COURT OF APPEAL FOR ONTARIO

CITATION: Bank of Nevis International Limited v. Kucher, 2024 ONCA 240
DATE: 20240403
DOCKET: COA-23-CV-0750

Roberts, George and Monahan JJ.A.

BETWEEN

Bank of Nevis International Limited

Plaintiff (Appellant)

and

Mark Kucher and BNI Holdcorp Ltd.

Defendants (Respondents)

James P.E. Hardy and Rebekah O'Hare, for the appellant

Robert W. Staley, Nathan J. Shaheen, and Mehak Kawatra, for the respondents

Heard: March 28, 2024

On appeal from the order of Justice Michael Dineen of the Superior Court of Justice, dated June 6, 2023.

REASONS FOR DECISION

[1] The appellant, Bank of Nevis International Limited ("BONIL"), appeals the dismissal of its action. The motion judge allowed the respondents' jurisdiction motion, determining that BONIL's action should be heard in Nevis and not Ontario. At the conclusion of BONIL's oral argument, we advised counsel for the parties that the appeal was dismissed with reasons to follow. These are those reasons.

[2] BONIL is an international bank headquartered in Nevis, a small island in the Caribbean Sea. The respondent, Mark Kucher, is BONIL's former Vice-President of Investments. The other respondent, BNI Holdcorp Ltd. ("BNI"), was incorporated by Mr. Kucher in order to buy shares in BONIL. In 2019, all of BONIL's shares were sold to Petrodel Investment Advisors ("Petrodel"), a Nevis corporation owned by Michael Prest, the former CEO and a Director of BONIL.

[3] The dispute between the parties arises from an investment agreement negotiated by Mr. Kucher and Mr. Prest in December, 2019. This agreement, between BONIL and BNI (and not Mr. Kucher personally), provided that BNI would purchase shares in BONIL from Petrodel, conditional upon Mr. Kucher receiving approval from Nevis's Regulator of International Banking to be a beneficial shareholder. The agreement includes confidentiality provisions, and an exclusive jurisdiction clause (the "Forum Selection Clause") as follows.

> Any disputes arising out of this Investment Agreement will only be heard exclusively in the Courts which exercise jurisdiction in the Federation of St. Kitts and Nevis.

[4] Mr. Kucher, who did not receive the necessary approval, asserts that he paid Mr. Prest for the BONIL shares, and that Mr. Prest neither repaid, nor delivered BONIL shares to him.

[5] Mr. Prest alleged that Mr. Kucher made various unfounded and false reports to Nevis law enforcement and regulatory authorities – leading to investigations and

ultimately criminal charges against Mr. Prest. On this basis, BONIL commenced an action in Ontario against Mr. Kucher for violating the agreement's confidentiality provisions and for defamation.

[6] The respondents, relying on the above noted Forum Selection Clause, moved to dismiss the action. BONIL argued that the Superior Court of Justice had jurisdiction because Mr. Kucher had lived and worked in Ontario, taking the position that it could be inferred that at least some of the alleged defamatory statements were made by Mr. Kucher while he was in Ontario.

[7] The motion judge granted the respondents' motion and dismissed the action. Assuming, without deciding, that the court otherwise had jurisdiction over the appellant's claim, the motion judge accepted the respondents' argument that the Forum Selection Clause applied and should be enforced. In the event he was wrong and the Forum Selection Clause did not apply, the motion judge indicated that he would have relied on the doctrine of *forum non conviens* as "many of [the] factors clearly favour[ed] Nevis as the preferable forum and [that] none favour[ed] Ontario".

[8] While BONIL advances several grounds of appeal, they can be distilled down to two principal arguments, which were the focus of its oral submissions. First, BONIL alleges that the motion judge erred by finding that the Forum Selection Clause applied to Mr. Kucher, who was not a party to the investment

agreement. And second, BONIL alleges that the motion judge erred in his *forum non conveniens* analysis by assigning insufficient weight to Mr. Kucher's connection to Ontario, and by assigning too much weight to Mr. Kucher's connection to Nevis, which BONIL argued was virtually non-existent.

[9] There are two aspects to BONIL's argument that the Forum Selection Clause does not apply. First, it argues that defamation is not a dispute "arising out of" the investment agreement. And second, even if it did, it would not apply to any claims against Mr. Kucher, who was not a party to the agreement.

[10] We reject the appellant's suggestion that the motion judge's reasons on this issue were conclusory. After reviewing the allegations in BONIL's statement of claim, the motion judge concluded that the "broader allegations of defamatory statements are entirely bound up in the dispute over the investment agreement and the alleged breach of its confidentiality provision". This conclusion was open to the motion judge, for two reasons. First, BONIL's statement of claim specifically alleges a breach of the agreement's confidentiality clauses. And second, Mr. Prest himself acknowledged that the investment agreement is the "genesis" of some aspects of the action.

[11] There is also no basis to interfere with the motion judge's conclusion that the Forum Selection Clause applied to Mr. Kucher. BONIL, in its amended statement of claim, makes a concerted effort to tie Mr. Kucher to BNI, treating them

essentially as one and the same. BONIL further alleged that Mr. Kucher had "complete control" over BNI and asserted that Mr. Kucher should be held personally liable for BNI's conduct. The motion judge was entitled to rely on these pleaded facts. As this court held in *Novatrax International Inc. v. Hägele Landtechnik GmbH*, 2016 ONCA 771, 132 O.R. (3d) 481, at para. 18, affirming the motion judge's application of *Momentous.ca Corp. v. Canadian American Assn. of Professional Baseball Ltd*., 2010 ONCA 722, 103 O.R. (3d) 467:

> [W]here the plaintiff itself takes a position in its claim, (and supports the position by advancing allegations of a nature that make its position clear), that the allegations against the parties not privy to the contract are so intertwined with the claims being asserted against a party that is a party to the contract that they should be heard and decided together, and where the allegations clearly all relate to and arise out of the dealings between the parties to the contract, that the choice of forum clause agreed to by the plaintiff should govern.

[12] Given how the issues are framed by BONIL in its pleadings, we see no way to separate the conduct of Mr. Kucher from BNI. As such, and as found by the motion judge, the two could not be severed from each other.

[13] BONIL has also failed to identify any reversible error in the motion judge's assessment of Mr. Kucher's connections to Ontario. As the Supreme Court explained in *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 S.C.R. 3, "presumptive connecting factors must not give rise to an irrebuttable presumption of jurisdiction": *Goldhar*, at para. 42. Indeed, while Mr. Kucher's former Ontario

residence, and the possibility that he committed the alleged tort in Ontario, may serve as presumptive connecting factors as identified in *Van Breda v. Village Resorts Ltd*., 2012 SCC 17, [2012] 1 S.C.R. 572, at para. 90, these factors are not determinative in the *forum non conveniens* analysis. Rather, the analysis emphasizes fairness and efficacy by "adopting a case-by-case approach" to the question of jurisdiction: *Goldhar*, at para. 28, *Van Breda*, at para. 105.

[14] The motion judge, during the course of his *forum non conveniens* analysis, applied the correct legal principles and considered the relevant factors[1]. He thoroughly examined the relationship between the parties and the two jurisdictions in question, Nevis and Ontario. He found that the "relative strengths of the parties' connections to each forum" was a factor that "strongly favour[ed] Nevis" for several reasons, including that Mr. Kucher was served with the statement of claim in Nevis; no witnesses or evidence was located in Ontario; BNI is incorporated in Nevis; Mr. Kucher was no longer a resident of Ontario; and there was no basis to conclude that either Mr. Kucher or BNI had any assets in Ontario. In light of these specific findings, the conclusion that Nevis was clearly the preferable forum was reasonable and amply supported by the evidence.

[15] For these reasons the appeal is dismissed.

---

[1] We do not accept BONIL's argument that the motion judge erred by failing to take into account that it would be left without a remedy if its action proceeded in Nevis. There was no evidence to support this argument.

[16] The respondents are entitled to their partial indemnity costs of the appeal in the all-inclusive amount of $25,000. This cost award shall be satisfied by the payment out of court of the $25,000 posted by the appellant as security for the respondents' costs of the appeal. The respondents are also entitled to receive payment out of court of the amount of $50,000 that was posted by the appellant as security for the costs of the underlying motion ordered by the motion judge.

"L.B. Roberts J.A."

"J. George J.A."

"P.J. Monahan J.A."