**CITATION:** Cannon v. Funds for Canada Foundation, 2010 ONSC 4517
**COURT FILE NO.:** CV-08-362807CP
**DATE:** 20100818



**ONTARIO SUPERIOR COURT OF JUSTICE**

**RE:** **Michael Cannon,** Plaintiff/Respondent

**Funds for Canada Foundation, et al.**, Defendants/Moving Parties

**BEFORE:** G.R. Strathy J.

**COUNSEL:** *Samuel S. Marr and D. Fogel*, for the Plaintiff

*Brad Berg and Charles Dobson*, for the Defendant Appleby Services (Bermuda) Ltd., as trustee of the Bermuda Longtail Trust

**DATE HEARD:** July 16, 2010

## E N D O R S E M E N T

(Jurisdiction Motion)

[1] Appleby Services (Bermuda) Ltd. ("Appleby"), as trustee as the Bermuda Longtail Trust (the "Trust"), moves to have this action permanently stayed or dismissed against it on the ground that this court lacks jurisdiction *simpliciter* over the claim against it. Appleby also moves to set aside service of the statement of claim *ex juris* on the ground that the claim is not one for which service *ex juris* without leave is authorized under the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, and not one for which such service should be authorized. Alternatively, Appleby asks that claims in the statement of claim over which the court has no jurisdiction should be severed and service of those portions should be set aside.

[2] The motion raises the question of whether there is a real and substantial connection between Ontario and the claim against Appleby and engages the application of the test for assumed jurisdiction set out by the Court of Appeal in *Van Breda v. Village Resorts Ltd.* (2010), 98 O.R. (3d) 721, [2010] O.J. No. 402, ("*Van Breda*"), leave to appeal granted, *Club Resorts Ltd. v. Van Breda*, [2010] S.C.C.A. No. 174.

[3] Appleby's motion is based solely on jurisdiction. It raises no issue of *forum conveniens*.

The nature of the action and the pleadings

[4] This is a proposed class action arising out of a tax shelter called the "Donations Canada" charitable donation program (the "Program"). Michael Cannon, the proposed representative plaintiff, claims that he invested a total of $23,100 in the Program in 2005 and 2006. He claims that the Canada Revenue Agency (the "CRA") determined that the Program was not a *bona fide* charitable endeavour and that all tax credits claimed by the class members were disallowed. Mr. Cannon alleges that the primary purpose of the Program was to benefit the defendants and that most of the money paid by members of the proposed class was received by the defendants and not by the charities. He claims that as a result of the defendants' actions he lost his investment and faces an additional tax liability, with interest.

[5] The plaintiff sued a number of defendants. These included:

(a) Funds for Canada Foundation ("Funds for Canada"), a registered Canadian charity;

(b) Donations Canada Financial Trust, a private Canadian charitable trust;

(c) Parklane Financial Group Limited ("Parklane") and Trafalgar Associates Limited ("Trafalgar Associates"), Ontario corporations that allegedly marketed, administered and sold the Program;

(d) Trafalgar Trading Limited ("Trafalgar Trading"), a Bermuda corporation that allegedly marketed, administered and sold the Program;

(e) Trafalgar Securities Limited and Trafalgar Research (Bermuda) Limited, Bermuda corporations that allegedly marketed, administered and sold the Program;

(f) TCL Trafalgar, B.V., a Netherlands corporation that allegedly marketed, administered and sold the Program;

(g) Patterson Palmer, a law firm based in Atlantic Canada and Edwin Harris, a partner in that firm, who allegedly provided a "comfort letter" in connection with the Program; and

(h) Certain individuals, namely Edward Furtak ("Furtak"), Wayne Robertson ("Robertson"), Ronald G. Olsthoorn, Ron K. Olsthoorn, Sheila Zych, Stephen Freedman, Kenneth Spurling, Axel Kindbom, Sam Albanese, Ken Ford, Riyan Mohammed, David Raby and Greg Wade, some of whom are Ontario residents, who are alleged to have controlled some of the defendant corporations and who allegedly created, controlled, marketed and sold the Program.

[6] An agreement has been reached between the plaintiff and some of the defendants, as a result of which the action has been dismissed against the defendants Trafalgar Research

(Bermuda) Limited, Trafalgar Securities Limited, TCL Trafalgar B.V., Zych, Kindbom, Robertson, Ronald G. Olsthoorn, Spurling and Furtak. I approved that settlement on November 20, 2009: *Cannon v. Funds for Canada Foundation*, [2009] O.J. No. 4986. On March 31, 2010, I approved a settlement and dismissal as against the defendant Freedman: *Cannon v. Funds for Canada Foundation*, [2010] O.J. No. 2137. Part of the reasons for these settlements was to permit the plaintiff to obtain helpful evidence from the released defendants and to recognize the potential jurisdictional and recovery issues relating to some of those defendants.

[7] The statement of claim has been amended a number of times. The plaintiff became aware of the existence of the Trust as a result of examinations of some of the defendants who have been released from the action, and on May 5, 2010, the claim was amended to add "Bermuda Long Tail Trust" as a defendant. On June 17, 2010, the Plaintiff delivered a motion, returnable at the hearing of this motion, to change the name of the added defendant to "Appleby Services (Bermuda) Ltd. as trustee for the Bermuda Long Tail Trust". The plaintiff later advised that he wished to correct the name to make "Longtail" one word. Appleby does not oppose these amendments and leave to amend will be granted.

[8] The proposed Amended Further Fresh as Amended Statement of Claim, which now names Appleby as a defendant in its capacity as trustee of the Trust, alleges that the Trust is a Bermuda trust, that it is affiliated with Parklane, Trafalgar Trading and Trafalgar Associates and that these corporations and the Trust acted in concert, effectively acting as one entity, to create, control, promote, market and operate the Program.

[9] The statement of claim pleads that during the operation of the Program, between 2004 and 2009, class members contributed approximately $100 million to the Program. It is alleged that the Trust contributed approximately $300 million, for which it received, in return, $320 million purportedly as royalties and licence payments, realizing a profit of $20 million. It is also claimed that Parklane received an estimated $12 million, Trafalgar Trading received $44 million and Funds for Canada received $4 million.

[10] The plaintiff claims damages against the defendants for breach of contract, conspiracy, fraud, fraudulent misrepresentation and negligence. Claims are also asserted in restitution, unjust enrichment, waiver of tort, constructive trust, *quantum meruit* and for breach of the *Consumer Protection Act*, S.O. 2002, C. 30, Sched A.

The Evidence

[11] The following facts are either admitted or established by the evidence.

(a) The parties

[12] The plaintiff, Michael Cannon, is an Ontario resident and is the proposed representative of a class of Canadian taxpayers who participated in the Program between 2005 and 2009. The largest group of proposed class members is comprised of Ontario residents.

[13] All but two of the defendants remaining in the action are Canadian. Appleby and Trafalgar Trading are Bermuda entities and the Trust itself is based in Bermuda.

[14] Furtak is a Canadian citizen living in Bermuda. The evidence supports the conclusion that Furtak was the mastermind of the Program. He is President and founder of the Trafalgar Group of companies and a signing officer of Trafalgar Trading. Parklane and Trafalgar Trading were part of the Trafalgar Group.

[15] Robertson was the Chief Financial Officer of the Trafalgar Group and Vice President of Trafalgar Trading. The evidence supports the conclusion that he worked closely with Furtak in establishing and implementing the Program and that he acted as an agent on behalf of Furtak in giving directions or making requests to Appleby in connection with the Trust.

[16] The Trust was created on October 30, 1998 by a deed of trust between Furtak as settlor and a predecessor of Appleby as trustee. The beneficiaries of the trust are Furtak, his wife and his children. The Trust has a life of 100 years, following which the funds then held are to be distributed to the Salvation Army. The Trust was settled under Bermuda law and is governed by Bermuda law.

[17] Appleby is an independent corporate trustee and trust administrator, incorporated in Bermuda and with offices in Bermuda.

(b) How the Program Worked

[18] As might be expected, the mechanics of the Program were complicated. It was designed to enable Canadian taxpayers to obtain a financial benefit, by way of a tax deduction, that was almost twice the amount of their cash investments or "donations". If the plaintiff's allegations are true, it was also designed to reap substantial profits for the defendants. The following is a general overview.

[19] Canadian taxpayers like Mr. Cannon, who participated in the Program, made an initial payment to Parklane in increments of $2,500. This money was then paid by Parklane to Funds for Canada Foundation and ultimately to a registered charity participating in the Program. In return for this investment, the taxpayer would also receive two units in a sub-trust, valued at $3,750 each, for a total of $7,500. The taxpayer would then donate the sub-trust units to the same registered charity and would receive two charitable donation receipts, one a cash receipt for the $2,500 donation and the other an in-kind receipt, for the donation of the sub-trust units valued at $7,500. For a taxpayer in the highest tax bracket, this would result in tax savings of $4,640 on a donation of $2,500, for a net cash return of 86%. Obviously, this was a very attractive "investment".

[20] The charities that participated in the program were amateur athletic associations including the Canadian Amateur Wrestling Association, Little League Baseball Canada and the Canadian Five Pin Bowlers' Association. In order to participate in the Program, and receive the benefit of investor contributions, they were required to enter into agreements with some of the defendants that governed the use of the money they received through the Program.

[21] As part of the arrangement made with the charity, Donations Canada Financial Trust then acquired the sub-trust units held by the charity for their assigned value, namely $3,750 each. The money that was used to acquire the sub-trust units was provided by the Trust.

[22] This was presumably intended to satisfy CRA that the two sub-trust units in fact had a value of $7,500. However, the charity was not permitted to retain the $10,000 that it now had in hand. The arrangement between the Program and each charity required the charity to pay to Trafalgar Trading all but $100 of the $10,000, in exchange for participating in a long-term investment agreement which was supposed to provide the charity with an income stream over a number of years.

[23] Of the remaining $9,900 paid by the charity to Trafalgar Trading, approximately $800 was paid to Parklane and was used to pay commissions to salespeople, the balance being retained by Parklane as profit. Trafalgar Trading retained $1,100, ostensibly for investing on behalf of the charities to provide a future income stream, and the balance, $8,000, was paid to the Trust.

[24] Thus, for every $7,500 contributed by the Trust, it received in return $8,000, usually in a matter of a few days, resulting in a profit of $500 on a very short term advance.

[25] The upshot was that everyone was happy. The investor had effectively made a profit on the investment by achieving tax savings that substantially exceeded the amount of his or her "donation". The charity was happy, because it acquired $100 in real cash and what was promised to be a long-term income stream. Parklane and its sales staff were happy, because the salespeople received commissions and Parklane made a profit. Trafalgar was happy because it had funds for investment. The Trust was happy because it made a healthy profit on a short-term loan or investment. Presumably, Mr. Furtak, as the creator of the Program and a beneficiary of the Trust, was very happy. The Trust's money went around in a big circle and at the end of the day, before commissions and expenses were paid, most of the investors' money was in the pockets of various participants in the Program and the charities received only 1% of the total "donation".

[26] Unfortunately, the happiness did not last, at least for Mr. Cannon and the other taxpayer "investors". The CRA disallowed their claimed deductions and they not only have lost their "donations", but they have to repay CRA for the taxes owing, with interest.

[27] The CRA asserted that the emperor had no clothes. It took the position that the "donation" made by Mr. Cannon was not in fact a "gift". In a letter dated May 7, 2008 to Mr. Cannon, disallowing the deductions claimed by Mr. Cannon, CRA stated:

> We have concluded, based on our review of the flow of cash in the Donation Program that your cash payment is not a gift at law. While the cash was received by a designated charity, it is clear that this amount was never intended to be for the charity's exclusive use. In fact, the charity only retained 1% of the funds received. The charities were required to disperse [sic] the funds in accordance with agreements entered into as pre-requisites to becoming involved in the Donation Program. In addition, the promoter controlled and directed the flow of cash to the

> other entities by requiring the charities to sign documents transferring 99% of the funds to Trafalgar Trading Ltd. Only after the bank transfers were signed and submitted to the promoter were the funds deposited to the charity's bank account.
>
> Although, the charities allegedly invested 93% of the funds received in an investment contract, most of the funds ended up back in the hands of the Program "Facilitator" [the Trust] the same day. Trafalgar Trading Ltd retained only 15% of the funds they had committed to invest.
>
> In addition, the charities, had no recourse to recover any of these funds. As a result the charities did not have unfettered use of the funds nor were the funds available to be invested for the benefit of the charities. This circular flow of funds was preordained with the intended result that the charity would never have use of these funds for its activities. The charities were simply conduits through which the funds were flowed in an attempt to generate the donation tax credit.
>
> Finally, in most if not all cases, the donors did not know which charity from a pre-determined list would be the recipient of their donation. The promoter decided this at the time the funds were transferred to the charity.
>
> A gift can not be perfected if the recipient does not have unfettered use of the property. Clearly the charity did not have unfettered use of the all the money for which the donation receipts were issued. Your cash payment was not a gift to the charity at all, rather was it a fee paid indirectly to the promoter to participate in the donation program.
>
> Accordingly, the amounts you donated to a charity pursuant to the Donations Canada 2005 Donation Program are not allowed as deductions against Part I tax payable in 2005 nor in your subsequent taxation years.

[28] I should note that in coming to my conclusions on the evidence, I have not relied on these reasons given by CRA in disallowing the deduction claimed by Mr. Cannon. I note that CRA's findings are, however, broadly confirmatory of the evidence.

(c) The role played by Appleby and the Trust

[29] In order to determine whether the court has jurisdiction over Appleby in this proceeding, is important to understand the role played by Appleby and the Trust in the Program. The Trust provided the $7,500 that was required to "purchase" from the charity the sub-trust units that had been donated by the taxpayer. This purchase was made with real money and was presumably designed to give the appearance that the sub-trust units were worth something to a third party. That money quickly left the hands of the charity, which was required to invest it (along with most of the donation made by the taxpayer) in the investment program operated by Trafalgar

Trading. In the context of the entire scheme, the Trust's money created the illusion that the charity had received something of real value – in fact, like the emperor's clothes, it was a fabrication.

[30] The transfer of funds from the Trust to the Program worked as follows.

[31] Between October 2005 and January 2009, Appleby, in its capacity as trustee of the Trust, transferred or caused to be transferred to or for the benefit of the Program some $417 million. Initially, approximately $84 million of this amount was transferred to a Toronto law firm for use in the Program. At a later stage, transfers of approximately $333 million were made from Appleby to another Bermuda trust company, which was then transferred to Canada for use in the Program.

[32] These transfers were made at the request of Robertson acting on behalf of Furtak. Robertson told Appleby when to transfer money, in what amount, and to what bank or bank accounts. These payments were not in one lump sum, but were made at the rate of one or two a month over a period of more than four years. Each advance was repaid, with a profit component, whether characterized as a loan repayment, royalty or licence fee, within a matter of a few days. The total repayments were approximately $439 million.

[33] As a result of this circular flow of funds, the Trust made a profit over the period of approximately $22 million. This profit went to the benefit of the beneficiaries of the Trust, namely Furtak and his family.

[34] Appleby, which controlled and authorized the outgoing payments from the Trust, was aware that they were to be used in connection with the Program, but it had only a vague understanding of the Program and of the exact purpose of the payments. Appleby has produced no documentation, and has provided no evidence, to explain why the payments were made or why they were considered to be appropriate investments for the Trust, apart from the fact that they were requested by Robertson acting as agent on behalf of Furtak.

[35] While counsel for Appleby submits that in making these payments Appleby was exercising its discretionary powers under the Trust deed, Appleby has produced no evidence to show that it exercised its discretion based on any independent assessment of the merits of the investment. The lack of such evidence supports the conclusion that Appleby simply did what Furtak, through Robertson, directed it to do.

[36] The evidence also supports the conclusion that Appleby permitted the Trust funds to be controlled by Furtak, acting through Robertson, and that the funds were advanced by Appleby, with the knowledge that they would be used in the Program.

[37] Finally, the evidence also supports the conclusion that the Program would not have worked as it was intended without the contribution of millions of dollars by Appleby from the Trust.

[38] I turn now to the question of whether the plaintiff was entitled to serve Appleby outside the jurisdiction without leave under rule 17.02 and, if not, whether service should be validated under rule 17.06(3).

Real and Substantial Connection

[39] In order to assume jurisdiction over a non-resident defendant, the court must be satisfied that there is a real and substantial connection to Ontario. The leading authority in Ontario is now *Van Breda*, in which the Court of Appeal refined and simplified the test it had set out in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20, [2002] O.J. No. 2128. The test was summarized at para. 109 of *Van Breda* as follows:

> ∗ First, the court should determine whether the claim falls under rule 17.02 (excepting subrules (h) and (o)) to determine whether a real and substantial connection with Ontario is presumed to exist. The presence or absence of a presumption will frame the second stage of the analysis. If one of the connections identified in rule 17.02 (excepting subrules (h) and (o)) is made out, the defendant bears the burden of showing that a real and substantial connection does not exist. If one of those connections is not made out, the burden falls on the plaintiff to demonstrate that, in the particular circumstances of the case, the real and substantial connection test is met.
>
> ∗ At the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and the defendant, respectively.
>
> ∗ The remaining considerations should not be treated as independent factors having more or less equal weight when determining whether there is a real and substantial connection but as general legal principles that bear upon the analysis.
>
> ∗ Consideration of the fairness of assuming or refusing jurisdiction is a necessary tool in assessing the strengths of the connections between the forum and the plaintiff's claim and the defendant. However, fairness is not a free-standing factor capable of trumping weak connections, subject only to the forum of necessity exception.
>
> ∗ Consideration of jurisdiction *simpliciter* and the real and substantial connection test should not anticipate, incorporate or replicate consideration of the matters that pertain to *forum non conveniens* test.
>
> ∗ The involvement of other parties to the suit is only relevant in cases where that is asserted as a possible connecting factor and in relation to avoiding a multiplicity of proceedings under *forum non conveniens.*

> ∗ The willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis is as an overarching principle that disciplines the exercise of jurisdiction against extra-provincial defendants. This principle provides perspective and is intended to prevent a judicial tendency to overreach to assume jurisdiction when the plaintiff is an Ontario resident. If the court would not be prepared to recognize and enforce an extra-provincial judgment against an Ontario defendant rendered on the same jurisdictional basis, it should not assume jurisdiction against the extra-provincial defendant.
>
> ∗ Whether the case is interprovincial or international in nature, and comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere are relevant considerations, not as independent factors having more or less equal weight with the others, but as general principles of private international law that bear upon the interpretation and application of the real and substantial connection test.
>
> ∗ The factors to be considered for jurisdiction *simpliciter* are different and distinct from those to be considered for *forum non conveniens*. The *forum non conveniens* factors have no bearing on real and substantial connection and, therefore, should only be considered after it has been determined that there is a real and substantial connection and that jurisdiction *simpliciter* has been established.
>
> ∗ Where there is no other forum in which the plaintiff can reasonably seek relief, there is a residual discretion to assume jurisdiction.

[40] Earlier in his reasons, Sharpe J.A. noted, at para. 84 that:

> The core of the real and substantial connection test is the connection that the plaintiff's claim has to the forum and the connection of the defendant to the forum, respectively. The remaining considerations or principles serve as analytic tools to assist the court in assessing the significance of the connections between the forum, the claim and the defendant.

[41] The Supreme Court of Canada has granted leave to appeal the decision of the Court of Appeal in *Van Breda*.

The Evidence Required

[42] There was considerable discussion on the motion concerning the evidentiary burden on the parties and concerning the nature and quality of the evidence submitted in this case. While this was not directly addressed in *Van Breda*, it is clear that in the application of the test to the cases before it, the Court of Appeal engaged in an analysis of the evidence that had been tendered to support the claim for jurisdiction against the non-resident defendants. In its decision

in the *Charron* proceeding, it carefully examined the activities engaged in by the defendant CRL in promoting its business in Ontario and concluded at para. 120 that "this level of activity and presence in Ontario on the part of CRL to promote its business amounts to a significant connection with Ontario." In the *Van Breda* action the Court of Appeal also examined the underlying evidentiary foundation and concluded at para. 134 that both on the pleadings "and the evidence led on the motion" that the claim was in respect of a contract made in Ontario.



[43] I accept the submission of counsel for Appleby that where the defendant puts in issue the facts pleaded in support of service out of the jurisdiction without leave, and evidence is tendered by one or both parties on this issue, or on the issue of whether leave should be granted under rule 17.03 or service validated under rule 17.06(3), the court must determine whether there is a "good arguable case" on that evidence for the assertion of jurisdiction: see *Vitapharm Canada Ltd. v. F. Hoffmann-La Roche Ltd.*, [2002] O.J. No. 298, (2002), 20 C.P.C. (5th) 351 (S.C.) at para. 99; *Ecolab Ltd. v. Greenspace Services Ltd.* (1998), 38 O.R. (3d) 145, [1998] O.J. No. 653 (Div. Ct.) at para. 25.

[44] There was also considerable discussion about the quality of the evidence put forward in this case. Appleby's counsel criticized the quality of the plaintiff's evidence, arguing that Mr. Cannon has no personal knowledge of the material facts and that much of his "evidence" was repetition of hearsay based on information provided by his counsel.

[45] It is quite understandable that Mr. Cannon, who was simply one of many investors, would have no detailed personal knowledge concerning the underlying facts. My factual conclusions rest on Appleby's own evidence and admissions as well as the evidence of the former defendants, particularly Furtak and Robertson, who were directly involved in the operation of the Program.

[46] If there is any infirmity in the evidence, it lies with Appleby. Mr. Gorman, Appleby's Managing Director, who swore the affidavit in support of Appleby's motion, had no personal knowledge about the material events, having come on the scene only in 2009 when the Program was no longer in operation. People who had direct knowledge of the events, including the managers of the Trust at the material time, did not provide evidence. The investigations of "the files" carried out by Mr. Gorman and his "discussions with staff" did not yield any relevant information at all as to why Appleby transferred over $417 million for use in the Program and why it received $439 million in return, other than that it was directed to do so by Furtak's representative.

Analysis – Real and Substantial Connection

[47] The Court of Appeal's decision in *Van Breda* was designed to simplify the real and substantial connection test. Although the test is framed in two stages, the bottom line is the determination of whether a sufficient real and substantial connection exists to support the assumption of jurisdiction by the court over a foreign defendant. The first stage simply determines which party bears the onus on the issue. The failure of the plaintiff to slot the claim

under one of the headings of rule 17.02 (other than sub (h) or (o)), does not prevent a finding of real and substantial connection in the second stage.

[48] In this case, the plaintiff has pleaded claims that fall within:

- rule 17.02(f)(i) (contract made in Ontario);
- rule 17.02(f)(iv) (contract breached in part in Ontario); and
- rule 17.02(g) (tort committed in Ontario).

[49] Counsel for Appleby submits that, if the defendant challenges the court's jurisdiction, the plaintiff cannot simply rely on the pleading but must demonstrate, in the first stage of the analysis, both that there is a "good arguable case" that there is a cause of action and that there is a "good arguable case" that the cause of action falls within the court's jurisdiction.

[50] I agree that the first stage analysis does not end with the pleadings and that the court is required to examine the evidence, if any, put forward by both sides to determine whether the claims in fact "fall under" one of the sub-headings of rule 17.02. This was the approach followed by the Court of Appeal in *Van Breda* of examining both the pleading and the evidence lead by the parties, to determine whether the claims at issue fell within one of the connections described in the rule.

[51] The evidence before me, much of which came from Mr. Gorman, Furtak and Robertson, establishes a good arguable case that Appleby, in its capacity as trustee of the Trust, participated in the commission of torts in Ontario by knowingly using the Trust's funds, or permitting those funds to be used by the defendants, in furtherance of the Program.

[52] The torts alleged include negligence, conspiracy, fraud and fraudulent misrepresentation, and are all based on the transmission of allegedly false or fraudulent information. A tort of this kind occurs in the jurisdiction in which the information was received or acted or relied upon: *Atlas Copco Canada Inc. v. Hiller*, [2009] O.J. No. 377 (S.C.) at para. 34; *Hyundai Auto Canada v. Bordeleau* (2002), 60 O.R. (3d) 641, [2002] O.J. No. 3195 (S.C.) at para. 12; *National Bank of Canada v. Clifford Chance* (1996), 30 O.R. (3d) 746 at p. 759.

[53] I therefore find that the claim falls within rule 17.02(g) and that Appleby bears the onus of establishing that a real and substantial connection to Ontario does not exist.

[54] I am not able to find an evidentiary basis for the allegation that Appleby was party to a contract made or breached in Ontario, or that it engaged in conduct that could give rise to a remedy under the *Consumer Protection Act*.

[55] I turn then to the second stage of the test. The Court of Appeal in *Van Breda* said that at the second stage, the core of the analysis rests upon the connection between Ontario and the plaintiff's claim and between Ontario and the defendant.

Connection between Ontario and the plaintiff's claim

[56] There is a strong connection between Ontario and the plaintiff's claim. This is not challenged by Appleby. Mr. Cannon and a large number of the proposed class members were resident in Ontario, were solicited by the Program in Ontario, made their donations in Ontario and suffered damages in Ontario. The Court of Appeal at para. 114 of *Van Breda* noted that, while not presumptive of a real and substantial connection, damage suffered in the jurisdiction has been accepted as a significant connection in many cases.

Connection between Ontario and Appleby

[57] I turn then to the connection between Appleby and Ontario.

[58] In *Van Breda*, Sharpe J.A. discussed this issue at paras. 89 and 92:

> When assessing the connection between the forum and the defendant, the primary focus is on things done by the defendant within the jurisdiction. Where the defendant confines its activities to its home jurisdiction, it will not ordinarily be subject to the jurisdiction of the forum: see e.g. *Lemmex*, *Leufkins* and *Sinclair*. However, as was held in *Moran*, physical presence or activity within the jurisdiction is not always required. Where a defendant could reasonably foresee that its conduct would cause harm within the forum by putting a product into the normal channels of trade and knows, or ought to know, that the product would be used in the forum and that if defective could harm a consumer in the forum, jurisdiction may be assumed.
>
> …
>
> On the other hand, acts or conduct short of residence or carrying on business will often support a real and substantial connection. As stated in *Beals*, at para. 32, "a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction". [Emphasis added.]

[59] Appleby was not resident in Canada. It allegedly did not carry on business in Canada and allegedly did not have assets in Canada. Appleby's counsel, in his factum, submits that Appleby has done very little in Ontario:

> On behalf of the Trust, [Appleby] has undertaken only one activity touching the jurisdiction of Ontario. At the request of Wayne Robertson at TTL [Trafalgar Trading Limited] from time to time [Appleby] exercised its discretionary powers under the [trust] Deed to transfer money from Bermuda to a law firm in Toronto. Mr. Robertson told [Appleby] when to transfer money, in what amount, and to what bank

> and bank account. [Appleby] was not involved in planning or deciding on these transactions and did not know the details or reasons behind them.

[60] This assertion understates the evidence in several ways. First, some $417 million was actually transferred by Appleby from the Trust. Of this, $84 million was transferred to the Toronto law firm and a further $333 million was transferred to another Bermuda trust company, with knowledge that it was to be used in the Program in Canada. Second, although Mr. Gorman neglected to mention this in his affidavit, and only disclosed it on cross-examination, both of these transfers were made for the benefit of the Donations Canada Financial Trust and the funds transferred by Appleby to the other Bermuda trust company were in trust for Donations Canada Financial Trust. Third, Mr. Gorman admitted that while Appleby basically had no idea why these payments were being made, it knew that the Trafalgar Group was promoting the Program in Canada and knew that the flow of money from the Trust to Donations Canada Financial Trust and back to the Trust through Trafalgar Trading was a part of that "transaction" in a general way.

[61] In my view, this conduct falls squarely within what the Court of Appeal was referring to in *Van Breda* when it said at para. 92 that "a defendant can reasonably be brought within the embrace of a foreign jurisdiction's law where he or she has participated in something of significance or was actively involved in that foreign jurisdiction". Like the three wise monkeys, Appleby adopts a "see no evil, hear no evil, speak no evil" approach and says that because it was ignorant of the reasons for these transactions it could not reasonably foresee that its actions could harm persons in Ontario. Whether or not Appleby's actions were intentional, negligent or the result of wilful blindness, the fact remains that funds from the Trust were used to prime the Program and the scheme would not have worked without Appleby making the transfers. It clearly participated in something of significance in Ontario and that "something of significance" is the very Program that lies at the root of the plaintiff's complaints. This gives rise to a real and substantial connection to Ontario.

[62] Counsel for Appleby submits that Appleby's contact with Ontario was fleeting and ephemeral and was similar to that of a bank making a wire transfer of funds on behalf of a customer. In my view, the analogy is inappropriate. There is a reasonable evidentiary basis to conclude that, on a regular basis over a period of more than four years, Appleby used the Trust's funds in the province of Ontario for the purpose of making a profit in connection with a business venture undertaken by the settlor and beneficiary of the Trust and that in so doing Appleby acted in concert with the settlor and with other corporations and trusts owned or controlled by the settlor. The nature and frequency of this activity speaks both to the "real" and the "substantial" quality of Appleby's connection to Ontario in this matter.

[63] In considering Appleby's connection to Ontario, it is appropriate to examine the legal nature of a trust. As noted by the editor of one of the leading Canadian texts, Donovan W.M. Waters Q.C., *Waters' Law of Trusts in Canada*, (3rd ed.) (Toronto: Thomson Carswell, 2005) at p. 3, the essential features of a common law trust are: (1) a segregated fund containing assets; (2) a person or persons who are the objects of the trust with the right to enjoyment of the fund; and (3) a person holding title to the assets held in the trust and in some instances administering or managing the fund.

[64] The trust is, however, most correctly described as a relationship. Waters quotes at p. 3 from G.W. Jeeton and L.A. Sheridan, *The Law of Trusts,* 10th ed. (London: Barry Rose Law Publishers, 1993) at p. 3:

> A trust is the relationship which arises whenever a person (called the trustee) is compelled in equity to hold property, whether real or personal, and whether by legal or equitable title, for the benefit of some persons (of whom he may be one, and who are termed beneficiaries) or for some object permitted by law, in such a way that the real benefit of the property accrues, not to the trustees, but to the beneficiaries or other objects of the trust.

[65] It is well-established that a trust itself does not have legal personality – it operates through its trustees: *Foo v. Yakimetz,* [2002] O.J. No. 3958 (S.C.) at para. 72; *Kingsdale Securities Co. v. Canada (M.N.R.),* [1974] 2 F.C. 760, [1974] F.C.J. No. 182 (C.A.). It is also held accountable through its trustees.

[66] The trustee derives his, her or its powers from the trust instrument. If the trustee exceeds those powers, the settlor or beneficiaries may seek a remedy against the trustee for the consequences. Where a third party suffers an injury as a result of the use of the trust funds, or as a result of the actions of the trustee in the administration of the trust funds, then the third party is entitled (in fact required) to look to the trustee for redress. There is no right of action against the trust fund *per se,* or against the settlor or the beneficiaries. It is through the trustee that compensation is obtained. Depending on the legal nature of the injury, the right to compensation may be limited to the assets in the trust fund. In other cases, the trustee itself may be exposed to personal liability.

[67] It seems to me that in considering whether there is a real and substantial connection between the trustee and the jurisdiction, the court is entitled to look at the use made of the trust property in the jurisdiction. A foreign trustee, who maintains no residence or business presence in this jurisdiction, may nevertheless become subject to the jurisdiction if it uses the trust assets to engage in activities of significance in the jurisdiction. That is what occurred here.

Other *Muscutt* factors

[68] The Court of Appeal in *Van Breda* observed that the remaining *Muscutt* considerations should not be treated as independent factors, having more or less equal weight when determining whether there is a real and substantial connection, but as general legal principles that bear upon the analysis.

*Fairness to the parties*

[69] The Court of Appeal in *Van Breda* noted that "fairness" should not be regarded as a free-standing factor, capable of trumping other considerations, but rather as a tool for assessing the strengths of the connections between the forum and the plaintiff's claim and between the forum and the defendant. There is nothing unfair about holding the Trust accountable, through Appleby,

for actions carried out by the use of trust property. Had Appleby bothered to investigate what was taking place with the hundreds of millions of dollars it so obligingly transferred to Ontario for use in a Program of which it claims to have had a "vague" understanding, it would have appreciated what the CRA described as the role of the Trust as "Facilitator" of the entire Program.



[70] On the other hand, there would be unfairness to the class in not assuming jurisdiction given the strong connection between Ontario and the events giving rise to the claim. Moreover, there is no class action legislation in Bermuda and the costs of pursuing a claim in Bermuda on an individual basis would effectively deprive the plaintiff and other class members of access to justice.

*Involvement of other parties to the suit*

[71] The Court of Appeal in *Van Breda* noted that the involvement of other parties to the suit will not be a consideration in every case. The fact that the foreign party is a "necessary and proper party" to the proceeding was specifically excluded as a presumptive connection by the Court of Appeal. In this case, however, the connection between Appleby and Ontario is strengthened because there is convincing evidence that Appleby permitted the Trust to be used as a tool by other parties who carry on business in Ontario and are based in Ontario. There is an evidentiary foundation for the conclusion that the participants in the Program worked in concert, using the assets of the Trust to accomplish their objectives. This is a case in which Appleby's connection to Ontario is strengthened because it acted together with other defendants who had strong connections to Ontario.

[72] This is an appropriate point to observe that I do not accept Appleby's submission that the plaintiff's decision to release Furtak from the action is somehow fatal to his claim against Appleby as trustee of the Trust. The plaintiff was entitled to conclude that he had slim prospects of collecting a personal judgment against Furtak, who may well have organized his affairs in such a way as to make it difficult to locate and execute against personal assets. The plaintiff was also entitled to conclude that Furtak's cooperation and evidence was necessary if there was to be any hope in unraveling the complex web of arrangements that were put together by the defendants to effectuate the Program. It was Furtak's evidence that disclosed the pivotal role played by Appleby and the Trust, a role that Mr. Gorman failed to explain in a full and forthright manner in his affidavit filed in support of Appleby's motion. The plaintiff's decision to pursue some defendants and not others is a strategic decision that he was entitled to make.

*Willingness to recognize foreign judgment on same jurisdictional basis*

[73] There is no doubt that an Ontario court would recognize a foreign judgment in which the foreign court assumed jurisdiction over an Ontario resident on grounds similar to those set out in rule 17.02, applying the *Van Breda* and *Muscutt* approach.

*International – Comity – Standards of Jurisdiction*

[74] Appleby relies on the expert evidence of Narinder Hargun, a Bermuda lawyer, who expresses two opinions. First, he says that assuming that a Bermuda court concluded that there is a serious issue to be tried, the court would likely permit service out of the jurisdiction against the trustee of an Ontario trust, on the basis that the trustee is a necessary or proper party to the Bermuda proceedings. Bermuda law requires that leave be granted for service outside the jurisdiction and the application must be supported by an affidavit of the plaintiff stating the grounds on which the application was made and the deponent's belief that the plaintiff has a good cause of action. The plaintiff must establish both that there is a good arguable case that the claim falls within the relevant rule and must establish by affidavit evidence that there is a substantial issue of fact or law or both that the plaintiff *bona fide* desires to have tried. The court nevertheless retains the discretion not to grant leave.

[75] It seems to me that, although the law and practice in Bermuda is different from that of Ontario, the approach is not dissimilar. More important, on the facts of this case, if the position was reversed, it seems clear that a Bermuda court would grant leave to permit service on a trustee outside the jurisdiction. The evidence adduced by the plaintiff in this motion establishes an arguable case that the Trust would be a necessary and proper party to the proceedings and that there are serious issues to be tried. In fact, as I have found, the evidence establishes other important connections between the Trust and this jurisdiction.

[76] The second part of Mr. Hargun's evidence deals with the question of whether a Bermuda court would recognize and enforce an Ontario judgment against Appleby as trustee of the Trust. He says that unless the Trust was resident in Ontario, counterclaimed in this proceeding, voluntarily appeared in this proceeding or agreed to submit to the jurisdiction, a Bermuda court would not enforce this court's judgment against it. He says that if Appleby's motion is unsuccessful, its bringing of this motion would not amount to attornment and if it fails to defend and judgment goes against it by default, any resulting judgment would not be enforced in Bermuda.

[77] It is well-settled in Ontario, and confirmed by rule 17.06(4), that bringing a motion to set aside service out of Ontario without leave is not a submission to this court's jurisdiction.

[78] I see no reason, however, to speculate as to what Appleby may or may not do as a result of the court's decision in this matter. The plaintiff may well take a risk in proceeding against Appleby in this jurisdiction. I am satisfied, however, from the evidence of Mr. Hargun on the first issue, that the assumption of jurisdiction over Appleby would not be inconsistent with comity and would be consistent with, albeit not identical to, the approach to jurisdiction applied by Bermuda courts. The possibility that a Bermuda court may not give effect to this Court's judgment should not defeat jurisdiction in light of the very real and substantial connections in this case: see *Black v. Breeden*, 2010 ONCA 547 at paras. 73 and 74.

Conclusion with respect to real and substantial connection

[79] I find that there is a real and substantial connection in this case, sufficient to support the exercise of jurisdiction in relation to all claims other than the claims for breach of contract and for breach of the *Consumer Protection Act.*

Appleby's argument that service *ex juris* should be set aside

[80] Appleby submits that in order for service of the statement of claim out of the jurisdiction to be valid, all of the causes of action pleaded against the foreign defendant must fall within rule 17.02, failing which service of the entire claim must be set aside. It relies on *Tridon Ltd. v. Otto Bihilier KG* (1979), 21 O.R. (2d) 569, [1978] O.J. No. 3568 (H.C.) and *Lailey v. International Student Volunteers Inc.*, 2008 BCSC 1344.

[81] In this particular case, Appleby says that although the plaintiff's claims in contract and tort (including fraud, fraudulent misrepresentation, negligence and conspiracy) fall within rule 17.02, the claims for unjust enrichment and *quantum meruit*, waiver of tort, constructive trust, restitution, and breach of the Ontario *Consumer Protection Act* do not. Due to this alleged infirmity, Appleby says that service of the entire claim should be set aside, even if the claim was properly served out of the jurisdiction with respect to some of the claims.

[82] As well, Appleby says that the plaintiff has failed to establish that it has a "good arguable case" for any of the claims under rule 17.02. Alternatively, Appleby submits that the claims for which the plaintiff has failed to show a good arguable case should be severed from the claim and service in respect of those claims should be set aside.

[83] I asked counsel for further submissions and authority on this issue, and I have now reviewed those submissions.

[84] The *Tridon* case was a 1978 decision of Goodman J., as he then was. Under the practice at the time, notice of the writ and statement of claim was served on the foreign defendant, without leave under what was then rule 25(1). Without referring to authority, Goodman J. found that service *ex juris* could not be maintained unless all the claims fell within the rule (at p. 572):

> I have accepted the submission of counsel for the applicant that *ex juris* service cannot be maintained unless all of the claims set forth in the endorsement on the writ and in the statement of claim fall within the provisions of Rule 25(1). In my opinion, the use of the words "consist of" make this abundantly clear. In the shorter Oxford English Dictionary, vol. 1, 3rd ed., the word "consist" when followed by the preposition "of" is said to mean "to be made up or composed of". In my opinion, that meaning is the equivalent of the meaning of the words "includes only". If the Rule had contemplated that *ex juris* service could be made where the action consisted of a claim covered by the provisions of the Rule together with a claim or claims not covered by the provisions of the Rule, it would have read "a party to an action or proceeding may be served out of

> Ontario as provided by Rule 26 where the action or proceeding as against that party *includes* "a claim or claims ..." rather than "*consists* of a claim or claims ...".
>
> Furthermore, the Rule is exhaustive and embraces all the cases in which it is intended that the jurisdiction of the Court shall be exercised in the case of a defendant out of jurisdiction: Holmested and Gale, *Judicature Act of Ontario and Rules of Practice*, vol. 1 (1968), at p. 549. [Emphasis in original.]

[85] He concluded that although there were proper claims in respect of a breach of contract, there were also claims for restitution, unjust enrichment and a declaration, which were based on the absence of any contract. If the plaintiff were successful in proving that no contract existed, there would be no basis for service of the statement of claim out of the jurisdiction. Accordingly, at p. 573 he set aside service of the writ and statement of claim, "without prejudice to the right of the plaintiff to amend the writ and statement of claim so that the action consists of a claim or claims permitting service out of Ontario."

[86] That decision was followed by Grauer J. of the British Columbia Supreme Court in the *Lailey* case, above.

[87] *Tridon* was, as I have noted, decided under the former rule 25, which is different from rule 17 of the current rules in two important respects.

[88] First, rule 17.03 provides that in a case to which rule 17.02 does not apply (i.e., in those cases where there is no automatic right to serve outside the jurisdiction), the court may grant leave to serve an originating process outside Ontario. Moreover, rule 17.06 provides that, on a motion by the defendant to set aside service, the court may make an order validating service where it concludes that the case is one in which it would have been appropriate to grant leave to serve outside Ontario under rule 17.03.

[89] Second, unlike the case under the former rule 25, it is now clear that rule 17 is not exhaustive of the circumstances in which the proceedings may be served out of the jurisdiction – this point was argued, and rejected by the Court of Appeal in *Van Breda* at para. 80.

[90] A similar argument based on *Tridon* was raised by the defendants in *Overland Custom Coach Inc. v. Thor Industries Inc.* (2000), 46 O.R. (3d) 788, [1999] O.J. No. 5285 (S.C.) and soundly rejected by Hockin J. who concluded at para. 19 that order and fairness is not accomplished "by turning away jurisdiction where a fraction of the relief claimed may fall outside rule 17.02 and where in other respects there is a 'real and substantial connection' between the parties and the subject matter of the action in Ontario". He noted that *Tridon* had been "overruled or modified for pragmatic reasons" by Borins J., as he then was, in *Upper Lakes Shipping Ltd. v. Foster Yeoman Ltd.* (1993), 14 O.R. (3d) 548, [1993] O.J. No. 1586 (Gen. Div.) at pp. 561-62:

As I have indicated, the master decided that the plaintiff's claim for damages for breach of fiduciary duty did not come within rule 17.02*(g)* or *(h)* on the ground that it did not constitute a tort. On the basis of the authorities provided by the parties it cannot be said that he was incorrect. For the purposes of this appeal it is unnecessary to decide if breach of fiduciary duty constitutes a tort. Although the master gave no consideration, as he was empowered to do under rule 17.03, with respect to whether the plaintiff should be granted leave under rule 17.03 to serve *ex juris* its claim for breach of fiduciary duty, there is nothing to prevent me from doing so and from validating the service. But for *Tridon Ltd. v. Otto Bihlier KG* (1978), 21 O.R. (2d) 569, 90 D.L.R. (3d) 733 (H.C.J.), it would have been my view that where one of two or more claims comes within rule 17.02 a plaintiff could serve a statement of claim *ex juris* without the need to obtain leave to do so under rule 17.03 in respect to the other claim or claims, leaving it to the defendant to move to set aside service on the ground that Ontario is a *forum non conveniens*. However, in the *Tridon* case, interpreting language in former Rule 25(1) identical to language in rule 17.02, Goodman J. held that service *ex juris* cannot be maintained unless all of the claims set forth in the statement of claim fall within the provisions of the authorizing rule.

Counsel for the defendant addressed considerable argument to whether the evidence in the record supported the claim asserted by the plaintiff for breach of fiduciary duty. For the purposes of this appeal I believe that it is not necessary to decide this question as this portion of the plaintiff's claim has not been attacked under rule 21.01(1)*(b).* If it were necessary to do so, I would have no hesitation in concluding that on all of the evidence there appears reasonable evidence that the plaintiff has a claim for damages for breach of fiduciary duty and would add, taking a rule 21.01(1)*(b)* approach, that it is far from plain and obvious that the plaintiff does not have such a claim. Considered pragmatically, this claim is so closely connected with the plaintiff's claim for damages for breach of contract that it would make little sense not to grant leave to the plaintiff to serve its statement of claim *ex juris* and, if necessary, validate service in respect to it. Indeed, on the basis of the record it is difficult at this stage to determine what difference there would be in regard to the damages which the plaintiff could recover in respect to each of its claims. Were leave not to be granted and were the plaintiff to pursue this claim against the defendant in the courts of the United Kingdom this would result in an undesirable multiplicity of litigation and, possibly, conflicting results. Therefore, the plaintiff is granted leave to serve *ex juris* its statement of claim in regard to its claim for damages for breach of fiduciary duty and there will be an order validating service of it upon the defendant.

[91] I respectfully agree with the approaches taken by Hockin J. and Borins J. In this case, I have concluded that there is a real and substantial connection between Appleby and Ontario because Appleby participated in something of significance in Ontario in the sense described in *Van Breda*. I conclude as well that there is a reasonable and sufficient evidentiary basis for the plaintiff's claims against Appleby in tort as well as in unjust enrichment, *quantum meruit*, waiver of tort, constructive trust and restitution. I conclude, therefore, that it is appropriate to validate service of the statement of claim on Appleby in respect of those claims.



Conclusion

[92] In summary:

> (a) the plaintiff will have leave to amend the statement of claim as requested;
>
> (b) Appleby's motion to stay or to dismiss this action, and to set aside service of the statement of claim, is dismissed except as regards the claims for breach of contract and breach of the *Consumer Protection Act*;
>
> (c) service of the statement of claim on Appleby is validated in respect of the claims for unjust enrichment, *quantum meruit*, waiver of tort, constructive trust and restitution.

[93] If the parties are unable to agree on costs, written submissions may be addressed to me, care of Judges' Administration, within 30 days. Counsel shall agree on a schedule in that regard.

_____

G.R. Strathy J.

**DATE:** August 18, 2010