IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Huang v. Silvercorp Metals Inc.,*
2016 BCSC 1168

Date: 20160624
Docket: S146424
Registry: Vancouver

Between:

Kun Huang

Plaintiff

And

Silvercorp Metals Inc.

Defendant

And

**Jon Richard Carnes, One Horizon Foundation,
EOS Holdings LLC (Nevada LLC31246-2004), EOS Holdings LLC
(Nevada E0542782012-5) and EOS Holdings LLC (Dominica)**

Third Parties

Before: The Honourable Madam Justice Warren

Reasons for Judgment

Counsel for the Plaintiff:	Howard A. Mickelson, Q.C. Lorne M.A. Kotler
Counsel for the Defendant:	Tom A. Hakemi Nathan J. Muirhead
Counsel for Third Parties:	No one appearing
Place and Dates of Hearing:	Vancouver, B.C. June 16, 2016
Place and Date of Judgment:	Vancouver, B.C. June 24, 2016

Introduction

[1] The defendant, Silvercorp Metals Inc. ("Silvercorp"), applies for an order that the trial of this action proceed by judge alone.

[2] In the action, the plaintiff, Mr. Huang, seeks damages for false imprisonment and defamation. He alleges that Silvercorp orchestrated his detention and incarceration in China in retaliation for his involvement in the online publication of reports critical of Silvercorp and its Chinese subsidiary. Those reports have been referred to by the parties as the "Alfred Little Reports". He also alleges that Silvercorp defamed him by claiming he had profited by taking short positions in Silvercorp's stock and then publishing false and deceptive statements about Silvercorp in the Alfred Little Reports in order to drive down the price of the stock.

[3] Mr. Huang filed a jury notice on August 24, 2015. The action is scheduled to be tried before a jury for 40 days commencing in late January 2017.

[4] Under Rule 12-6(5) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009, except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a jury notice has been served may apply for an order that the trial be heard without a jury on certain specified grounds. Rule 12-6(5) reads, in its material part:

> Except in cases of defamation, false imprisonment and malicious prosecution, a party on whom a notice under subrule (3) has been served may apply
>
> (a) within 7 days after service for an order that the trial or part of it be heard by the court without a jury on the ground that
>
> (i) the issues require prolonged examination of documents or accounts or a scientific or local investigation that cannot be made conveniently with a jury,
>
> (ii) the issues are of an intricate or complex character, or
>
> (iii) the extra time and cost involved in requiring that the trial be heard by the court with a jury would be disproportionate to the amount involved in the action, or
>
> …

[5] As already noted, this is a case of defamation and false imprisonment; two of the three kinds of cases that are expressly excluded from the ambit of Rule 12-6(5). As a result, the defendant does not rely on Rule 12-6(5) but rather invokes the inherent jurisdiction of the court to ensure trial fairness. The defendant contends that a judge alone trial is necessary to ensure trial fairness because this case is too complex, both factually and legally, for a jury to decide.

[6] Mr. Huang opposes the application. He says that a plaintiff in a defamation case has an absolute right to a jury trial and that the inherent jurisdiction of the court to ensure trial fairness cannot be invoked to deny him that right, at least not where the alleged unfairness is said to arise from one of the express grounds upon which a jury notice may be struck under Rule 12-6(5). He also says that, in any event, the case is not too complex for a jury.

Background

[7] Silvercorp is a Vancouver-based public company with mining interests in China. Indirectly, it owns a majority interest in Henan Found Mining Co. Ltd. ("Henan"). The minority interest is owned by the Chinese government. Henan operates a mine close to the city of Luoyang, which is located in Henan province in central China.

[8] Mr. Huang is a Canadian citizen. He was employed as a researcher by EOS Holdings, a hedge fund controlled by John Carnes, who is or was a resident of British Columbia. EOS and Mr. Carnes have been named by Silvercorp as third parties in the action. They took no position on this application.

[9] Mr. Carnes and EOS apparently took short positions in companies that Mr. Carnes thought had exaggerated their value. Silvercorp was one of these. Mr. Carnes and EOS did research on the companies and published reports under the assumed name Alfred Little, on a website bearing the same name, that were critical of the companies in question. In the course of his employment with EOS, Mr. Huang performed research on Silvercorp in China and contributed to Alfred Little Reports published in September 2011 that were critical of Silvercorp.

[10] Following publication of those Alfred Little Reports, the price of Silvercorp's shares fell significantly. Silvercorp took several measures in response. On September 22, 2011, it filed a defamation action against Alfred Little in the state of New York. That claim was ultimately dismissed in August 2012 on the basis that the statements complained of were protected opinions that are not actionable under New York law. It is alleged that Silvercorp also made complaints to various securities regulators and law enforcement agencies claiming that the Alfred Little Reports contained inaccurate and misleading information intended to depress the price of Silvercorp's stock as part of an illegal short-selling scheme.

[11] Mr. Huang alleges that Silvercorp identified those behind the Alfred Little Reports and then published defamatory statements concerning him and others associated with the Reports. He also alleges that Silvercorp has a significant influence on certain Chinese officials including the Luoyang police, referred to as the Public Security Bureau ("PSB"), and that Silvercorp used that influence to enlist the PSB as Silvercorp's agent to falsely imprison him and to knowingly bring baseless criminal charges against him in China. The false imprisonment aspect of the claim is predicated on the assertion that Silvercorp was controlling the PSB, both directly and indirectly, out of its head office in Vancouver.

[12] On December 28, 2011, Mr. Huang was detained by airport authorities in Beijing as he was trying to leave China. He alleges that his passport had been flagged by the PSB at the direction of Silvercorp. He was placed into the custody of the PSB three days later and driven to Luoyang where he was confined by the Luoyang police for a further three weeks. He says he was then placed under house arrest for about six months, from January 2012 to July 2012.

[13] In July 2012, the *New York Times* published an article in which Mr. Carnes criticized Silvercorp's response to the Alfred Little Reports. Mr. Huang alleges that in retaliation for that article, Silvercorp caused Mr. Huang to be removed from house arrest and placed into the Luoyang jail where he remained for approximately two years.

[14] In June 2013, after he had been held in custody in the Luoyang jail for nearly a year, Mr. Huang was charged with the crimes of harming the business credibility and product reputation of Henan and the illegal use of wiretapping and undisclosed photographic devices. He alleges that the charges were brought by the PSB at the direction of Silvercorp. His trial was conducted on September 10, 2013. In February 2014, he was convicted by the Chinese trial court and sentenced to two years in prison, a fine, and deportation from China. He had been in custody continuously since July 2012 and was given credit for time served with the result that he was scheduled for release in July 2014.

[15] Mr. Huang appealed his conviction on several grounds, including that the PSB received financial assistance from Henan and therefore the evidence against him was illegally obtained and ought to be excluded. The Chinese appellate court apparently found no proof that the PSB received financial assistance from Henan and upheld the conviction. The decision of the appellate court was released on June 15, 2014. Mr. Huang was released from custody in July 2014, having served his sentence, and was deported. He returned to Canada on July 18, 2014 and commenced this action on August 19, 2014.

[16] Mr. Huang alleges that the investigation, prosecution and conviction in China were tainted by Silvercorp's conduct and that the Chinese legal proceedings were unfair.

Issues

[17] The issues arising on the application are:

1. Whether the inherent jurisdiction of the court to ensure trial fairness empowers a judge to strike a jury notice in a case of defamation and false imprisonment on grounds of complexity; and

2. If so, whether the court should exercise that jurisdiction and order that the trial proceed by judge alone in the circumstances of this case.

Analysis

Inherent Jurisdiction

[18] In *Yates v. Lee*, 2014 BCSC 1298, Justice Pearlman summarized the nature and limits of this Court's inherent jurisdiction in the context of an application to strike a jury notice, in that case for alleged juror partiality which is a ground unrelated to those enumerated in Rule 12-6(5). Pearlman J. held that "the remedial jurisdiction to ensure trial fairness does not endow a chambers judge with an inherent power to set aside a jury notice for juror partiality" (para. 37), and that the *Jury Act,* R.S.B.C. 1996, c. 242, provides the statutory framework for challenging partiality (para. 41). The fundamental principle that emerges from Justice Pearlman's analysis is that the court's inherent jurisdiction, including its inherent jurisdiction to ensure trial fairness, may be ousted by statute. (See also *Nathanson, Schachter & Thompson LLP v. Boss Power Corp.*, 2016 BCCA 1, at para. 31.)

[19] This principle underlies the Supreme Court of Canada's conclusion in *Conseil scolaire francophone de la Colombie-Britannique v. British Columbia*, 2013 SCC 42, that any inherent jurisdiction to admit documents into evidence in a language other than English was ousted by Rule 22-3 of the *Supreme Court Civil Rules*, which requires all documents to be in English unless the nature of the document renders this impracticable. As stated by Justice Wagner for the majority in *Conseil scolaire francophone*, this Court's inherent jurisdiction and discretion to fulfill its judicial function "is subject to the requirement that the court exercise them without contravening any statutory provision" (para. 63). In the same case, at para. 50, Justice Wagner confirmed that the *Rules* have the force of statute law.

[20] It almost goes without saying that this Court has the inherent jurisdiction to ensure trial fairness. What must be determined is whether that inherent jurisdiction could be exercised to grant an order that the trial in this action proceed by judge alone without contravening Rule 12-6(5). In my view, that depends on whether the basis for the application is one of the expressly enumerated grounds set out in the

Rule because the Rule clearly prohibits the bringing of the application on one or more of those grounds in a defamation and false imprisonment case.

[21] As mentioned above, Silvercorp's application is predicated on the assertion that a judge alone trial is necessary to ensure trial fairness because this case is too complex, both factually and legally, for a jury to decide. In other words, complexity is the only asserted source of unfairness.

[22] In terms of factual complexity, Silvercorp says that the case will involve a large volume of documents, and that it is expected to involve complex expert evidence about the substantive and procedural laws of a foreign legal system, including its police investigation procedures; the mineral resource disclosure obligations of a public company; the financial disclosure obligations of a public company under securities law, regulations, and exchange rules of multiple jurisdictions; the valuation of a large publicly traded company; and the operations and prospects of a silver mine in China.

[23] In terms of legal complexity, Silvercorp says that there are two legal issues that are highly interconnected with and dependent on the facts such that it will be difficult, if not impossible, to charge the jury on the application of the law.

[24] First, it will be necessary to determine whether British Columbia law applies to the false imprisonment claim. There is no tort of false imprisonment in China and, accordingly, if Chinese law applies the false imprisonment claim will fail. As a general rule, the substantive law to be applied to a tort claim is the law of the place where the activity occurred (the *lex loci delicti)*; although the Supreme Court of Canada may have left open the possibility for carefully defined exceptions: *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022. Silvercorp says that neither the Supreme Court of Canada nor the British Columbia Court of Appeal have considered whether any exception to the *lex loci delicti* rule does in fact exist and, if so, the parameters by which it is to be defined. Silvercorp says that determining where the activity occurred (given Silvercorp's conduct in British Columbia is alleged to have resulted in harm to Mr. Huang in China), and if it occurred in China whether an exception

exists such that the law of British Columbia nevertheless applies will require a careful consideration of all factual circumstances. Silvercorp says that a jury could not be fairly instructed on the question of whether British Columbia law applies because the answer to that question will depend upon the view the jury takes of a myriad of issues.

[25] Second, Silvercorp says the false imprisonment claim will result in the re-litigation of issues decided in the Chinese criminal proceedings and, as such, it is an abuse of process of the sort contemplated by the Supreme Court of Canada in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63. Silvercorp acknowledges that in *C.U.P.E* the Court emphasized that the abuse of process doctrine ought not to be applied where it would operate in an unfair or unjust way and that there may be instances where re-litigation will enhance rather than impeach the integrity of the justice system. This might be the case when the first proceeding was tainted by fraud or dishonesty, when new evidence impeaches the original results, or when fairness dictates that the original results should not be binding in a new context. Silvercorp submits that, as with the choice of law question, determining whether the abuse of process doctrine ought to be applied to preclude the re-litigation of facts determined by the Chinese courts will require careful consideration of a myriad of factors making it difficult if not impossible to charge the jury on its application.

[26] Again, Rule 12-6(5) provides that "[e]xcept in cases of defamation, false imprisonment and malicious prosecution a party on whom a [jury] notice … has been served may apply … for an order that the trial … be heard by the court without a jury on the ground that … the issues are of an intricate or complex character".

[27] The Court of Appeal has characterized Rule 12-6(5) (formerly Rule 39(27)) as providing a plaintiff in a defamation case with the "absolute right to trial with a jury … no matter how complicated the issues": *Pierre v. Pacific Press Ltd.*, [1994] B.C.J. No. 583 at para. 9. (See also *Lawson v. Baines*, 2012 BCCA 117 at para. 51.) In an earlier ruling in this case (indexed at 2016 BCSC 1052) in which I denied Silvercorp an adjournment of this application, I concluded, on the basis of these authorities,

that factual complexity will not deprive the plaintiff in a defamation case of a jury trial. I left open the question of whether the same is true of legal complexity.

[28] The question is whether the scope of the phrase "issues … of an intricate or complex character" in Rule 12- 6(5) extends to legal issues and the interrelationship between the legal issues and the factual issues. Having now heard the substantive application and having reflected on the matter further, in my view it clearly does.

[29] There is nothing in the language of the Rule itself that indicates any limitation in the nature of the issues that could be found to give rise to intricacy or complexity justifying an order striking a jury notice. Further, the authorities suggest there is no such limitation.

[30] In *Pierre* (which was a negligence case) the issue was whether the jury notice should be struck on the ground that the legal issues were complex. While the majority of the court concluded that the legal issues were not "of a sort with which the trial judge would be unable to deal properly in the course of a jury trial", there was no suggestion that the complexity ground in the Rule could only be invoked in cases of factual complexity.

[31] Similarly, in *Rados v. Pannu*, 2015 BCSC 453; aff'd 2015 BCCA 459, Justice Fitch (then of this Court) observed, at para. 34, that issues may be found to be intricate or complex if the judge would have difficulty forming questions for the jury, and that the interplay between issues can make them intricate or complex in nature. Ultimately, in determining whether to exercise the discretion to strike a jury notice on grounds of complexity, the question is whether the "complexities of the case are such that the matter cannot fairly be tried with a jury" (para. 78).

[32] This is precisely the sort of legal complexity Silvercorp relies on in support of its claim that fairness requires a judge alone trial in this case. Again, the legal complexity that Silvercorp asserts arises from the interplay between the factual and legal issues, which Silvercorp says will make it very difficult to charge the jury. Thus, the foundation for Silvercorp's application falls squarely within the "intricate or

complex" ground expressly set out in Rule 12-6(5)(a)(ii). In the circumstances, it would be impossible to grant the order sought by Silvercorp without contravening Rule 12-6(5) because, on a plain reading, the Rule does not permit the application to be brought in cases of defamation, false imprisonment or malicious prosecution.

[33] It is not necessary, on this application, to answer the broader question of whether, given the existence of Rule 12-6(5), there remains any scope at all for the exercise of the court's inherent jurisdiction to order a judge alone trial in a case of defamation, false imprisonment or malicious prosecution. The only question is whether there remains any scope for the exercise of that jurisdiction in a case of defamation, false imprisonment or malicious prosecution on the ground of factual or legal complexity. I have concluded that no scope remains because granting such an order would contravene Rule 12-6(5), which clearly provides that a jury notice may not be struck on that ground in cases of defamation, false imprisonment or malicious prosecution.

[34] It does not follow, however, that the parties must simply accept that some measure of unfairness is inherent in intricate or complex defamation, false imprisonment or malicious prosecution cases that are tried by juries. Rule 12-6(5) reflects a legislative assessment that whatever difficulties may arise in a jury trial of a defamation, false imprisonment or malicious prosecution case as a result of the intricacy or complexity of the issues are outweighed, as a matter of fairness, by the importance of permitting parties in such cases to demand a jury trial as a means of ensuring that the ultimate decision reflects community standards.

Is the case too complex?

[35] Even if I had the jurisdiction to order that the trial of this action proceed by judge alone I would decline to exercise it because I am not persuaded that the complexities are such that it cannot be fairly tried by a jury

[36] I accept that the jury in this case will be faced with somewhat complicated expert evidence and that there may be a large volume of documents, particularly in regard to the truth of the Alfred Little Reports. However, I am not persuaded that

evidence concerning the laws of a foreign legal system; the disclosure obligations of a public company; the valuation of a public company; or the operations and prospects of a silver mine in China is likely to be so extensive or complex as to exceed a jury's capacity to arrive at a just and proper determination. I am not persuaded that these matters are materially more complex than those faced by juries in personal injury actions, who are often required to determine the nature and cause of a plaintiff's injuries from competing and sometimes complex expert medical evidence, and consider a variety of scenarios including hypotheticals and competing contingencies in analyzing a plaintiff's claim for loss of earning capacity.

[37] I also accept that the determination of whether certain legal principles apply may depend on a variety of factual issues and their interrelation, and that this will complicate the task of crafting an appropriate instruction to the jury. However, the number of factual findings that could be relevant to the choice of law issue and the application of the abuse of process doctrine will, as always, be limited by the evidence. In other words, at the end of the evidentiary phase of the trial counsel will be in a position to make submissions concerning the factual findings that could be made, on the evidence, and to assist the court in crafting a charge that will appropriately instruct the jury on the law applicable to a variety of alternative factual scenarios. While this might result in some reasonable time lag between the end of the evidentiary phase of the trial and the charging of the jury, I am not persuaded that it will give rise to unfairness.

Conclusion

[38] Silvercorp's application for an order that the trial of this proceeding be heard by a judge without a jury is dismissed.

"WARREN J."