SUPREME COURT OF YUKON

Citation: *Cheng v Glencore plc,* 2024 YKSC 61

Date: 20241108
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 Wardell	Alan Gardner Cheryl Woodin and Joseph Blinick

REASONS FOR DECISION

Introduction

[1] The plaintiff, Libei Cheng, brought these proceedings against the defendants seeking relief principally in oppression, pursuant to s. 243 of the *Business Corporations Act*, RSY 2002, c 20. The defendants brought an application to dismiss the plaintiff's

claim, which I granted (*Cheng v Glencore plc,* 2024 YKSC 27). Mr. Cheng appealed that decision, which is pending. He also seeks that I reconsider the application to dismiss.

[2] Because I reviewed the facts in my decision on the application to dismiss Mr. Cheng's claim, I will provide only a brief description here. Mr. Cheng was a minority shareholder of the corporation Katanga Mining Limited, which was incorporated in the Yukon. Then, through a Rights Offering Transaction, Glencore International AC acquired more than 99% of the shares in Katanga. Subsequently, Katanga amalgamated with another company, and was taken private by Glencore International AC. Finally, it discontinued in the Yukon, and incorporated in the Isle of Man.

[3] Mr. Cheng alleges that the way the Rights Offering Transaction was carried out violated securities law. Once Glencore International AC acquired 99% of Katanga's shares, moreover, the price for shares fell, permitting it to go private at a reduced price. Cumulatively, this was oppressive conduct to Katanga's minority shareholders, pursuant to s. 243 of the *Business Corporations Act*.

[4] The central question before me in the application to dismiss was whether the Yukon had subject-matter jurisdiction. I determined that the *Business Corporations Act* applies only to corporations incorporated in the Yukon, and not to corporations that were incorporated in the Yukon but had discontinued and incorporated elsewhere. I concluded that because none of the defendants or the other corporations implicated in the proceedings by Mr. Cheng are incorporated in the Yukon, the Supreme Court of the Yukon does not have jurisdiction over the dispute.

Issue

[5] The issue is:

A. Should the application to dismiss Mr. Cheng's claim be reconsidered?

Law

[6] The court has the discretion to reopen or reconsider a matter prior to the entry of an order. This discretion should be exercised rarely, however, and only to avoid a miscarriage of justice. Examples in which the court may exercise its discretion include where the trial judge is satisfied that they made a material error in their judgement, overlooked or misconstrued evidence, misapplied the law, or failed to address an argument that was advanced at the hearing (*Bajwa v Habib*, 2020 BCCA 230 at para. 48). A reconsideration is not an opportunity for a party to "…re-argue, re-cast, or re-state his or her case" (*Moradkhan v Mofidi*, 2013 BCCA 132 at para. 31).

[7] The court has the jurisdiction to reopen a matter even after an appeal has been filed. The court should be cautious about reconsidering a matter where an appeal is pending, however. Generally, trial judges are discouraged from expanding upon reasons on their own motion after an appeal has been filed. Doing so can create the perception that the judge has engaged in result-driven reasoning (*M McIssac Family Holdings Ltd v Tolam Holdings Ltd*, 2020 BCCA 371 at paras. 172-173).

[8] While *M McIsaac Family Holding* dealt with the circumstance in which the trial judge expanded on his reasons on his own initiative, it seems to me that this concern still arises, although less compellingly, when a party seeks a reconsideration after having filed an appeal. It is for this reason, amongst others, that a court should take care not to readily wade back into a matter that has been appealed.

Analysis

[9] Mr. Cheng seeks a reconsideration for two reasons. First, he implicitly submits that I made an error of fact or failed to take facts into account in my analysis. One of Mr. Cheng's submissions at the application to dismiss was that, if a shareholder could not seek recourse against a corporation that had discontinued, then a corporation could commit wrong doing, then simply discontinue, and incorporate elsewhere. The wronged shareholder would have no recourse; and the corporation would evade the application of the law. I addressed this argument, in part, by noting that before a corporation can discontinue in one jurisdiction and incorporate in another, it must inform the shareholders of its intention, and hold a vote. A shareholder would, therefore, have notice of the corporation's intent, and act to protect themselves, either by commencing legal proceedings, or voting against the move.

[10] Mr. Cheng submits that, in his case, by the time New Katanga discontinued in the Yukon it had been taken private. He therefore had no notice nor the ability to oppose the discontinuance. My analysis about the safeguards for shareholders was not applicable to him; however, I failed to address this in my decision.

[11] Second, he submits that my analysis is not complete. He argues that, if the Supreme Court of Yukon does not have jurisdiction over his claim, then New Katanga's discontinuance from the Yukon violated the *Business Corporations Act*; and its discontinuance is null and void. New Katanga should therefore be declared to continue to be a company incorporated in the Yukon and subject to the *Business Corporations Act*. Mr. Cheng argues that I should reconsider the application and take this into account.

[12] Mr. Cheng has not explained why it is necessary for me to address these issues to avoid a miscarriage of justice; and I conclude that there would not be a miscarriage of justice if I decline to reconsider the application. These are issues that can be argued before the Court of Appeal of Yukon. In the circumstances, a reconsideration would simply be an appeal in disguise.

Conclusion

[13] I therefore deny Mr. Cheng's application for reconsideration.

_____
WENCKEBACH J.