

CANADA / JUDGMENT

Lerner v. Lerner Estate

2017 BCCA 408

COURT

British Columbia Court of Appeal

DECIDED

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2017 BCCA 408 Lerner v. Lerner Estate COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Lerner v. Lerner Estate, 2017 BCCA 408 Date: 20171106 Docket: CA44661 Between: Meda Maxine Lerner Appellant (Plaintiff) And Pearl Lerner, Irvin Greenberg, and Robert Goodwin as Executors of the Estate of Arthur Isadore Lerner Respondents (Defendants) Corrected judgment: A correction was made in para. 1 on December 1, 2017. Before: The Honourable Madam Justice Stromberg-Stein The Honourable Mr. Justice Savage The Honourable Mr. Justice Hunter On appeal from: An order of the Supreme Court of British Columbia, dated August 9, 2017 (Lerner v. Lerner Estate, 2017 BCSC 1389, Vancouver Registry S168446). Oral Reasons for Judgment Counsel for the Appellant: S. Batkin and P. Waldkirch Counsel for the Respondents: G.E.H. Cadman, Q.C. and H. Craig Place and Date of Hearing: Vancouver, British Columbia November 6, 2017 Place and Date of Judgment: Vancouver, British Columbia November 6, 2017 Summary: Ms. Lerner appeals from an order staying her underlying action on the basis that Manitoba was the more appropriate forum, pursuant to ss. 3, 10, and 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "Act"). She submits the chambers judge erred in his jurisdictional analysis and in failing to provide adequate reasons in support of that analysis. Held: appeal dismissed. The chambers judge's reasons provide an adequate basis upon which to ascertain his reasoning process. While the chambers judge was equivocal with respect to the first component of the jurisdictional analysis - an assessment of territorial competence pursuant to ss. 3 and 10 of the Act - the result of the jurisdictional analysis was supportable on the basis of his s. 11 analysis. I. Introduction

- [1] SAVAGE J.A.: Meda Maxine Lerner appeals from the order of Mr. Justice Affleck staying the underlying action on the basis that Manitoba was a more appropriate forum, under ss. 3, 10, and 11 of the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 (the "Act").
- [2] Ms. Lerner says that the chambers judge erred in staying the action by (1) failing to properly analyze whether British Columbia has territorial competence over the action, (2) failing to properly assess whether there is a "clearly" more appropriate forum for the action, and (3) failing to provide adequate reasons.
- [3] For the reasons that follow, I would dismiss the appeal. II. Background

- [4] In a notice of civil claim filed September 13, 2016, Ms. Lerner alleged the respondent executors breached their fiduciary duty over the administration of her late father's estate, of which Ms. Lerner is a beneficiary. She sought punitive damages and a range of equitable remedies by way of relief, including an accounting for profits, disgorgement to the estate, and specific performance of certain provisions in the will.
- [5] The estate has three executors. The respondent Irvin Greenberg resides in Winnipeg, Manitoba. The respondent Pearl Lerner resided in Winnipeg, Manitoba, but has died since the notice of civil claim was filed. The respondent Robert Goodwin who is retired, resides in Vancouver, British Columbia.
- [6] On October 27, 2016, the executors filed a jurisdictional response. They challenged the court's jurisdiction to adjudicate the plaintiff's claims. Alternatively, the executors submitted the court ought to decline jurisdiction, or in the further alternative transfer the proceedings to the Manitoba Court of Queen's Bench ("MBQB").
- [7] In objecting to the jurisdiction of the British Columbia courts to adjudicate the matter, and submitting that the judge should decline to exercise jurisdiction if it exists, the executors noted that the deceased's will was proven before the MBQB; the estate assets are located in Manitoba; there are concurrent proceedings before the MBQB seeking directions about the interpretation of the will and payments to the appellant as beneficiary; the estate accounts "are now being passed" in the MBQB; the only respondent residing outside of Manitoba, Robert Goodwin, has limited involvement with the estate and intends to resign as executor; and the applications before the Manitoba court ask that all executors be replaced by daughters of the deceased, who reside in Manitoba.
- [8] The appellant argued the action is most closely connected with British Columbia because she will bear its consequences and that, since trustees must act unanimously under this will, the estate can be seen as being administered in British Columbia as well as in Manitoba. She responded to the arguments relating to s. 11 of the Act primarily on the basis that she expects to call nine witnesses at trial who reside in British Columbia, and that financial and medical conditions prevent her from travelling to Manitoba to participate in an action there.
- [9] In reasons indexed as 2017 BCSC 1389, the chambers judge stayed the action in favour of proceedings in Manitoba. The chambers judge found that even if the court had territorial competence it should decline to exercise that jurisdiction (RFJ, para. 10). He considered the enumerated factors that he was obligated to consider under s. 11 of the Act, and held that "[s]ubsection 11(a) favours the plaintiff but the other provisions of s. 11 do not" (RFJ, para. 12). III. Analysis
- [10] The appellant submits that the chambers judge erred in (1) his assessment of territorial competence pursuant to ss. 3 and 10 of the Act, and (2) his exercise of discretion to decline jurisdiction pursuant to s. 11 of the Act.

- [11] Under the Act, jurisdictional analysis proceeds in two steps. First, an assessment of whether a court has territorial competence pursuant to ss. 3 and 10: see e.g., *Stanway v. Wyeth Pharmaceuticals Inc.*, 2009 BCCA 592 at paras. 5-24. Second, if territorial competence is established, the court may exercise its discretion pursuant to s. 11 to decline jurisdiction if there is a more appropriate forum to hear the action.
- [12] The onus in the second step is on the party arguing that there is another clearly more appropriate forum: *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd.*, 2015 BCCA 200 at para. 44. A. Adequacy of Reasons
- [13] The appellant also submits that the chambers judge's reasons did not meet the threshold for adequacy of reasons as they are not reasonably intelligible to the parties and do not suffice as a basis for meaningful appellate review. Therefore, she submits, the chambers judge committed a reversible error of law: *The Owners, Strata Plan VIS2030 v. Ocean Park Towers Ltd.*, 2016 BCCA 222 at paras. 37-38.
- [14] In light of the chambers judge's s. 11 analysis as discussed below, there is no merit to this ground of appeal. The chambers judge provided adequate reasons to ascertain his reasoning process. B. Jurisdiction
- i. Territorial Competence
- [15] The chambers judge was equivocal with respect to whether there was territorial competence. Before us the appellant acknowledges that her territorial competence argument rests on the basis that one of the trustees, who was one of three prior to commencement of the action, has retired to reside in British Columbia. Because there is alleged to be a continuing breach of trust, the administration of the trust is principally carried on in British Columbia. Although it is true that one of three trustees now resides in British Columbia, the principle issue concerns the actions of the trustees which occurred many years ago in Manitoba.
- [16] While it could be argued that it was an error to not explicitly apply ss. 3 and 10 of the Act and make an ultimate determination with respect to territorial competence - which either exists or does not - I am persuaded that the chamber's judge's conclusion is supportable on the basis of his s. 11 analysis. ii. Decision to Decline Jurisdiction
- [17] Section 11 of the Act codifies the common law doctrine of *forum non conveniens* which asks if there is a clearly more appropriate forum for the action: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 at paras. 21-22. In this case, as I interpret the decision below, the chambers judge found that the s. 11 analysis was dispositive of the jurisdictional challenge.

- [18] The standard of review for a decision under s. 11 of the Act is deferential. Such a decision is discretionary and will not be interfered with unless the discretion was exercised on a wrong principle or was clearly wrong: JTG Management Services Ltd. at para. 44. Absent an error of law or a clear and serious error in the determination of the relevant facts, this discretionary decision is entitled to deference from appellate courts: Club Resorts v. Van Breda, 2012 SCC 17 at para. 112.
- [19] Section 11 of the Act reads as follows: 11 (1) After considering the interests of the parties to a proceeding and the ends of justice, a court may decline to exercise its territorial competence in the proceeding on the ground that a court of another state is a more appropriate forum in which to hear the proceeding.
- (2) A court, in deciding the question of whether it or a court outside British Columbia is the more appropriate forum in which to hear a proceeding, must consider the circumstances relevant to the proceeding, including
- (a) the comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum,
 - (b) the law to be applied to issues in the proceeding,
 - (c) the desirability of avoiding multiplicity of legal proceedings,
 - (d) the desirability of avoiding conflicting decisions in different courts,
 - (e) the enforcement of an eventual judgment, and
 - (f) the fair and efficient working of the Canadian legal system as a whole.
- [20] The appellant argues that the chambers judge made a number of errors in his s. 11 analysis. In particular, she alleges that he conflated the territorial competence analysis with his discretionary decision to decline jurisdiction pursuant to s. 11, and erroneously placed an equal burden of proof on her and the respondent executors.
- [21] I am not persuaded that the chambers judge's decision making process can be so characterized. In my view, the chambers judge's s. 11 analysis remained distinct from any analysis regarding territorial competence. That is, he assumed territorial competence: there would not be any point in embarking on a s. 11 analysis otherwise. Likewise, I am not persuaded that the chambers judge improperly attributed any burden of proof to the appellant in the s. 11 analysis. The reasons do not say that.
- [22] In his reasons, the chambers judge considered s. 11, noting that while he was sympathetic to Ms. Lerner, "exercis[ing] jurisdiction would not be in the interests of the fair and efficient working of the Canadian legal system as a whole" (RFJ, para. 10). His reasons indicate that he considered each of the enumerated requisite factors in s. 11(2) (RFJ, para. 12). He found that ss. 11(2)(a) favoured the appellant, but ss. 11(2)(b), (c), (d), (e) and (f) did not.

- [23] The appellant submits that the chambers judge erred by failing to determine that Manitoba was a clearly more appropriate forum for the action. In *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, Sopinka J. said that the "choice of the appropriate forum is still to be made on the basis of factors designed to ensure, if possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties" (p. 912), and noted that the "clearly" standard, has particular application where there are no parallel proceedings (p. 921).
- [24] There was a substantial body of evidence tendered which supported the chambers judge's decision to exercise his discretion pursuant to s. 11: probate occurred in Manitoba, the estate assets are located in Manitoba, there are concurrent proceedings in Manitoba, accounts are being passed there, and the proposed executors (the appellant's sisters) are resident in Manitoba.
- [25] The concurrent proceedings in Manitoba address some of the same subject matter; most importantly, the interpretation of the will, the obligations of the trustees in the circumstances before them, and who is owed what. As noted in *Westec Aerospace Inc. v. Raytheon Aircraft Company*, 1999 BCCA 243 at para. 28, "[t]aking a narrow, particular, and formalistic approach to determining whether proceedings are parallel is also not consonant with the policy rationale for avoiding parallel proceedings ... parallel proceedings raise the possibility of inconsistent or conflicting judgments being given."
- [26] Taken as a whole, I am of the view that there was no error in the s. 11 analysis. The chambers judge properly exercised his discretion to decline any jurisdiction he may have had. IV. Conclusion
- [27] In the result, I would dismiss the appeal.
- [28] STROMBERG-STEIN J.A.: I agree.
- [29] HUNTER J.A.: I agree.
- [30] STROMBERG-STEIN: The appeal is dismissed. "The Honourable Mr. Justice Savage"

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