewed the agreement every year until that termination. Trends says that, on a straightforward reading of the term clause, the 1997 Agreement expired on June 30, 1999.

[11] The term clause says this:

> 4. TERM
>
> This Agreement shall be effective from the date of its execution to June 30, 1998, unless earlier terminated hereunder. Notwithstanding the foregoing, should [Trends] not receive a written letter of termination from Dana by the termination date hereof, the Agreement shall be deemed renewed for one year from the date of such renewal, with all terms and conditions hereof remaining in full force and effect.

[12] The California law and jurisdiction clause says this:

> 16. GOVERNING LAW
>
> This Agreement shall be construed and enforced in accordance with the laws of the State of California of the United States of America and any dispute

> arising under this Agreement shall be resolved in a Court of cognizant jurisdiction in either Los Angeles or Orange County, California which shall have the sole personal and subject matter jurisdiction over any dispute arising under this Agreement,

[13] The termination clause, entitling either party to terminate on 30 days' notice, says this:

> 9. TERMINATION
>
> A. Either party shall have the right to terminate this Agreement, in its sole discretion, upon thirty (30) days written notice to the other. Either party to this Agreement shall further have the right to terminate this Agreement, without any advance notice to the other, in the event of breach of the Agreement by such other party. Such termination, in either case, shall not extinguish obligations previously incurred under this Agreement, or obligations which by their nature survive such termination.

C. The Business Relationship from 1999–2022

[14] After 1999, the business arrangement between the parties changed, as Dana gradually moved away from Trends being its exclusive Canadian distributor.

[15] In 2001–2002, Dana began selling its products through various channels into Canada without Trends as its distributor. By 2008, it was selling products directly to other Canadian distributors and retailers. By 2019, Dana had certain product lines in Canada which it did not permit Trends to carry.

[16] Dana's evidence is that it discussed with Trends its desire to responsibly diversify, and to branch into the commercial sphere which was not Trend's specialty. Its evidence is that it also consistently warned Trends of being surpassed by other distributors who were adding sales representatives, and asked Trends to open a warehouse and showroom in Toronto. Trends' witnesses generally dispute this evidence.

D. The November 2022 Termination

[17] By letter of November 1, 2022, Dana terminated the parties' distributor relationship, effective that same day. The letter said Trends could continue selling its

Dana inventory until December 31, 2022, which Trends did until ultimately returning approximately US $180,000 of product and warranty claims.

[18] Trends alleges that Dana immediately began contacting Trends' Canadian customers to offer predatory pricing below wholesale cost. By letter of November 2, 2022, Trends demanded that Dana cease this alleged improper interference with its business.

[19] On November 21, 2022, Trends sent Dana its draft Notice of Civil Claim and a settlement proposal. It advised that it would file its claim on December 1, 2022, if no agreement were reached.

[20] Trends' Notice of Civil Claim alleged that Dana's termination of their business relationship without notice was a breach of contract. It also claimed in wrongful interference with economic relations, and breach of the duty of good faith and honesty for soliciting its customers with predatory pricing immediately following the termination.

[21] On November 30, 2022, Dana's California counsel requested an additional week to consider its response.

[22] Unbeknownst to Trends at the time, Dana filed its California claim on November 30, 2022, seeking a declaration that the 1997 Agreement was valid and enforceable until lawfully terminated by Dana, and seeking damages for:

a) Trends' breach of the 1997 Agreement by: engaging with third parties to sell and distribute products competing with those Trends was selling and distributing for Dana; failing to ship Dana's products and properly service the market; and, failing to make timely payment for Dana's goods.

b) Trends failure to pay for $399,014.66 worth of goods that were requested and delivered, of which $134,871.74 was past due.

[23] On December 6, 2022, Trends served its Notice of Civil Claim. On January 9, 2023, Dana served its California claim and its Response in these proceedings.

E. The California Proceedings

[24] On April 21, 2023, Judge Fred W. Slaughter of the Central District Court of California denied Trends' three motions to dismiss or stay Trends' California claims.

[25] First, Trends applied to dismiss Dana's claims, for breach of contract and declaratory relief, as time-barred by California's four-year statute of limitations for written contracts. Second, it sought to dismiss the claim for goods delivered on the basis that, even if the jurisdiction clause in the 1997 Agreement remained in effect, it did not extend to that claim. Third, it sought to stay the entire claim in light of the parallel proceedings in British Columbia.

[26] On the first motion, Trends argued that, because the 1997 Agreement expired on June 30, 1999, the four-year statute of limitations for claims under written contracts applied. Judge Slaughter concluded, however, that the 1997 Agreement was "ambiguous" regarding whether it expired on June 30, 1999, or provided for perpetual renewal until expressly terminated. He said that he was expressing no view on the "proper construction" of the term clause, but rather had found ambiguity only for purpose of the motion to dismiss.

[27] Judge Slaughter said that he agreed with Trends that the only "explicit term of renewal" was for one year, and so "strictly construed" one could reasonably read the contract as renewing for only one year and then expiring. He found ambiguity, however in the phrase "the Agreement shall be deemed renewed for one year from the date of such renewal". He said that this:

> … does not clearly foreclose whether, after the first one-year renewal, the Agreement continues to renew in subsequent periods for one year until a written notice of termination is provided.

[28] On Trends' second motion, Judge Slaughter found that, regardless of whether the 1997 Agreement had expired, the substantial overlap between Dana's claim for goods delivered and its other claims for breach of contract and declaratory relief provided a basis for taking jurisdiction over Trends for that claim too.

[29] Finally, on the motion to stay the California claim in light of these British Columbia proceedings, Judge Slaughter agreed with the parties that the two actions were “substantially similar”. After pointing out that the general approach under California law was “heavily weighted in favor of the exercise of jurisdiction”, and considering various factors similar to our *forum non conveniens* test, he found the concern of parallel proceedings insufficient to justify a stay. He held that the parties pursuing parallel actions over a routine business dispute did not give rise to the type of exceptional circumstances or special concerns that might justify staying the California proceedings.

III. ANALYSIS

A. Summary Trial or R. 21-8(2) Application?

[30] During the hearing, Mr. Boucher acknowledged the Court’s territorial competence over Dana under the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28, s. 3(e), because of the real and substantial connection between British Columbia and the facts on which Trends’ claims are based.

[31] Under the presumptive factors in *CJPTA*, s. 10, a real and substantial connection exists because the proceeding concerns: contractual obligations substantially performed in British Columbia (s. 10(e)); a tort committed in British Columbia (s. 10(g)); and, a business carried on in British Columbia (s. 10(h)).

[32] Having conceded territorial jurisdiction, Dana remains entitled to seek a stay of proceedings on the ground that the court ought to decline to exercise its jurisdiction (*SCCR*, R. 21-8(2)).

[33] From February to March 2023, the parties exchanged correspondence regarding scheduling that application. Trends’ position was that, because Dana would not commit to a deadline for doing so, Trends wished to apply to have the issue decided. Dana accepted that approach and agreed to the jurisdiction issue being brought in an application by Trends. Trends filed a notice of application, relying on the summary trial rule 9-7(15).

[34] Dana took no procedural objection to Trends proceeding in this way, nor did it argue that the issue was unsuitable for summary determination. Its Application Response stated that British Columbia "is clearly not the proper jurisdiction for the claims raised in the within action, and this Court should decline jurisdiction in favour of the [California Court]". This is the same relief that a defendant such as Dana would seek in its own application under R. 21-8(2).

[35] Given that Dana takes no objection to how the application was brought, and seeks the relief contemplated in R. 21-8(2), I will treat the application as if brought by Dana under R. 21-8(2). I do so for two reasons. First, the parties did not make submissions on the appropriateness of dealing with this issue by way of summary trial brought by Trends. Second, as already mentioned, this application raises issues that overlap in important ways with the merits of the dispute. In my view, it is therefore preferable to decide the application as a jurisdictional question under R. 21-8(2), as opposed to deciding, by summary trial, one issue in the case which overlaps in important ways with other issues.

B. Framework for Determining Appropriate Forum

[36] *CJPTA*, s. 11, codifies the test for the doctrine of *forum non conveniens*. Under s. 11(1), a British Columbia court may decline to exercise its territorial competence if, after considering the interests of the parties and the ends of justice, it finds that a court of another state is a more appropriate forum in which to hear the proceeding. Section 11(2) sets out a non-exclusive list of factors to be considered in making that assessment.

[37] As explained in *Douez v. Facebook, Inc*., 2017 SCC 33, forum selection clauses call for a different assessment than s. 11. There is a two-step approach to determining whether to enforce a forum selection clause by staying an action brought contrary to its terms.

[38] First, the party seeking a stay must establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" (*Douez*

SCC, paras. 20, 28). This determination is on a *prima facie* basis and subject to the further evidence and arguments at trial (*Douez v. Facebook, Inc.*, 2014 BCSC 953, para. 48).

[39] Second, if the defendant succeeds at step one, then the onus shifts and the plaintiff must show "strong reasons why the court should not enforce the forum selection clause and stay the action" (*Douez SCC*, para. 29.).

C. Is The Forum Selection Clause Valid, Clear and Enforceable?

[40] As described above, Dana says that the term clause in the 1997 Agreement provided for a "recurring annual renewal" until Dana terminated it in writing on November 1, 2022. It says the choice of California law and jurisdiction therefore continued to govern.

[41] Trends argues that, pursuant to its term clause, the 1997 Agreement was for a one-year term, with a potential one-year extension. The 1997 Agreement having expired in 1999, the choice of California law and jurisdiction ceased to bind the parties long ago.

[42] To repeat the term clause:

> 4. TERM
>
> This Agreement shall be effective from the date of its execution to June 30, 1998, unless earlier terminated hereunder. Notwithstanding the foregoing, should [Trends] not receive a written letter of termination from Dana by the termination date hereof, the Agreement shall be deemed renewed for one year from the date of such renewal, with all terms and conditions hereof remaining in full force and effect.

[43] In my view, Dana has not met its burden of establishing a valid, clear and enforceable jurisdiction clause that applies to Trends' claims. For purposes of this jurisdiction application, I find that the better side of the argument is that the 1997 Agreement expired on June 30, 1999, for the following reasons:

a) The term clause refers to Dana providing a letter of termination "by the termination date hereof", referring back to the termination date, in the prior

sentence, of June 30, 1998. This suggests a termination date of June 30, 1998, with only a single, one-year extension of that date.

b) If the parties intended the 1997 Agreement to roll over, year after year, indefinitely into the future until terminated, one would expect this to be stated expressly instead of only by possible implication.

c) Trends submitted evidence from two witnesses, Messrs. Daoust and Campbell, who negotiated the 1997 Agreement on behalf of the parties, and were the parties' respective representatives responsible for their business relationship and dealings from approximately 1996–2020.

   Their evidence was that Dana generally stopped using this standard form of agreement in 1998. After 1998, in the dealings between Trends and Dana, they treated the 1997 Agreement as terminated, and never again referred to, or relied on, it.

d) The parties' business relationship fundamentally changed from that contemplated in the 1997 Agreement, which suggests it no longer governed. As described above, after 2001 Trends was no longer Dana's exclusive distributor in Canada, contrary to the fundamental arrangement in the 1997 Agreement which appointed Trends as "the exclusive distributor" for Dana products in Canada.

e) Dana's termination letter did not refer to, or rely on, the 1997 Agreement.

[44] Dana relies on the evidence of its chief sales officer, who joined the company in 2008, and its national sales manager, who was with Dana from 1997–1999 and then 2009 forward. They testify to their shared understanding that the 1997 Agreement remained in effect and continued to govern Dana's relationship with Trends up until Dana's termination letter. Their evidence also suggests, however, that they were not personally involved in the communications and dealings between the parties. On the current record, their evidence appears less direct and specific about how the parties did business with one another than that of Trends' witnesses.

[45] Dana also points to references, in the "Background Facts" and Article 5 of the 1997 Agreement, to three-year revenue goals and the possibility of "a multi-year term".

[46] The "Background Facts" section says in part:

> 5. Dana and [Trends] have set a long-term goal that within three (3) years the sale of Products in the Territory be approximately five to seven percent (5-7%) of the sale of the Products in the United States.

[47] Article 5 says in part:

> [I]f the term of this Agreement is a multi-year term, the preceding sales goal will be for the first year of the agreement only. Thereafter, the Sales Goals shall be adjusted annually, upon the written mutual agreement of the parties, on or before the yearly anniversary date(s) hereof.

[48] In my view, these clauses do not outweigh the points in favour of Trends' interpretation listed above. Also, they are arguably consistent with Trends' position that, pursuant to the term clause, the 1997 Agreement extended from July 1, 1997 to June 30, 1999, making it a "multi-year" deal requiring adjustment of the first-year sales goals.

[49] Perhaps it bears repeating that I am not making a final determination of whether the 1997 Agreement remained valid and binding up until Dana's termination. That decision has ramifications for the parties on the merits of the claims, and is for the trial judge who will see the witnesses and hear more evidence and submissions on the issue.

[50] I would also add that, as a matter of private international law, comity is of course a relevant consideration when taking jurisdiction in a case such as this. My finding that Dana has not met its burden of establishing, for purposes of this application, a valid, clear and enforceable forum selection clause is not inconsistent with Judge Slaughter's finding that the term clause is ambiguous on this issue. As a further comity point, Judge Slaughter's Reasons indicate his understanding that the British Columbia proceedings would continue despite his decision not to stay the California proceedings.

D. Is California Clearly a More Appropriate Forum?

[51] Trends having established territorial competence and the absence of a clear, valid and enforceable forum selection clause, the onus falls on Dana to overcome Trends' presumed entitlement to choose this Court as its forum. Dana has the

"heavy burden" of showing that California is "clearly more appropriate" (*Breeden v. Black*, 2012 SCC 19, para. 37; *Thunderstruck Resources Ltd. v. Bonga Xploration Drilling Supplies Ltd.*, 2022 BCSC 404, para. 97).

[52] I turn to the non-exclusive factors under *CJPTA*, s.11(2) for assessing the appropriate forum.

Comparative Convenience and Expense (s. 11(2)(a))

[53] This factor favours British Columbia.

[54] Trends' representatives are based here (including some representatives that Dana allegedly tried to recruit), as are the customers it wishes to call regarding Dana's solicitations and predatory pricing. Its evidence in this application included an affidavit from the president of one such customer located in Vancouver.

[55] Presumably, some of Dana's witnesses are in California, but their affidavits in this application, from Messrs. Sheldon and Sloan, do not say where they reside. Dana's written submissions say that all of its potential witnesses "reside in the United States" but do not mention California in particular. Our courts can of course easily accommodate video evidence from witnesses in the United States.

Applicable Law (s. 11(2)(b))

[56] This factor is neutral.

[57] In the absence of evidence to the contrary, the principles of law are assumed to be the same in both jurisdictions.

[58] The parties made no submissions about which law applied if the 1997 Agreement expired in 1999, though it may well be the law of British Columbia since this is where the causes of action arose and where the alleged losses occurred.

Multiple Proceedings and Inconsistent Judgments (ss. 11(2)(c) and (d))

[59] These factors favour Dana, but I give them little weight in the circumstances.

[60] Retaining jurisdiction in British Columbia means there will be parallel proceedings here and California, i.e. litigation between the same parties about the same subject matter and the possibility of inconsistent judgments. The overlapping issues include determination of what contractual terms bound the parties at the time of Dana's termination and how much termination notice Dana was required to provide.

[61] In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, Chief Justice McLachlin, for the Court, said that a foreign court's assertion of jurisdiction is not "an overriding and determinative factor in the s. 11 analysis" (para. 24). It should not cause our courts to decline jurisdiction in favour of another that is not more appropriate, all things considered. Instead, "[a] holistic approach, in which the avoidance of a multiplicity of proceedings is one factor among others to be considered, better serves the purpose of fair resolution of the *forum non conveniens* issue with due comity to foreign courts" (para. 30).

[62] The Chief Justice also explained how giving s. 11(c) and (d) too much weight in circumstances like these can be inconsistent with the ultimate goal of hearing an action where most convenient and appropriate:

> [29] Finally, policy considerations do not support making a foreign court's prior assertion of jurisdiction an overriding and determinative factor in the *forum non conveniens* analysis. To adopt this approach would be to encourage a first-to-file system, where each party would rush to commence proceedings in the jurisdiction which it thinks will be most favourable to it and try to delay the proceedings in the other jurisdiction in order to secure a prior assertion in their preferred jurisdiction. Technicalities, such as how long it takes a particular judge to assert jurisdiction, might be determinative of the outcome. In short, considerations that have little or nothing to do with where an action is most conveniently or appropriately heard, would carry the day. Such a result is undesirable and inconsistent with the language and purpose of s. 11, discussed above.

[63] I give these two factors reduced weight in this case because: (a) Dana made the tactical decision to bring its claim in California having received Trends' proposed Notice of Civil Claim, and so knowing that suing in California would almost certainly create dual proceedings; (b) Dana knew, or should have known, that Trends' claims

had a real and substantial connection to British Columbia, and knew (as of November 2, 2022) that Trends disputed that the 1997 Agreement remained in effect; (c) I accept Ms. Jones' submission that Trends believes its damages claim to be substantial. This is supported by its evidence of $4.436 million of projected sales of Dana's products in 2022. In my view this weighs against requiring Trends to bring its claim as a counterclaim in California; and (d) in terms of comity, as mentioned above, when dismissing Trends' application, the California Court expected that this would result in parallel proceedings there and in British Columbia.

Judgment Enforcement (s. 11(2)(e))

[64] This factor is neutral.

[65] Dana's evidence suggests that Trends would need to enforce a judgment in California regardless of whether it was obtained here or there. California is a reciprocating state for the purposes of Part 2 of the *Court Order Enforcement Act*, R.S.B.C. 1996, c. 78, so this is a straightforward process if Trends proceeds in British Columbia.

Fair and Efficient Working of the Canadian Legal System (s. 1(2)(f))

[66] This factor favours Trends.

[67] Our legal system has a legitimate interest in resolving claims with such strong connections to this jurisdiction. The parties' distribution arrangement was for sale of products to a BC company, to be managed and warehoused in the Lower Mainland, for re-sale to retailers and consumers in British Columbia and elsewhere across Canada. The BC's company's loss and damage occurred here.

[68] In sum, the overall assessment of the s. 11(2) factors demonstrates that Trends' claim is most conveniently and appropriately heard in British Columbia.

IV. CONCLUSION

[69] British Columbia is the appropriate jurisdiction for the claims raised in this action, and so I do not exercise the discretion in R. 21-8(2) to decline jurisdiction in favour of California.

[70] Subject to the parties wishing to speak to costs, Trends is awarded its costs of this application in the cause.

"Coval J."