
CANADA / JUDGMENT

Ruloff Capital Corporation v. Hula

2013 BCSC 322

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Supreme Court of British Columbia

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2013 BCSC 322 Ruloff Capital Corporation v. Hula

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ruloff Capital Corporation v. Hula,

2013 BCSC 322

Date: 20130301

Docket: S126749

Registry: Vancouver

Between:

Ruloff Capital Corporation

Plaintiff

And

Errol Hula and Hulavision Inc.

Defendants

Before: The Honourable Mr. Justice Harvey

Reasons for Judgment

Counsel for the Plaintiff:

R. McFee, Q.C.

E. LeDuc

Counsel for the Defendants:

G. van Ert

E. Kirkpatrick

Place and Date of Hearing:

Vancouver, B.C.

January 30, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 1, 2013

- [1] The defendants, Hulavision Inc. and Errol Hula (collectively called "Hula") seek a declaration that the British Columbia Supreme Court (1) has no territorial competence over the action brought by the plaintiff, Ruloff Capital Corporation ("Ruloff") or, alternatively, (2) ought to decline jurisdiction over the action under the Court Jurisdiction and Proceedings Transfer Act, S.B.C. 2003, c. 28 [CJPTA].
- [2] The underlying litigation commenced by Ruloff is in respect of a written contract entered into between the parties in or about July 2009 (the "litigation agreement"). The purpose of the litigation agreement was for Ruloff to provide funding to Hula for litigation against NBC Universal ("NBCU"), an American mega-corporation.

Background

- [3] Hulavision is a closely held corporation, the shares of which are predominantly owned by Errol Hula and his wife. It is said to have developed technology for the delivery of streaming video having potential commercial value.

Cause of Action between Hula and NBCU

- [4] In 2006, Hula entered into discussions with NBCU for the purpose of exploring a business concept involving streaming video media which Hulavision wanted NBCU to develop. Hulavision and NBCU entered into a non-disclosure agreement regarding the information provided by Hulavision to NBCU in their discussions. Subsequently, NBCU created an internet media company known as Hulu, LLC, which proceeded to develop the product said to be conceived and owned by Hulavision.
- [5] The product, streaming video media, became an instant success. 10% of Hulu, LLC, was subsequently sold for \$200 million. At this time, Hula claims an overall valuation of its worth at \$2 billion.

- [6] Hulavision always considered that NBCU had improperly made use of its intellectual property. Hulavision and its principals were without resources to pursue litigation against NBCU in the United States. While aggrieved, and believing it had a cause of action, Hulavision was essentially powerless to proceed against NBCU, a deep pocketed adversary, for recompense for the alleged breach of the non-disclosure agreement and use of Hulavision's intellectual property.

Litigation Agreement between Ruloff and Hula

- [7] In 2009, Walt Ruloff, principal of Ruloff Capital Corporation, and Hula began discussions about an investment/share acquisition in Hulavision by a company called Premise Media ("Premise"). During the due diligence process, Ruloff came to learn of NBCU's alleged breach of the non-disclosure agreement. The terms of the non-disclosure agreement provided arbitration rights to the parties in the event of a dispute. Those arbitration rights were governed by a limitation period which expired in December 2009.
- [8] In the course of negotiations for an investment in and/or share acquisition of Hulavision by Premise, Ruloff discussed the possibility of obtaining legal advice to pursue a legal claim against NBCU. The parties began to discuss what came to be the litigation agreement, wherein Ruloff agreed, in essence, to fund the litigation as between Hula and NBCU for a 50% share of the net proceeds received by Hula by way of either settlement or arbitration award.
- [9] Thereafter, the parties sharply diverge as to the unfolding of events. I am not called upon in these reasons for judgment to determine the veracity of either proffered version.
- [10] In short, Hula asserts that Ruloff breached its obligations under the litigation agreement by, inter alia, failing to provide proper funding to the British Columbia solicitors, Fasken Martineau charged with pursuing the claim against NBCU; and failing to make required payments to Hula under the terms of the litigation agreement.
- [11] Ruloff denies these allegations and says, instead, that Hula covertly went to California in December 2009 in search of counsel who would take on its cause on a contingency basis thus obviating the need for the litigation agreement with Ruloff. Ruloff claims Hula wanted to avoid sharing any proceeds required under the agreement beyond the terms of the California lawyer's retainer.
- [12] The litigation agreement contained a termination clause allowing either party to terminate the litigation agreement upon the happening of certain events. The material provisions of the termination rights are found in Clauses 5.03 and 5.04 of the litigation agreement which reads as follows:

5.03 This Agreement may be terminated by either party upon 12 months written notice if, once formally commenced, the intended action is not actively prosecuted by Ruloff Capital or supported by Hulavision.

5.04 Upon the expiry or termination of this Agreement in accordance with the terms, the parties shall have no further obligation to each other, including no obligation of Hulavision to repay or reimburse Ruloff Capital or any third party investors that Ruloff Capital secures in accordance with article 3 of this agreement in respect of the Hulavision advance or any other funding provided to Hulavision hereunder. This section does not apply, however, if this agreement is terminated by Ruloff Capital pursuant to s. 5.03 for good cause due to Hulavision's material failure to support or cooperate in the prosecution of the intended action.

- [13] From December 2009 to January 2010, a series of emails were exchanged between the parties, their respective solicitors, and Geoff Cowper, the lawyer engaged by the parties to pursue the California claim against NBCU. The correspondence culminated with an email by Hula to Ruloff on January 31, 2010, purporting to give notice under clause 5.03. The stated reason was Ruloff's failure to "actively prosecute" the action.
- [14] Ruloff denies the allegation that they were not actively prosecuting the action. It points out that a notice to arbitrate was given by Fasken Martineau prior to the governing limitation date and there appears, on the limited information available to me, to be some legitimate dispute as to Fasken Martineau's funding requirements for litigation at given points in time.
- [15] I also observe that in late January 2010, Ruloff's counsel sent a letter to Fasken Martineau containing a draft for \$50,000 by way of retainer with an acknowledgement that if such was insufficient, a further retainer would be provided upon request.
- [16] Ruloff asserts that Hulavision is in breach of the litigation agreement by unilaterally retaining California counsel to replace Fasken Martineau as litigation counsel in the NBCU litigation. The retention of Mr. Vantress, Hula's California counsel, obviated the need and motive for Hulavision to require Ruloff's financial support in the litigation. Ruloff says that all of Hula's subsequent actions should be seen as an effort to 'jettison' the burdensome provisions of the litigation agreement once a cheaper alternative was secured by Hula.
- [17] Hula, for its part, suggests that Ruloff actively delayed the preparation of the paperwork relating to its investment in Hula and payments of funds to Fasken Martineau in an effort to "squeeze" Hula so as to allow Ruloff and/or a nominee to require equity participation in Hula at a bargain price.
- [18] Neither of these cross-assertions is capable of resolution in this application. I note them only by way of background to give some flavour to the litigation ultimately commenced by Ruloff in this jurisdiction. All the events which transpired from the formation of the litigation agreement to its purported termination will be the focal point of the B.C. litigation. All of the events took place in B.C. All the relevant 'actors' reside in B.C.

California Litigation

- [19] Prior to the commencement of this litigation in the fall of 2012, events continued to unfold in California. Mr. Vantress, counsel for Hula, began to embark upon discussions and negotiations with NBCU, and Ruloff continued to insist that the terms of the litigation agreement remained binding and enforceable on both parties.
- [20] Notwithstanding the purported termination of the litigation agreement in January 2010, Hula mended fences with Ruloff to the extent that an agreement was entered into allowing Darryl Snider, an attorney hired by and paid for by Ruloff, to assist Mr. Vantress in the prosecution of the NBCU litigation. The relationship between Snider and Vantress continued up until February 2012 when Ruloff, according to its principal, refused to pay Mr. Vantress a substantially higher hourly fee and to pay for certain of the litigation expenses.
- [21] The relationship between Snider and Vantress broke down such that Ruloff says it was no longer informed as to events involving the arbitration. As a result, it made an independent application to the California arbitrator in 2012 to firstly participate in the arbitration and, when that application was dismissed, to attend as an observer in the arbitration so as to remain informed as to negotiations. That application, too, was dismissed.
- [22] Snider, on behalf of Ruloff, then wrote directly to counsel for NBCU asserting an interest in Hulavision's claims against NBCU and demanding participation. NBCU responded in the negative to Ruloff's requests for information and 'a seat at the table'.
- [23] All of this, says Hula, resulted in the filing of an action by Hula in the California Superior Court on April 13, 2012 (the "California Action") wherein Hulavision sought relief against Ruloff and others. In the California Action, Hula sought a finding that the litigation agreement had been lawfully terminated and damages resulting from Ruloff's "harmful interference with Hulavision's conduct of the Hula litigation".
- [24] Hula says it was only able to bring commence the action against Ruloff et al as a result of a further agreement with Mr. Vantress to proceed with it on a contingency basis. Hula asserts throughout that it is impecunious and does not have the funds to pursue the litigation in California nor does it have funds sufficient to engage counsel to defend Ruloff's action in British Columbia.
- [25] On August 16, 2012, Ruloff brought a motion in the California Action arguing that the California Superior Court should decline to hear the case on the basis of forum non conveniens. The application was dismissed without reasons being given and the California court has assumed jurisdiction over the dispute.
- [26] Further applications were brought by Ruloff to strike a portion of the pleadings. This was successfully done. A further application to have Mr. Vantress removed as counsel was denied.

- [27] No appeal has been filed in respect of any of those decisions I have mentioned or, at least, the parties have not been drawn such to my attention.

Application before this Court

- [28] In October 2012, this action was commenced by Ruloff. There is no doubt that the central issue in this litigation appears to be that which has been raised in the California Action. Specifically the validity and enforceability of the litigation agreement.
- [29] The events which transpired from the formation of the litigation agreement to its purported termination will be the focal point of the B.C. litigation. All of the events took place in B.C.
- [30] I should note, if it is not clear, that all parties to the B.C. litigation, Hulavision, Errol Hula, and Ruloff Capital, are British Columbia residents. Each of the corporate entities is incorporated under the laws of British Columbia with registered offices in British Columbia. Each of the directors and operating minds of the corporate parties are British Columbia residents.
- [31] The contract which is the subject of the dispute was formulated in British Columbia with the assistance each party's legal counsel. Hula through its counsel, Keith Spencer, who practices in Vancouver, British Columbia; Ruloff through its counsel, Jeffrey Scouten, who also practices in Vancouver.
- [32] Fasten Martineau, the law firm originally engaged to prosecute the NBCU litigation is a Vancouver law firm. Geoffrey Cowper, Q.C., the Fasken's lawyer engaged to conduct the litigation is resident in Vancouver.
- [33] The litigation agreement specifically references that the law governing the interpretation of the litigation agreement is B.C. law.

Position of the Parties

- [34] In seeking the court to decline its admitted territorial jurisdiction over B.C. residents litigating a contract executed in B.C. and governed by B.C. law, the defendants accept that they must demonstrate that California, where jurisdiction has been assumed, is clearly the more appropriate forum to resolve the dispute.
- [35] In *Club Resorts Ltd v. Van Breda*, 2012 SCC 17 [Club Resorts], that phrase has been interpreted as follows at paras.108-109:
- [108] Regarding the burden imposed on a party asking for a stay on the basis of forum non conveniens, the courts have held that the party must show that the alternative forum is clearly more appropriate. The expression "clearly more appropriate" is well established. It was used in *Spiliada* and *Amchem*.

[109] The use of the words "clearly" and "exceptionally" should be interpreted as an acknowledgment that the normal state of affairs is that jurisdiction should be exercised once it is properly assumed. The burden is on a party who seeks to depart from this normal state of affairs to show that, in light of the characteristics of the alternative forum, it would be fairer and more efficient to do so and that the plaintiff should be denied the benefits of his or her decision to select a forum that is appropriate under the conflicts rules. The court should not exercise its discretion in favour of a stay solely because it finds, once all relevant concerns and factors are weighed, that comparable forums exist in other provinces or states. It is not a matter of flipping a coin. A court hearing an application for a stay of proceedings must find that a forum exists that is in a better position to dispose fairly and efficiently of the litigation. But the court must be mindful that jurisdiction may sometimes be established on a rather low threshold under the conflicts rules. Forum non conveniens may play an important role in identifying a forum that is clearly more appropriate for disposing of the litigation and thus ensuring fairness to the parties and a more efficient process for resolving their dispute.

[Emphasis added.]

[36] Here the defendants point to what they say are the decisive factors giving credence to their suggestion that California is clearly the more appropriate forum: (1) California has assumed jurisdiction and given notice in the August 2012 ruling that they will not step aside for the B.C. court, and (2) the defendants, unlike the plaintiff Ruloff, cannot afford representation in the B.C. action and can only afford to defend/prosecute the litigation through the vehicle of their California attorney given his largesse in acting, presumably, on a contingency.

[37] The plaintiff says that the enumerated factors in s. 11(2) of the CJPTA point overwhelmingly to the opposite conclusion.

Analysis

[38] As noted above, the governing legislation is the CJPTA. The CJPTA is the codification of the common law of forum non conveniens: *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11 [Teck] at para. 22.

[39] Once territorial competence is established, the court has discretion to decline to exercise its jurisdiction or an applicant can demonstrate that the "alternative forum is clearly a more appropriate" forum than British Columbia for the determination of the issues: *Club Resorts* at para. 108.

- [40] Surprisingly, perhaps, this application is founded firstly on the basis that British Columbia doesn't have territorial competence over the parties. This because in *O'Brien v. Simard*, 2006 BCCA 410, Low J.A. held that for an order application to invoke the doctrine of forum non conveniens and seek the court to decline jurisdiction, a party must first challenge the court's territorial competence in compliance with Rule 14(6.1) of the Rules of Court (now Rule 21-8 of the Supreme Court Civil Rules).
- [41] The matter of territorial competence was raised by the plaintiff as a formality so as to comply with the *O'Brien* decision. It was not seriously advanced by the applicant, nor could it be. The defendants properly proceeded to their alternative relief: that is that the court should exercise its discretion to decline to exercise its territorial jurisdiction.
- [42] Such a decision requires a consideration of all of the provisions of s. 11 of the CJPTA which provide 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.
- [43] The Supreme Court of Canada has made clear that the court must consider all relevant factors listed in s. 11 to determine if a stay of the proceeding in British Columbia is warranted: *Teck* at para. 21.
- [44] The defendants submit, and I agree, that an analysis of s.11 requires the court to not only weigh the factors enumerated in s. 11(2) but, as well, to pay heed to the words of s.11(1).
- [45] The defendants submit that justice will not be done if the litigation is fought on two separate fronts where, in one of them, the defendants will be without representation.
- [46] In considering the whole of s.11, as I must, I will now proceed with all the relevant factors in s. 11(2) to consider in forum non conveniens.

(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

[47] I am satisfied that the central issue between the litigants is the validity and enforceability of the litigation agreement. All of the witnesses who could testify as to the litigation agreement's formation, implementation and execution reside in B.C.

[48] The costs of travel to California would be a significant factor if all potential witnesses suggested by Ruloff are required. The witnesses include three lawyers, Messrs. Cowper, Scouten and Spencer, who would not only need travel expenses but, undoubtedly, professional fees for travel days to attend a trial in California.

[49] I am satisfied on the evidence of Mr Ruloff, that counsel fees will also be higher, at least for him and the other defendants in the California action, than they would be for counsel of comparable calibre here in B.C.

(b) The law to be applied to issues in the proceeding

[50] As described in the litigation agreement itself, if there were any doubt, B.C. law governs the contract.

[51] The California action raises matters on which it is entirely possible that an expert will need to be engaged to opine as to B.C. law. The California action alleges the contract is champertous and, therefore, void or voidable. I have no confidence in the defendants' submission that the case involves common law principles where there can be no divergence between B.C. and California law.

[52] I am alive to the defendants' contention that there are other issues at play in the California action, specifically; the claim by Hula that Ruloff and others committed tortious acts under California law. That may be a matter better left to California courts but the outcome hinges, in my view, on the answer to the central question of the status of the litigation agreement.

(c) The desirability of avoiding multiplicity of legal proceedings; and (d) the desirability of avoiding conflicting decisions in different courts

[53] The defendants correctly point out that the California action is not going away regardless of my ruling. Ruloff is free, they say, to counterclaim for the same relief he seeks in the B.C. action avoiding, thereby, a multiplicity of proceedings.

[54] Counsel referred me to *Ingenium Technologies Corporation v. The McGraw Hill Companies Inc*, 2005 BCCA 358 [Ingenium], where the majority decision found the learned Chambers Judge had erred by failing to reference, and presumably consider, the fact of ongoing litigation involving the same parties in New York State. Lowry J.A., stated, at para. 10:

- [101] Wedge J. appears to have then completely discounted the fact that the United States District Court has positively asserted jurisdiction and to have effectively attached no significance to it in her analysis. I do not consider what was said in Loewen to have survived this Court's decision in Thrifty, and I do not consider Wedge J. was right in principle to have attached no significance to the District Court having dismissed Ingenium's application for the dismissal of the New York action on jurisdictional grounds. I endeavour to explain why in brief terms.
- [55] The majority carried on to discuss the importance of comity and the undesirability of parallel proceedings.
- [56] While acknowledging the merit of that position, I agree here with counsel for Ruloff when he stated: "the prior positive assertion of jurisdiction by a foreign court does not oust the s.11 inquiry. Comity is not served by the automatic deferral to the first court that asserts jurisdiction."
- [57] As was stated in Teck:
- [21] The first argument is that s. 11 of the CJPTA does not apply where a foreign court has asserted jurisdiction. I cannot agree. The CJPTA creates a comprehensive regime that applies to all cases where a stay of proceedings is sought on the ground that the action should be pursued in a different jurisdiction (forum non conveniens). It requires that in every case, including cases where a foreign judge has asserted jurisdiction in parallel proceedings, all the relevant factors listed in s. 11 be considered in order to determine if a stay of proceedings is warranted. This includes the desirability of avoiding multiplicity of legal proceedings. But the prior assertion of jurisdiction by a foreign court does not oust the s. 11 inquiry.
- ...
- [24] Alternatively, it is argued that if s. 11 applies, the assertion of jurisdiction by the foreign court is an overriding and determinative factor in the s. 11 analysis. This argument also must be rejected.
- [25] First, had actual assertion of jurisdiction by a foreign court been seen as a factor that should override all others, one would have expected the legislature to have stated this expressly. Rather, avoidance of multiplicity of proceedings is simply listed along with other factors. This suggests that the existence of foreign proceedings is only one factor, among many, to be considered in a forum non conveniens analysis.
- [58] Further, at para. 38. McLachlin, C.J.C. said:
- [38] Teck argues that a refusal to stay the B.C. Coverage Action places the parties in the difficult position of having legal proceedings on the issue of insurance coverage in two separate jurisdictions. While I am sympathetic to the difficulties presented by parallel proceedings, the desire to avoid them cannot overshadow the objective of the forum non conveniens analysis, which is "to ensure, if possible, that the action is tried in the jurisdiction that has

the closest connection with the action and the parties" (Amchem Products Inc. v. British Columbia (Workers' Compensation Board), 1993 CanLII 124 (SCC), [1993] 1 S.C.R. 897, at p. 912).

[59] I am informed by those passages, delivered after the judgment in Ingenium, in concluding that the overriding objective in determining forum non conveniens is to ensure the action is tried in the jurisdiction that has the closest connection with the action and the parties.

(e) The enforcement of an eventual judgment

[60] The defendants submit that "enforcement is not likely to be an issue in this case regardless of whether it proceeds in California, B.C., or both places".

[61] Once, again I agree with the position of Ruloff. While a monetary judgment, wherever granted, is unlikely to result in enforcement difficulties, the plaintiff in the B.C. action seeks both equitable and in personam orders against Hula.

[62] Pro Swing Inc. v. Elta Golf Inc., 2006 SCC 52, makes clear, that complications can arise in enforcement of non-monetary foreign judgments: see paras. 14, 15, 30, 31.

(f) The fair and efficient working of the Canadian legal system as a whole

[63] The defendants raise the issue of their impecuniosity in relation to s.11(f), coupled with the words "After considering the interests of the parties to a proceeding and the ends of justice" found in s.11(1).

[64] While the claim of impecuniosity is challenged by Ruloff, based on share sales to family members which according to Ruloff give rise to a finding of great wealth based on a share valuation of Hulavision of close to 4 million dollars, I will accept, for the purpose of the analysis that Hulavision and Hula are both financially challenged such that they cannot engage counsel here to defend the action.

Conclusions

[65] Does a finding that one party can acquire representation in another jurisdiction, coupled with the fact that the other jurisdiction, for reasons not articulated, has accepted jurisdiction over the parties, trump the objective in Teck to ensure the action is tried in the jurisdiction that has the closest connection to it?

[66] The answer here is no.

[67] The only connection here between the litigation and California is the focus of the impugned agreement to bring legal proceedings against NBCU.

[68] Every other factor weighs overwhelmingly in favour of conducting the litigation in the jurisdiction in which the agreement and alleged breach thereof arose and where all of the parties and witnesses reside.

[69] The defendants have failed to persuade me that California is clearly the more appropriate forum for determination of the issues between them and, in the result, the application is dismissed.

[70] The plaintiff is entitled to the costs attendant upon the application in any event of the cause.

"Harvey J."

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