
CANADA / JUDGMENT

Huang v. Silvercorp Metals Inc.

2017 BCSC 273

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Supreme Court of British Columbia

DECIDED

20 February 2017

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2017 BCSC 273 Huang v. Silvercorp Metals Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Huang v. Silvercorp Metals Inc.,

2017 BCSC 273

Date: 20170220

Docket: S146424

Registry: Vancouver

Between:

Kun Huang

Plaintiff

And

Silvercorp Metals Inc.

Defendant

And

Jon Richard Carnes, One Horizon Foundation, EOS Holdings LLC

(Nevada LLC31246-2004), EOS Holdings LLC (Nevada E0542782012-5), and

EOS Holdings LLC (Dominica)

Third Parties

Before: The Honourable Madam Justice Warren

Reasons for Judgment

(Security for Costs)

Counsel for Plaintiff:

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Place and Dates of Hearing:

Vancouver, B.C.

January 9-12, 2017

Place and Date of Judgment:

Vancouver, B.C.

February 20, 2017

Introduction

- [1] The defendant, Silvercorp Metals Inc. ("Silvercorp"), applies for an order that the plaintiff, Kun Huang, post security for costs in the amount of \$294,249.38, or such other amount as the court deems fit, failing which the action be stayed until such time as the security is posted.

Nature of the Action

- [2] Mr. Huang seeks damages, including punitive damages, for false imprisonment and defamation. He alleges that Silvercorp orchestrated his detention, conviction and incarceration in China in retaliation for his involvement in the online publication of reports (referred to as the "Alfred Little Reports") that were critical of Silvercorp and its Chinese subsidiary, Henan Found Mining Co. ("Henan"). Mr. Huang also alleges that Silvercorp defamed him in material published on the internet that accused him of taking short positions in Silvercorp's stock and then publishing false and deceptive statements about Silvercorp in the Alfred Little Reports to drive down the price of the stock.

- [3] There is no dispute that Mr. Huang was detained, convicted and imprisoned in China. However, Silvercorp denies that it caused the detention and imprisonment. Silvercorp says that Mr. Huang was lawfully detained by Chinese authorities in relation to illegal surveillance and other criminal activities he engaged in as one of the perpetrators of a "short and distort" scheme by which he and others profited through the manipulation of Silvercorp's stock price. Silvercorp also says that any statements it published concerning Mr. Huang are true.
- [4] Silvercorp advances a third-party claim against Jon Richard Carnes, One Horizon Foundation, Eos Holdings LLC (Nevada LLC31246-2004), Eos Holdings LLC (Nevada E0542782012-5), and Eos Holdings LLC (Dominica). Silvercorp says that Mr. Carnes and the other third parties participated in the short and distort scheme. Silvercorp says that Mr. Huang's arrest and imprisonment were caused primarily by Mr. Huang's own illegal conduct but that the third parties are also at fault for directing Mr. Huang to violate the laws of China by engaging in criminal activities in China. Silvercorp alleges that the third parties knew or ought to have known that many of the activities they caused or directed Mr. Huang to undertake in China were contrary to Chinese law and rendered Mr. Huang liable to arrest and imprisonment.
- [5] The third parties deny that they caused Mr. Huang's detention and imprisonment. They also deny participating in any short and distort scheme. The third parties say that Silvercorp engaged in a "pump and dump" scheme by which Silvercorp insiders profited through the inflation of Silvercorp's stock price following the issuance of public statements that did not reflect Silvercorp's true value. The third parties say that when they exposed the pump and dump scheme, through publication of the Alfred Little Reports, Silvercorp took retaliatory action against them and against Mr. Huang in order to silence the criticism and to prolong the stock promotion. They say this included causing Mr. Huang's detention and imprisonment in China.

Background

- [6] Silvercorp is a Vancouver-based public company with mining interests in China. Indirectly, it owns 77.5% of Henan. The remaining 22.5% of Henan is indirectly owned by the Chinese government. Henan operates a mine close to the city of Luoyang, which is located in Henan province in central China.
- [7] Mr. Huang is a Canadian citizen. He resides in Vancouver. He has been employed by one of the Eos entities since 2006. One of the Eos entities is a hedge fund controlled by Jon Carnes. Mr. Carnes and Eos took short positions in companies that Mr. Carnes thought had exaggerated their value, 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 work with Eos, Mr. Huang performed research and analysis on Silvercorp in China and contributed to reports critical of Silvercorp that were published on the Alfred Little website in September 2011.

- [8] 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 on a preliminary motion in August 2012 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. 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.
- [9] Mr. Huang alleges that Silvercorp identified those behind the Alfred Little Reports and published defamatory statements concerning him and others associated with the reports. Mr. Huang also alleges that Silvercorp has a significant influence on 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. He alleges that Silvercorp did so to obtain information that could be used by Silvercorp for its own purposes including in connection with its defamation action in New York.
- [10] 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 kilometres 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, until July 2012.
- [11] In July 2012, the New York Times published an article in which Mr. Carnes criticized Silvercorp's response to the Alfred Little Reports. Mr. Huang alleges that in retaliation for that article, Silvercorp caused Mr. Huang to be removed from house arrest and placed into the Luoyang jail where he remained for approximately two years.
- [12] 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.
- [13] Mr. Huang appealed his conviction. On June 15, 2014, the Chinese appellate court dismissed the appeal. 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.

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

Mr. Huang's Compensation Arrangement

[15] Mr. Huang's unusual compensation arrangement lies at the heart of Silvercorp's application for security for costs. The only evidence about the compensation arrangement is that given by Mr. Huang during his examination for discovery, which I have distilled:

- Mr. Huang started working for Eos Holdings, a British Columbia company, in 2006. At the end of 2007, he moved to China and started working for Eos Asia, a Hong Kong company. In 2010 or 2011, he started working for Eos Dominica, which is incorporated in the Commonwealth of Dominica. He continues to be employed by Eos Dominica.
- Mr. Huang was paid a base salary of about \$45,000 per year in 2006. This increased to about \$75,000 per year by 2011. As of early 2011, he stopped receiving a base salary. At present, he receives no base salary. He said this is because he is not working full time but rather is "more like casual working".
- In addition to the base salary that was paid until early 2011, Mr. Huang was and remains entitled to bonus compensation in amounts determined by Mr. Carnes, in his sole discretion. The bonuses are project-based and their quantum does not fully crystallize until the project is complete and all expenses and liabilities accounted for. The accounting is done by Mr. Carnes, in his discretion. In other words, Mr. Carnes sets the gross amount of each project-based bonus allocated to Mr. Huang and he also decides whether and to what extent each such bonus is ultimately offset by expenses and liabilities associated with the project. Mr. Huang has never discussed with Mr. Carnes the methodology he employs in exercising his discretion in relation to Mr. Huang's bonuses.
- None of the bonuses have been paid to Mr. Huang. Rather, the bonus monies have been invested by Mr. Carnes on Mr. Huang's behalf, in the Eos hedge fund. All bonuses allocated to Mr. Huang are credited to an account he holds with the Eos hedge fund. The account is managed by Mr. Carnes as part of his management of the fund.
- Mr. Huang was not allocated any bonus in 2006. The bonus allocated to him in 2007 was not significant and was probably less than \$10,000. In 2008, Mr. Carnes told Mr. Huang that his bonus allocation would be about \$180,000 or \$190,000. As of June 30, 2010, Mr. Huang had been allocated bonus funds totalling \$439,407. As of June 30, 2011, Mr. Huang's bonus account had increased to about \$1.4 million. Mr. Huang testified that he has received no information about the balance in his bonus account since June 30, 2011. He has not even discussed this with Mr. Carnes. Mr. Carnes made a profit of \$2.8 million shorting the shares of Silvercorp. Mr. Huang expects to be allocated some portion of that profit as a bonus, but the size of that allocation has not been determined by Mr. Carnes or even discussed with him.

- The balance in Mr. Huang's bonus account (whatever it is) does not reflect the expenses that Mr. Carnes will deduct, at his discretion, when the projects are deemed to be complete. None of the project-based bonuses have yet reached that stage, not even the \$180,000 to \$190,000 that was allocated approximately nine years ago, in 2008. There have been significant expenses incurred in connection with the Silvercorp project including, but certainly not limited to, the cost of these proceedings. The portion of these expenses to be allocated to Mr. Huang's bonus account is undetermined and remains entirely at Mr. Carnes' discretion. Mr. Huang has never discussed with Mr. Carnes the methodology he will use or the factors he will consider in exercising that discretion. If Silvercorp is successful in this action, Mr. Huang's bonus account may be entirely depleted.
 - Mr. Huang can withdraw funds from his bonus account. At least one of these withdrawals was characterized as an interest free loan, but other withdrawals are not loans. In about the summer of 2011, Mr. Huang withdrew \$250,000 from his bonus account, which he advanced to his parents. He characterized this withdrawal as a loan from his bonus account. In addition, he withdrew about \$38,000 in 2014 and \$71,000 in 2015, but these amounts were not loans. If Mr. Huang takes a loan from the account, he and Mr. Carnes verbally agree, at the time, on the repayment terms.
 - Mr. Huang's arrangement with Mr. Carnes concerning his bonus account is entirely verbal and "based on mutual trust".
- [16] Mr. Huang does not own any real property in British Columbia. As already noted, although he continues to work, at least on a casual basis, for Eos Dominica, he receives no base salary.

Legal Principles

- [17] Whether to order security for costs is a matter of discretion. A discretionary jurisdiction must be exercised judicially. In other words, it must be based on a fair assessment of the interests of all parties. The law does not require any particular outcome. Previous decisions in which the discretion was exercised in particular ways constitute guidelines that should be considered in the interest of uniformity and in response to perceptions of public policy, but they do not constitute binding principles of law: *Shiell v. Coach House Hotel Ltd.* (1982), 37 B.C.L.R. 254 (C.A.).
- [18] It is helpful to start with a reminder of the purpose of an order for security for costs, which is to protect the defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff: *Fat Mel's Restaurant Ltd. v. Canadian Northern Shield Insurance Company* (1993), 76 B.C.L.R. (2d) 231 at paras. 15 and 31 (C.A.). However, a just balance must be struck between achieving that objective and not stifling legitimate claims. The manner in which these competing objectives are balanced on an application against a corporation differs from the manner in which they are balanced on an application against a natural person.

- [19] Once an applicant seeking security for costs against a corporation has shown that the corporation will not likely be able to pay costs should the claim fail, security is generally ordered unless the court is satisfied that there is no arguable defence: *Fat Mel's Restaurant Ltd.* at para. 16. This reflects a concern to prevent litigation abuses by a corporate plaintiff that is manipulated by natural persons who are insulated by the limited liability of the corporation.
- [20] A different approach is taken in applications for security for costs against natural persons because of a concern to ensure that poverty is not a bar to legitimate access to the courts: *Bronson v. Hewitt*, 2007 BCSC 1751 at paras. 26-33. The fact that a plaintiff who is a natural person is not sufficiently wealthy to be able to pay a costs award if he or she loses the case would not, on its own, justify the granting of an order for security for costs because such an order would likely preclude access to the courts. As Shaw J. said in *Fraser v. Houston* (1997), 36 B.C.L.R. (3d) 118 at para. 11 (S.C.), "the court should not make an order which would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction".
- [21] The parties provided me with several authorities concerning applications for security for costs against natural persons. As I have already said, while previous decisions should be considered as guidelines, they do not constitute binding principles of law. While it is clear that the court's discretion to order security for costs against a natural person has been exercised cautiously, sparingly and under special circumstances, I disagree with Mr. Huang's submission that the court should only exercise that discretion "in egregious circumstances amounting to an abuse of the court's process". As I have already explained, that condition, which originated in *Fraser*, was expressly stated to apply where the order would preclude access to the court.
- [22] It is apparent that there are no firmly prescribed criteria to be employed in analyzing whether the discretion ought to be exercised in a particular case. This reflects the court's reluctance to be the prisoner of a formula that might fetter the court's discretion to balance the interests of the parties in all the circumstances of the case. What is very clear is that in the case of a natural person, a concern that a legitimate claim could be stifled by an order for security for costs will almost always override a concern that a successful defendant will be unable to recover costs if security is not ordered.
- [23] Given the purpose of an order for security for costs, it is sensible to commence the analysis by determining whether the applicant has established, at least on a *prima facie* basis, that in the event of its success it will be unable to recover its costs. This has been referred to as the "threshold" requirement: *Equustek Solutions Inc. v. Jack*, 2013 BCSC 2135 at paras. 25-31.
- [24] If an applicant for security for costs meets that threshold requirement, then it is necessary to assess the risk of a legitimate claim being stifled. This requires a consideration of all the relevant factors present in the case in question, including the ability of the plaintiff to post the security sought and the merits of the plaintiff's claim. If it is plain and obvious that the

claim lacks merit then the concern not to frustrate legitimate claims is engaged with less force. If there is no reason to believe that the plaintiff's ability to continue the claim will be impeded if ordered to post security, then the concern to ensure that poverty is not a bar to legitimate access to the courts does not arise. If there is a real risk that an order for security for costs will make it difficult for the party against whom security is ordered to continue with the claim, then it is necessary to consider whether egregious circumstances exist that would tip the balance in favour of making the order even though the claim might be stifled.

Analysis

- [25] As discussed above, Silvercorp must establish, at least on a prima facie basis, that in the event of its success it will be unable to recover its costs.
- [26] In *Equustek*, the fact that the plaintiffs appeared to be unwilling to pay a costs award readily was held to be insufficient to meet this threshold, at least where they had unencumbered real estate assets in British Columbia valued at \$5.2 million.
- [27] The fact that the plaintiff resides outside the jurisdiction and has no assets within the jurisdiction has been held to be insufficient to meet this threshold, at least where one of the three plaintiffs was employed and another owned an apartment in another jurisdiction: *Han v. Cho*, 2008 BCSC 1229.
- [28] Similarly, the fact that the plaintiffs reside in a non-reciprocating jurisdiction and have no assets in British Columbia, has been held to be insufficient, at least where one of the plaintiffs has sworn that he has more than sufficient assets to cover the defendants' costs: *Bronson v. Hewitt*, 2007 BCSC 1751 at para. 44-45.
- [29] Silvercorp says Mr. Huang's compensation structure has enabled him to improperly hide income from Canadian tax authorities and submits this is a factor that weighs in favour of an order requiring him to post security for costs. The record before me was insufficient to establish that Mr. Huang has hidden income from Canadian tax authorities and, accordingly, this is not a factor I have considered.
- [30] There is no evidence of Mr. Huang having any material assets in British Columbia. He does not own real estate in this jurisdiction. Although he continues to be employed by Eos on a casual basis, he is not receiving and is not entitled to receive any base salary. There is no evidence that he is employed elsewhere. On the record before me, the only material asset he owns is the bonus account at Eos, which is held in a non-reciprocating jurisdiction.
- [31] Mr. Huang has not received any information concerning the balance in his bonus account since June 2011. At that time, the balance was about \$1.4 million, although no final accounting of expenses had been completed with respect to any of the projects on which the bonuses were earned. Mr. Huang expects to be allocated a bonus with respect to the Silvercorp project on which Mr. Carnes earned a profit of \$2.8 million, but the size of Mr. Huang's bonus on that project has not been determined or even discussed, and no final

accounting of expenses has been completed. Mr. Carnes has complete discretion over the account. At any time, Mr. Carnes can choose to offset expenses against the balance in the account. Mr. Huang has never discussed with him the criteria or methodology he will employ in deciding which expenses or which portion of which expenses he will allocate to Mr. Huang. Nevertheless, Mr. Huang can withdraw funds from the account by way of loan or otherwise.

- [32] While Silvercorp characterized the arrangements between Mr. Huang and Mr. Carnes concerning Mr. Huang's bonus account as exceptional and suspicious, Mr. Huang's counsel submitted that it is not at all surprising that Mr. Carnes would wait until the end of the litigation to see where the dust settles before finalizing Mr. Huang's compensation.
- [33] I agree that it is not surprising that the quantum of Mr. Huang's entitlement to bonus income associated with the Silvercorp project has not yet crystallized given the ongoing litigation. However, it is somewhat surprising that Mr. Huang's bonus entitlement from previous projects has not yet crystallized. It is more surprising that Mr. Huang has had no discussions with Mr. Carnes concerning the amount of any bonus allocated to his account since June 2011. It is very surprising that Mr. Huang has given Mr. Carnes complete discretion with respect to the amount of his compensation, the kinds of expenses that can be set off against that compensation, the portion of those expenses to be borne by him, the factors that Mr. Carnes will consider in exercising that discretion, and the methodology he will use to finalize Mr. Huang's financial entitlement. In short, the discretion Mr. Huang has ceded to Mr. Carnes is so broad as to permit Mr. Carnes to extinguish the balance in Mr. Huang's bonus account at any time. This is astonishing, particularly given that the bonus account reflects the entirety of the fruits of Mr. Huang's labour over at least the past six years. Mr. Huang has chosen not to swear an affidavit on this application and accordingly I have not been provided with a rational explanation for why he has structured his affairs in this fashion. He has provided no assurance that he has or will have assets sufficient to cover a costs award in the event his claim is dismissed.
- [34] Mr. Huang emphasizes that as a resident of British Columbia, he is subject to the compulsion of this Court on any enforcement proceedings. His counsel says he will be disposed to satisfying a costs award to avoid the garnishment of his future wages or the negative impact on his credit rating that would result from an outstanding judgment. However, he led no evidence to this effect. He has lived outside this jurisdiction for lengthy periods in the past. He has said nothing about his connections to this jurisdiction or his future plans.
- [35] Mr. Huang emphasizes that there is no evidence demonstrating an inclination on his part to attempt to avoid legitimate claims of creditors. He points out that the unusual compensation structure pre-existed this claim and as a result it is not open to me to find that the structure was put in place in anticipation of these proceedings and for the purpose of frustrating Silvercorp's ability to enforce a costs award. I agree with those submissions. Nevertheless, the inescapable conclusion is that Mr. Huang's financial affairs have been structured in an

extremely unusual manner that permits Mr. Carnes to cause Mr. Huang to be rendered judgment proof though a mere accounting entry in Mr. Huang's bonus account.

- [36] On the record before me, Mr. Huang is working on only a casual basis and has no entitlement to any base salary. He has not provided any indication of his connections to this jurisdiction or his future plans. His bonus account is his only material asset. It is held in a non-reciprocating jurisdiction. More importantly, it is under the control of Mr. Carnes and subject to an extraordinary arrangement that gives Mr. Carnes the complete discretion to extinguish its value at any time. No rational explanation has been provided for this arrangement. I am satisfied that there is a real likelihood that Silvercorp will be unable to enforce a costs award against Mr. Huang in the event the claim is dismissed.
- [37] I turn then to consider whether there is a risk that an order for security for costs would stifle a legitimate claim.
- [38] A significant amount of time was spent during the hearing of the application on the merits of the case. If a claim has little merit, the overriding concern about stifling legitimate claims is not engaged with as much force as would otherwise be the case.
- [39] This is a difficult case. It is expected to involve complex expert evidence about the substantive and procedural laws of a foreign legal system, including its police investigation procedures; the mineral resource and financial disclosure obligations of a public company in multiple jurisdictions; the valuation of a large publicly traded company; and the operations and prospects of a silver mine in China. Even if Mr. Huang is able to establish that Silvercorp improperly directed the PSB to detain him, he will also have to establish that British Columbia law applies to the false imprisonment claim. There is no tort of false imprisonment in China and, accordingly, if Chinese law applies the false imprisonment claim will fail. Even if British Columbia law applies, a successful claim of false imprisonment in a case where the plaintiff was ultimately convicted may well be unprecedented. It may be necessary to determine whether the law precludes the re-litigation of facts determined by the Chinese courts. This may turn on whether Mr. Huang can establish that the Chinese proceedings were unfair.
- [40] On the other hand, it is not disputed that a person named Wang Mei, who Silvercorp claims was an employee of Henan, was in contact with the PSB in relation to the detention of Mr. Huang, that she was supplying information to and obtaining information from the PSB, and that some information obtained by the PSB through its interrogation of Mr. Huang was used by Silvercorp in its attempts to mitigate the effects of the damaging Alfred Little Reports. There is some evidence that could, if accepted, support the conclusion that Henan funded certain expenses associated with the PSB's investigation of Mr. Huang.

- [41] Given the complexities of this case, it is not possible for me to delve deeply into the merits at this stage. While the case is unusual, I am satisfied that it is arguable. In the circumstances, the merits of the case do not weigh materially either in favour of or against the granting security for costs.
- [42] The far more significant issue is that there is no evidence suggesting that an order requiring Mr. Huang to post security for costs will impede, let alone stifle, his ability to prosecute the claim. His counsel did not make a submission to this effect. To the contrary, on the record before me, Mr. Huang could easily comply with an order requiring him to post security for costs by withdrawing funds from his bonus account with Eos.
- [43] Mr. Huang submitted that Silvercorp's delay in bringing this application should weigh against granting the relief sought. He says no explanation was offered as to why Silvercorp, after advancing a vigorous defence including several unsuccessful interlocutory applications, which substantially increased the cost of the proceedings, would wait over two years to bring this particular application. However, there was an explanation for the delay. As I have already explained, the foundation of the application is Mr. Huang's extraordinary compensation arrangement, which Silvercorp did not find out about until Mr. Huang's examination for discovery.
- [44] I return then to the principles that guide my discretion on this application. The discretion must be exercised in a manner that reflects a fair assessment of the interests of all parties. The purpose of an order for security for costs is to protect the defendant from the likelihood that in the event of its success it will be unable to recover its costs from the plaintiff. However, a just balance must be struck between achieving that objective and not stifling a legitimate claim. The discretion to order security for costs against a natural person has been exercised cautiously, sparingly and under special circumstances because of a concern to ensure that poverty is not a bar to legitimate access to the courts. A concern that a legitimate claim brought by a natural person could be stifled by an order for security for costs will almost always override a concern that a successful defendant will be unable to recover costs if security is not ordered. Thus, the court should not make an order that would preclude the right of access except in egregious circumstances amounting to a likely abuse of the court's jurisdiction.
- [45] Mr. Huang's extraordinary compensation arrangement gives rise to a very unusual situation. There is a substantial risk that, without an order for security for costs, Silvercorp will be unable to recover its costs in the event the claim is dismissed, but no corresponding risk that an order for security for costs will make it impossible, or even difficult, for Mr. Huang to continue the action. For Silvercorp, this is high-stakes litigation. The allegations against it are extremely serious. The case is complex and will be very costly to litigate. The unusual way in which Mr. Huang has organized his financial affairs has the effect of largely insulating him from the risk of a costs award, which is likely to reduce his incentive to respond to reasonable settlement offers and, conversely, to increase the pressure on Silvercorp. An order requiring Mr. Huang to post security for costs would restore balance

and allow the prospect of a costs award to serve its intended function, without impeding his ability to continue with the action. Having considered the interests of both parties, I have concluded that this is a case where security for costs ought to be awarded. The next issue to consider is the amount of security that should be awarded.

- [46] Silvercorp seeks security in the amount of \$294,249.38. This is based on a draft bill of costs, at Scale C, for a 40-day trial. That draft bill of costs claims a total of 849 units at \$170 per unit, disbursements for court reporter fees and expert reports totaling \$126,285.50, plus taxes. Silvercorp's counsel acknowledged, during the hearing, that one of the medical reports should be deleted from the claim because the associated cost had already been incurred. That would reduce the claim by \$10,000.
- [47] The factors to be considered when determining the amount of security to order were recently summarized by Master Taylor in *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCSC 1900. I consider the following to be particularly applicable in this case. The security should be such as the court thinks to be just in the circumstances of the case. The court can order any amount up to the full amount claimed. The amount ordered should sufficiently secure the defendant's position without unduly burdening the plaintiff. The order is usually limited to future costs. It is relatively common for security to be ordered to be posted in installments. Historically, dollar-for-dollar security has not been awarded. This reflects the reality that the quantum of security claimed will always be based on an estimate and it may be appropriate to discount the estimate for the prospects of settlement.
- [48] The application of these factors satisfies me that this is a case where a significant order is warranted because the purpose is to sufficiently secure the position of the defendant without unduly burdening the plaintiff, and there is no evidence that the plaintiff will be unduly burdened. Having said that, it is my view that the \$294,249.38 sought by Silvercorp is excessive.
- [49] In my view, too many units were claimed for some items in Silvercorp's draft bill of costs but too few were claimed for others. Silvercorp claimed the maximum number of units for items such as item 2 (correspondence, conferences, instructions, investigations or negotiations) and item 17 (all processing correspondence associated with experts). Given that the order is usually limited to future costs and given the action was commenced approximately two and a half years ago, the quantum should not reflect the maximum number of units for these items. Further, Silvercorp claimed for 10 days of examination for discovery of Mr. Huang and eight days for its representative, but a significant portion of the discoveries had been completed before the application was filed in October 2016. On the other hand, Silvercorp claimed for only 40 days of trial and by agreement the trial has been extended to 60 days, although I think it is unlikely that all 60 days will be required. On balance, I accept 849 units as a reasonable estimate.

- [50] However, I am not persuaded that the quantum of the security for costs order should be based on Scale C. At the conclusion of the trial I may conclude that the level of difficulty justifies Scale C but I am not persuaded that this assessment should be made in advance. In the circumstances, the costs should be estimated at Scale B.
- [51] If Silvercorp's draft bill of costs is recalculated to reflect the number of units originally claimed but at Scale B and without the one expert report that counsel acknowledged should be deleted, the total estimate is about \$225,000. In my view that is the appropriate starting point.
- [52] As already noted dollar-for-dollar security is not usually appropriate because the quantum is, by necessity, based on an estimate and does not reflect the possibility of settlement. Further, Silvercorp has indicated an intention to bring on a summary trial application and a successful summary trial application would significantly reduce the costs. In all the circumstances, it is my view that an order requiring Mr. Huang to post \$150,000 as security for costs will sufficiently secure Silvercorp's position without unduly burdening Mr. Huang.
- [53] Finally, the security should be posted in installments in order to balance the interests of the parties as fairly as possible.

Conclusion

- [54] Mr. Huang shall post the sum of \$150,000 as security for the costs of Silvercorp in accordance with the following schedule: 50% within 30 days; 25% within 10 days of completion of all examinations for discovery; and 25% no later than 60 days before the first day of trial. In the event that an installment is not made on the date it is due, the action shall be stayed until such time as the security is posted, with leave to Silvercorp to apply for further relief including dismissal of the action if Mr. Huang fails to post the security as ordered.

"WARREN J."

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