IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Huang v. Silvercorp Metals Inc.,*
2016 BCSC 278

Date: 20160204
Docket: S146424
Registry: Vancouver

2016 BCSC 278 (CanLII)

Between:

Kun Huang

Plaintiff

And

Silvercorp Metals Inc.

Defendant

Before: The Honourable Madam Justice Warren

Oral Ruling on Defendant's Application to Strike and Plaintiff's Application for Documents

In Chambers

Counsel for the Plaintiff:	Howard A. Mickelson, Q.C. Lorne M.A. Kotler
Counsel for the Defendant:	Tom A. Hakemi Nathan J. Muirhead
Place and Date of Hearing:	Vancouver, B.C. January 28-29, 2016
Place and Date of Ruling:	Vancouver, B.C. February 4, 2016

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Introduction

[1] The plaintiff, Mr. Huang, seeks damages, including punitive damages, for false imprisonment and defamation. He alleges the defendant, Silvercorp Metals Inc. ("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, Henan Found Mining Co. ("Henan"). He also alleges that Silvercorp defamed him in material posted on the internet, which, in general terms, claimed that he had profited by taking short positions in Silvercorp's stock and then publishing false and deceptive statements about Silvercorp in order to drive down the price of the stock. The action is scheduled to be tried before a jury for 40 days commencing in late January 2017.

[2] Each of the parties has an application before the court. Silvercorp applies to strike the portion of the Notice of Civil Claim containing the false imprisonment allegations as disclosing no reasonable claim pursuant to Rule 9-5(1)(a) of the *Supreme Court Civil Rules*, or as an abuse of process pursuant to Rule 9-5(1)(d); to strike some of the defamation allegations as disclosing no reasonable claim pursuant to Rule 9-5(1)(a); to strike particular excerpts from the Notice of Civil Claim as unnecessary rhetorical flourishes pursuant to Rule 9-5(1)(b); and for further and better particulars pursuant to Rule 3-7.

[3] In its Notice of Application, Silvercorp asserted several bases for its application to strike, including that some of the claims were time-barred. In the course of responding to the application, Mr. Huang delivered a proposed amended Notice of Civil Claim that added allegations intended to meet the limitations defence. With one exception that I will address later, Silvercorp has consented to the proposed amendments and no longer relies on a limitation defence on this application. I have considered Silvercorp's applications as if the proposed amendments had already been made, except for the one proposed amendment to which Silvercorp objects.

[4] Mr. Huang originally sought an order compelling Silvercorp to produce documents that are or have been in the possession of Henan. However, during the hearing, his counsel conceded that the evidence before me does not establish that documents in the possession of Henan are within Silvercorp's power or control within the meaning of those words in Rule 7-1. Accordingly, Mr. Huang instead seeks an order that Silvercorp take all reasonable steps necessary to obtain the documents from Henan and list those obtained, and, if Silvercorp does not obtain the documents from Henan, that a representative of Silvercorp provide an affidavit describing the efforts made to obtain them and the reasons why they have not been obtained.

[5] This is hard-fought, bitter litigation. There has already been much procedural wrangling. Among other things, the defendant has already applied for an order that the court decline jurisdiction in respect of the false imprisonment claim on the basis that China is a more appropriate forum. Madam Justice Ross dismissed that application with reasons indexed as *Huang v. Silvercorp Metals Inc*., 2015 BCSC 549. I am advised that her decision is under appeal.

[6] Although Silvercorp has served a list of documents, it has vigorously resisted full document production apparently on the basis that it should not be required to comply with its discovery obligations prior to the hearing of its application to strike. That notion has been rejected by Master Baker, who granted an order on January 12, 2016 requiring the defendant to serve an amended list of documents by January 26, 2016 and to include documents in its possession evidencing communications between it and Henan, or between either of them and public officials in China, with respect to the investigation, arrest, incarceration and prosecution of Mr. Huang. The defendant then applied for an order staying that order, which was dismissed by Mr. Justice Sewell on January 26, 2016.

[7] It is apparent that Silvercorp did not depose, either before Master Baker or Mr. Justice Sewell, that it does not have any such documents. As both Master Baker and Mr. Justice Sewell pointed out, if there were no such documents, simply saying so would have been an easy and expeditious manner of dealing with the

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demand. Nevertheless, following the dismissal of the stay application by Mr. Justice Sewell, Silvercorp claimed privilege over many of the documents that apparently fall within Master Baker's order. It produced an amended list of documents that listed only two new documents in part 1 and many new documents in part 4. It almost goes without saying that, if virtually all the documents falling within the order of Master Baker were privileged, simply saying so would have been a much more direct manner of dealing with the demand.

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[8] I mention this history because it illustrates the difference between the parties that underlies Silvercorp's application to strike. They fundamentally disagree about the detail and precision with which a plaintiff must plead his case before acquiring discovery opportunities, which may provide him with the evidence required to prove his case out of the mouth of the defendant. This tension often arises in cases that, by their very nature, are founded upon facts that are largely within the knowledge of the defendant and not the plaintiff.

Background

[9] Silvercorp is a Vancouver-based public company with mining interests in China. It owns 77.5% of Henan. The remaining 22.5% of Henan is owned by the Chinese government. Silvercorp, apparently through Henan, has a mine close to the city of Luoyang, which is located in Henan province in central China.

[10] Mr. Huang is a Canadian who was employed as a researcher by EOS Holdings, a hedge fund controlled by John Carnes, who is or was a resident of British Columbia. Mr. Carnes and EOS 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 reports critical of Silvercorp that were published on the Alfred Little website in September 2011.

[11] Following publication of the 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 dismissed in August 2012 on a preliminary motion to dismiss on the basis that the statements complained of were protected opinions that are not actionable under New York law. Silvercorp abandoned its appeal of that decision in 2013. 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.

[12] Mr. Huang alleges that Silvercorp identified those behind the Alfred Little reports and 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 effectively enlist the PSB as Silvercorp's agent to falsely imprison him and to knowingly bring baseless criminal charges against him in China. It is these allegations that form the basis of this action.

[13] 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 and encouragement of Silvercorp. He says he was placed into the custody of the Luoyang PSB three days later and driven approximately 800 km from Beijing to Luoyang where he was confined to a local inn 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.

[14] In July 2012, the *New York Times* published an article in which Mr. Carnes criticized Silvercorp's response to the Alfred Little reports and referred to the police in Luoyang having arrested and terrorized his researchers. Mr. Huang alleges that in retaliation for that article, Silvercorp caused Mr. Huang to be removed from house

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arrest and placed into the Luoyang jail where he remained for approximately two years.

[15] 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.

[16] 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 found "no proof that, during the process of investigating the case" the PSB received financial assistance from Henan, and ultimately 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.

[17] In late 2014, the British Columbia Securities Commission held a hearing into allegations that, in publishing the Alfred Little reports, Mr. Carnes 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. The Securities Commission issued its decision on May 14, 2015, dismissing the proceeding. Although it found that Mr. Carnes had not contravened the *Securities Act*, the Securities Commission was expressly critical of Mr. Carnes' conduct.

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The defendant's application to strike

General principles

[18] An application to strike under Rule 9-5(1) is "an attack on the pleadings on the basis that the action or defence, as pleaded, cannot succeed as a matter of law" and is "concerned only with the sufficiency of the pleadings": *International Taoist Church of Canada v. Ching Chung Taoist Association of Hong Kong Limited*, 2011 BCCA 149 at paras. 9 and 10.

[19] The test on an application to strike a plaintiff's pleading is well known. The burden is on the defendant to establish that it is plain and obvious that the action is certain to fail because the pleading contains a radical defect: *Hunt v. Carey Canada Inc.*, [1990] 2 S.C.R. 959 at 980.

[20] The defendant relies on subparagraphs (a), (b) and (d) of Rule 9-5(1). The "plain and obvious" standard applies to all branches of Rule 9-5, but different evidentiary rules apply. For the purpose of an application to strike under subparagraph (a) on the basis that the pleading discloses no reasonable claim, no evidence is admissible and the facts asserted in the Notice of Civil Claim must be taken as proven: *International Taoist Church* at para. 21. While evidence is admissible on applications grounded upon subparagraphs (b) and (d), it is only admissible for the purpose of showing whether it is plain and obvious that the claim ought to be struck as unnecessary, scandalous, frivolous or vexatious under subparagraph (b), or an abuse of process under subparagraph (d).

The false imprisonment claim

[21] Mr. Huang's claim against Silvercorp for false imprisonment is summarized at paragraph 6 of the proposed amended Notice of Civil Claim as follows:

> … 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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[22] The proposed amended Notice of Civil Claim contains some particulars of Silvercorp's involvement. These include allegations that:

- In the days and months following publication of the Alfred Little report, Silvercorp directed and encouraged "local Chinese investigations into Alfredlittle, with a particular focus on its researchers working in China"; "funded these foreign investigations and in particular engaged the local Luoyang PSB, effectively as Silvercorp's agent"; and, "provided on-the-ground support and direction to the PSB's investigations and interrogations" (para. 19);

- Prior to his initial detention on December 28, 2011, Silvercorp directed the PSB to flag Mr. Huang's passport (para. 20);

- Silvercorp paid for the rental car in which Mr. Huang was driven to Luoyang following his initial detention at the Beijing airport (para. 24);

- Silvercorp provided questions and direction to the PSB that the PSB then used in conducting its interrogation of Mr. Huang and focused the interrogation on obtaining information that could be used by Silvercorp for its own purposes including in connection with its defamation action in New York, rather than on obtaining information to support criminal prosecution (paras. 26-27);

- Silvercorp directed the PSB to obtain passcodes to access Mr. Huang's email and trading accounts for Silvercorp's own purposes (para. 28) and used information obtained to seek document production in support of the defamation claim (para. 30);

- Silvercorp gained possession of Mr. Huang's computers or data electronic data for Silvercorp's benefit (para. 29);

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- Silvercorp paid expenses incurred by the PSB in the course of their investigation of Mr. Huang during the period in which he remained under house arrest (para. 32);

- Silvercorp caused Mr. Huang to be removed from house arrest and placed in jail in retaliation for the July 2012 *New York Times* article (para. 34);

- Silvercorp directed and encouraged the laying of charges against and orchestrating the prosecution of Mr. Huang (para. 37 and 38).

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[23] Silvercorp submits that the false imprisonment claim should be struck for the following three reasons:

1. the facts as pleaded by Mr. Huang establish that he was detained as a result of an independent state action and as such this aspect of his pleading should be struck under Rule 9-5(1)(a) as disclosing no reasonable claim;

2. the claim is barred by the doctrine of *ex turpi causa* because the imprisonment was in accordance with a sentence following a criminal conviction and as such this aspect of the pleading should be struck under Rule 9-5(1)(a); and

3. the claim is an abuse of process because it is a collateral attack on the criminal conviction by the Chinese trial court and the dismissal of the appeal from that conviction by the Chinese appellate court and as such this aspect of the pleading should be struck under Rule 9-5(1)(d).

[24] Before addressing each of these submissions, it is helpful for context to set out the elements of the tort of false imprisonment. As Madam Justice Ross noted at para. 37 of her reasons dismissing the defendant's jurisdiction application, those elements are: first, the plaintiff has been totally deprived of liberty; second, the deprivation was against his will; and third, it was caused by the defendant. The onus then shifts to the defendant to justify the detention. In this case, it is not disputed

that Mr. Huang was totally deprived of his liberty, against his will. The question to be determined at trial is whether that was caused by Silvercorp and, if so, whether the detention was nevertheless lawful.

Independent state action

[25] When a claim of false imprisonment is brought against a private party based on an allegation that the private party caused the plaintiff to be detained by police or some other state authority, the question arises as to whether the private party went beyond filing a complaint, which the police or other authority acted upon as they thought fit. If not, a claim for malicious prosecution may lie against the police provided all the elements of that tort are established, but no claim for false imprisonment may be maintained against the private party because the detention was caused by independent state action. However, where the private party's conduct goes beyond lodging a complaint with the police and extends to directing the police to detain the plaintiff then a claim for false imprisonment may be made out against the private party: *Hanisch v. Canada*, 2004 BCCA 539; *Roberts v. Buster's Auto Towing Service Ltd. et al.* (1976), 70 D.L.R. (3d) 716 (B.C.S.C.); and *Robitaille v. Mason and Young* (1903), 9 B.C.R. 499.

[26] Silvercorp emphasizes that on its face the Notice of Civil Claim alleges that Mr. Huang's passport was flagged by the PSB, he was initially detained as a result by the airport authorities, and that he was then picked up by the PSB and driven to Luoyang. In these circumstances, Silvercorp submits it is plain and obvious from the plaintiff's own pleadings that the plaintiff was detained as a result of the independent and considered decision of the Chinese authorities. As such, Silvercorp says the Notice of Civil Claim discloses no reasonable claim in false imprisonment and the portions of it raising the false imprisonment claim ought to be struck under Rule 9-5(1)(a).

[27] In my view, this submission ignores the substance of this aspect of the pleading, which, as outlined above, expressly alleges that Silvercorp was involved in directing the PSB. Specifically, it is alleged in the Notice of Civil Claim that

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Mr. Huang was detained against his will and that the detention was caused, not by independent state action, but rather by Silvercorp exerting its influence over the local PSB. It is apparent from the authorities just referred to that the involvement of the police is not enough to insulate a private party from a claim of false imprisonment if the private party's conduct is properly characterized as directing, procuring or encouraging the police to act to an extent that the police conduct is not properly viewed as independent.

[28] Silvercorp submits that in the cases where a private party has been found liable for false imprisonment in circumstances where the police were involved, the private party was present at the time of the detention. Silvercorp emphasizes that there is no allegation that any representative of Silvercorp was present at the airport when Mr. Huang was initially detained. However, I was provided with no authority that holds that the private party must be present at the time of the detention. The gravamen of the tort is the causing of the detention and it is not plain and obvious that it is necessary for the defendant to be physically present at the detention in order to be found to have caused it.

[29] Silvercorp also submitted that Mr. Huang has failed to plead any material facts to support the bare legal conclusion that the PSB acted as Silvercorp's agent. In my view, that is an inaccurate characterization of the pleadings, which, as already summarized, do contain particulars of Silvercorp's involvement.

[30] It may be that Mr. Huang will not ultimately be able to establish that Silvercorp caused his detention by encouraging and directing the PSB but that is a question to be determined following a trial. At this stage, all that may be determined is whether the pleadings adequately allege that Silvercorp's involvement in the detention crossed the line and amounted to improper direction. They clearly do. This aspect of Silvercorp's application is therefore dismissed.

Ex turpi causa

[31] The doctrine of *ex turpi causa* prevents a plaintiff from pursuing a legal remedy for damage that arises in connection with his own illegal act. Silvercorp

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submits that this doctrine applies such that Mr. Huang may only pursue compensation for his imprisonment in China if the Chinese court concludes that his conviction was wrongful. There is no allegation in the Notice of Civil Claim to the effect that any Chinese court has found the conviction wrongful. Accordingly, Silvercorp submits that the Notice of Civil Claim discloses no reasonable claim for false imprisonment and the portions raising the false imprisonment claim ought to be struck under Rule 9-5(1)(a).

[32] I was provided with no authority to support the proposition that the *ex turpi causa* doctrine may be applied to prohibit a plaintiff from seeking compensation in British Columbia as a result of a detention in a foreign jurisdiction or, if it may be so applied, that it will be enough to preclude a plaintiff from seeking compensation in British Columbia if the damage arose in connection with conduct that is illegal under foreign law, irrespective of whether it is unlawful under domestic law.

[33] Further, it appears from the face of the translation of the Chinese appellate decision that the receipt by the PSB of financial assistance from Henan during the course of the PSB's investigation could render the evidence thereby obtained inadmissible under Chinese law. Thus, there is at least some prospect that the receipt of such assistance would render the detention unlawful even under Chinese law. I am aware that the Chinese courts were not persuaded that such assistance had in fact been received by the PSB, but whether that question can be considered afresh in British Columbia is an issue I will address in a moment in connection with the defendant's abuse of process argument.

[34] Madam Justice Ross has already found that there is a serious question to be tried as to which law, Chinese or British Columbian, is to be applied in deciding the false imprisonment claim, and that it is inappropriate to decide that question on a preliminary motion (paras. 52-56). Equally, there is a serious question to be tried as to whether the *ex turpi causa* doctrine applies to prohibit a plaintiff from obtaining compensation in British Columbia as a result of a detention in a foreign jurisdiction that has been found by the courts of that jurisdiction to be lawful under the law of the

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foreign jurisdiction. I am not persuaded that it is plain and obvious that the false imprisonment claim will fail as a result of the application of the *ex turpi causa* doctrine. This aspect of Silvercorp's application is therefore dismissed.

Abuse of process

[35] Silvercorp submits that the false imprisonment claim is a collateral attack on the decisions of the Chinese courts and as such that aspect of the Notice of Civil Claim ought to be struck, under Rule 9-5(1)(d), as an abuse of process. Specifically, Silvercorp submits that Mr. Huang seeks to re-litigate the question of whether Silvercorp, through Henan, improperly interfered with his arrest and conviction in China. Silvercorp says that allegation was rejected by the courts in China and the doctrine of collateral attack prevents Mr. Huang from re-litigating it in British Columbia.

[36] The rule against collateral attack is properly viewed as a particular application of the broader doctrine of abuse of process: *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 22. The collateral attack rule has been described as follows: "a judicial order pronounced by a court of competent jurisdiction should not be brought into question in subsequent proceedings except those provided by law for the express purpose of attacking it" (para. 33 citing *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 20, [emphasis added in *C.U.P.E.*]). It applies to an attack on the judgment itself and not to the findings of fact underpinning the judgment: *C.U.P.E.* at para. 34.

[37] Mr. Huang does not allege that he was not subject to the jurisdiction of the Chinese courts, or that his trial or appeal were not carried out in accordance with Chinese law. He does not, in other words, attack the Chinese conviction itself. Rather, he seeks to re-litigate some of the factual matters on which the Chinese courts have pronounced. As such, the doctrine of collateral attack has no application.

[38] That, however, does not end the matter because the broader doctrine of abuse of process as articulated in *C.U.P.E.* may nevertheless apply. In *C.U.P.E.*,

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the Supreme Court of Canada explained that the doctrine of abuse of process is flexible and used in a variety of contexts where proceedings are unfair or violate the principles of justice underlying the community's sense of fair play or decency (paras. 35 and 37). In that case, the Court held that it would be an abuse of process to permit the re-litigation, in a Canadian labour arbitration, of the central facts underlying a previous criminal conviction in a Canadian court, because permitting the re-litigation of those facts, in those circumstances, would undermine the integrity of the justice system by offending the principle of finality and giving rise to the risk of inconsistent results.

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[39] The specific question to be addressed in deciding this aspect of Silvercorp's application is whether Silvercorp has established that it is plain and obvious that what I will refer to as the *C.U.P.E.* abuse of process doctrine applies to Mr. Huang's false imprisonment claim. For the following reasons I have concluded that Silvercorp has not.

[40] First, it is not plain and obvious that the doctrine has any application in connection with the decisions of foreign courts.

[41] I was provided with no authority to support the proposition that the doctrine applies to prevent the re-litigation in Canada of issues decided in Chinese courts. On this specific question, Silvercorp referred only to *Walker v. Bank of New York Inc.* (1993), 15 O.R. (3d) 596 (Gen. Div.), rev'd on other grounds (1994) 16 O.R. (3d) 504 (C.A.), leave to appeal ref'd [1994] SCCA No. 127, a decision of the Ontario Court General Division. In that case, the plaintiff, who had been convicted of a criminal offence in a New York court, sought to sue in Ontario for conspiracy, unlawful imprisonment, fraud and misrepresentation, among other things, claiming that the defendants implicated him in a fictitious unlawful arms deal and enticed him into the United States where he was arrested and then convicted of violations of certain arms control legislation.

[42] In my view, the *Walker* case does not assist Silvercorp. The specific excerpts relied upon by Silvercorp relate only to whether the foreign court, in that case the

New York court, was a court of competent jurisdiction as that phrase is used in connection with the collateral attack doctrine. The case, which was decided a decade before *C.U.P.E.*, says nothing about the extra jurisdictional application of the broader abuse of process doctrine. Further, the comments about the New York court being a court of competent jurisdiction for purposes of the collateral attack doctrine were *obiter dicta*.

[43] Mr. Huang submits that the doctrine of abuse of process articulated in *C.U.P.E.* applies to protect the administration of justice in Canada, not China. However, the Court in *C.U.P.E.* did not expressly limit the application of the doctrine to findings of fact made by a domestic court. Nevertheless, the policy grounds supporting the doctrine, which are directed at upholding the integrity of the justice system (paras. 38 and 51), are engaged with significantly more force where the previous proceeding is a domestic one. In the circumstances, I am not persuaded that it is plain and obvious that the doctrine applies to prevent the re-litigation of foreign findings of fact.

[44] Second, even if the doctrine could apply in connection with a foreign judgment, its application is discretionary and, in my view, it is not plain and obvious that the discretion would be exercised in Silvercorp's favour.

[45] The Court, in *C.U.P.E.*, emphasized that the doctrine ought not to be applied where it would operate in an unjust or unfair way (paras. 52 and 53). The Court emphasized that there may be instances where re-litigation will enhance rather than impeach the integrity of the justice system and gave the following as examples at para. 52:

- when the first proceeding is tainted by fraud or dishonesty;
- when fresh, new evidence, previously unavailable, conclusively impeaches the original results; or
- when fairness dictates that the original results should not be binding in the new context.

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[46] In my view, these are examples only and not an exhaustive list. From a reading of the decision as a whole, it is clear that the question is whether the administration of justice would be better served by preventing or permitting the second proceeding to go forward. For example, fairness may dictate that the original findings should not be binding where the subsequent action affords procedural opportunities unavailable in the first that could result in a different outcome. In such a case, fairness may dictate that the original results should not be binding.

[47] In the proposed amended Notice of Civil Claim, it is alleged that the Chinese proceedings were unfair and suffered from numerous legal defects including insufficient pretrial disclosure and no right to cross-examine witnesses including the police officers who testified. Mr. Huang has filed no evidence to support those assertions but Silvercorp, who bears the burden on this application, has not established that the Chinese proceedings were fair.

[48] Silvercorp relies on the English translation of the judgments of the Chinese trial and appellate courts, but those translations, on their own, disclose little of the actual nature of the process and, in some respects, give rise to more questions than answers in that regard. For example, it appears from those translations that some of the witness testimony was admitted by way of written statements. This is apparent from the fact that only some of the witnesses are expressly identified as having appeared in court. However, the testimony of the witnesses that appears to have been admitted by way of statement is referred to as having been "presented and cross examined" (see Chinese trial decision page 12). It remains unanswered how testimony presented by way of statement could have been subject to cross-examination. This gives rise to questions concerning what is really meant by cross-examination in the translation. Further, there is no evidence that indicates Mr. Huang had the benefit of any pretrial disclosure in China. Certainly, there is nothing to indicate that he had access to the kind of discovery opportunities available to him in a tort action of British Columbia. This is particularly relevant in

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this case, which, as I have already mentioned, is the kind of case that is likely to turn on evidence obtained from the defendant.

[49] On the evidence before me, I am unable to make any findings concerning the fairness of the Chinese process to which Mr. Huang was subjected. The fairness of that process is certainly not something about which I could take judicial notice. In the absence of evidence demonstrating that it was fair and in the absence of evidence demonstrating that Mr. Huang had access to the kind of discovery opportunities available here, it is not plain and obvious that the *C.U.P.E.* abuse of process doctrine ought to be applied. Put another way, it is not plain and obvious that the doctrine would not operate, in this case, in an unjust or unfair way.

[50] For these reasons, Silvercorp's application to strike the portions of the Notice of Civil Claim containing the false imprisonment allegations is dismissed.

The defamation claim

[51] Mr. Huang alleges that Silvercorp defamed him in material posted on the internet that claimed he had profited by taking short positions in Silvercorp's stock and then publishing false and deceptive statements about Silvercorp in order to drive down the price of the stock. Mr. Huang pleads four specific publications by Silvercorp that he says were defamatory. The third and fourth of these refer expressly to Mr. Huang. The first and second, referred to in paragraphs 46 and 47 of the Notice of Civil Claim, do not.

[52] Silvercorp submits that paragraphs 46 and 47 of the Notice of Civil Claim ought to be struck pursuant to Rule 9-5(1)(a) as disclosing no reasonable claim because the words Mr. Huang complains of in those paragraphs do not clearly identify him.

[53] It is trite law that an action for defamation is a personal action based upon injury to one's own reputation and that as a result it is necessary for a plaintiff to prove that an allegedly defamatory publication refers to him in particular. However, this does not mean that an individual cannot be defamed by a statement that does

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not refer to him by name. The question is whether the plaintiff establishes that he was a specific target of the statements.

[54] The distinction between allegedly defamatory words reflecting on a class of persons generally and allegedly defamatory words reflecting on a group of persons that specifically includes a plaintiff but does not mention him by name was discussed by the Ontario Court of Appeal in *Bai v. Sing Tao Daily Ltd*. (2003), 226 D.L.R. (4th) 477, 171 O.A.C. 385 (C.A.), leave to appeal ref'd [2003] SCCA No. 354. As emphasized in that case, the crucial question is whether, on their true construction, the defamatory words were "published of and concerning the plaintiff" (para. 13). This depends on whether the context would lead one to believe that the plaintiff is the target of the words.

[55] The statement referred to in paragraph 46 of the Notice of Civil Claim is alleged to have been initially published on September 19, 2011. It refers to "nefarious short sellers utilizing the internet", to the "IFRA's Dino Huang", and to "Anonymous Shorters and Alfred Little". The statement referred to in paragraph 47 refers to Silvercorp having been "attacked by a group of well-organized and well-planned illegal short sellers". The attack was said to have occurred "in September". That statement was initially published on October 13, 2011.

[56] The Notice of Civil Claim, in paragraph 49, alleges that Mr. Huang was identified both directly and by Silvercorp's disclosure of those involved with the Alfred Little report. The latter two publications, which are not the subject of the application to strike, identify Mr. Huang by name. Earlier in the Notice of Civil Claim, the relationship between Mr. Huang and Alfred Little is pleaded as is the publication of the Alfred Little reports in September 2011. Finally, the Notice of Civil Claim also alleges that all of the allegedly defamatory publications were released on the internet and were continuously available online as of the date of filing the claim.

[57] In these circumstances, I am satisfied that the pleading adequately alleges that the publications in paragraphs 46 and 47 would, in context, be understood as having been published of and concerning the plaintiff. Among other things, the

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statements in question expressly mention Alfred Little and they are alleged to have been continuously available online, after other publications identified Mr. Huang as being involved with Alfred Little. This is not to say that the trier of fact would, following a trial, conclude that Mr. Huang was the specific target of the words but that is not the test at this stage. It is not plain and obvious that the publications referred to in paragraphs 46 and 47, when considered in context, do not specifically target Mr. Huang. This aspect of Silvercorp's application is dismissed.

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The allegedly unnecessary rhetorical flourishes

[58] Silvercorp submits that the Notice of Civil Claim is prolix with rhetorical flourishes and allegations unrelated to the legal issues that could prejudice the jury. It seeks to strike approximately 20 specific excerpts from the Notice of Civil Claim pursuant to Rule 9-5(1)(b) as unnecessary or vexatious.

[59] In *Carr v. Cheng*, 2007 BCSC 997, Mr. Justice Smith summarized the meaning of the words "unnecessary, scandalous, frivolous or vexatious" in what is now subparagraph (b) in Rule 9-5(1). It is apparent from his summary that something more than superfluous must be established. That 'something more' includes pleadings that are so confusing that it is difficult to understand what is being pleaded, so irrelevant that they will involve the parties in useless expense, or otherwise materially prejudicial in some other manner (para. 19).

[60] In this case, the prejudice identified by Silvercorp is the prospect that the rhetoric could influence the jury. The parties disagree as to whether the jury would even see the pleadings. I am not persuaded that the potential of prejudice to the jury is a sufficient basis to strike pleadings at this early stage. What the jury should or should not see is a matter that can be dealt with by the trial judge, at the commencement of the trial, in the absence of the jury. At this stage, the question is whether the pleadings are so confusing that it is difficult to understand the allegations, so irrelevant that they will involve the parties in useless expense, or otherwise materially prejudicial. In considering that question, I am mindful that the

Court of Appeal has made clear that pleadings are to be read generously and as a whole: *Lee Estate v. G.Y. Lee & Associates Ltd.*, 2014 BCCA 400 at para. 14.

[61] Having applied that standard to the proposed proposed amended Notice of Civil Claim, I am not persuaded that any of the pleadings should be struck. Certainly, they could have been more carefully drafted and there are some excerpts that, considered on their own, appear superfluous. For example, the statement in paragraph 35 that the authors of the September 2012 *Globe* article were nominated for a newspaper award is gratuitous, but it does not reach the fairly high threshold established in the case law for striking pleadings as unnecessary under Rule 9-5(1)(b). Having read the proposed amended Notice of Civil Claim generously and as a whole, I have no difficulty understanding the claim.

[62] Further, in an action of this kind, particularly given the claim for punitive damages, it is appropriate for the plaintiff to plead matters of narrative or context in order to establish that Silvercorp engaged in a pattern of conduct that, when considered in the context of all the relevant circumstances, was oppressive or high-handed. In my view, the objected to excerpts in paragraphs 3, 10, 13, 14, 15, 16, 19, 28, 29, 30, 33, 35 and 36 go to providing that narrative or context, and some of those excerpts are particularly material to the punitive damages claim.

[63] Several of the objected to excerpts are actually particulars of the allegation that Silvercorp directed and encouraged the PSB to detain Mr. Huang. These include the objected to excerpts in paragraphs 2, 22, 26, 28, 29, 30, 33, 35 and 36. Silvercorp's objection to those excerpts is puzzling given that it is seeking further particulars of its alleged involvement in the detention.

[64] I do not intend to engage in what Mr. Huang's counsel referred to as a redline exercise of parsing the pleadings. However, I will address some of the specific objections.

[65] In paragraph 2 of the proposed amended Notice of Civil Claim, the relationship between Silvercorp and Henan is pleaded, and it is alleged that at all

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material times Henan acted under the direction and control of Silvercorp. Although Henan is not specifically referred to later in the Notice of Civil Claim, its relationship to Silvercorp underlies several of the particulars the plaintiff has already provided in response to the defendant's demand for same. For example, the plaintiff's response to the Demand for Particulars refers to PSB expenses, including for hotels and rental cars, having been paid for by Silvercorp or its "subsidiaries". Henan is specifically mentioned in this regard.

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[66] Silvercorp objects to certain portions of paragraph 48 of the Notice of Civil Claim where it is alleged that Silvercorp's then CEO, Mr. Feng, made defamatory statements about Mr. Huang in an interview with Canadian journalists. Portions of the resulting newspaper article are set out, which are alleged to contain the defamatory statements. Silvercorp objects to two passages, the first on the basis that it is not a statement by Mr. Feng and the second on the basis that it is not potentially defamatory. I disagree with both characterizations. The first objected to portion states that in an interview with the *Globe and Mail*, Mr. Feng attacked Mr. Huang's credibility. Even if that, strictly speaking, is not a specific statement made by Mr. Feng, it provides context for the next portion, which is not objected to. The second objected to portion, which mentions Mr. Feng having referred to "these ... bad people" being Mr. Feng's "enemy" and to Mr. Feng having been "raped", particularly when read in the context of the previous excerpts, are, in my view, potentially defamatory.

[67] Silvercorp objects to three particular passages in the Notice of Civil Claim on the basis that they offend Rule 3-7(2), which requires a party to state the effect of any document or the purport of any conversation referred to in a pleading but not to state the precise words of the document or conversation except in so far as the words themselves are material. In my view, the words in the three particular passages identified, are themselves material. Specifically, the words attributed to Silvercorp's then CEO Mr. Feng in paragraphs 16 and 19 of the Notice of Civil Claim are material to the punitive damages claim. The words of the *New York Times* article set out in paragraph 33 are, in my view, necessary to understand the

subsequent allegation that Silvercorp reacted to the article by causing Mr. Huang to be removed from house arrest and placed into custody in the Luoyang jail.

[68] Again, the Notice of Civil Claim could have been more carefully drafted. However, when read generously and as a whole, the pleading is not confusing. I am not persuaded that it will involve the parties in any unnecessary expense. I am not been persuaded that it will result in prejudice to Silvercorp that justifies an order striking portions of it. This aspect of Silvercorp's application is dismissed.

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The defendant's application for particulars

[69] Silvercorp served a Demand for Particulars in September 2015, which was responded to in a letter from Mr. Huang's counsel approximately 10 days later. However, Silvercorp maintains that the response was inadequate and, in addition, complains that the response ought not to be embedded in a letter from counsel that addresses other matters.

[70] Silvercorp has focused on:

- items five and six in its demand for particulars, which relate to paragraphs 16 and 18 of the Notice of Civil Claim in which it is alleged that Silvercorp engaged in an aggressive counteroffensive to silence its critics in response to the publication of the Alfred Little reports; and
- items 8(b) and (g) in its demand for particulars, which relate to paragraph 19 of the Notice of Civil Claim in which it is alleged that Silvercorp directed the PSB investigation.

[71] In *Tour-Mate Technologies Corp. v. Syntronix Systems Ltd.*, [1993] B.C.J. No. 599 (S.C.), Mr. Justice Brenner commented on the tension between a plaintiff who seeks to prove his case with evidence obtained through discovery of the defendant and a defendant who resists being subject to a fishing expedition. He said:

> 13. In Proconic Electronics Limited and Far East United Electronics Ltd. v Wong et al (1985) 67 B.C.L.R. 237 Southin J. (as she then was) considered an application to strike a plea of breach of fiduciary duty. At p. 239 the court

> set out the competing interests of the plaintiffs who hoped to identify particulars of the breach alleged at discovery with those of the defendant who did not want to be subjected to a "fishing expedition". In Proconic the plaintiffs were unable to give any particulars and they filed no direct affidavit evidence.
>
> 14. At p. 241 Southin J concluded that "a plaintiff who makes serious allegations of misconduct against someone who stands in a fiduciary relationship to him and who says he cannot give any particulars of those allegations must adduce some evidence even if very little in order to require a defendant to answer. Defendants are not to be called upon to answer a bald allegation of breach of fiduciary duty of which there is no evidence and of which no particulars are given." (emphasis added).
>
> 15. In my view this test is equally applicable in a case involving allegations of conspiracy. Have the plaintiffs met this "even if very little" test in their pleadings and in the material filed on this motion?
>
> 16. The defendants say that the allegations do not specify when the agreement took place, whether the agreement was oral or in writing, what occasions serve as material facts supporting the allegation of an agreement among the defendants nor indeed do they even allege what specifically was agreed upon by the defendants. Although the defendants concede that the plaintiffs have alleged six "overt acts", they say these allegations do not constitute overt acts in the sense of material facts and are completely lacking of any particulars in the sense of clarity or precision as to who carried out those acts, when they were committed, or who was threatened.
>
> 17. In my view, the defendants seek to hold the plaintiffs to a higher standard of particularity than is required at this stage of the proceeding. Unlike Proconic the plaintiffs in this case have met the standard which should be imposed on a party prior to discovery. The plaintiff has alleged the conspiracy, a number of overt acts in furtherance of the conspiracy and damages flowing as a result. While the defendants may well be entitled to the particulars sought after discovery and prior to the trial, at this stage, the plaintiffs' pleadings and the affidavit material filed in support meet the test in Proconic and are sufficient to enable the plaintiff to proceed to discovery and examine on those allegations.

[72] In my view, the same can be said here. Silvercorp seeks to hold Mr. Huang to a higher standard of particularity than is required at this stage of the proceeding. Through the particulars already articulated in the Notice of Civil Claim and those subsequently provided, Mr. Huang has met the standard which should be imposed on a party prior to discovery.

[73] I will deal first with the allegation of Silvercorp's involvement in and direction of the PSB investigation. Silvercorp submits that no particulars have been provided as to the identity of the individual police officers, prosecutors or members of the

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judiciary who allegedly conspired with Silvercorp, any of the relevant dates in which such coordinated action took place, or particulars of the means by which such manipulation took place.

[74] I disagree. As already noted, the Notice of Civil Claim itself contains a number of particulars in support of the general allegation that Silvercorp directed the PSB. Again, these include allegations that:

- In the days and months following publication of the Alfred Little report, Silvercorp directed and encouraged "local Chinese investigations into Alfredlittle, with a particular focus on its researchers working in China"; "funded these foreign investigations and in particular engaged the local Luoyang PSB, effectively as Silvercorp's agent"; and, "provided on-the-ground support and direction to the PSB's investigations and interrogations" (para. 19);

- Prior to his initial detention on December 28, 2011, Silvercorp directed the PSB to flag Mr. Huang's passport (para. 20);

- Silvercorp paid for the rental car in which Mr. Huang was driven to Luoyang following his initial detention at the Beijing airport (para. 24);

- Silvercorp provided questions and direction to the PSB which the PSB then used in conducting its interrogation of Mr. Huang and focused the interrogation on obtaining information that could be used by Silvercorp for its own purposes including in connection with its defamation action in New York, rather than on obtaining information to support criminal prosecution (paras. 26-27);

- Silvercorp directed the PSB to obtain passcodes to access Mr. Huang's email and trading accounts for Silvercorp's own purposes (para. 28) and used information obtained to seek document production in support of the defamation claim (para. 30);

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- Silvercorp gained possession of Mr. Huang's computers or data electronic data for Silvercorp's benefit (para. 29);

- Silvercorp paid expenses incurred by the PSB in the course of their investigation of Mr. Huang during the period in which he remained under house arrest (para. 32);

- Silvercorp caused Mr. Huang to be removed from house arrest and placed in jail in retaliation for the July 2012 *New York Times* article (para. 34); and

- Silvercorp directed and encouraged the laying of charges against and orchestrating the prosecution of Mr. Huang (paras. 37 and 38).

[75] In addition, in the response to the demand for particulars, the plaintiff has provided some further detail and has identified some members of the PSB and at least one person from the airport authority who were involved in his detention. Thus, some specific dates and other general dates have been provided, the identities of some of the persons involved have been provided, and particulars of some specific acts on the part of Silvercorp have been pleaded.

[76] I will now address Silvercorp's demand for additional particulars of the allegation that Silvercorp engaged in an aggressive counteroffensive to silence its critics in response to the publication of the Alfred Little reports. Again, the Notice of Civil Claim itself provides some particulars. For example, it is alleged that Mr. Feng stated, in an interview from his office in Vancouver, "I don't know who my enemy is, but we are a real company…I am going to fight to the death." The Notice of Civil Claim goes on to allege that three days after publication of one of the Alfred Little reports, Silvercorp filed a defamation action against both Alfred Little and another website, Chinastockwatch.com. It goes on to allege that Silvercorp made complaints to securities regulators and law enforcement agencies and then identified the principal and researchers behind the Alfred Little report and issued defamatory publications against Mr. Huang and others associated with the Alfred Little report.

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Of course, the specific defamatory statements and the dates they are alleged to have been published are particularized later in the Notice of Civil Claim. These are particulars of the allegation that Silvercorp engaged in an aggressive counteroffensive in response to the publication of the Alfred Little reports.

[77] It is important not to lose site of the fact that most of the particulars demanded relate to Silvercorp's own conduct which is, of course, entirely within its own knowledge. While Silvercorp may well be entitled to further particulars after discovery and prior to the trial, at this stage, the plaintiff's pleadings and the additional particulars provided in response to the demand for particulars meet the threshold set in *Proconic Electronics Limited and Far East United Electronics Ltd. v. Wong et al.* (1985), 67 B.C.L.R. 237 (S.C.), and are sufficient to enable the plaintiff to proceed to discovery and examine on those allegations. Silvercorp's application for further particulars is dismissed.

[78] Before moving on to Mr. Huang's application for an affidavit of documents, I wish to address two outstanding matters. First, although this was not the subject of a specific application, Silvercorp submitted that Mr. Huang's response to the demand for particulars should not be embedded in a letter from counsel. During the course of the hearing, Mr. Mickelson consented to reformatting the response in a stand-alone document. As such, it is not necessary for me to make an order to that effect.

[79] The last outstanding matter concerns the one amendment in the proposed amended Notice of Civil Claim with respect to which Silvercorp did not consent. That is the new allegation that Silvercorp was aware that the allegations in the Alfred Little report were true, or were reasonably founded, or both, which Mr. Huang proposes to add to paragraph 16 of the Notice of Civil Claim. In my view that allegation is directly relevant to the claim for punitive damages and as such it is a proper amendment.

The plaintiff's application for an affidavit of documents

[80] As already explained, Mr. Huang concedes that the evidence before me on this application does not establish that documents in the possession of Henan are

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within Silvercorp's power or control within the meaning of those words in Rule 7-1. Accordingly, he now seeks only an order that Silvercorp take all reasonable steps necessary to obtain the documents from Henan, list the documents obtained as a result, and, if Silvercorp does not obtain documents from Henan, that a representative of Silvercorp provide an affidavit describing the efforts made to obtain the documents and the reasons why they have not been obtained.

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[81] Mr. Huang submits that there is clearly a relationship between Silvercorp and Henan and that Silvercorp's obvious efforts to resist document production in this case warrant the order sought. He relies on *Han v. Cho*, 2008 BCSC 1207, in which Madam Justice Griffin granted a similar order.

[82] However, *Han* is distinguishable because in that case, Madam Justice Griffin expressly found that, on the evidence before her, it was reasonable to infer that the requested documents were within the power or control of the defendant. As such, she actually ordered the defendant to produce them. She then added the provision that if the documents were not actually within the defendant's possession then the defendant was to take steps to obtain them and provide the affidavit if they were not obtained.

[83] I appreciate Mr. Huang's frustration with the approach Silvercorp has taken to document production thus far. As Master Baker concluded, it appears that Silvercorp is intent on taking every proper step open to it to delay the prosecution of this proceeding. However, even if its latest manoeuver of forcing Mr. Huang to bring the application before Master Baker and then seeking the stay from Mr. Justice Sewell, only to subsequently claim privilege over most of the documents, is questionable, I am not persuaded that the appropriate remedy is to order an affidavit of documents. Typically, that kind of order is made when there is evidence that a party has intentionally or recklessly breached its document production obligations. I am not persuaded that Silvercorp has yet done so.

[84] For these reasons, Mr. Huang's application is dismissed.

[SUBMISSIONS ON COSTS]

[85] Costs will be in the cause. Notwithstanding the difficult procedural history, I do not intend to suggest that these particular applications were not brought in good faith. Although Silvercorp has not been successful, there is no basis to depart from the normal rule as to costs.

"WARREN J."

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