

CANADA / JUDGMENT

Hydro Aluminium Rolled Products GMBh v. MFC Bancorp Ltd.

2020 BCCA 295

COURT

British Columbia Court of Appeal

DECIDED

28 October 2020

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2020 BCCA 295 Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.,

2020 BCCA 295

Date: 20201028

Docket: CA46445

Between:

Hydro Aluminium Rolled Products GmbH

Appellant

(Plaintiff)

And

MFC Bancorp Ltd., also known as MFC Bancorp Ltd. (Caymans) and MFC 2017 Ltd. and MFC 2017 II Ltd., Samuel Morrow and Michael John Smith

Respondents

(Defendants)

Corrected Judgment: The front page of the judgment was corrected on

November 17, 2020 and November 27, 2020, and paragraph 2 was corrected on November 27, 2020.

Before:

The Honourable Madam Justice Saunders

The Honourable Madam Justice Fenlon

The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated
September 20, 2019 (Hydro Aluminium Rolled Products GmbH v. MFC Bancorp
Ltd., Vancouver Docket S184225).

Counsel for the Appellant:

D.R. McGowan

Counsel for the Respondents:

J.K. McEwan, Q.C.

W.E. Stransky

Place and Date of Hearing:

Vancouver, British Columbia

June 24, 2020

Place and Date of Judgment:

Vancouver, British Columbia

October 28, 2020

Written Reasons by:

The Honourable Madam Justice Fenlon

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Madam Justice DeWitt-Van Oosten

Summary:

The parties entered into a guarantee which provided that any disputes would be referred to courts in Germany or, at the appellant's option, any place where the respondent held an office. Immediately after signing the guarantee, respondent corporation moved its registration to the Cayman Islands. Appellant sued on the guarantee in BC, relying on the forum selection clause and the respondents' ongoing presence in a Vancouver office as well as the connection between BC and the guarantee. Respondents applied to dismiss on the basis that BC lacked jurisdiction over the dispute, and in any event Germany was the more appropriate forum because the appellant's witnesses were located there and German law applied. Chambers judge granted the

application and dismissed the claim, finding the forum selection clause did not apply because the appellant had not pleaded respondents had an office in Vancouver, and finding in the alternative that Germany was the more appropriate forum.

Held: Appeal allowed. Judge erred in concluding that BC lacked territorial competence as the appellant met the low threshold of an arguable case that respondents continued to have an office in BC and an arguable case guarantee breached here. Judge erred by declining jurisdiction on the basis that it would be more convenient for the appellant to litigate in Germany. Plaintiffs are generally entitled to their choice of forum even if proceedings would be more convenient for them in another jurisdiction, subject to defendant's competing interests. Here, the defendants had not established Germany was more convenient for them.

Reasons for Judgment of the Honourable Madam Justice Fenlon:

- [1] This is an appeal from the decision of a chambers judge to dismiss the appellant's claim on the basis that British Columbia does not have jurisdiction over the matter.

Background

- [2] The appellant Hydro Aluminium Rolled Products GmbH ("HARP") is a German company. Late in 2016, HARP agreed to deliver aluminum products to another German company on the condition that the purchaser arrange for a merchant banking enterprise to guarantee the payment. MFC Bancorp Ltd. ("MFC") assumed that obligation, which provided in relevant part:

This premised and at the request of the Company we, MFC Bancorp Ltd., the Guarantor, having our registered office at 400 Burrard Street, Suite 1860, Vancouver, BC, V6C 3A6, Canada ("Office"), herewith irrevocably and unconditionally undertake, in case the Company has failed to fulfil its payment obligations in accordance with the Framework Agreement and the relevant Orders, to indemnify and pay, on the first demand, to you, the Beneficiary, in EURO any sum or sums not exceeding in total the amount of:

EUR 4.200.000.00 (in words: EURO four million two hundred thousand 00/100) ("Maximum Guaranteed Amount")

upon receipt by the Guarantor of the Beneficiary's first demand in writing ("Demand")

The Demand, Statement and Documents must be presented to the Guarantor by mail, telefax or hand delivery, all of which shall suffice, at its Office ("Place of Presentation"). Payment of the demanded amount shall become due within three business days from receipt of the Demand, Statement and Documents.

This Guarantee shall be governed by and construed in accordance with the laws of Germany without giving effect to any conflict of law to the extent that the application of the laws of another jurisdiction would be required thereby. Any dispute or difference of claim arising out of or in relation to this Guarantee including the construction, validity, performance or breach thereof, shall be referred to the competent courts in Frankfurt am. Main, Germany or, at the option of the Beneficiary, any other place at which the guarantor holds an office.

[Emphasis added.]

- [3] When MFC and HARP entered into the Guarantee on June 8, 2017, MFC was a BC company with a registered office at 400 Burrard Street in Vancouver. However, unbeknownst to HARP, the day before signing the Guarantee, MFC had filed a petition in the BC Supreme Court seeking approval of a plan of arrangement under which MFC would be continued out of BC and reorganized into companies domiciled in the Marshall Islands and Cayman Islands. HARP contends that the materials MFC filed in support of that petition did not disclose that the arrangements could affect the obligations of MFC under the Guarantee.
- [4] The BC Supreme Court approved the plan of arrangement on July 12, 2017. That plan triggered a series of complex corporate steps which resulted in:
 - (a) The guarantor MFC Bancorp Ltd. changing its name to 0778539 B.C. Ltd. ("077 Ltd.", which the chambers judge referred to as "Old Bancorp") and then being continued in the jurisdiction of the Marshall Islands;
 - (b) Incorporation of MFC Bancorp 2017 Ltd. and MFC 2017 II Ltd. pursuant to the laws of the Cayman Islands;
 - (c) MFC Bancorp 2017 Ltd. changing its name to MFC Bancorp Ltd., the same name as the guarantor (which the chambers judge referred to as "New Bancorp"); and
 - (d) 077 Ltd. becoming the wholly-owned subsidiary of MFC 2017 II Ltd.
- [5] HARP alleges that the plan of arrangement and subsequent reorganization was a sham, a cloak for fraud, or otherwise improper and was done in part to try to avoid the obligations under the Guarantee.
- [6] HARP delivered its demand for payment to the Burrard office, in accordance with the terms of the Guarantee, and discovered that MFC no longer had a registered office in Vancouver. When MFC failed to make payment, HARP filed a notice of civil claim in the BC Supreme Court for breach of contract and, in the alternative, for damages for fraudulent misrepresentation by MFC and its principals, the respondents Michael Smith and Samuel Morrow. MFC filed a jurisdictional response and immediately applied to strike HARP's claim on the basis that BC did not have jurisdiction over the dispute.
- [7] The chambers judge hearing that application correctly identified the framework to be applied under the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA], which governs jurisdictional conflicts in private international law. The judge

concluded that the contractual obligations under the Guarantee "to a substantial extent were to be performed in Germany," and that the misrepresentations alleged with respect to MFC's registered office were "received and relied upon in Germany," with any damages suffered there: at paras. 19 and 21. As such, the judge concluded that BC lacked territorial competence in the proceeding: at para. 22. The judge went on to determine that even if BC had territorial competence, he would decline to exercise jurisdiction on the basis that Germany was "in a better position to dispose fairly and efficiently of the litigation." In reaching the latter conclusion, he identified the following circumstances at paras. 29-35:

- HARP's witnesses were located there;
- Determining the amount due under the Guarantee could involve considering evidence of the purchaser's insolvency and any mitigation efforts made by HARP to collect, which might necessitate evidence from the German insolvency administrator;
- German law applied to the contract; and
- The jurisdiction clause in the Guarantee named Germany as an appropriate location for resolution of disputes.

[8] For the reasons that follow, I respectfully conclude that the judge erred in finding that British Columbia does not have territorial competence over the dispute and in reaching his alternative conclusion that jurisdiction should be declined in any event.

Analysis

1. Does British Columbia have territorial competence in the dispute?

[9] Whether a provincial superior court has territorial competence in a matter is a question of law reviewable on the standard of correctness: *Ewert v. Höegh Autoliners AS*, 2020 BCCA 181 at para. 44.

[10] HARP asserts that BC has territorial competence, relying on the following provisions of s. 3 of the CJPTA, which provide that a court has territorial competence in a proceeding brought against a person if:

- (c) there is an agreement between the plaintiff and that person to the effect that the court has jurisdiction in the proceeding,
- (d) that person is ordinarily resident in British Columbia at the time of the commencement of the proceeding, or
- (e) there is a real and substantial connection between British Columbia and the facts on which the proceeding against that person is based.

HARP asserts that subsection (c) applies because MFC agreed to the forum selection clause in the Guarantee; subsection (d) applies because a corporation is ordinarily resident in BC when it has a registered office here or has a place of business in this province (ss. 7(a) and (c) of the CJPTA); and s. 3(e) applies because, as set out in s. 10, the proceeding:

- (e) concerns contractual obligations, and
- (i) the contractual obligations, to a substantial extent, were to be performed in British Columbia,
- (g) concerns a tort committed in British Columbia,

[11] In the court below, HARP did not expressly rely on s. 3(d). The respondents submit HARP should therefore not be allowed on appeal to rely on the presence of the corporate respondents in BC. I would decline to accede to that objection. Although HARP did not identify s. 3(d), it pleaded and argued that the new companies and the original MFC were all one entity and continued to carry on business in Vancouver. Whether MFC continued to have a presence in BC was a live issue on the application below, and I see no prejudice to the respondents in permitting HARP to rely on the argument on appeal.

[12] The judge recognized that there is a low threshold for establishing territorial competence under the CJPTA--a party need only establish an arguable case: at para. 12. But he found that none of the connections relied on by HARP sufficed. In my respectful view, the judge erred in that conclusion.

[13] First, he gave no weight to the forum selection clause in the Guarantee which provided:

Any dispute or difference of claim arising out of or in relation to this Guarantee including the construction, validity, performance or breach thereof, shall be referred to the competent courts in Frankfurt am Main, Germany or, at the option of the Beneficiary, any other place at which the Guarantor holds an office.

[Emphasis added.]

[14] As noted by Jean-Gabriel Castel and Janet Walker in *Canadian Conflict of Laws*, 6th ed. (Markham, ON: LexisNexis Canada, 2005) (loose-leaf updated June 2020, release 80), vol. 1, ch. 11 at 11-8, parties may establish a court's jurisdiction by entering into an agreement nominating the court as one possible forum for the resolution of disputes. Here, HARP contracted for the right to choose to litigate either in Germany or in any other place at which MFC "holds an office."

[15] The judge did not directly address the applicability of the forum selection clause in his reasons, but it can be inferred that he dismissed it on the basis that MFC no longer had a registered office in BC and that HARP's alternative claim in misrepresentation relied on MFC not having even "an office" in BC: at para. 16. In effect, then, the judge considered the forum selection clause to be inapplicable on the basis that the "precondition" of an office in Vancouver had not been pleaded: at para. 16. However, HARP's response to the notice of

application made it clear that it was relying on the restructured corporations constituting a single entity that continued to have a business presence and an office in Vancouver. The omission in the pleading could have been addressed by a simple amendment: *Purple Echo Productions, Inc. v. KCTS Television*, 2008 BCCA 85 at para. 34 [Purple Echo];

- [16] The judge described the evidence HARP relied on to establish MFC'S ongoing business presence in BC as follows:
- [7] After the final order in the Plan of Arrangement proceedings was made, New MFC Bancorp publicly represented that it had an office in British Columbia at 1860 - 400 Burrard Street, Vancouver ("Vancouver Office"), through Rene Randall, an individual described in New MEC Bancorp's security filings and press releases as the person responsible for New MFC Bancorp's investor relations and the Corporate Vice President of New MFC Bancorp.
- [8] On August 8, 2017, the United States Securities and Exchange Commission ("SEC") wrote to New MEC Bancorp at its Vancouver Office. By letter dated September 1, 2017, New MFC Bancorp's Vancouver corporate counsel responded to the SEC's letter but took no issue with the Vancouver Office having been identified as the office of New MFC Bancorp.
- [9] On May 15, 2018, New MFC Bancorp filed a News Release with the SEC that provided both a Vancouver telephone number and Mr. Randall's email address as contact information for stakeholders who required information in respect of the News Release. New MFC Bancorp's website also directs investor inquires to Mr. Randall.

[Emphasis added.]

- [17] The judge was no doubt alive to the distinct corporate personalities and the challenges HARP faces in proving that the party to the Guarantee continues to have an office in Vancouver. But, as he noted, on an application of this kind, the plaintiff need only establish an arguable case: *Purple Echo* at para. 34.
- [18] In my view, the facts alleged by HARP arguably support its choice of Vancouver under the forum selection clause: *Fairhurst v. De Beers Canada Inc.*, 2012 BCCA 257 at paras. 19-21, and the judge was wrong to entirely disregard the clause at this stage of the proceedings.
- [19] Second, the judge relied heavily on *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 34, to support his conclusion that the Guarantee was comparable to the letter of credit considered in that case and therefore should be found to be substantially performed in Germany. However, JTG stands for a broader principle. In that case, the defendant Bank of Nanjing applied to strike JTG's claim for money owing under the letter of credit related to timber exports by JTG to a purchaser in China. Nanjing argued that China, not BC, had jurisdiction over the matter because JTG had delivered its demand in China, and Nanjing had decided not to pay the demand in China, effectively breaching the contract there rather than in BC. This Court found, nonetheless, that there was a substantial connection to this province. Justice Kirkpatrick, writing for the Court, said:

[37] Fundamentally, the inquiry with respect to s. 10(e)(i) of the Act concerns the existence of circumstances that connect performance of the contract to the forum. In asking whether the obligations were to be performed in British Columbia, the inquiry focuses on the expectations of the parties as to performance at contract formation: see *North America Steamships Ltd.* at para. 16. Put another way, the Act requires the Court to engage in a preliminary interpretive inquiry to determine the limited question of the jurisdiction (or jurisdictions) where the parties intended the contract to be performed. The phrase "performed to a substantial extent" clearly denotes that the contract may be performed in multiple jurisdictions; thus, it is no bar to the operation of s. 10(e)(i) to say that the contract was intended to be performed in more than one jurisdiction (which is typical in a letter of credit arrangement). It is entirely possible to have an international contractual arrangement whereby both parties to the contract perform obligations "to a substantial extent" in their home jurisdictions.

[Underline emphasis added; italic emphasis in original.]

[20] The judge in the present case did not address whether both Germany and BC could have territorial competence. In concluding that the contract was to be performed in Germany, he reasonably inferred that the documents required to serve the demand would be compiled in Germany and that payment would be made there. But he did not give weight to the express terms of the contract which provide that MFC executed the contract in Vancouver, identify MFC as a BC company with a registered office in Vancouver, require the demand to be presented in Vancouver, and tie termination of the Guarantee to Vancouver time. In my view, it cannot be said in these circumstances that the parties did not have a reasonable expectation at the time the contract was entered into that it would be substantially performed in Vancouver. In addition, the judge acknowledged that "it is arguable that the cause of action under the Guarantee arose in British Columbia when Old MFC Bancorp failed to make payment": at para. 35.

[21] In summary on this ground of appeal, I conclude that the forum selection clause, the claim that MFC is a business operating in Vancouver, and the cause of action for breach of the Guarantee each could suffice, if proved, to establish territorial competence under ss. 3(c), 3(d) and 3(e) of the CJPTA. Therefore, I need not consider the judge's reasoning with respect to the fraudulent misrepresentation claim other than to note that once jurisdiction over one claim is established, it will generally suffice to establish jurisdiction with respect to related claims against the same parties. As the Supreme Court of Canada observed in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17:

[99] If [a real and substantial] connection exists in respect of a factual and legal situation, the court must assume jurisdiction over all aspects of the case. The plaintiff should not be obliged to litigate a tort claim in Manitoba and a related claim for restitution in Nova Scotia. That would be incompatible with any notion of fairness and efficiency.

2. Is Germany the more appropriate forum?

- [22] The standard of review of a decision to decline to exercise territorial competence under s. 11 of the CJPTA is discretionary. An appeal court should intervene only if the judge erred in principle, misapprehended or failed to take account of material evidence, or reached an unreasonable decision: JTG at para. 44.
- [23] HARP contends the judge erred by not giving effect to the forum selection clause, which it says can only be departed from if the defendant shows "strong cause" to do so. I note that HARP did not raise this issue at the hearing below, but in any event, I do not agree that the strong cause test governs in this case. That common law test applies to contracts with exclusive forum selection clauses, but the clause in the Guarantee is not of that kind. It is, rather, a non-exclusive forum selection clause. Non-exclusive forum selection clauses lack "the force and clarity required to engage the rule" that a party must show strong cause to override the forum the parties contracted to use: *Schleith v. Holoday* (1997), 31 B.C.L.R. (3d) 81 at paras. 10 and 12 (C.A.); *Douez v. Facebook, Inc.*, 2017 SCC 33 at paras. 18-22. In short, the judge correctly determined that the framework in s. 11 of the CJPTA governed the exercise of his discretion.
- [24] That is not to say, however, that the forum selection clause was of no import in the exercise of that discretion. As Castel and Walker state: "Where a party to the contract has exercised its right under a non-exclusive jurisdiction clause to commence an action in the forum, the court will take the jurisdiction agreement into account when weighing the arguments for and against a stay in favour of another forum": *Canadian Conflict of Laws*, vol.1, ch. 11 at 11-8. The judge did not consider the forum selection clause at this stage of his analysis because he had already concluded (in error as I have found) that it had no application on the facts of this case as pleaded.
- [25] In my view, the judge also erred in applying s. 11(2)(a) of the CJPTA. That section requires the court to consider "the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum" (emphasis added). This exercise is relatively straight-forward in a typical jurisdictional dispute such as JTG, where the BC-based plaintiff and the China-based defendant each championed their own jurisdiction as the more convenient forum. In the present case, however, the defendants proposed a jurisdiction with which they had no ties, asserting that it was more appropriate because the plaintiff had ties there. While it may be correct that it would be simpler and less expensive for HARP to litigate its dispute in Germany, that is not the relevant consideration when the plaintiff has chosen to accept the additional expense and inconvenience associated with having its case heard in BC. In this case, the relevant consideration is the comparative convenience and expense for the defendants as between the plaintiff's choice of forum and an alternative forum.
- [26] Nothing in the judge's analysis suggests that Germany is more convenient or less expensive for the respondents. Indeed, the evidence suggested they have no presence in Germany and some presence in Vancouver. As the judge noted at para. 29, their "key witnesses are in Ireland, Hong Kong and possibly Vancouver." The affidavit evidence filed by the respondents

stated that Mr. Morrow resided in Ireland and Mr. Smith in China. It must also be remembered that the defendant bears the burden at this stage of the CJPTA analysis to establish that another forum is clearly more appropriate.

- [27] Although the court retains discretion to decline jurisdiction over a dispute, it should not do so lightly. Once the plaintiff has established territorial competence there is a presumption in favour of the forum selected by the plaintiff: JTG at para. 46. A plaintiff is generally entitled to its choice of forum even if it would be more convenient and less expensive for that party to sue in another jurisdiction, subject to competing considerations affecting the interests of the defendant. Here, the respondents did not establish that Germany was more convenient and less expensive for them.
- [28] Finally, I note that the judge did not give any weight to the requirement in s. 11(1) that, before turning to the list of relevant circumstances in s. 11(2), the court is first to consider the "interest of the parties to a proceeding and the ends of justice". In the present case, HARP claims that MFC committed fraud in part by using the BC Supreme Court to obtain approval of a corporate reorganization without disclosing its prejudicial impact on the Guarantee holders. None of these allegations has been proven, but, at this stage of the proceedings, this circumstance also arguably supports BC as an appropriate forum.
- [29] In summary on this ground of appeal, I conclude that the respondents did not meet the burden of proving that Germany is clearly the more appropriate forum to resolve this international commercial dispute.
- [30] Although I have concluded that the order dismissing HARP's claim was granted in error, I note that neither the claims nor the facts relied on by HARP to establish jurisdiction have been proved on a balance of probabilities, and that jurisdiction may continue to be a live issue in the proceeding.

Disposition

- [31] I would set aside the order dismissing the appellant's notice of civil claim.

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Madam Justice DeWitt-Van Oosten"

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