SUPREME COURT OF YUKON

Citation: *Cheng v Glencore plc,* 2024 YKSC 27

Date: 20240607
S.C. No. 20-A0119
Registry: Whitehorse

BETWEEN:

LIBEI CHENG

PLAINTIFF

AND

GLENCORE PLC (in its own capacity and as successor by merger to Katanga Mining Limited), HUGH STOYELL and ROBERT WARDELL

DEFENDANTS

Before Justice K. Wenckebach

Counsel for the Plaintiff	Eli Karp and Sage Nematollahi
Counsel for the Defendant Glencore plc	Michael Feder, KC Shane D'Souza and Patrick Williams
Counsel for the Defendants Hugh Stoyell and Robert Waddel	Alan Gardner Cheryl Woodin and Joseph Blinick

REASONS FOR DECISION

OVERVIEW

[1] The defendants, Glencore plc, Hugh Stoyell and Robert Wardell, have brought applications seeking that the Court dismiss the proceedings against them, pursuant to Rule 20(26) of the *Rules of Court* of the Supreme Court of Yukon (the "*Rules*").

[2] The plaintiff, Libei Cheng, was a minority shareholder of a corporation, Katanga Mining Limited ("Katanga"). Katanga was a mining company, which was incorporated in

the Yukon under the *Business Corporations Act*, 2002 RSY, c 20 ("*BCA*"), with mining properties and assets in the Democratic Republic of Congo.

[3] In November 2019, Katanga carried out a Rights Offering Transaction. Glencore International AG, which was the majority shareholder of Katanga, acquired more than 99% of Katanga's shares through the Rights Offering Transaction.

[4] In June 2020, Katanga amalgamated with another Yukon corporation, 836074 Yukon Inc to form Katanga Mining Limited ("New Katanga"). It was then taken private.

[5] In December 2020, New Katanga was discontinued under the *BCA* and continued in the Isle of Man.

[6] Mr. Cheng has brought this action as a purported representative action on behalf of Katanga's minority shareholders. Mr. Cheng alleges that the Rights Offering Transaction circumvented and breached securities law, specifically, Part 5 of Multilateral Instrument 61-101 (Protection of Minority Security Holders in Special Transactions), by not following the procedures required by the Multilateral Instrument. Moreover, he alleges that Katanga did not comply with s. 195 of the *BCA*, which requires that specific business arrangements be voted on and approved by the court.

[7] Mr. Cheng further alleges that, as a result of how the transaction was carried out, Glencore International AG was able to acquire Katanga's shares and take it private for a substantially lower price than it would otherwise have had to pay. He claims that, when the Rights Offering Transaction was announced, Katanga's shares fell by 46% and did not recover.

[8] Mr. Cheng alleges that this amounted to oppression. He therefore seeks financial compensation for Katanga's minority shareholders, or, alternatively, another economic

measure the Court deems appropriate as a remedy to the harms he and the other minority shareholders suffered.

[9] Mr. Cheng did not name New Katanga as a defendant, even though it continues to exist and operate. He also did not name Glencore International AG as a defendant. Rather, he named as a defendant Glencore plc, in its own capacity and as the purported successor by merger to Katanga. Glencore plc is an investment and holding company. It owns all the shares of Glencore International AG. Glencore International AG is Glencore plc's main operating subsidiary.

[10] Mr. Cheng also named as defendants Hugh Stoyell and Robert Wardell, who were directors of Katanga when the Rights Offering Transaction was carried out.

[11] The defendants now seek that the Court dismiss the proceedings. Glencore plc makes three main arguments in support of its application. First, it argues that there is no viable claim because Mr. Cheng sued Glencore plc as "successor by merger" to a non-party, Katanga. Glencore plc never merged with Katanga, however, and is not a successor to Katanga. Second, it submits that the Court does not have subject-matter jurisdiction. Third, Glencore plc argues that the Court lacks territorial jurisdiction over the dispute.

[12] Alternatively, Glencore plc submits that Mr. Cheng's claim is not properly constituted and should have been brought as a petition, not a statement of claim. Glencore plc seeks that the Court stay the proceedings until Mr. Cheng complies with the *Rules* or persuades the Court that the matter should proceed by way of statement of claim.

[13] Mr. Stoyell and Mr. Waddell agree with Glencore plc's main arguments and the alternative arguments. They also submit that the statement of claim does not contain

allegations that Mr. Stoyell or Mr. Waddell engaged in misconduct, which is necessary to ground a viable claim of oppression against them.

[14] Mr. Cheng submits that the claim of oppression is a statutory tort, and that the Supreme Court does have jurisdiction over the dispute. He furthermore submits that Glencore plc is a proper party because it is linked to the claim through its merger or amalgamation with Katanga and/or New Katanga, or through vicarious liability, agency, common design or common enterprise and/or piercing the corporate veil. With regards to the individual defendants, Mr. Cheng argues that the statement of claim contains sufficient facts to support a claim against them[1].

SUBJECT-MATTER JURISDICTION AND TERRITORIAL JURISDICTION

[15] Although the parties raise several issues, it seems to me that the central question to be decided is whether the Supreme Court of Yukon (the "Supreme Court") is the proper forum for the dispute. There are two components to the question in this case: whether the Supreme Court has subject-matter jurisdiction and whether it has territorial jurisdiction.

[16] Subject-matter jurisdiction concerns itself with the court's legal authority to adjudicate a dispute (*Conor Pacific Group Inc v Canada (Attorney General)*, 2011 BCCA 403 ("*Conor Pacific*") at para. 38). As an example, under the *Small Claims Court Act*, RSY 2002, c 204, the Small Claims Court has the jurisdiction to hear civil claims if the amount claimed does not exceed $25,000 (s. 2(1)). It cannot hear civil

[1] In his written arguments Mr. Cheng states that the defendants are estopped from bringing their applications due to delay. He did not make any written submissions on this issue, however, so I will not consider it.

claims where the amount claimed is more than $25,000: it does not have the subject-matter jurisdiction over those disputes.

[17] Territorial jurisdiction, on the other hand, is about the geographical connection between the dispute and the court's territorial authority (*Conor Pacific* at para. 38).

[18] A court must have both subject-matter jurisdiction and territorial jurisdiction to hear a dispute (*Sharp v Autorité des marchés financiers*, 2023 SCC 29 ("*Sharp*") at para. 162 (minority, but not on this issue)). Put another way, if a court does not have subject-matter jurisdiction, it cannot hear a matter, even if it has territorial jurisdiction.

[19] Moreover, where, by legislation, a court does not have subject-matter jurisdiction, parties cannot grant the court subject-matter jurisdiction through agreement or attornment.

ISSUES

[20] The principles of subject-matter jurisdiction and territorial jurisdiction help to determine how the issues in the case at bar should be framed and determined. The nature of the dispute is an integral part of determining subject-matter jurisdiction and territorial jurisdiction. Here, however, the parties disagree about the nature of the dispute. Mr. Cheng states that the oppression claim is a statutory tort, while the defendants argue that it is not. Because of the centrality of this question, therefore, I will consider it first. I will then consider the question of subject-matter jurisdiction.

[21] As explained below, I conclude that the oppression remedy is not a statutory tort. I also conclude that the Supreme Court does not have subject-matter jurisdiction over the dispute. My conclusion that the Supreme Court does not have subject-matter jurisdiction means that the Supreme Court cannot adjudicate the dispute between the parties. It is dispositive of the defendants' applications. It is, therefore, unnecessary to

consider the questions about territorial jurisdiction, who is a proper party, and whether the individual defendants should have been named as parties.

[22] The issues I will address, therefore, are:

A. Is the oppression remedy a statutory tort?

B. Does the Supreme Court have subject-matter jurisdiction over the dispute?

ANALYSIS

A. Is the oppression remedy a statutory tort?

[23] Mr. Cheng's counsel makes the novel submission that oppression, as described in s. 243 of the *BCA*, is a statutory tort arising out of the law of the Yukon. He does not provide any case law in which oppression is described as a statutory tort, nor does he explain why oppression remedy is a statutory tort. He relies on several cases in support of his submission; however, they are not cases about oppression remedies.

[24] This argument is not persuasive. The oppression remedy is not a statutory tort; rather, it involves concepts and principles that are distinct from those arising in tort. Unlike torts, the oppression remedy draws its genesis from equity. Thus, the court's approach and remedies in oppression remedy cases is different than in tort cases. As in equity, when applying the oppression remedy, the court has the authority to do what is fair and is not confined to doing only what is legal. In addition, in determining whether oppression has occurred the court considers "company realities" and not "narrow legalities" (*Mennillo v Intramodal inc,* 2016 SCC 51 at para. 8).

[25] The onus on an applicant in proving oppression is also specific to that area of law. To demonstrate oppression, an applicant must identify their expectations, show

they were reasonably held, how the expectations were violated by corporate conduct and that the conduct was oppressive (*Wilson v Alharayeri*, 2017 SCC 39 at para. 24).

[26] The Ontario Court of Appeal has also commented that the oppression remedy should not be placed into the mould of the "formal construct of causes of action" (*Ford v OMERS* (2006), 79 OR (3d) 81 (ONCA) at para. 111), because doing so would insert complexities of the common law which the legislature and Parliament did not intend when enacting the oppression remedy.

[27] The nature of the oppression remedy is, therefore, different than that of torts. There is also nothing in the *BCA* suggesting that, despite these differences, the oppression remedy should be treated as a tort.

B. Does the Supreme Court have subject-matter jurisdiction over the dispute?

[28] I conclude that the Supreme Court does not have subject-matter jurisdiction over the dispute.

[29] The defendants' position that the Supreme Court does not have subject-matter jurisdiction is derived from its interpretation of s. 243 of the *BCA*. Mr. Cheng takes a different approach. He argues that the Court should apply the "*Unifund*" test, as expressed in *Unifund Assurance Co v Insurance Corp of British Columbia*, 2003 SCC 40 ("*Unifund*") and *Sharp*, to determine jurisdiction. Using that test, Mr. Cheng submits that the Supreme Court does have subject-matter jurisdiction.

[30] I will begin my analysis of this issue by addressing whether the *Unifund* test applies. I will then address the defendants' argument that the legislation does not grant the Supreme Court subject-matter jurisdiction.

Does the Unifund Test Apply?

[31] Mr. Cheng submits that, to decide jurisdiction, the Court must apply the *Unifund* test: it must determine whether there is a "real and substantial connection" between the proceedings and the Supreme Court (*Unifund* at para. 54; *Sharp* at para. 104). He submits that, in the case at bar, Katanga violated s. 195 of the *BCA* when it was incorporated under the legislation. In doing so, it acted oppressively against minority shareholders. The Supreme Court has exclusive jurisdiction to resolve matters arising under ss. 195 and 243. Thus, Mr. Cheng argues, the Supreme Court has subject-matter jurisdiction over the claim.

[32] Mr. Cheng's reliance on *Unifund* and *Sharp* is misplaced. While the *Unifund* test is used to determine a court's jurisdiction over a matter, it is used in circumstances where legislation is broadly framed, thus potentially allowing the legislation to be applied to out-of-province parties in ways that violate constitutional limits on a province's territorial reach. The *Unifund* test ensures that the legislation is not applied in a way that goes beyond the legislature's territorial powers by restricting the application of the statute to an out-of-province party only in matters where there is a sufficient connection between the legislation and the out-of-province party. It therefore "… allows a statute to be interpreted to apply to an out-of-province defendant in certain circumstances without having an extraterritorial effect" (*Sharp* at para. 114).

[33] *Sharp* dealt with that precise situation. In that case, Quebec securities legislation provided the securities regulator with broad powers to be exercised in the public interest (at para. 94). The legislation did not expressly provide the securities regulator with jurisdiction over out-of-province parties, nor did it limit the regulator's jurisdiction over such parties (at para. 102). The facts in that case were that out-of-province defendants

had allegedly engaged in a “pump and dump” scheme which affected individuals living in Quebec. The regulator then sought to impose penalties and prohibitions on the out-of-province defendants through the securities legislation. The Supreme Court of Canada thus applied the *Unifund* test to determine that the regulator could use the Quebec securities legislation against the out-of-province defendants in those circumstances.

[34] In contrast to the legislation in *Sharp*, the *BCA* does not contain broad language that could be read as providing the Supreme Court with impermissible jurisdiction outside the Yukon. Rather, the *BCA* explicitly applies only to companies incorporated under the *BCA* and to Yukon companies (s. 5). The Supreme Court’s jurisdiction in applying the *BCA*, moreover, is generally constrained to companies that are subject to the act. The issues arising in *Sharp* do not arise here. As a result, neither *Sharp* nor the *Unifund* test are applicable to the case at bar.

Does the BCA Grant the Supreme Court Subject-Matter Jurisdiction?

[35] I conclude that, under the *BCA*, the Supreme Court does not have subject-matter jurisdiction over the parties’ dispute.

[36] The defendants argue that the *BCA* only applies to companies currently governed by the *BCA*. In the case at bar, the defendant Glencore plc is not incorporated under the *BCA*, and never has been. While Katanga and New Katanga were incorporated under the *BCA*, they were discontinued, and now continue under the law of the Isle of Man. The defendants therefore argue that the *BCA* does not apply to Glencore plc or the corporations implicated in the allegations but not named as defendants. Section 243 cannot be invoked against them.

[37] In response to Glencore plc’s argument, Mr. Cheng submits that, at the time the Rights Offering Transaction took place, both Katanga and the Rights Offering

Transaction were governed by the *BCA*. The Supreme Court at that point had jurisdiction over Katanga and the actions it took in advancing the Rights Offering Transaction. Its jurisdiction did not terminate when New Katanga discontinued under the *BCA* and continued in the Isle of Man.

[38] Mr. Cheng further argues that, if the defendants' argument is accepted, then corporations will be able to violate the *BCA* with impunity, as, after committing their wrongdoing, they could escape the reach of the court simply by discontinuing from the jurisdiction and incorporating in another.

[39] The determination on this issue turns on the interpretation of s. 243. Section 243 states that, on application by a complainant, the Supreme Court may provide a remedy if it is satisfied that a "corporation or any of its affiliates" acted in an oppressive manner. The question then is what the word "corporation" includes. "Corporation" is a defined term in the *BCA*. It is defined as "a body corporate incorporated or continued under this Act and not discontinued under this Act". A body corporate that is discontinued, in turn, includes a company that was incorporated under the *BCA* but has moved to another jurisdiction.

[40] Thus, under the *BCA* the word "corporation" refers only to companies that are currently incorporated under the legislation. It does not include companies that were previously incorporated under the legislation but have moved to another jurisdiction. As a result, s. 243 applies only to companies presently incorporated under the legislation.

[41] I also agree with defendants' counsel that an examination of the rest of s. 243, and of the legislation more broadly, supports this conclusion. Under s. 243, once the court determines that a corporation has acted in an oppressive manner, it has broad powers over the governance of the corporation. It may even go so far as to dissolve the

corporation. It would be unworkable for the court to have such powers over a company incorporated in another jurisdiction.

[42] Turning to other parts of the legislation, as noted above, pursuant to s. 5, the *BCA*, as a whole, applies only to companies currently incorporated under the legislation. Section 191, which fixes the process for moving from the Yukon to another jurisdiction, also draws a clear line between companies currently incorporated under *BCA*, and those that were previously incorporated under the *BCA*, but are no longer. Section 191(8) provides that, as of the date of discontinuance as a corporation under the *BCA*, "… the corporation becomes an extra-territorial body corporate as if it had been incorporated under the laws of the other jurisdiction". The overall intent of the legislation is to apply only to companies currently incorporated under it.

[43] Section 191 also provides a response to Mr. Cheng's concern that if oppression remedies cannot be applied to companies that discontinue under the *BCA* and continue elsewhere, then companies will be able to evade oppression remedies by simply leaving a jurisdiction and incorporating elsewhere when they are accused of acting oppressively.

[44] Under s. 191, corporations proposing to discontinue from the Yukon and to continue elsewhere must obtain shareholder approval. This in turn, means that they must hold a special shareholders' meeting at which the proposal is voted on. The corporation must also comply with the requirements for holding a special shareholders' meeting, including by providing between 21-60 days' notice to shareholders (or a different amount, if otherwise permitted) of the date of the meeting.

[45] Once the corporation has shareholder approval, it may then apply to the registrar of corporations to continue in another jurisdiction. As a part of that application, the

corporation must demonstrate that the laws of the other jurisdiction provide that "an existing cause of action, claim or liability to prosecution" will remain unaffected (s. 191(9)(c)).

[46] Section 191, therefore, affords the shareholders the ability to protect themselves if they believe that continuing in another jurisdiction will have a detrimental impact on their legal rights. Providing the shareholder the chance to vote on the proposal may not offer sufficient protection: a minority shareholder, by themselves, is unlikely to prevent the proposal from being approved. More importantly, the shareholder will have advance notice of the corporation's intentions. A shareholder who believes they have been harmed by the corporation's oppressive actions may then commence a proceeding or take the steps necessary to give notice to the corporation that they have a claim against the corporation. Section 191(9)(c) would then apply. The corporation would be required to show that the shareholder's claim or cause of action would be unaffected if the company were permitted to continue in another jurisdiction. A corporation cannot, therefore, engage in oppressive actions and then simply change jurisdictions, leaving the shareholder without recourse.

[47] In his submissions, if I understand him correctly, Mr. Cheng's counsel implies that s. 191(9)(c) should protect him because he had either an existing claim or cause of action when New Katanga applied to discontinue from the *BCA*. However, Mr. Cheng filed his statement of claim after New Katanga was discontinued under the *BCA* and continued in the Isle of Man. There is also no evidence that New Katanga had sufficient notice of Mr. Cheng's claim, thus requiring it to demonstrate that Mr. Cheng's claim would be unaffected if New Katanga were to continue in the Isle of Man. Section 191(9)(c) is, therefore, not applicable to the case at bar.

[48] The *BCA*'s applicability is clear and narrow. The *BCA* generally, and s. 243 specifically, applies only to companies that are currently incorporated under it. It does not apply to companies that previously were incorporated under it but have been discontinued in the Yukon and continued elsewhere. Because of this, the Supreme Court has jurisdiction to consider s. 243 only in relation to companies currently incorporated under the *BCA*.

[49] In the case at bar, neither Glencore plc nor the other corporations implicated in the allegations are incorporated under the *BCA*. The Supreme Court does not, therefore, have subject-matter jurisdiction over the dispute between the parties.

CONCLUSION

[50] The action is dismissed. Costs may be spoken to in case management if the parties are unable to agree.

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WENCKEBACH J.