COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: Tetra Resources Inc. v. Senior Resources Inc., 2017 BCCA 26

Date: 20170126
Docket: CA43944

Between:

Adelphi Appellate Centre, Lux Principal Centre Moving, Lux Principal Centre Moving Limited Partnership, Lux Principal Centre Moving Inc., Mitsui Fudosan Canada Development Inc., Mitsui Fudosan Canada Holdings Inc., Mitsui Fudosan Canada Holdings Limited

Appellants

And

Tetra Resources Inc.

Respondent

Defendant

And

Amnesty International Canada

Intervenor

Before: The Honourable Mr. Justice Groberman
The Honourable Madam Justice Bennett
The Honourable Madam Justice Griffin

On appeal from: An order of the Supreme Court of British Columbia, dated November 9, 2015 (Davis v. Tetra Resources Inc., 2015 BCSC 2040, Vancouver Docket S154795).

Counsel for the Appellants: D. Gibbons, Q.C.
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Counsel for the Respondent: D. Sigalet
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Intervenor, Amnesty International Canada: T. Pitfield

Place and Date of Hearing: Vancouver, British Columbia
October 24, 2016

Place and Date of Judgment: Vancouver, British Columbia
January 26, 2017

Written Reasons by:
The Honourable Madam Justice Griffin

Concurring in the Result:
The Honourable Madam Justice Bennett
The Honourable Madam Justice Griffin

Summary

Through its shareholders, Tetra Resources Inc. (the "Tetra") has been involved in a Canadian-owned mine in Guatemala allegedly and once located Apollo Gold as well as its other Guatemalan subsidiaries (collectively, "Tetra Guatemala"). The plaintiffs, who are residents of Guatemala, brought a class action against Tetra in the Supreme Court of British Columbia, alleging that Tetra Guatemala committed torts in Guatemala against Tetra in the Supreme Court of British Columbia. Tetra, a British Columbia company, contended that the British Columbia court lacked jurisdiction over the claim but applied for an order that court exercise its jurisdiction over the claim. The chambers judge dismissed the application, concluding that the British Columbia court had jurisdiction over the claim and that it was not a forum non conveniens. Tetra appealed.

[1] The application primarily turned on the judge's assessment of the plaintiffs' ability to obtain a fair trial in Guatemala. The judge concluded that they could. The plaintiffs appeal from the judge's decision, contending that it was open to Tetra to have the plaintiffs' claims heard in Canada and that the judge's decision ought to be upheld on the forum conveniens ground.

[2] On this appeal, the appellants contend that the judge erred in law in imposing on them the burden of proving that justice could never be done in Guatemala, they had the correct test in mind when they made their submissions, and the judge's decision to dismiss the application was not supported by the evidence. The respondent Tetra contends that the judge's decision was correct, and that it was not unreasonable in light of the evidence and the applicable legal principles.

[3] On appeal, the appellants seek to introduce new evidence. The intervenor Amnesty International seeks to make submissions on the law of forum conveniens and provides further opinions concerning the plaintiffs' ability to obtain a fair trial in Guatemala.

[4] Amnesty International Canada intervenes. It supports the appellants' contention that the judge erred in her articulation of the legal test to be applied in assessing the fact that the appellants could not obtain a fair trial in Guatemala.

1. Background Facts Relevant to the Appeal

A. The April 27, 2010, Incident

[5] Through its shares, Tetra owns Tetra Vantage and controls all significant aspects of the operation of the Canadian mine, a silver, gold, lead, and zinc mine in Guatemala (Guatemala) in the municipality of San Rafael Las Flores.

[6] As of the operations in Canada, mine is a student, they are residents of San Rafael Las Flores.

[7] On April 27, 2010, the appellants participated in a protest outside the gates of the mine.

[8] The protest was peaceful, but it was not authorized by the mine. The protest was accompanied by protest activities with the operation of the mine. He and Tetra were aware of strong opposition to the mine among the local population, including the municipal government, and had been in discussions with the municipal government and the local population about the mine. In the months before April 27, 2010, the protests assembled in front of the gates to the mine. In their notice of civil claim, the appellants allege that security guards from the mine gates and "operatives from the protesters" were responsible for the protests. Tetra denies that security guards were involved.

[9] The appellants claim that the shooting was premeditated, planned, and distributed by Radovanovic and Tetra Vantage or implicitly authorized the use of excessive force by Radovanovic and other security personnel. Tetra denies that the shooting was premeditated, planned, and distributed by Radovanovic and Tetra Vantage.

[10] The parties agree that the shooting was unlawful and that Radovanovic was convicted of the offence of manslaughter.

[11] The appellants allege that, after the incident, Radovanovic and other security personnel in family accounts of the shooting and attempts to cover up evidence.

B. Criminal Proceedings

[12] A Guatemalan prosecutor charged Radovanovic with assault, aggravated assault, and obstruction of justice. No charges were brought against Tetra or its Guatemalan subsidiary. Tetra San Rafael S.A. ("Tetra") is convicted of the shooting.

[13] In the appellants' respective, they were present on the criminal proceeding as a permitted civilian witness, and, within that derivative proceeding, they said:

C. Civil Proceedings

[14] Tetra of Tetra's directors resides in Mexico, Nevada, and Tex resides in Canada. The Plaintiffs' Claim Originating Offshore, and General Counsel of Tetra resides in Reno and work from Tetra's Vancouver office. Tetra's Vice President of Human Resources, Tetra's Vice President of Human Resources, Tetra's Vice President of Human Resources,

circumstances which make the granting of a stay adverse to the interests of justice: *Spiliada Maritime Corp v. Cansulex Ltd* (1986), [1987] A.C. 460 at 478. One such circumstance is the real risk that the plaintiff will not obtain justice in the alternate forum: *AK Investment* at 1828. Consequently, in the English application of the *forum non conveniens* analysis, consideration of corruption and injustice in the alternate forum comes at a secondary stage with a reverse onus on the plaintiff to show that granting a stay would be adverse to the interests of justice.

[119] By contrast, the Canadian jurisprudence reflects a more unified approach to the application of the *forum non conveniens* analysis. Writing for the Court in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at 919-20, Sopinka J. said:

> In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum. The existence of two conditions is based on the historical development of the rule in England which started with two branches at a time when oppression to the defendant and injustice to the plaintiff were the dual bases for granting or refusing a stay. The law in England has evolved by reworking a passage from the reasons of Scott J. in *St. Pierre v. South American Stores (Gath & Chaves), Ltd.*, [1936] 1 K.B. 382, which contained two conditions. In its original formulation the second condition required the court to ensure that there was no injustice to the plaintiff in granting the stay. No doubt this was because the oppression test concentrated largely on the effects on the defendant of being subjected to a trial in England. When the first condition moved to an examination of all the factors that are designed to identify the natural forum, it seems to me that any juridical advantages to the plaintiff or defendant should have been considered one of the factors to be taken into account. The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.
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> [Emphasis added.]

[120] Writing for the Court in *Van Breda,* LeBel J. affirmed that *Amchem* provided the structure for the Canadian application of the *forum non conveniens* analysis and described the application as a weighing of "all relevant concerns and factors" (at paras. 104, 109). Thus, the Canadian approach to *forum non conveniens* is not a two-stage analysis as in England. All factors and concerns must be weighed together in one stage with the overall burden on the defendant to establish that the proposed alternate forum "is in a better position to dispose fairly and efficiently of the litigation": *Van Breda* at para. 109.

[121] Given the differences between the English and Canadian applications of the *forum non conveniens* analysis, I find it unhelpful to frame the issue as whether the judge applied the correct legal test for assessing evidence of corruption and injustice. It is more appropriate to frame the issue as whether the judge correctly defined a factor which she was required to consider in the overall *forum non conveniens* analysis. In other words, should the judge have considered the "capability" of the alternate forum to provide justice, or should she have considered the "likelihood" that the alternate forum would provide justice (i.e., whether there was a real risk that justice would not be done)?

[122] The judge's approach to the analysis reflects the English approach. Though the judge addressed the corruption evidence under the *CJPTA s.* 11(2)(a) "comparative convenience" factor, the judge's reasoning shows that she viewed the question of whether the appellants could obtain justice in Guatemala as a secondary stage in the analysis. At para. 64 of her reasons, she said:

> …As stated in *Connelly*, where the *forum non conveniens* analysis points to a clearly more appropriate forum, then the plaintiff must take the forum as he finds it even if it is in certain respects less advantageous to him unless he can establish that substantial justice cannot be done in the appropriate forum.
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> [Emphasis added.]

[123] In my view, the judge erred in considering the issue of corruption and injustice in the Guatemalan judiciary as a secondary stage in the analysis with the burden on the appellants to rebut her *prima facie* determination that Guatemala was the more appropriate forum. In addition, the judge erred in defining the question as whether Guatemalan courts were "capable" of providing justice.

[124] There is no binding authority on this Court concerning the correct question to ask when considering evidence of corruption and injustice in a defendant's proposed alternate forum. In light of the fact that the application of *forum non conveniens* focusses on whether an alternate forum is better equipped than Canada to dispose of the litigation fairly and efficiently, I find that it is inadequate to ask whether the alternate forum is "capable" of providing justice. On the other hand, the principle of comity requires that Canadian courts be cautious in determining that a foreign court is unlikely to provide justice. The "real risk" test articulated in *AK Investment* was formulated with these considerations in mind. Though the English analysis is structured differently, as I have noted above, I find the "real risk" standard helpful and I would adopt it. Where a plaintiff presents evidence of corruption and injustice in the defendant's proposed alternate forum, the court must ask whether the evidence shows a real risk that the alternate forum will not provide justice. I note that two lower court decisions in Canada have considered the real risk that justice will not be done in the alternate forum when applying *forum non conveniens* : see *Norex Petroleum Limited v. Chubb Insurance Company of Canada*, 2008 ABQB 442 at paras. 115-116; *Sistem Mühendislik İnşaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 2012 ONSC 4351 at para. 71.

[125] I am mindful of the fact that the evidentiary standard to establish "real risk" is a high bar in England. As Tahoe points out, sweeping, generalized evidence of corruption in the alternate forum does not meet that standard: *Ferrexpo AG v. Gilson Investments Ltd*, [2012] E.W.H.C. 64 (Comm.); *Mengiste v. Endownment Fund for the Rehabilitation of Tigray*, [2013] E.W.H.C. 599 (Ch.). In the two-stage English application of the *forum non conveniens* analysis, it is necessary for the plaintiff to satisfy a high evidentiary threshold at the second stage because, at the first stage, the court made a finding that the alternate forum is *prima facie* more appropriate for the dispute. In Canada, however, it is not necessary to stipulate a specific evidentiary threshold for the risk of unfairness since it is just one factor of many to weigh in a unified *forum non conveniens* analysis. The quality of evidence regarding the risk of unfairness should dictate the weight that is attached to that factor. Broad assertions of corruption should be given limited weight, whereas detailed and cogent evidence of corruption should attract significant weight.

[126] In my view, the judge erred by considering the risk of unfairness as a secondary stage in the *forum non conveniens* analysis and by defining the question as whether Guatemala was "capable" of providing justice. As a result, she gave insufficient weight to the evidence of weakness and lack of independence in the Guatemalan justice system in her discretionary weighing of the factors, particularly given the context in which the alleged shooting occurred. The evidence of weakness in the Guatemalan justice system ought not to be ignored. A discretionary decision may be reversed where the lower court gives no, or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport)*, [1992] 1 S.C.R. 3. Based on the judge's errors, it is open to this Court to reverse her discretionary decision. Though the appellants' evidence regarding the risk of unfairness in Guatemala is of a general nature, I am of the view that the evidence factors against finding Guatemala is clearly the more appropriate forum. I place moderate weight on this factor given the quality of the appellants' evidence.

v. Conclusion Regarding Stand-alone Civil Suit

[127] As LeBel J. said in *Breeden*, the *forum non conveniens* analysis does not require that all factors point to the defendant's proposed alternate forum, but it does require that the defendant establish that the alternate forum is *clearly* more appropriate. In this case, the judge found that Tahoe had established that Guatemala was clearly the more appropriate forum. However, in my view, the three factors discussed above weigh against such a finding with regards to the stand-alone civil suit. The judge erred in finding that these three factors did not weigh against the suitability of Guatemala. The first factor is the limited discovery procedures available to the appellants in Guatemala; the second is the marked uncertainty as to how the expiration of the limitation period will be treated by Guatemalan courts; and the third is the real risk that the appellants will not obtain justice in Guatemala given the context of the dispute and the evidence of endemic corruption in the Guatemalan judiciary.

[128] I conclude that the judge did not give adequate consideration to the difficulties the appellants will face in bringing suit against Tahoe given the limited discovery procedures available in Guatemala. This factor weighs against a finding that Guatemala is the more appropriate forum.

[129] I find that the judge erred by concluding that the expiration of the limitation period for bringing a civil suit in Guatemala would not affect the appellants' claim. The expert evidence does not support such a conclusion. In my view, the uncertainty occasioned by the expiration of the limitation period is a juridical advantage factor that weighs heavily against a conclusion that Guatemala is the more appropriate forum. This is a significant factor because it casts doubt on whether the appellants will be able to advance a claim against Tahoe in Guatemala at all.

[130] I conclude that the judge erred by ignoring the context of this dispute and placing insufficient weight on the risk that the appellants will not receive a fair trial in Guatemala. That risk should not be ignored. In reaching this conclusion, I make no general pronouncement on Guatemala's legal system. Rather, I simply conclude that there is some measurable risk that the appellants will encounter difficulty in receiving a fair trial against a powerful international company whose mining interests in Guatemala align with the political interests of the Guatemalan state. This factor points away from Guatemala as the more appropriate forum.

[131] In the result, I conclude the judge erred in finding that Tahoe had established that Guatemala was clearly a more appropriate forum than British Columbia for adjudication of the appellants' claims.

VIII. Disposition

[132] I would admit the new evidence concerning the criminal proceedings against Rotondo, but I would not admit the new evidence concerning judicial corruption. I would allow the appeal and dismiss Tahoe's application for a stay of the British Columbia proceeding.

"The Honourable Madam Justice Garson"

I AGREE:

"The Honourable Mr. Justice Groberman"

I AGREE:

"The Honourable Madam Justice Dickson"