COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Huang v. Silvercorp Metals Inc.,*
2016 BCCA 100

Date: 20160302
Docket: CA42787

Between:

Kun Huang

Respondent
(Plaintiff)

And

Silvercorp Metals Inc.

Appellant
(Defendant)

Before: The Honourable Mr. Justice Lowry
The Honourable Madam Justice Garson
The Honourable Madam Justice Fenlon

On appeal from: An order of the Supreme Court of British Columbia, dated April 13, 2015 (*Huang v. Silvercorp Metals Inc.*, 2015 BCSC 549, Vancouver Docket S146424).

Counsel for the Appellant: T. Hakemi
N. Muirhead

Counsel for the Respondent: A. Dosanjh
L.M.A. Kotler

Place and Date of Hearing: Vancouver, British Columbia
February 3, 2016

Place and Date of Judgment: Vancouver, British Columbia
March 2, 2016

Written Reasons by:
The Honourable Madam Justice Garson

Concurred in by:
The Honourable Mr. Justice Lowry
The Honourable Madam Justice Fenlon

Summary:

The appellant appeals the dismissal of its application for a stay based on forum non conveniens under s. 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28. The respondent brought an action claiming false imprisonment based in part on his trial, conviction and imprisonment in China, which he says was orchestrated by the appellant. The appellant says the chambers judge erred by failing to dismiss the action as an abuse of process, by failing to consider the interests of the parties and the ends of justice as required by the Act, and by misapplying several factors under the Act. Held: Appeal dismissed. The abuse of process argument was not made in chambers and is not appropriately considered on appeal. Moreover, the argument goes to the substance of the claim and would not have been appropriately addressed on a procedural jurisdiction application. The chambers judge considered the interests of parties and the ends of justice. There was no error in her discretionary assessment of the other factors under the Act.

Reasons for Judgment of the Honourable Madam Justice Garson:

[1] The appellant, Silvercorp Metals Ltd. ("Silvercorp"), applied in the Supreme Court of British Columbia for an order that the court decline jurisdiction with respect to pleaded allegations of false imprisonment made by the respondent, Kun Huang, on the basis that China was the more appropriate forum in which to litigate that cause of action. The application is governed by the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 (the "*CJPTA*").

[2] The chambers judge concluded that Silvercorp had failed to establish that China was a more appropriate forum, as required by *CJPTA* s. 11, and dismissed application. Her reasons for judgment are indexed at 2015 BCSC 549 (the "Reasons"). Silvercorp now appeals.

[3] For the reasons that follow I would dismiss the appeal.

Factual Background

[4] Mr. Huang is a Canadian citizen, who was educated at the University of British Columbia. His action against Silvercorp arises out of his arrest, conviction, and imprisonment, in China, where he was employed as a researcher for a Vancouver-based company called Eos Holdings LLC ("Eos"). The events in question occurred between 2011 and 2014.

[5] Silvercorp is a Vancouver-based public company with mining interests principally located in China. Indirectly, it owns a majority share in Henan Found Mining Co. Ltd. ("Henan"). The government of China owns the minority interest. Mr. Huang pleads that, "[a]t all material times, Henan was under the direction and control of Silvercorp and acted as its agent receiving direction from Silvercorp's head office in Vancouver". Henan operates a mine known as Ying mine in China.

[6] Eos is an investment fund in the business of researching public companies operating in China. After 2009, Eos began "shorting" its Chinese investments owing to what it perceived to be a wide-spread practice of overvaluing assets among public companies operating in China. The manager of Eos was a Vancouver-based individual called Jon Carnes. He used information from his China-based researchers to publish anonymously an investment newsletter called Alfredlittle. Mr. Huang pleads that the anonymity was necessary to protect Eos's China-based researchers.

[7] On September 13, 2011, Alfredlittle released a report questioning the value of Silvercorp's assets in China, and the Ying mine in particular. The report was based in part on Mr. Huang's research and local investigations. Silvercorp's share price lost significant value following its publication. Jon Carnes and Eos made a profit of $2.8 million by "shorting" the Silvercorp stock (*Re Carnes*, 2015 BCSECCOM 187 at para. 50). Silvercorp subsequently complained to the British Columbia Securities Commission that the report was written to facilitate short selling and earn a profit for Eos and Mr. Carnes. The Commission brought proceedings against Mr. Carnes, alleging that he had perpetrated a fraud contrary to the *Securities Act*, R.S.B.C. 1996, c. 418, and engaged in conduct contrary to the public interest. While the Commission described Mr. Carnes' actions as "unsavoury", it did not find that he had engaged in fraud or conduct contrary to the public interest (*Re Carnes* at paras. 139, 141).

[8] On December 28, 2011, as he was about to leave China, Mr. Huang was arrested at the Beijing airport. A few days later, he was transferred to Luoyang police custody and transported about 800 kilometers from Beijing to Luoyang. Luoyang is a

prefecture-level city located in Henan Province, and is the closest major city to the Ying mine. Silvercorp is an important taxpayer and economic driver in Luoyang. Mr. Huang alleges that Silvercorp has significant influence on local officials, including the Luoyang Public Security Bureau ("PSB").

[9] Mr. Huang pleads that the Luoyang PSB acted as Silvercorp's agent, and that Silvercorp orchestrated his investigation and imprisonment. Paragraphs 6 and 19 of his notice of civil claim read as follows:

> 6. In particular, Silvercorp used its influence on public officials in the prefecture-level city of Luoyang China, effectively enlisting the local police, known as the Public Security Bureau (the "Luoyang PSB" or, "PSB"), as Silvercorp's agent, and otherwise providing the PSB with encouragement and direction, as well as financial and logistical support, to falsely imprison and then later knowingly bring baseless criminal charges against Mr. Huang.
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> …
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> 19. In the days and months following the Alfredlittle Report, Silvercorp directed and encouraged local Chinese investigations into Alfredlittle, with a particular focus on its researchers working in China. In violation of Canadian and Chinese law, including the Corruption of Foreign Public Officials Act (S.C. 1998, c. 34), Silvercorp funded these foreign investigations and in particular engaged the local Luoyang PSB, effectively as Silvercorp's agent, as part of its "fight to the death". At various times, Silvercorp representatives provided on-the-ground support and direction to the PSB's investigations and interrogations.

[10] The Luoyang PSB interrogated and imprisoned Mr. Huang for about three weeks. Mr. Huang pleads that his interrogation was based on questions provided by Silvercorp. He pleads that part of the expense of his arrest and transportation was paid for by Silvercorp. He says that his private electronic information was obtained by the Luoyang police and passed on to Silvercorp.

[11] Between January 2012 and July 2012, Mr. Huang was under house arrest. He pleads that during this period, he was under the control of Silvercorp and the PSB, was not permitted to leave China, was subjected to further interrogation, and required to travel with and assist the Luoyang PSB in interviewing other Chinese researchers. He pleads that representatives of Silvercorp were present on these trips, and that Silvercorp paid or reimbursed the Luoyang PSB's expenses.

[12] On July 13, 2012, the New York Times published an article about the criminal complaints against Alfredlittle's researchers, noting Jon Carnes' skepticism about Silvercorp's financial results.

[13] Mr. Huang says that in retaliation for the New York Times article, he was removed from house arrest and returned to prison in Luoyang, under difficult conditions. He was charged with the crimes of harming the business credibility and product reputation of a third party, and the illegal use of wiretapping and undisclosed photographic devices, approximately one year after his original detention.

[14] In September 2013, Mr. Huang was convicted of harming the business credibility and product reputation of Silvercorp and Henan. He was sentenced to two years in prison and fined. He pleads that his investigation, prosecution, and conviction were tainted by Silvercorp's actions:

> 38. Silvercorp orchestrated the investigation and prosecution knowing that local conviction rates in China are extraordinarily high and that by encouraging prosecution, a conviction would be a virtual certainty. In these circumstances, Mr. Huang's conviction did not constitute an independent state action.
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> 39. On or about September 10, 2013, a one day closed-door "trial" which was not a fair trial, was held on the charges against Mr. Huang. The only people permitted to attend the proceeding were Mr. Huang's lawyers and two lawyers from Silvercorp. The Silvercorp lawyers actively participated in the proceeding, acting effectively as the prosecutor.

[15] Mr. Huang was released on July 17, 2014, and deported to Canada on July 18, 2014.

[16] Mr. Huang appealed his conviction to the Luoyang Intermediate People's Court, arguing that the police received financial assistance from Henan and therefore the evidence against him was illegally obtained. His appeal was dismissed.

[17] Upon his return to Canada, Mr. Huang commenced this action for defamation and false imprisonment. Silvercorp challenges jurisdiction only in respect to the false imprisonment claim.

Reasons for Judgment of the Chambers Judge

[18] The chambers judge began by noting that Silvercorp conceded that the court had jurisdiction *simpliciter*, and made no jurisdictional challenge to that part of the action pleading defamation.

[19] After outlining the facts discussed above, she reviewed the expert evidence introduced by both parties respecting the Chinese legal system (at para. 30). Importantly, she noted that although China has implemented a form of tort law, there is no private law tort of false imprisonment. She also noted that Mr. Huang could commence a trial supervision proceeding in China seeking a declaration of innocence in relation to his conviction, which, if successful, could result in compensation payable to him.

[20] The chambers judge reviewed the uncontroverted aspects of the expert evidence, and then moved to an analysis of the applicable legal principles (at paras. 31-35). She correctly instructed herself that the jurisdictional challenge was made pursuant to the provisions of the *CJPTA*, s. 11, and noted that the burden lay on Silvercorp to demonstrate that a stay based on *forum non conveniens* was justified.

[21] After setting out the applicable law, the chambers judge moved to an analysis of the *forum non conveniens* factors, as codified in *CJPTA*, s. 11. *CJPTA*, s. 11(1) allows a court, after considering the interests of the parties and the ends of justice, to decline to exercise territorial competence on the basis that there is another more appropriate forum. In reaching that decision, the court is obliged to consider the circumstances relevant to the proceeding, including the factors specifically enumerated in *CJTPA*, s. 11(2).

[22] First, she considered where the parties resided and carried on business, finding this factor to be neutral. She noted that both parties reside in British Columbia, but carried on business in China at the relevant time (at para. 36).

[23] Second, she considered where the cause of action arose and where the loss or damage occurred (at paras. 37-39). She correctly held that the elements of the tort of false imprisonment are: (1) that the plaintiff has been totally deprived of his liberty; (2) against his will, and; (3) that the imprisonment was caused by the defendant. She noted that the onus then shifts to the defendant to justify the detention. Again, the chambers judge determined that this factor was neutral. Much of the impugned conduct occurred in China; however, Mr. Huang asserted that his imprisonment was directed by Silvercorp, acting in British Columbia.

[24] Third, she turned to juridical advantage to the plaintiff in British Columbia (at paras. 40-41). She concluded that this factor strongly favoured Mr. Huang because there is no tort of false imprisonment in China, no discovery, no document discovery, and no evidence that British Columbia witnesses would be compellable in China.

[25] Fourth, the chambers judge considered the juridical disadvantage to Silvercorp in British Columbia (at paras. 42-44). She noted that Silvercorp would not be a party to the litigation in China, and faced no legal jeopardy in that regard at all. I infer, on the basis of this finding, that the chambers judge concluded on the expert evidence that the only proceeding available to Mr. Huang in China was the trial supervision proceeding. The chambers judge treated this as the parallel or equivalent Chinese proceeding for the purposes of her s. 11 analysis. I shall return to the question of the equivalency of these proceedings below.

[26] Fifth, the chambers judge considered the comparative convenience and expense for the parties and for their witnesses (at paras. 45-51). She noted that if the matter proceeded in China, it would be more convenient and less expensive for Silvercorp, since it would no longer be a party, but far less convenient for Mr. Huang, since he would have no cause of action in tort. The judge concluded that this factor weighed in favour of Mr. Huang.

[27] Sixth, the chambers judge turned to the question of the law to be applied (at paras. 52-56). Silvercorp submitted that because the imprisonment occurred in China, Chinese law would apply. Mr. Huang submitted that the tortious activity

occurred in B.C., because Silvercorp, which directed his imprisonment, was located in B.C. (at para. 53). He further submitted that the concept of the *situs* of the tort had no meaningful application, because there is no tort of false imprisonment in China, and therefore no Chinese law to apply (at para. 54). The chambers judge held there was a serious question to be tried as to what law was applicable. Correctly, in my view, she did not consider it appropriate to make a final determination as to what law applied on the contested arguments before her: see *Douez v. Facebook, Inc.*, 2015 BCCA 279 at para. 83.

[28] Seventh, the chambers judge considered the difficulty and cost of proving foreign law (at para. 57). She noted that if the matter was litigated in British Columbia, Chinese law would have to be proven. Accordingly, she found that the factor favoured Silvercorp, although not strongly. I note that the parties did not seem to face insurmountable difficulties in filling expert opinions on Chinese law for the purposes of this application.

[29] Eighth, the chambers judge considered whether permitting the British Columbia proceeding to continue could result in a multiplicity of proceedings, or inconsistent verdicts (at paras. 58-62). She concluded that this factor strongly favoured Mr. Huang. She found that staying British Columbian proceedings would require Mr. Huang to pursue his defamation claim here, and seek compensation for false imprisonment in China, inevitably resulting in a multiplicity of proceedings (at para. 59). She agreed with Mr. Huang's submission that the foundations of defamation and false imprisonment claims were closely related (at para. 60). Additionally, she held that certain issues relating to his false imprisonment would inevitably be litigated in British Columbia as part of his defamation claim, because he was advancing a claim for punitive damages (at para. 61).

[30] Ninth, the chambers judge briefly considered the question of enforceability of an eventual judgment. She drew no conclusions in respect of that factor.

[31] After noting that the fair and efficient working of the Canadian legal system was not a relevant factor, the chambers judge turned to her disposition. Having

considered the interest of the parties and the end of justice, as well as the individual factors set out in s. 11(2), she concluded that China was not clearly the more appropriate forum in which to litigate the action. She dismissed the application.

Issues

[32] Silvercorp alleges that the chambers judge erred by:

a) failing to decline jurisdiction on the grounds that Mr. Huang's action is an abuse of process;

b) failing to consider the required factors under s. 11(1) of the *CJPTA*; and

c) misapplying several factors considered under s. 11(2) of the *CJPTA*.

Standard of Review

[33] A judge's decision on the *forum non conveniens* analysis is discretionary. It is therefore entitled to deference, unless that discretion was exercised on a wrong principle or was clearly wrong: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 44; *Breeden v. Black*, 2012 SCC 19 at para. 37.

[34] The parties agree that this is the standard of review applicable to this appeal.

Analysis

[35] As noted, *CJPTA*, s. 11 governs a judge's discretion to decline to exercise territorial competence. It provides as follows:

> **Discretion as to the exercise of territorial competence**
>
> 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
>
> (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
>
> (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,

> (b) the law to be applied to issues in the proceeding,
>
> (c) the desirability of avoiding multiplicity of legal proceedings,
>
> (d) the desirability of avoiding conflicting decisions in different courts,
>
> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

Did the judge err in not declining jurisdiction on the basis of abuse of process?

[36] Silvercorp contends that Mr. Huang's false imprisonment claim is a collateral attack on his Chinese conviction, and that continuing to exercise jurisdiction does not accord with principles of international comity. It situates these submissions within a broader argument that Mr. Huang's action constitutes an abuse of process. Silvercorp says that the "ends of justice" criterion in s. 11(1) provides a statutory basis for the court to consider abuse of process on a *forum conveniens* motion. It relies on *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62 for the proposition that abuse of process can inform the s. 11 analysis. Silvercorp says that the chambers judge erred by failing to decline jurisdiction on the basis of abuse of process.

[37] First, I note that this comity/abuse of process argument was not made in the court below and was not considered by the chambers judge. This Court will consider new issues on appeal when the interests of justice require it and where the court has a sufficient evidentiary record and findings of fact to decide the issue: *Devine v. Devine*, 2012 BCCA 509 at paras. 45-46. In my view, this issue is not appropriately raised on appeal. As I will explain below, the substantive character of the argument leads me to conclude that it should be addressed at trial, and not in this appeal.

[38] Second, and perhaps more importantly, the argument overlooks the true nature of Mr. Huang's action. The fact he was tried, convicted, and imprisoned in China is the very basis of his claim. Mr. Huang says that his imprisonment and conviction were obtained corruptly at the behest of Silvercorp. To say, as Silvercorp does, that the fact he was convicted in China precludes any inquiry into whether that

conviction was the result of Silvercorp's unlawful conduct in B.C. and China, is in substance an attack on the merits of the action.

[39] Asserting abuse of process in the manner that Silvercorp does thus conflates procedural and substantive defences to Mr. Huang's claim. Proof of Mr. Huang's conviction in China may or may not be a full answer to a cause of action for false imprisonment. It may well be an important issue in this case, but it ought not to be determined on this procedural, *forum conveniens* application. It is a substantive matter for trial.

[40] Silvercorp's reliance on *Boehringer* as support for the proposition that abuse of process and comity may or ought to factor into the *forum conveniens* analysis is also misplaced. *Boehringer* involved identical class proceedings brought by the same plaintiffs through the same lawyers in two Canadian jurisdictions. The defendants applied for a stay in Saskatchewan on the basis of either abuse of process or *forum non conveniens*. At first instance, the application was analyzed through *forum non conveniens*, and it was concluded that a stay was not appropriate. This result was reversed on appeal, with the court determining that the doctrine of abuse of process was more appropriately applied. The court recognized that in most cases involving multiple jurisdictions, the *forum non conveniens* analysis would be appropriate. However, it held that where a plaintiff commences the same action in two provinces without any apparent reason, such circumstances fall within the doctrine of abuse of process.

[41] In my opinion, this case is clearly distinguishable from *Boehringer*. This appeal does not involve ongoing parallel proceedings in two jurisdictions, and the integrity of the Canadian judicial system is not threatened. I would not accede to this argument.

[42] Regardless of whether the argument was raised in chambers, the judge did not err in failing to decline jurisdiction on the basis that the action is an abuse of process. To the extent that Silvercorp seeks to defend the action on the basis of abuse of process, the argument should be addressed at trial.

Did the judge err in considering *CJPTA*, s. 11(1)?

[43] Apart from its arguments respecting abuse of process, Silvercorp submits that the chambers judge failed to consider *CJPTA*, s. 11(1). In my view, there is no merit to this assertion. As noted, *CJPTA*, s. 11(1) requires the court to consider the interests of the parties and the ends of justice. At para. 66 of her reasons, the chambers judge indicated explicitly that she had considered these requirements:

> [66] … I have concluded that Silvercorp has not established that China is the clearly more appropriate forum in the present case. Rather, on balance, the relevant considerations favour Mr. Huang continuing in his choice of forum. Having considered the interests of the parties and the ends of justice, and having regard to the factors enumerated in s. 11(2) of the *CJPTA*, I have concluded that the court of China is not a more appropriate forum to hear the proceeding. In the result, the application is dismissed. [Emphasis added.]

[44] It is apparent from this paragraph and her reasons as a whole that the chambers judge did not fail to apply s. 11(1). I would not accede to this ground of appeal.

Did the judge err in applying *CJPTA*, s. 11(2)?

[45] I now turn to Silvercorp's argument that the chambers judge misapplied s. 11(2) factors. Silvercorp alleges that the cause of action and damage or loss occurred in China, that there is no jurisdictional advantage to Mr. Huang in this jurisdiction, that comparative convenience and expense favours China, that there will be a multiplicity of proceedings and potentially conflicting decisions if this proceeding is not stayed, and that Mr. Huang could enforce a claim for compensation against the Chinese government.

[46] In my view, Silvercorp's submissions are answered by a broader consideration of the conceptual framework within which s. 11 operates. Section 11 contemplates an existing or similar proceeding, including the main elements of the claim, being continued in another more convenient jurisdiction. It is apparent from the chambers judge's findings of fact, the pleadings, the filed affidavits, and the expert opinions, that if Mr. Huang's false imprisonment claim does not proceed in British Columbia, it will not proceed at all.

[47] Both parties agreed on the main points of the expert opinions on foreign law, summarized by the chambers judge as follows (at para. 30):

> (a) There has been tort law in China since 2010 with the passage of a statute *(Tort law of the People's Republic of China: Adopted at the 12th session of the Standing Committee of the Eleventh National People's Congress on December 26, 2009, Effective as of July 1, 2010).* The statute enabled individuals to sue each other for torts identified in the statute.
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> (b) There is, however, no tort of false imprisonment in China.
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> (c) There are no jury trials in China for the adjudication of civil torts. No depositions are available.
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> (d) Mr. Huang could claim compensation pursuant to Article 17(3) of the PRC State Compensation Law which provides for compensation for loss incurred resulting from a sentence carried out under an original judgment where the original sentence was fully executed, and the individual is declared innocent during a trial supervision proceeding.
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> (e) Mr. Huang could commence proceedings in China for a trial supervision proceeding by appointing a representative to act on his behalf.
>
> (f) It is unlikely that a court in British Columbia would receive assistance in China to collect evidence for use in the British Columbia proceedings.
>
> [Emphasis added.]

[48] There is no private law tort equivalent proceeding available in China. The only proceeding available is an application for compensation made to the government of China for its wrongful imprisonment of Mr. Huang. This claim can only be pursued if Mr. Huang is declared innocent in a trial supervision proceeding. Silvercorp would not be a party to such a proceeding, nor is it clear that Silvercorp would be compellable in such a proceeding. As a result, Silvercorp's application is effectively a motion to strike Mr. Huang's pleading in this jurisdiction.

[49] In my view, the fact that Mr. Huang's claim (or a reasonably similar one) could not be pursued in China is determinative of this appeal. I see no error in the chambers judge's determination that there was a clear juridical advantage to proceeding in British Columbia. Other obvious and compelling factors are that both parties are in British Columbia; Mr. Huang is legally prohibited from entering China to participate at all in his own proceeding; and that the defamation aspect of the

same claim is proceeding in British Columbia and is not the subject of a jurisdictional challenge.

[50] After considering all of the relevant factors, the chambers judge determined that China was not clearly a more appropriate forum. In my view, the chambers judge made no error in the exercise of her discretion. Silvercorp has not shown that it was based on a wrong principle or clearly incorrect. I would dismiss this ground of appeal.

Disposition

[51] I would dismiss the appeal.

"The Honourable Madam Justice Garson"

I agree:

"The Honourable Mr. Justice Lowry"

I agree:

"The Honourable Madam Justice Fenlon"