

COURT OF APPEAL FOR ONTARIO

CITATION: Pringle v. Zenova Group PLC, 2026 ONCA 549

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van Rensburg, Miller and Sossin JJ.A.

BETWEEN

Shawn Pringle

Plaintiff (Appellant)

and

Zenova Group PLC and Zenova Ltd.

Defendants (Respondents)

Paul Champ, for the appellant

Kundera Provost-Yombo, for the respondents

Heard: November 27, 2025

On appeal from the order of Justice Heather J. Williams of the Superior Court of Justice, dated November 6, 2024, with reasons at 2024 ONSC 6172.

van Rensburg J.A.:

Overview

[1] The appellant, Shawn Pringle, brought a wrongful dismissal action in Ontario against the respondents, Zenova Group PLC and Zenova Ltd. (together, “Zenova”). On a motion under r. 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O.

1990, Reg. 194, the motion judge concluded that the appellant was an independent contractor – not an employee – for the purposes of the *Employment Standards Act, 2000*, S.O. 2000, c. 41 (“ESA”). As the ESA had no application, the forum selection clause in the parties’ agreement, which provided that all disputes arising under the agreement are subject to the exclusive jurisdiction of the courts of England and Wales, was valid and enforceable. The motion judge thus stayed the action. This is an appeal from that order.

[2] For the reasons that follow, I agree with the appellant that, while the motion judge identified the correct legal test for the characterization of the parties’ relationship, as articulated in this court’s decision in *Belton v. Liberty Insurance Co. of Canada* (2004), 72 O.R. (3d) 81 (C.A.), she made an extricable error of law in its application. In particular, in considering the fourth and fifth factors identified in *Belton* – the appellant’s risk of loss or expectation of profit, and whether or not the activity of the appellant was part of the business organization of the respondents – the motion judge conflated the appellant’s position as a founder and shareholder of the respondents’ business and the role he played in providing services. This error infected the motion judge’s analysis of whether the appellant was an employee or independent contractor, necessitating a fresh consideration of that issue by this court. I have concluded that the relevant circumstances in relation to the appellant’s provision of services under the parties’ agreement weigh in favour of finding an employment relationship between the appellant and Zenova.

[3] I have gone on to consider the alternative bases on which the respondents sought to stay the Ontario action, which were not considered by the motion judge in view of her determination that the appellant was an independent contractor. I am satisfied that there is a real and substantial connection sufficient for the Ontario court to have jurisdiction over this matter, and that the respondents have not met their onus of showing that England is a more convenient forum for the determination of the parties' dispute.

[4] I would therefore allow the appeal, set aside the stay of proceedings, and permit the appellant's action to continue in Ontario.

Background Facts

[5] In 2018, the appellant, together with Tony Crawley and Graeme Sargent, established a fire safety and heat management business, with a focus on the development of flame-resistant paints and fluids. In 2020, the founders incorporated a company, which would eventually become known as Zenova Ltd., under the laws of England and Wales. The appellant and Mr. Sargent were based in Canada, while Mr. Crawley was based in England, where the business was headquartered.

[6] The appellant's role in the business from its inception was primarily product development. From 2018 to 2021, he and the other two founders worked without compensation.

[7] By 2021, the venture was ready to start marketing its products and sought investment through a public limited company, also incorporated in England and Wales, Zenova Group PLC. The appellant, through his corporation 1291207 B.C. Ltd. (“129”), owned slightly more than 10% of Zenova Ltd.’s shares. Zenova Group PLC acquired the capital of Zenova Ltd., including the appellant’s shares, and, in exchange, he was issued new shares in the public company.

[8] The Zenova Group PLC board of directors decided that, in order to attract investment, the company needed to show that it had employees and a management team under contract. In the spring of 2021, the appellant was offered and accepted a position as Director of Product Development for £80,000 per year. He was given the option of being an employee or an independent contractor, and for tax reasons chose to be classified as an independent contractor. In May 2021, the appellant, 129, and Zenova Ltd.¹ entered into an agreement titled “Product Development Consultant Contract for Services” (the “Agreement”). The Agreement was for an initial term of three years. The appellant began his full-time work with Zenova in July 2021. Although the appellant was considered part of the management team, and held the title of Director of Product Development, he was never a director or officer of Zenova.

¹ Although the Agreement was with Zenova Ltd., it defines the “Company” to include Zenova Group PLC, and the parties refer to both companies together as Zenova and to the appellant providing services to both.

[9] On September 22, 2022, Zenova Ltd., through legal counsel, notified the appellant that the Agreement was terminated, allegedly for cause. The termination letter asserted that the appellant had breached the Agreement by providing services to at least two other businesses and not devoting his full time and attention to Zenova's business.

[10] Although the appellant previously lived in British Columbia, he had moved to Ontario before commencing his work under the Agreement. He commenced an action against the respondents shortly after his termination in Ontario, seeking damages for breach of contract and wrongful dismissal.

The Motion

[11] Relying on clause 22.1 of the Agreement, and before delivering a statement of defence, the respondents brought a motion, pursuant to r. 21.01(3)(a) of the *Rules of Civil Procedure* and s. 106 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, to permanently stay the action on the basis that the Ontario court lacks jurisdiction. Clause 22.1 is a choice of law and forum selection clause which provides that the Agreement shall be governed by and interpreted according to the laws of England and Wales, and that all disputes arising under the Agreement (including non-contractual disputes or claims) shall be subject to the exclusive jurisdiction of the English and Welsh courts.

[12] The respondents asserted, in the alternative, that the Ontario court was without jurisdiction *simpliciter*, as there is no real and substantial connection between the dispute and Ontario, and, in the further alternative, invoking the doctrine of *forum non conveniens*, that England is the more convenient forum for the litigation.

[13] In resisting the motion, the appellant argued that the forum selection clause was void because he was an “employee” working in Ontario, and that the Agreement violated s. 5 of the *ESA* by contracting out of an employment standard. Specifically, the forum selection clause eliminated his right to make a complaint under s. 96 of the *ESA*. The appellant submitted that the litigation is properly in the Ontario court, which is also the most convenient forum.

The Motion Judge’s Reasons

[14] The motion judge determined that the appellant was an independent contractor, and that accordingly the forum selection clause was enforceable. As a result, she permanently stayed the appellant’s action. It was unnecessary for her to rule on the alternative grounds for a stay raised by the respondents.

[15] In determining whether the appellant was an independent contractor or an employee for the purposes of the *ESA*, the motion judge considered the five *Belton* factors:

- (1) Whether or not the appellant was limited exclusively to the service of Zenova;
- (2) Whether or not the appellant was subject to the control of Zenova;
- (3) Whether or not the appellant had an investment or interest in what are characterized as the “tools” relating to his service;
- (4) Whether or not the appellant had undertaken any risk in the business sense or had any expectation of profit associated with the delivery of his services, as distinct from his fixed compensation; and
- (5) Whether or not the activity of the appellant was part of the business organization of Zenova; in other words, whose business was it?

[16] With respect to the first factor – whether the appellant was limited exclusively to the service of Zenova – the motion judge noted that, while the appellant had committed to serving Zenova during business hours, the Agreement did not prevent him from having other business interests.

[17] As for the second factor – whether the appellant was subject to Zenova’s control – the motion judge observed that, while the appellant was subject to Zenova’s control in some respects (such as compliance with company rules, regulations, and policies, and approval of vacation time), there was no evidence that Zenova controlled his actual hours of work, or how or where he did his work.

[18] In considering the third factor – whether the appellant had an investment in the “tools” relating to his service – the motion judge noted that the appellant was reimbursed for the purchase of his laptop and that Zenova paid all but \$150 of the monthly rent for his office.

[19] The fourth factor was whether the appellant had undertaken any risk in the business sense or had any expectation of profit associated with the delivery of his services, as distinct from his fixed compensation. Here, the motion judge noted that, although the appellant’s compensation under the Agreement was limited to £80,000 per year, “as one of the company’s major shareholders, the [appellant] could hope to profit indirectly from the work he performed under the contract.” The motion judge stated that, “it would be reasonable for him to expect that there would be a correlation between the success associated with his product development and other efforts on behalf of the company, the profitability of the company and the value of his shares.”

[20] In addressing the fifth factor – whether the appellant’s activity was part of the business organization of Zenova or, in other words, “whose business was it?” – the motion judge concluded that it was again relevant to consider the appellant’s status as a founder and “major” shareholder of Zenova. She noted that he was not a stranger to Zenova when he signed the Agreement, and that he knew the reason he and the others were asked to sign contracts was that the company was going

public and seeking investors, and that it would look good if the company could show it had employees and a management team under contract.

[21] The motion judge also considered, as “a factor that deserves significant weight”, the clear statement in the Agreement indicating that it was not an employment contract. She noted that the appellant had asked to provide his services as a consultant, and not an employee, to reduce his tax liability, and that two months after signing the Agreement he had signed a deed indicating he was self-employed.

[22] After setting out her findings of fact, the motion judge summarized her conclusion at para. 40:

The [appellant] was carrying on business for himself, and not as an employee of Zenova. Although the [appellant] had signed a contract with Zenova, he was not simply providing specified services to the company at a specified rate of pay. He was one of the company’s founders. He was advising the company. As one of the major shareholders of the company, he had the potential to benefit from the company’s successes through the value of his shareholding. Further, the [appellant] and Zenova had contractually agreed that the [appellant] would not be a Zenova employee.

Issues

[23] The parties identify the following specific issues to be determined in this appeal:

- (1) Did the motion judge err in respect of her determination that the appellant was an independent contractor (a) in her application of the *Belton* factors; and (b) by adding into the *Belton* analysis as a “sixth factor”, the written terms of the Agreement?
- (2) If the motion judge made a reversible error, what is the proper characterization of the parties’ relationship?
- (3) If there was an employment relationship between the appellant and Zenova and the forum selection clause is void, does Ontario have jurisdiction over the parties’ litigation?
- (4) If so, is Ontario the most convenient forum?

[24] I will deal with each of these issues. As I will explain, I have concluded that the motion judge made a reversible legal error in her consideration of two of the *Belton* factors when she conflated the appellant’s contractual role and his status as a shareholder. I will then explain why, considering the relevant factors afresh, I have concluded that the appellant was Zenova’s employee for the purposes of the *ESA*, and that accordingly the forum selection clause in the Agreement is void. I will also explain why the parties’ characterization of their relationship in the Agreement is not a significant factor. I will then turn to the questions of jurisdiction *simpliciter* and *forum non conveniens*, concluding that the Ontario court has jurisdiction over the parties’ dispute and that Zenova has not met its burden to

establish that there is a more appropriate forum in which the litigation should proceed.

Analysis

1. The Proper Characterization of the Parties' Relationship

a. Legal Framework

[25] There is no single and universally applicable criterion for determining whether a worker is an employee: *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2001 SCC 59, [2001] 2 S.C.R. 983, at para. 46. The context, including the statutory context if there is one, shapes the analysis. “[T]he same worker may be ruled to be an ‘employee’ in one legal forum, but self-employed in another forum, if such a conclusion is harmonious with the differing policy considerations in the respective forums.”: Geoffery England *et al.*, *Employment Law in Canada*, 4th ed. (LexisNexis Canada, 2005), at § 2.4.

[26] In this case, the appellant asserts that he was an “employee” for purposes of the *ESA*, even though he intended to be an “independent contractor” for tax purposes.

i. The *Employment Standards Act* context

[27] Section 1 of the *ESA* defines an “employee” to include “a person, including an officer of a corporation, who performs work for an employer for wages” and “a

person who supplies services to an employer for wages”. The definition also includes a person who was formerly an employee.

[28] Under s. 3(1)(a) of the *ESA*, subject to certain exceptions which are not relevant here, “the employment standards set out in [the] Act apply with respect to an employee and his or her employer if [...] the employee’s work is to be performed in Ontario”. Section 5 of the *ESA* prohibits contracting out of or waiving an employment standard and provides that any such contracting out or waiver is void.

[29] “Employment standards” include the right to make a complaint to the Ministry of Labour under s. 96(1) of the *ESA*: *Heller v. Uber Technologies Inc.*, 2019 ONCA 1, 145 O.R. (3d) 81, at para. 36, aff’d on other grounds 2020 SCC 16, [2020] 2 S.C.R. 118. A forum selection clause ousts that right and is thus void pursuant to s. 5 of the *ESA*: *Heller*, at paras. 41-42. There is no dispute between the parties that, if the appellant was an “employee” of Zenova under the *ESA*, the forum selection clause in the Agreement is void.

ii. The “*Belton*” Principles or Factors

[30] In Ontario, courts look to the *Belton* principles or factors in determining whether a worker is an “employee”.

[31] *Belton* involved a wrongful dismissal claim in which this court upheld the trial judge’s conclusion that the plaintiffs, who were commissioned sales agents, were employees. It accepted that the trial judge, in finding that the agents were

employees rather than independent contractors, had applied the appropriate principles or factors (i.e., the five factors applied by the motion judge here). This court also affirmed that the fact that the parties' contract stated that it did not create an employer-employee relationship was not determinative.

[32] The *Belton* list of factors is not exhaustive, and the weight to be given to any particular factor depends on the context. Not all five criteria need to point to an employment relationship for there to be such a relationship; sometimes the criteria might point in different directions, and not all the criteria will necessarily be relevant. What is important is to look at the "total relationship" between the parties; that is, one must "examine all the possible factors which have been referred to in [the] cases as bearing on the nature of the relationship between the parties concerned.": *Sagaz*, at para. 46.

[33] As noted in *Braiden v. La-Z-Boy Canada Ltd.*, 2008 ONCA 464, 294 D.L.R. (4th) 172, at para. 33, the five *Belton* factors were modelled on the factors listed in *Sagaz*, a case dealing with the employee/independent contractor issue in the context of vicarious liability for a tort. Gillese J.A. cited the following passage from para. 47 of *Sagaz*:

The central question is whether the person who has been engaged to perform the services is performing them as a person in business on his own account. In making this determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker

provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.

[34] After listing the five *Belton* factors, Gillese J.A. noted, at para. 34, that the question “whose business is it?” is key:

In many ways, the question posed at the end of the fifth principle – whose business is it? – lies at the heart of the matter. Was the individual carrying on business for him or herself or was the individual carrying on the business of the organization from which he or she was receiving compensation? [Emphasis added.]

b. The Positions of the Parties

[35] Although the appellant accepts that the motion judge cited the correct legal test, he submits that she erred in her treatment of four of the *Belton* factors: exclusivity, control, expectation of profit/risk of loss, and integration into the business to which services are provided. He also alleges that the motion judge erred by adding a sixth factor – the parties' characterization of the relationship – and in giving significant weight to that factor.

[36] The appellant contends that, when the *Belton* factors are properly considered, he was clearly an employee, and was not, in relation to the services he provided to Zenova, in business for himself.

[37] The respondents submit that the motion judge properly applied the holistic and contextual framework required by *Belton* and *Sagaz*. They assert that the motion judge did not in fact consider a “sixth” and new factor, but that the court properly considered the factors in light of the parties’ conduct and the factual matrix. The respondents contend that the motion judge’s interpretation of the parties’ relationship is error-free and entitled to deference, and that the appellant is asking this court to reweigh the evidence that was carefully considered by the motion judge.

c. Discussion

[38] Whether someone is an independent contractor or employee is a question of mixed fact and law, which, subject to an extricable error of law, is reviewable only for palpable and overriding error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 37.

[39] Although the appellant takes issue with some of the motion judge’s factual findings and the weighing of certain factors, he also contends that the motion judge made extricable errors of law.

[40] Respectfully, I agree that the motion judge made an extricable error.

i. The motion judge conflated the appellant's role under the Agreement and his status as shareholder

[41] The appellant contends that the motion judge improperly conflated his roles as shareholder and as a person providing services to Zenova in her approach and findings on the fourth and fifth *Belton* factors. By way of review, the fourth factor asks whether the appellant had undertaken any risk in the business sense or had any expectation of profit associated with the delivery of his services, as distinct from his fixed compensation. The fifth asks whether his activity was integrated into the business organization of Zenova; in other words, “whose business was it?”

[42] The respondents argue that it was appropriate for the motion judge to consider the appellant's status as shareholder as part of her examination of the parties' “total relationship”, referring to *Sagaz*, at para. 46.

[43] I agree that the motion judge's conflation of the appellant's status as shareholder and role as employee led her into error.

[44] I begin by noting that the only information about the appellant's shareholding is that he held 10% of Zenova Ltd.'s shares at the time the company went public, and was issued a comparable proportion of shares in the public company. There is no other information in the record that indicates the number of shares the appellant ultimately held in the public company. Nothing, however, turns on the size of the appellant's shareholding or whether he was properly characterized as a “major” shareholder. As I will explain, the appellant's status as a shareholder and

founder of Zenova should not have driven the motion judge's analysis of the fourth and fifth *Belton* factors, which helped ground her conclusion that the appellant was an independent contractor.

[45] I say this for several reasons.

[46] First, it is not uncommon for employees to have shares in the company for which they work. As noted in *Employment Law in Canada*, “[c]ompanies obviously can and frequently do employ shareholders.”: at § 2.45. An employee may own shares in their employer's company for reasons related to their employment (e.g. having been granted stock options as part of their compensation package), or for reasons unrelated to their employment (e.g. because the shares are considered a good investment). Similarly, an independent contractor could acquire shares in the company to which they provide services for reasons related to their role as a contractor (e.g. as compensation), or for reasons unrelated to the contract (e.g. as a personal investment). As such, having shares in the company to and for which services are provided does not, in itself, point to whether a person is an independent contractor.

[47] Second, this is the case even if the appellant was a “major” shareholder, as described by the motion judge, or had acquired shares as a founder of Zenova. As the authors note in *Employment Law in Canada*, “[e]ven a major shareholder with controlling interest in the company may be its employee.”: at § 2.45.

[48] In observing that a person may have multiple statuses in relation to a corporation, the textbook authors refer to the English Privy Council decision in *Lee v. Lee's Air Farming Ltd.*, [1960] 3 All E.R. 420 (P.C.), and the Supreme Court decision in *Guildford v. Anglo-French Steamship Co.*, [1883] 9 S.C.R. 303. In each case, the fact that the individual in question was a shareholder of the defendant company did not affect entitlements arising from his status as an employee.

[49] Although these cases pre-date *Sagaz*, *Belton* and other contemporary cases distinguishing between employees and independent contractors, they are nonetheless instructive, in that they underline that an individual may have dual status. An individual may be both a shareholder and either an employee or independent contractor. *Sagaz*'s admonition to consider the "total relationship" in assessing whether an individual is an employee or independent contractor does not override the concept of dual status.

[50] Third, the motion judge's focus on the appellant's status as a founder and shareholder caused her to lose sight of the nature of an independent contractor relationship as compared to an employment relationship, which, in turn, caused her to misapply the fourth and fifth *Belton* factors (risk/profit and business integration).

[51] Specifically, the motion judge's approach failed to recognize that when an individual provides services as an independent contractor, there are two

businesses: the business receiving the services, and the independent business supplying the services. *Sagaz* defines an independent contractor as someone who is performing services “as a person in business on his own account”: at para. 47.

[52] A person with their own business bears the risk of loss and the expectation of profit, depending on how much business they attract, how much they can charge, and their expenses. The person is working on their own account and for their own separate business. Even if they were to acquire shares in the company they provide services to, and thus have an incentive to help that business to prosper, they would remain an independent contractor.

[53] In contrast, where there is an employment relationship, the worker is not in business on their own account. Rather, the worker is working on account of the employer. In other words, there is one business – the business that employs the worker.

[54] In describing the fourth *Belton* factor, this court has explained that the chance of profit factor relates to the opportunity to profit from the delivery of services. In *Belton*, at para. 11, the relevant inquiry is described as “[w]hether or not the agent has undertaken any risk in the business sense, or, alternatively, has any expectation of profit associated with the delivery of his services” (emphasis added).

[55] Here, in applying the fourth *Belton* factor, the motion judge lost sight of these concepts, finding that the appellant might profit indirectly from the delivery of his services under the Agreement because of his status as a shareholder. Even accepting that he might profit indirectly, it is not the indirect chance to profit as a shareholder that is relevant to whether he was providing services to Zenova on his own account or as an employee. Both independent contractors and employees may hold shares and benefit indirectly from their work if they do so.

[56] While the appellant may have had an expectation of profit or a risk of loss from his shareholding in Zenova, this is not the type of profit or loss that is contemplated by the fourth *Belton* factor. The question is whether, in carrying out the services, the appellant had a risk of loss or an expectation of profit. He may have been paid a fixed amount, but could he maximize his earnings by, for example, hiring employees and reducing the expenses associated with the delivery of his services so that the work contemplated by the Agreement could become more profitable? Conversely, did he bear a risk of loss if he underestimated the cost of providing the services? The absence of a risk of loss or expectation of profit in the delivery of his services would point to an employment relationship.

[57] Similarly, in the motion judge's analysis of the fifth *Belton* factor – the appellant's integration into Zenova's business/"whose business was it?" – she again emphasized the appellant's status as a founder and shareholder of Zenova. In doing so, she misapprehended how this factor works. The motion judge

answered the question “whose business was it?” in a way that separated this question from its purpose. The respondents make the same mistake when, at para. 84 of their factum, they state: “The question ‘whose business is it?’ admits of only one answer on these facts: the Appellant’s work was in furtherance of his own entrepreneurial venture, a company he co-founded, promoted, and partially owned, not in service of another’s business.”

[58] Even if the Zenova business could be said to have been the appellant’s in one sense because he had been a founder and remained a shareholder of Zenova, what matters is whether, in performing services under the Agreement, the appellant was carrying on Zenova’s business or his own separate business. The issue is whether the appellant was “carrying on business for him or herself or [...] carrying on the business of the organization from which he or she was receiving compensation”: *Braiden*, at para. 34. The fifth *Belton* factor asks whether and to what extent the appellant, in performing his services, was integrated into the business of Zenova, or was part of the Zenova organization; if it was Zenova’s business, this would point to an employment relationship.

[59] The motion judge interpreted the fourth and fifth *Belton* factors as supporting her conclusion that the appellant was an independent contractor and not Zenova’s employee. As I have explained, she erred in her consideration of each of these factors by conflating the appellant’s status as a shareholder and founder of Zenova with his role in providing services. Having concluded that the motion judge made

errors of law in her determination that the appellant was an independent contractor of Zenova, it is necessary to conduct the required analysis afresh.

ii. Considering the *Belton* factors afresh, the appellant was Zenova's employee

[60] The first *Belton* factor is whether or not the appellant was limited exclusively to the service of Zenova. The motion judge found that the appellant was limited exclusively to the service of Zenova during business days and business hours, but that the Agreement did not prevent him from having other business interests. The appellant submits that the motion judge erred by overlooking other relevant contractual provisions and the reality of the situation. In contrast, Zenova submits that the motion judge properly considered whether the appellant's contractual obligations prevented him from pursuing other business interests or engagements "altogether".

[61] Here, the motion judge referred to clause 8.1 but not 8.2 of the Agreement:

8.1 You will be expected to devote the whole of your time and attention on the proper performance of your duties during Business Days [defined as "a day on which banks are open for business in England but excludes Saturday, Sunday and any other day which is a legal holiday in England."] and Business Hours [defined as "9am to 5pm GMT during Business Days."].

8.2 However, you will be expected to dedicate additional Business Days and/or Business Hours as deemed necessary by the Company to meet the business needs of the Company. [Emphasis added.]

In addition, under clause 12.1, the appellant was precluded from engaging in any business in competition with Zenova's during the term of the Agreement and for one year thereafter.

[62] Considering all of the circumstances, the appellant was effectively required to work exclusively for Zenova: he was required to not only devote his whole time and attention to his work for Zenova during business days and business hours, but he was also required to work additional days and hours "as deemed necessary by the Company". Indeed, it was these contractual provisions that were relied on by Zenova in terminating the appellant.

[63] The second *Belton* factor concerns whether or not the appellant was subject to Zenova's control. The motion judge found that the appellant was subject to Zenova's control "in some respects". This included the "whole of your time and attention" clause, which required him to work only for Zenova during business hours. The appellant was also obligated to comply with Zenova's rules, regulations and policies, including policies regarding vacation time and sick leave. Vacation days had to be approved by Zenova and, on one occasion, a vacation request was denied.

[64] Notwithstanding the terms of the Agreement, the evidence, according to the motion judge, was that the appellant was not expected to work from 9:00 a.m. to 5:00 p.m. GMT. Nor was there any evidence that Zenova controlled the appellant's

actual hours of work or how he spent his time. Instead, his work was self-directed. As for where the work was performed, the appellant had moved from B.C. to Ottawa for personal reasons, and there was no evidence that Zenova's approval was required. Accordingly, the motion judge concluded that "Zenova exercised some control over [the appellant], but in respect of relatively minor matters such as vacation time and sick leave."

[65] The appellant submits that the motion judge erred in the weight given to this factor having regard to Zenova's control over his vacation time, the requirement that he follow Zenova's rules and policies, and the terms of the Agreement requiring Zenova's approval for the move of his place of business. The respondents assert that the motion judge made no error in giving limited weight to Zenova's control. After the contract was signed, the appellant continued to work independently on a separate continent from where Zenova's operations were located, consistent with his longstanding role as founder and technical lead.

[66] In my view, the "control" factor in this case is entitled to more weight than it was given by the motion judge. It is typical for executives, managers, professionals, or highly trained persons, whether employees or independent contractors, to have independence in how they carry out their responsibilities: *Mayer v. J. Conrad Lavigne Ltd.* (1979), 27 O.R. (2d) 129, at p. 133 (C.A.); *HMI Industries Inc. v. Santos*, 2010 QCCA 606, at para. 7. In *Sagaz*, at para. 38, the Supreme Court noted that the "control" criterion has been criticized as having "an

air of deceptive simplicity” and that the test has broken down completely in relation to highly skilled and professional workers, who possess skills far beyond the ability of their employers to direct. Accordingly, instead of focusing on the manner of performing work, “the modern law emphasizes control in the sense of directing the residual ‘when and where’ employment is carried on rather than the manner in which the job is done”: England *et al.*, at § 2.15.

[67] The Agreement includes a number of provisions that provide Zenova with control over the appellant, and in particular over the “when” and “where” of his work: clauses 3.3 (requiring compliance with rules, regulations, and policies, including vacation and sick time); 5.2 (prohibiting the appellant, without prior Board approval, from assigning the Agreement or his duties under it to others); 7.1 (permitting Zenova to dictate the “place of service”); 7.3 (permitting Zenova, upon notice, to require the appellant to work outside his principal office for more than one month); 8.1 (requiring the appellant to devote the whole of his time and attention to his duties for Zenova during business days and business hours); and 8.2 (permitting Zenova to direct the appellant to work additional hours as it deemed necessary).

[68] Although Zenova may have taken a relatively hands-off approach to the appellant’s work for most of the working relationship, it relied on clauses 8.1 and 8.2 in terminating the Agreement.

[69] The third *Belton* factor – whether the appellant had an investment or interest in the “tools” relating to his service – is not at issue in this appeal. The motion judge found, and I agree, that the appellant’s only investment in “tools” was the \$150/month he contributed towards the office rent. Zenova paid for the appellant’s laptop. Although both employees and independent contractors may have their expenses covered, the fact the appellant had no significant investment in his office and equipment is consistent with an employment relationship.

[70] The fourth *Belton* factor is whether the appellant had undertaken any risk in the business sense or had any expectation of profit associated with the delivery of his services. I agree with the motion judge’s observation that the appellant did not assume any risk when he signed the Agreement. As for “profit”, the only expectation of “profit” was that the appellant could hope to profit indirectly as a shareholder. As I have already explained, this is not relevant to his expectation of profit in the performance of services under the Agreement. Here, the appellant was paid an annual amount in equal monthly instalments, and he was reimbursed for his expenses. He was expected to personally perform the services on a full-time basis. There is nothing to suggest that the appellant had the ability to enhance the profitability of the Agreement by adjusting how the work was carried out or who performed it.

[71] The fifth factor is whether or not the appellant’s work activity was part of the business organization of Zenova or, in other words, “whose business was it?” This

is sometimes referred to as the “business integration” or “business organization” factor.

[72] There are a number of indicators, some of which were acknowledged by the motion judge, that the appellant was integrated into Zenova’s business organization. These include: (1) he was engaged as the full-time Director of Product Development and was identified as such on Zenova’s website; (2) he had a Zenova email address; (3) he had Zenova business cards; (4) the Ottawa office had a Zenova plaque on the door; (5) his Ottawa office was listed as Zenova’s “Canada Office” on its website; (6) the appellant was responsible for developing and testing products for Zenova and finding manufacturers for Zenova to get its products ready for market; (6) the appellant was a member of Zenova’s management team, giving the company advice about “high-level matters”, including performance, management, and strategy; and (7) the appellant was held out by Zenova as an employee. The answer to the question, “whose business was it?”, is that it was Zenova’s business, not the appellant’s.

[73] In summary, the *Belton* factors point to an employment relationship between the parties. The appellant was integrated into Zenova’s organization. While he may have profited from his shareholding, in assuming the role as Zenova’s Director of Product Development, for which he was paid annual compensation of £80,000, he did not undertake business risk or have any expectation of profit. There were significant contractual limitations on his ability to take on other work and to

delegate responsibilities. Given the terms of the Agreement, it was open to Zenova to dictate the “when” and “where” of the appellant’s work, and he was subject to company policies, including being required to have his vacation time pre-approved. Although Zenova was reasonably hands-off when the relationship was cordial, the fact that Zenova reserved that degree of contractual control, and then asserted it in the termination of the Agreement, is telling.

[74] Having concluded that the *Belton* factors strongly support the conclusion that the appellant was an employee, I turn to consider the relevance and importance of the statement in the Agreement indicating that it was not an employment contract.

iii. The parties’ characterization of their relationship is not a significant factor

[75] The appellant contends that whether he was an employee or an independent contractor is to be determined by the court irrespective of how the parties characterized their relationship, and that it was an error for the motion judge to refer to this as a factor deserving “significant weight”. The respondents assert that it was appropriate for the motion judge to consider the parties’ mutual intention as reflected in the label they attached to the Agreement. According to the respondents, courts routinely look to intention in borderline cases, where the relationship is not clearcut.

[76] The motion judge correctly noted that “the fact that a contract does not refer to an employer-employee relationship is not determinative of the issue”: *Belton*, at para. 11. The “not determinative” or “not always determinative” language from the case law (*Sagaz*, at para. 11) suggests that the parties’ characterization may be relevant.

[77] However, I do not agree with the motion judge’s view that clause (c), which provided that the Agreement was not an employment contract, was entitled to “significant weight” in this case.

[78] The relevance of the parties’ characterization of their relationship in determining whether a worker is an employee or independent contractor has been addressed in two reported decisions of the Superior Court as well as judgments of the appellate courts of other jurisdictions.

[79] In *Gerling v. Camrose Regional Exhibition & Agricultural Society*, 2022 ABCA 210, 51 Alta. L.R. (7th) 110, involving the appeal of a judgment after trial awarding damages for wrongful dismissal, the Alberta Court of Appeal concluded that the trial judge had erred in characterizing the respondent as the appellant’s employee.

[80] In the course of its decision, the court stated that, “the express intention of the parties in the contract should be given greater weight where the dispute is between the actual parties to the agreement” and that “the parties’ clear

understanding of their legal relationship at the time the agreement is signed ‘should be accorded significant weight particularly when the agreement is in plain language, contains no fine print and is not, on its face, oppressive, unfair or difficult to understand’”: at paras. 24, 27. The court cited as authority the trial level decision of Thorburn J. (as she then was) in *Shekhdar v. K&M Engineering and Consulting Corp.*, 2008 CanLII 27483 (Ont. S.C.), aff’d 2013 ONCA 521,² which in turn relied on *Wellington (County) v. Butler*, 56 O.R. (3d) 271 (Div. Ct.), a decision on judicial review of a decision of the Pay Equity Tribunal classifying home day care providers for pay equity purposes.

[81] The Alberta Court of Appeal also referred to cases from the Federal Court of Appeal highlighting the parties’ own label and/or their intention as a relevant factor in determining a worker’s status for income tax and pensionable and insurable employment purposes: e.g., *Wolf v. Canada*, 2002 FCA 96, 56 D.T.C. 6853; *Royal Winnipeg Ballet v. Canada (Minister of National Revenue)*, 2006 FCA 87, [2007] 1 F.C.R. 35; *1392644 Ontario Inc. v. Canada (Minister of National Revenue)*, 2013 FCA 85, 358 D.L.R. (4th) 363. The court went on, however, to state that the “ultimate question” was whether Mr. Gerling performed his services as a person in business on his own account; that is, “whose business was it?”

² On the appeal in *Shekhdar*, this court refused to interfere with the damages awarded at trial, stating that the trial judge’s interpretation of the clear language of the agreement was unassailable regardless of the characterization of the appellant as an employee or an independent contractor: at para. 4.

[82] In *1392644 Ontario Inc.*, Mainville J.A. noted a trend in the Federal Court (albeit one which “has not gone without criticism”) of affording substantial weight to the stated intention of the parties. He observed at para. 37 that, “[b]ecause the employee-employer relationship has important and far reaching legal and practical ramifications [...] the determination of whether a particular relationship is one of employee or of independent contractor cannot simply be left to be decided at the sole subjective discretion of the parties” and that “[c]onsequently, the legal status of independent contractor or of employee is not determined solely on the basis of the parties’ declaration as to their intent. That determination must also be grounded in a verifiable objective reality.” He went on to recognize a two-step test: first, to ascertain the common intention of the parties in entering into the contract; and second, to ascertain whether the subjective intention of the parties is consistent with the realities of the relationship: at paras. 38-40. The central question remained “whether the person who has been engaged to perform the services is, in actual fact, performing them as a person in business on his own account”: at para. 41.

[83] In *Ligocki v. Allianz Insurance Company of Canada*, 2010 ONSC 1166, 100 O.R. (3d) 624, in the context of determining entitlement to accident benefits, Hennessy J. similarly noted that the declared common intention could not be determinative of the legal nature of the relationship, and it cannot trump the parties’ *de facto* relationship. Referring to *Royal Winnipeg Ballet*, at para. 61, she stated that “[a] declared or found common intention of the parties will be disregarded if it

does not reflect the actual legal relationship the parties profess to have intended.”:
at para. 22.

[84] I take from this review of the case law that, even where courts have specifically referred to the parties’ characterization of their relationship, they have continued to emphasize that the true substance of the relationship takes priority over the parties’ own characterization of it.

[85] In this case, the fact that the Agreement states that it is not an employment agreement is not a significant factor and does not affect the result. I say this for two reasons.

[86] First, clause (c) of the Agreement is inconsistent with the substance of the parties’ relationship. As I have explained, the *Belton* factors strongly point to an employment relationship in this case.

[87] Second, the evidence suggests that the contractual characterization of the relationship did not mean much to Zenova – it was the substance of the relationship that mattered. For example, under cross-examination, Christopher Gilbert, an *ex officio* member of Zenova’s board, said, in relation to the appellant’s role, that “[t]he role is the role that you’re required to fulfill however it’s provided. [...] You know, you can call yourself an employee; you can call yourself a consultant. I don’t really care from the perspective of the role that the company is asking you to assume”. And despite the label used in the Agreement, the appellant deposed that Zenova

“represented to customers and other stakeholders that [he] was an employee of Zenova Group PLC.” This was consistent with his title, business cards, and his office, listed as Zenova’s “Canada Office” on its website.

[88] While the appellant, when given the choice, asked for a consultancy agreement, and may well have believed that he was self-employed, the legal characterization of the parties’ relationship depends on its substance. In the circumstances of this case, it would be wrong to accord clause (c) significant weight. The label the parties attached to their Agreement cannot overcome the conclusion, on a fresh analysis, that the appellant was Zenova’s employee.

2. Jurisdiction *Simpliciter* and *Forum Conveniens*

[89] I will deal briefly with two issues that were not addressed by the motion judge and received little attention in the argument of the appeal. These are raised by the respondents as alternative bases for a stay of the action. The first issue is whether the Ontario court has jurisdiction *simpliciter* over the action. The onus is on the appellant to establish jurisdiction. The second issue is whether there is a more convenient forum for the action. The onus is on the respondents to establish that their preferred venue, England, is the more appropriate forum.

a. Ontario Has Jurisdiction Over the Dispute

[90] For the jurisdiction issue, the question is whether there is a “good arguable case” that there is a “real and substantial connection” between the action and

Ontario sufficient to establish jurisdiction over a foreign defendant: *GlycoBioSciences Inc. v. Herrero and Associates*, 2023 ONCA 331, at para. 6, leave to appeal refused, [2023] S.C.C.A. No. 268. The determination of this question requires an assessment of the relationship between the parties and Ontario, based on the pleadings and any evidence before the court: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 72.

[91] The respondents contend that none of the presumptive connecting factors that would *prima facie* entitle a court to assume jurisdiction over a dispute, as identified in *Van Breda*, exist in this case. They are not domiciled or resident, nor do they carry on business in the province. There is no tort that was committed in the province and the contract associated with the dispute – the Agreement – was not made in Ontario.

[92] The appellant argues that the fact that the Agreement was substantially performed in the province should be recognized as a new presumptive factor. He relies on this court's recent decision in *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONCA 862, 165 O.R. (3d) 189 which he says identified as a presumptive factor connecting the action to Ontario that the Agreement was allegedly breached in the province: at paras. 47-49, 77-80.

[93] I am satisfied that the appellant has met his burden to establish that the Ontario court has jurisdiction over his action. The services provided under the Agreement were performed by the appellant in Ontario, and the Agreement expressly contemplated that it would be performed in Zenova's principal office in Canada, which, when the services were provided, and with the agreement of Zenova, was located in Ontario. I agree with the appellant that, under these circumstances, the respondents would reasonably have expected to face a claim from the appellant in Ontario where they employed his services on a full-time basis. Further, the alleged contract breach occurred when the appellant received the letter of termination in Ontario. As a result, I am satisfied that Ontario has jurisdiction as the place where the Agreement was allegedly breached.

b. England Is Not a More Convenient Forum

[94] With the Ontario court having jurisdiction, the onus is on the respondents to establish that their preferred forum is clearly more appropriate, as being "in a better position to dispose fairly and efficiently of the litigation.": *Van Breda*, at para. 109.

Relevant factors include:

- (a) the location where the contract in dispute was signed;
- (b) the applicable law of the contract;
- (c) the location of witnesses, especially key witnesses;
- (d) the location where the bulk of the evidence will come from;

- (e) the jurisdiction in which the factual matters arose;
- (f) the residence or place of business of the parties; and
- (g) the loss of a legitimate juridical advantage.

(*Black & McDonald Limited v. Eiffage Innovative Canada Inc.*, 2023 ONCA 91, 34 C.L.R. (5th) 62, at para. 16; *Young v. Tyco*, 2008 ONCA 709, 92 O.R. (3d) 161, at para. 26).

[95] Each side asserts that the relevant factors favour their preferred forum. The respondents' main arguments are that their business and registered offices are located in England, that all witnesses apart from the appellant, and all representatives of Zenova are in England or outside Ontario, and that the majority of key evidence, including Zenova's internal data and documentation, is located in England. The appellant submits that, while the Agreement may not have been signed in Ontario, it was substantially performed and breached in Ontario when Zenova purported to terminate the Agreement without notice. He points to the termination letter alleging that Zenova had cause to terminate the Agreement specifically because he was "providing services to at least two other businesses", and the refusal or inability of its representatives under cross-examination on the motion to identify where such businesses were located, except to surmise that they were "somewhere in Canada". He asserts that the factual matters that will need to

be determined arose in Ontario, and that there will likely be witnesses from Ontario, other than himself.

[96] I am not persuaded that the respondents have met their burden to establish that England is clearly a more appropriate forum for the litigation of this matter. The action involves an employment contract where services were provided by the appellant in Ontario and where both the breach and the alleged just cause for termination are connected to Ontario. While it can be anticipated that there will be witnesses and documentation in Ontario as well as in England, with today's modern technology, the location of witnesses and documents is not determinative: *Young*, at para. 52; *Kyko Global Inc. v. M/S Crawford Bayley & Co.*, 2021 ONCA 736, at para. 40.

Disposition

[97] For these reasons, I would allow the appeal, declare the forum selection clause in the Agreement void as contrary to the *ESA*, and permit the appellant's action to proceed in Ontario. If they have not done so already, I would order the respondents to deliver their statement of defence within 30 days from the date of release of this decision. In accordance with the parties' agreement, I would reverse the costs award in the court below and order the respondents to pay the appellant's costs of the motion fixed at \$12,000, inclusive of disbursements and HST, and I

would award costs of the appeal to the appellant fixed at the all-inclusive amount of \$14,900.

Released: July 29, 2026 "K.M.v.R."

"K. van Rensburg J.A."
"I agree. B.W. Miller J.A."
"I agree. L. Sossin J.A."