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Braintech, Inc. v. Kostiuk

Citation: Braintech, Inc. v. Kostiuk Date: 19990318
1999 BCCA 0169 Docket: CA024459
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

BETWEEN:

BRAINTECH, INC.

PLAINTIFF
(RESPONDENT)

AND:

JOHN C. KOSTIUK

DEFENDANT
(APPELLANT)

Before: The Honourable Mr. Justice Goldie
The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury

J. P. Scouten Counsel for the Appellant

Michael Wilhelmson Counsel for the Respondent

Place and Date of Hearing Vancouver, British Columbia
February 1 and 2, 1999

Place and Date of Judgment Vancouver, British Columbia
March 18, 1999

Written Reasons by:

The Honourable Mr. Justice Goldie

Concurred in by:

The Honourable Mr. Justice Donald
The Honourable Madam Justice Newbury

Reasons for Judgment of the Honourable Mr. Justice Goldie:

[1] On 7 May 1997 the respondent ("Braintech") obtained a default judgment in the District Court of Harris County in the State of Texas against the appellant ("Kostiuk"). On 9 May 1997 Braintech commenced an action on this judgment in the Supreme Court of British Columbia. On 2 April 1998, after a summary trial Braintech obtained a judgment in its favour from which the present appeal is taken.

ISSUES

[2] The issues may be grouped as follows:

1. Whether, in the circumstances, the trial judge erred in proceeding to summary trial under the provisions of Rule 18A of the Rules of the Supreme Court of British Columbia.
2. Whether a fraud was practised on the Texas court of which cognizance should be taken in the courts of British Columbia.
3. Whether there was a real and substantial connection between Texas and the wrongdoing alleged to have taken place in that state.

Issue 1

The mode of trial in the Supreme Court

[3] The writ was issued and the statement of claim filed on 9 May 1997. Kostiuk was alleged to reside at 602 - 195 West 21st Street, West Vancouver. (The first "West" is incorrect.) The proceeding in Texas was recited and judgment was sought in the amount of \$409,680, as the equivalent in Canadian currency of the judgment awarded by the Texas court of US\$300,000.

[4] Kostiuk in his statement of defence filed 8 August 1997 denied service on him of any process in the Texas action; denied any connection of his or the plaintiff with Texas; denied he had attorned to the foreign jurisdiction and alleged circumstances amounting to fraud on the Texas court, principally related to service of process. The relief sought was a declaration that the Texas court acted without jurisdiction and for an order dismissing Braintech's claim.

[5] A reply was filed on 14 November 1997. The rules of the Supreme Court require leave of the court to file any subsequent pleading, and where the reply is the final pleading (as it was here) all material facts alleged in it are deemed to have been denied and are in issue.

[6] The reply alleged the source of jurisdiction as s. 17.042(2) of the Texas Civil Practice and Remedies Code and the nature of service effected thereunder. In the alternative, jurisdiction of Texas was claimed by reason of a real and substantial connection between the Texas action and Texas, particulars of which were alleged. Among the particulars were the following:

3. ...

(a) the Defendant defamed the Plaintiff and disparaged the business of the Plaintiff by the transmission and publication in the State of Texas of untruths and false and disparaging words, as alleged in the Plaintiff's Original Petition and First Amended Petition filed in the District Court of Harris County;

(b) at the time of the aforesaid publication, shareholders of the Plaintiff resided in the Texas;

(c) at the time of the aforesaid publication, the Plaintiff maintained an office in Texas, its director of research and development resided in Texas and its research and development activities were carried on in Texas Furthermore, the Plaintiff's head office had been located in Texas until 1995;

...

(e) it was reasonably foreseeable to the Defendant that the Plaintiff's reputation stood to be injured in Texas by the publication of untruths by the Defendant in Texas;

[7] There was thus put in issue in the British Columbia courts the nature and effect of service; the application of the Texas long arm statute; and whether Kostiuk had committed a tort in Texas, in whole or in part, by transmission and publication in Texas of defamatory and disparaging untruths.

[8] On 24 March 1998 Braintech filed notice of a motion for judgment under Rule 18A. Kostiuk by motion filed 1 April 1998 moved for an order adjourning the summary trial application until such time as he had an opportunity to conduct an examination for discovery of a representative of Braintech and to cross examine the makers of the affidavits filed by Braintech in support of its Rule 18A application.

[9] Kostiuk's application was dismissed by Mr. Justice Thackray on 26 March without reasons. We were advised he did

so in order to leave the matter to the judge who would be hearing the Rule 18A application - then apparently set down to be heard on 31 March.

[10] Sub-rule (11) of Rule 18A provides in part that upon the hearing of the application for an order for a summary trial the court may:

(11) ...

(a) grant judgment in favour of any party, either on an issue or generally, unless

(i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to

decide the issues of fact or law, or

(ii) the court is of the opinion that it would be unjust to decide the issues on the application,

(b) ...

(c) ...

[11] The trial judge had before him the pleadings I have outlined and affidavits filed in the Supreme Court by both parties, the last one of which was filed on behalf of Kostiuk on 25 March 1998. In retrospect, it is clear pre-trial discovery and examination of the makers of some of the affidavits would have been of assistance. Nevertheless, the decision whether to proceed to trial on the affidavit material is a matter within the discretion of the trial judge. The motion to adjourn was not made in a timely way. In my view it has not been demonstrated that his decision to proceed with the summary trial amounts to a failure to exercise a discretionary power judicially. I would not give effect to the appellant's contention in this Court that the cause should be remitted to the Supreme Court to be placed on the regular trial list.

Issue 2

The Texas long arm statute and service thereunder

[12] Section 17.042 of "Subchapter C. Long-Arm Jurisdiction in suit on Business Transaction or Tort" of the Texas Civil

Practice and Remedies Code provides: 17.042. Acts Constituting Business in This State In addition to other acts that may constitute doing business, a nonresident does business in this state if the nonresident:

(1) contracts by mail or otherwise with a Texas resident and either party is to perform the contract in whole or in part in this state;

(2) commits a tort in whole or in part in this state; or

(3) recruits Texas residents, directly or through an intermediary located in this state, for employment inside or outside this state.

[Emphasis added.]

[13] Service on a non-resident who is deemed to do business within Texas by reason of having committed a tort in whole or in part in the state is provided for in ss. 17.044 and 17.045 of the Texas Code, the relevant parts of which are: 17.044. Substituted Service on Secretary of State

(a) ...

(b) The secretary of state is an agent for service of process on a nonresident who engages in business in this state, but does not maintain a regular place of business in this state or a designated agent for service of process, in any proceeding that arises out of the business done in this state and to which the nonresident is a party.

17.045. Notice to Nonresident

(a) If the secretary of state is served with duplicate copies of process for a nonresident, he shall require a statement of the name and address of the nonresident's home or home office and shall immediately mail a copy of the process to the nonresident.

(b) ...

(c) ...

(d) The process or notice must be sent by registered mail or by certified mail, return receipt requested.

(e) ...

[Emphasis added.]

[14] It is convenient at this point to outline the circumstances which gave rise to the litigation in Texas.

[15] Braintech described itself in its first pleading (the "Original Petition") filed in the District Court:

5. BrainTech, Inc. is a developmental stage company with corporate offices located in Vancouver, British Columbia and research and development facilities located in Austin, Texas. BrainTech is involved in design and development of advanced recognition systems based on its patented and highly adaptable set of computer-based pattern matching algorithms.

As a corporation in the "developmental stage" it makes no claim it produces and sells its systems.

[16] It asserts itself to be a publicly held company whose stock is bought and sold via OTC Bulletin Board trading. The location of the OTC exchange is not stated. From other references it may be inferred it is not in Canada.

[17] In 1996 Kostiuk is alleged to have used the Internet to transmit and publish defamatory information about BrainTech.

Specifically, the means of dissemination was alleged in Braintech's amended pleading (the "Amended Petition") as follows:

8. A discussion group or bulletin board has been established on the Internet to facilitate discussion and exchange of information regarding technology stocks and investments. This discussion group, which is operated under the name Silicon Investor, allows those interested in technology companies like BrainTech to exchange information relevant to possible investments in such companies.

I will refer to this bulletin board as "Silicon Investor".

[18] Kostiuk, who is described as a businessman, denies he was ever personally served with any process in the Texas proceeding. He alleges he was thereby denied the opportunity of presenting substantive defences.

[19] The electronic transmission and publication of the defamatory statements are, as I have said, in issue. There are no particulars in the record of either the information transmitted by Kostiuk or of his defences to the allegations of defamation and business disparagement. It was assumed at trial and here that both are valid causes of action sounding in tort.

[20] Before considering whether either was committed in whole or in part in Texas, it will be necessary to describe briefly the modes of service used by Braintech to invoke the jurisdiction of the Texas court.

[21] From the very provisions of the Texas Code I earlier quoted in paragraphs [12] and [13] it is apparent that Kostiuk was recognized by Braintech to be a non-resident who had neither a place of business in Texas nor one who had appointed an agent in Texas for service. It is the commission in Texas of a tort, in whole or in part, which deems him to have done business there and deemed him to have appointed the Secretary of State his agent for service.

[22] Braintech contends that Kostiuk was duly served by service of the Original Petition on the Secretary of State who thereupon was under the statutory duty to give notice to Kostiuk. As will be seen, this mode of service and its failure to operate in the manner contemplated are relevant to the determination of whether comity requires the courts here to give effect to the assertion of jurisdiction over a non- resident as well as to the question of whether there was a fraud practised on the District Court.

[23] In the case at bar the Original Petition was filed in the District Court 1 November 1996 and assigned Cause No. 965578. It alleged Kostiuk to be an individual residing at "... 2408 Westhill Court, West Vancouver, British Columbia, V7S 3A5 ..." (the "Westhill Court address").

[24] The petition was served on the Secretary of State on 7 November and his letter, addressed to the Westhill Court address given him by Braintech's attorney in Texas, was sent by registered mail, return receipt requested, on 15 November 1966. It contained a copy of the petition and the District Clerk's notice that default judgment may be taken if no answer was filed within 20 days of service. In fact, it was sent to an incorrect address. Since February, 1966 Kostiuk had resided at 602, 195 - 21st Street, West Vancouver (the "21st Street address").

[25] It appears the letter was accepted at the Westhill Court address by Kostiuk's father who lived there, as had Kostiuk until February, 1996. However, the return receipt requested by the Secretary of State was still attached to the envelope Kostiuk's father gave him in late November or early December, 1966. Without that receipt the Texas court had no notion of when the time to file an answer would expire.

[26] It will be apparent the efficacy of service on the Secretary of State depended on the correctness of the address given him to which he was to send the Petition and the notice warning the recipient an action had been commenced against him and of the consequences of a failure to appear.

[27] By a certificate dated 27 January 1997 the Secretary of State informed Mr. Courtney, Braintech's attorney in Texas, that a copy of what was served on him on 7 November was forwarded to Kostiuk at the Westhill Court address on 15 November and that as of 27 January, no response to the registered letter, return receipt requested, had been received.

[28] On 11 February 1997 Braintech filed in the Texas court the Amended Petition. It too alleged Kostiuk's residence to be the Westhill Court address.

[29] Nothing in the record indicates service of the Amended Petition on the Secretary of State. Instead, it appears that personal service on Kostiuk was to be attempted. A local process server, a Mr. Livingston, was hired. He deposed by affidavit dated 20 February 1997 (Livingston No. 1) and filed in the Texas court he had personally served Kostiuk the day before at the 21st Street address. Two other affidavits of Mr. Livingston were filed in the British Columbia court: Livingston No. 2 of 14 January 1998 and Livingston No. 3 of 26 February 1998.

[30] Meanwhile, Kostiuk who became aware of the original petition through his father, did nothing. He was led to believe he had not been validly served. He denies he was personally served with the Amended Petition on 19 February 1997 at the 21st Street address.

[31] Mr. Livingston

(a) in his original affidavit of service (Livingston No. 1) asserts service of the Amended Petition was effected by presenting and leaving the same with John Kostiuk;

(b) says in Livingston No. 2 that service was effected upon "a man who identified himself to me as the defendant"; and

(c) in Livingston No. 3, and with Kostiuk's denial of personal service before him, says he recognized Kostiuk to whom he

said "John"; the person who answered the door did not deny this form of address; and, upon the person closing the door as he attempted to effect service he thrust the Amended Petition forward which jammed in the door as it was closed.

[32] The trial judge in the British Columbia court decided the question of whether Kostiuk was personally served need not be answered as he concluded the Texas court relied on service on the Secretary of State. This appears from the following extracts from his judgment:

[24] If a finding of fact regarding the issue of personal service on the defendant is necessary for the plaintiff to succeed, its application must fail. I am persuaded, however, it is not necessary to decide that issue.

...

[27] In my view, the Texas court in relation to the issue of service founded its jurisdiction on the basis of default to the notice mailed by the Secretary of State, being a statutory method of service on a non-resident.

...

[31] What if Mr. Livingston is lying and he did not serve the defendant personally? Does that vitiate the Texas judgment? That involves consideration of whether untruthful affidavits by Mr. Livingston would constitute extrinsic or intrinsic fraud.

[32] In my view, as the court was not relying upon the fact of personal service to found its jurisdiction, it would be a matter of intrinsic fraud. The defendant's remedy would lie with the court in Texas and not here, where the merits of judgment are not in issue.

[33] A Mr. John McDonald, to whose affidavit evidence the trial judge referred, swore two affidavits in the Texas action as a Vice President of Braintech, one on 17 April 1997 and the other on 2 May. Both affidavits were sworn in British Columbia.

[34] If the disposition of this appeal turned on the credibility of McDonald I would be strongly inclined to the view it would not, under clause (ii) of sub-rule 11(a) of Rule 18A, have been just to decide the issues by way of summary trial. There is at least one aspect of Mr. McDonald's affidavit which appears to reflect an attempt to mislead.

[35] Furthermore, I think, with the greatest respect, the trial judge was mistaken in concluding the Texas court relied on service through the Secretary of State. However, to pursue the question of service through to a conclusion would extend this judgment unnecessarily as I have concluded this appeal must succeed on the issue of whether the Texas court had a real and substantial connection with the subject matter of the action. The question of service is but one aspect of whether there was such a connection.

[36] I am of the view that under the principles alluded to in *De Savoye v. Morguard Investments Limited*, [1990] 3 S.C.R. 1077 ("Morguard") and enlarged on in *Amchem Products Inc. v. British Columbia (Workers Compensation Board)*, [1993] 1 S.C.R. 897 ("Amchem") the issue of service is to be looked at in terms of its relationship to the obligations of the British Columbia courts to recognize the foreign judgment in accordance with the principles of comity. The minimum standard of service to be observed by the American courts is that mandated under the due process clause of the 14th Amendment to the Constitution of the United States. As stated by an intermediate appellate court in Texas: Due process required only that the method of notice utilized be reasonably calculated, under the circumstances, to apprise an interested party of the pendency of the action and afford the party the opportunity to present objections. [Citations omitted.] ... When a letter is returned as "refused" or "unclaimed", the notice is sufficient if it is apparent the address was valid and could be located by the postal office. [Citations omitted.]

Zuyus v. No' MisCommunications Inc. (1996) 930 SW (2d) 743 (Ct.App.Texas - Corpus Christi) at747

[37] Mr. McDonald's affidavits state, for the benefit of the Texas court:

- a) by reason of prior contacts with Kostiuk and his father in British Columbia, that Kostiuk was known to evade service of process there;
- b) his personal belief that Kostiuk acted in bad faith in defaming Braintech because of the part the latter's officials played in establishing that Kostiuk's father had committed securities offences;
- c) Braintech's general damages were \$250,000 and \$50,000 aggravated damages;
- d) the correct address for Kostiuk remained at the Westhill Court address.

[38] The trial judge here accepted Mr. McDonald's belief in his assertions. For my part, I do not regard this as determinative of anything other than the whole of the opinions expressed and the facts asserted were based on contacts in British Columbia. Whether a fraud was or was not committed on the Texas Court has, at this stage and in these proceedings, little relevance if there is not established a real and substantial connection between the Texas court and the parties to this litigation.

[39] This brings me to a consideration of Issue 3.

Issue 3

The standard of review of a foreign judgment by a Canadian Court

[40] The starting point is the judgment of the Supreme Court of Canada in *Morguard*. In that case *De Savoye* (the appellant) owned land in Alberta subject to two mortgages. When the mortgages fell into arrears the mortgagees commenced proceedings in Alberta. Meanwhile the appellant had left that province and service was effected in accordance with the rules for service *ex juris* of the Alberta court. The appellant took no steps to appear or to defend the actions.

[41] The mortgagees obtained judgments nisi and, at the expiration of the redemption period, orders for judicial sale of the mortgaged properties to themselves. Judgments were entered against the appellant for the deficiencies. Each mortgagee then commenced a separate action in the Supreme Court of British Columbia to enforce the Alberta judgments for the deficiencies. The issue in the Supreme Court of Canada was the recognition to be given by the courts in province A to an in personam judgment of the courts in province B granted in default of appearance of the non-resident defendant.

[42] Mr. Justice La Forest, speaking for the Court, concluded that considerations which reflected modern requirements of commerce and the reality of modern means of communication justified a departure from 19th century standards. At 1079 he said: These concerns, however, must be weighed against fairness to the defendant. The taking of jurisdiction by a court in one province and its recognition in

another must be viewed as correlatives and recognition in other provinces should be dependent on the fact that the court giving judgment "properly" or "appropriately" exercised jurisdiction. It may meet the demands of order and fairness to recognize a judgment given in a jurisdiction that had the greatest or at least significant contacts with the subject matter of the action. But it hardly accords with principles of order and fairness to permit a person to sue another in any jurisdiction, without regard to the contacts that jurisdiction may have to the defendant or the subject matter of the suit. If the courts of one province are to be expected to give effect to judgments given in another province, there must be some limit to the exercise of jurisdiction against persons outside the province. If it is reasonable to support the exercise of jurisdiction in one province, it is reasonable that the judgment be recognized in other provinces.

The approach of permitting suit where there is a real and substantial connection with the action provides a reasonable balance between the rights of the parties. It affords some protection against being pursued in jurisdictions having little or no connection with the transaction or the parties.

[Emphasis added.]

[43] As to the difficulties which may be experienced with the new test, Mr. Justice La Forest said at 1108: I am aware, of course, that the possibility of being sued outside the province of his residence may pose a problem for a defendant. But that can occur in relation to actions in rem now. In any event, this consideration must be weighed against the fact that the plaintiff under the English rules may often find himself subjected to the inconvenience of having to pursue his debtor to another province, however just, efficient or convenient it may be to pursue an action where the contract took place or the damage occurred.

and at 1110:

There are as well other discretionary techniques that have been used by courts for refusing to grant jurisdiction to plaintiffs whose contact with the jurisdiction is tenuous or where entertaining the proceedings would create injustice, notably the doctrine of forum non conveniens and the power of a court to prevent an abuse of its process; for a recent discussion, see Elizabeth Edinger, "Discretion in the Assumption and Exercise of Jurisdiction in British Columbia" (1982), 16 U.B.C. L. Rev. 1.

There may also be remedies available to the recognizing court that may afford redress to the defendant in certain cases such as fraud or conflict with the law or public policy of the recognizing jurisdiction. Here, too, there may be room for the operation of s. 7 of the Charter. None of these questions, however, are relevant to the facts of the present case and I have not given them consideration.

[44] In the case before him he observed Alberta was the place where the real properties were situate; where the contracts were entered into and where the affinity between a foreclosure proceeding and an action on the covenant was most apparent.

[45] The trial judge in the case at bar instructed himself with respect to the Morguard test, namely, whether there was a real and substantial connection to Texas, and concluded that the evidence strongly supported there being such a connection. For reasons I will next discuss I am of the view he erred.

Real and Substantial Connection

[46] I will consider first the connection between Texas and the injury alleged.

[47] It is here the judgment of the Supreme Court of Canada in Amchem is helpful. It does not appear to have been drawn to the attention of the trial judge.

[48] In Morguard the fairness of the process in a foreign jurisdiction was not directly in issue as the proceedings were wholly within the Canadian federation. On the other hand, in respect of true foreign judgment fairness to the non-resident defendant required that the judgment be issued by court acting through fair process with properly restrained jurisdiction. See Morguard at 1103.

[49] Comity thus becomes an element in the case at bar.

[50] In Amchem its importance arose in the context of an anti-suit injunction issued by the Supreme Court of British Columbia restraining those subject to it from pursuing a tort remedy in Texas for asbestos related injuries. Although the facts are complex, in its simplest form the action in Texas was commenced by plaintiffs resident in British Columbia against corporations unconnected with this province but which were alleged, as to some of them, to do business in Texas. Upon being served most of the corporate defendants specially appeared in the Texas court to claim Texas was not a convenient forum. The doctrine or rule commonly known as forum non conveniens has been abolished in Texas. The application for a stay of proceedings failed.

[51] In the British Columbia court the corporate defendants sought a declaration this province was the "natural forum" as most of the plaintiffs were residents claiming damages for injuries suffered here. Actions had been commenced here and the right to maintain an action which included an alleged conspiracy on the part of defendants who did not do business here had been confirmed by the Supreme Court of Canada. As well, many of the plaintiffs here were in receipt of compensation from the Workers' Compensation Board of this province giving rise in the latter to subrogated rights.

[52] A major reason why the chambers judge in Amchem granted the anti-suit injunction was the abolition of the rule of forum non conveniens in Texas. This was regarded as oppressive, arising from the defendants' need to defend parallel actions in two jurisdictions.

[53] As has been seen it was unnecessary in Morguard to consider the case of competing jurisdictions to which the recognized principle of comity applied with full force. This was the situation in Amchem.

[54] Mr. Justice Sopinka, speaking for the Court in *Amchem*, adopted the same definition of comity as was adopted in *Morguard*, namely, the following from the judgment in the Supreme Court of the United States in *Hilton v. Guyot*, (1895) 159 U.S. 113 at 163-64: "Comity" in the legal sense, is neither a matter of absolute obligation, on the one hand, nor of mere courtesy and good will, upon the other. But it is the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation, having due regard both to international duty and convenience and to the rights of its own citizens or of other persons who are under the protection of its laws . . .

[55] He identified the principle of *forum non conveniens* as the means of implementing the balancing of interests called for in the last clause of this definition. But, he expressly held its abolition in Texas did not have the conclusive weight adopted in the British Columbia courts. At 937 he said: With due respect to the trial judge, the principle of comity to which I have referred does not require that the decision of the foreign court be based on the doctrine of *forum non conveniens*. Many states in the United States and other countries do not apply that principle. Indeed, until comparatively recent times, it was not applied in England. Does this mean that a decision of the courts of one of these countries which, in the result, is consistent with the application of our rules would not be entitled to respect? The response must be in the negative. It is the result of the decision when measured against our principles that is important and not necessarily the reasoning that leads to that decision. Moreover, while the Texas courts do not apply a *forum non conveniens* test as such, they are required to comply with Section 1 of the Fourteenth Amendment to the Constitution of the United States which operates to limit the power of a state to assert in personam jurisdiction over a non- resident defendant. ... The due process requirements are satisfied when in personam jurisdiction is asserted over a non-resident corporate defendant that has "certain minimum contacts with [the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice' ";

[Citations omitted.]

[56] If the obligation to defer to the comity which is to be accorded the default judgment of the District Court of Harris County pronounced 7 May 1997 is to be tested by the principle of *forum non conveniens* some flesh must be put on the bare bones of "real and substantial connection".

[57] That this is the task of the courts of the jurisdiction of the resident against whom the judgment is sought to be enforced seems clear from what was said in *Amchem* at 914: While the above scenario is one we should strive to attain, it has not yet been achieved. Courts of other jurisdictions do occasionally accept jurisdiction over cases that do not satisfy the basic requirements of the *forum non conveniens* test. Comity is not universally respected. In some cases a serious injustice will be occasioned as a result of the failure of a foreign court to decline jurisdiction. It is only in such circumstances that a court should entertain an application for an anti- suit injunction. This then indicates the general tenor of the principles that underlie the granting of this form of relief. In order to arrive at more specific criteria, it is necessary to consider when a foreign court has departed from our own test of *forum non conveniens* to such an extent as to justify our courts in refusing to respect the assumption of jurisdiction by the foreign court and in what circumstances such assumption amounts to a serious injustice. The former requires an

examination of the current state of the law relating to the stay of proceedings on the ground of forum non conveniens, while the latter, the law with respect to injunctions and specifically anti-suit injunctions.

[Emphasis added.]

[58] It is apparent the "real and substantial connection" relied upon for the assumption of jurisdiction by the Texas court is the alleged publication there of a libel which affected the interests of resident present and potential investors. This is true only if the mode of communication through the Internet supports this conclusion.

[59] It is trite law that a libel is only committed when the defamatory material is published to at least one person other than the complainant.

[60] I earlier referred to the constitutional limitation in the United States on the exercise of personal jurisdiction. In *Zippo Manufacturing Company v. Zippo DotCom, Inc.* 952 F.Supp. 1119 (W.D.Pa. 1997) the following occurs at 1122 (with citations omitted): A three-pronged test has emerged for determining whether the exercise of special personal jurisdiction over a non-resident defendant is appropriate: (1) the defendant must have sufficient "minimum contacts" with the forum state, (2) the claim asserted against the defendant must arise out of those contacts, and (3) the exercise of jurisdiction must be reasonable. ... The "Constitutional touchstone" of the minimum contacts analysis is embodied in the first prong, "whether the defendant purposefully established" contacts with the forum state. ... Defendants who "'reach out beyond one state' and create continuing relationships and obligations with the citizens of another state are subject to regulation and sanctions in the other State for consequences of their actions." ... "[T]he foreseeability that is critical to the due process analysis is ... that the defendant's conduct and connection with the forum State are such that he should reasonably expect to be haled into court there." ... This protects defendants from being forced to answer for their actions in a foreign jurisdiction based on "random, fortuitous or attenuated" contacts. ... "Jurisdiction is proper, however, where contacts proximately result from actions by the defendant himself that create a 'substantial connection' with the forum State."

There are established criteria. The court went on to consider the advent of Internet at p. 1123-4: [I-3] Enter the Internet, a global "'super-network' of over 15,000 computer networks used by over 30 million individuals, corporations, organizations, and educational institutions worldwide." ... The Internet makes it possible to conduct business throughout the world entirely from a desktop. With this global revolution looming on the horizon, the development of the law concerning the permissible scope of personal jurisdiction based on Internet use is in its infant stages. The cases are scant. Nevertheless, our review of the available cases and materials reveals that the likelihood that personal jurisdiction can be constitutionally exercised is directly proportionate to the nature and quality of commercial activity that an entity conducts over the Internet. This sliding scale is consistent with well developed personal jurisdiction principles. At one end of the spectrum are situations where a defendant clearly does business over the Internet. If the defendant enters into contracts with residents of a foreign jurisdiction that involve the knowing and repeated transmission of computer files over the Internet, personal jurisdiction is proper. ...

At the opposite end are situations where a defendant has simply posted information on an Internet Web site which is accessible to users in foreign jurisdictions. A passive Web site that does little more than make information available to those who are interested in it is not grounds for the exercise personal jurisdiction. ... The middle ground is occupied by interactive Web sites where a user can exchange information with the host computer. In these cases, the exercise of jurisdiction is determined by examining the level of interactivity and commercial nature of the exchange of information that occurs on the Web site.

[Emphasis added.]

[61] From what is alleged in the case at bar it is clear Kostiuk is not the operator of Silicon Investor. It is equally clear the bulletin board is "passive" as posting information volunteered by people like Kostiuk, accessible only to users who have the means of gaining access and who exercise that means.

[62] In these circumstances the complainant must offer better proof that the defendant has entered Texas than the mere possibility that someone in that jurisdiction might have reached out to cyberspace to bring the defamatory material to a screen in Texas. There is no allegation or evidence Kostiuk had a commercial purpose that utilized the highway provided by Internet to enter any particular jurisdiction.

[63] It would create a crippling effect on freedom of expression if, in every jurisdiction the world over in which access to Internet could be achieved, a person who posts fair comment on a bulletin board could be haled before the courts of each of those countries where access to this bulletin could be obtained.

[64] In the default judgment it is recited that the allegations of the Original and Amended Petitions "have been admitted". This simply reflects the convention in Texas that if a defendant who has been properly served does not appear the allegations in the petition are admitted as proven. This is a deemed admission which does not assist the respondent in establishing a real and substantial connection between the appellant and the Texas court.

[65] In the circumstance of no purposeful commercial activity alleged on the part of Kostiuk and the equally material absence of any person in that jurisdiction having "read" the alleged libel all that has been deemed to have been demonstrated was Kostiuk's passive use of an out of state electronic bulletin. The allegation of publication fails as it rests on the mere transitory, passive presence in cyberspace of the alleged defamatory material. Such a contact does not constitute a real and substantial presence. On the American authorities this is an insufficient basis for the exercise of an in personam jurisdiction over a non-resident.

[66] The record demonstrates British Columbia was the natural forum for the resolution of a dispute between two residents. For the following reasons (which are not exhaustive) the connections in the case at bar show that Texas was not even an appropriate forum:

1. Kostiuk is a non-resident of Texas who has neither done business nor maintained a place of business nor appointed

an agent for service there. His only connection is "deemed" by virtue of the allegation of having committed aorta in Texas.

2. Braintech is a Nevada corporation domiciled in British Columbia. According to the Standard & Poor service excerpt exhibited to Kostiuk's affidavit of 18 February 1998, it was incorporated in Nevada on 4 March 1987 and has undergone a number of name changes before assuming its present name in 1987. As of 31 December 1996 its transfer agent was located in Salt Lake City; its office in North Vancouver, British Columbia; its stock was traded on the OTC Bulletin Board (the location of which is not identified); and its principal officers (Chairman, President and Vice President and Chief Financial Officers) were located in North or West Vancouver.

3. Braintech has had no presence in Texas since 31 December 1996. Between 1 September and 31 December 1996 its technical development activities are said to have been centered in Austin, Texas. Between January 1994 and the fall of 1995 its head office was located in Arizona. In the fall of 1995 it was moved to Vancouver.

4. No person in Texas is alleged to have seen the alleged defamatory material and the witnesses required to prove its damages are acknowledged to be citizens of Canada. The only proof of damages in the record is the McDonald affidavit of 17 April 1997, sworn in Vancouver.

5. No juridical advantage is alleged to accrue in Texas which is not available if a defamation action was brought in British Columbia.

6. The authorities cited in Braintech's brief in support of default judgment relate to the use within Texas of electronic communication for actual business purposes. None support the passive posting on an electronic bulletin board as constituting in itself the commission of a tort within Texas.

7. To enforce recovery of the default judgment obtained in Texas on the deemed proof of use of an electronic bulletin board would encourage a multiplicity of actions the world over wherever Internet was available.

8. The mode of service in the case at bar falls below the minimum constitutional standards for an American court.

[67] The authorities which support the last are found in *Zippo Manufacturing Company v. Zippo Dotcom, Inc.*, supra. The affidavit of Mr. Kyle R. McElroy, an attorney practising in the State of Texas, expresses the opinion that Kostiuk was not properly served under Texas law and that as a result the default judgment is void. Mr. McElroy's opinion rests, at least in part, on a failure to meet Texas standards. This would appear to be a matter for the Texas courts. It is the constitutional limitation which may properly be taken into account in determining whether comity requires recognition of the foreign court's jurisdiction.

[68] The Canadian cases relied on by the respondents either antedate *Morguard* and *Amchem* or demonstrate the consequence of actually doing business in a foreign jurisdiction. See: *Moses v. Shore Boat Builders Ltd.* (1993), 83 B.C.L.R. (2d) 177 (B.C.C.A.).

Conclusion

[69] In my opinion the trial judge erred in failing to consider whether there were any contacts between the Texas court and the parties which could, with the due process clause of the 14th Amendment to the Constitution of the United States, amount to a real and substantial presence.

