# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Wang v. Fu,*
2023 BCCA 247

Date: 20230614
Docket: CA48754

Between:

**Ji Yao Wang also known as Jianyu Wang, Chiangxia Lv carrying on business as a partnership,**
**Ji Yao Wang also known as Jianyu Wang, Changxia Lv, 1146530 BC Ltd., Buffalo Properties Inc. and Buffalo Investment (Canada) Inc.**

Appellants
(Defendants)

And

**Lihua Fu**

Respondent
(Plaintiff)

Before: The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated November 18, 2022 (*Fu v. Wang*, 2022 BCSC 2099, Vancouver Docket S215802).

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| Counsel for the Appellants: | R. Clark, K.C. |
| Counsel for the Respondent: | J.R. Shewfelt |
| Place and Date of Hearing: | Vancouver, British Columbia<br>March 31, 2023 |
| Place and Date of Judgment: | Vancouver, British Columbia<br>June 14, 2023 |

**Written Reasons by:**
The Honourable Justice Skolrood

**Concurred in by:**
The Honourable Mr. Justice Harris
The Honourable Mr. Justice Fitch

***Summary:***

*The respondent commenced an action against the appellants in the Supreme Court of British Columbia alleging that funds she provided were in the form of loans that had not been repaid to her. The appellants asserted that the money was an investment in a real estate project in B.C. All parties were residing in B.C. at the time of the transaction. The respondent then commenced an action in China claiming recovery of the same debt. The appellants filed an application in the Chinese court objecting to that court's jurisdiction over the dispute, which was dismissed at first instance and on appeal. The appellants then brought an anti-suit injunction to the Supreme Court to restrain the respondent from continuing the Chinese action. The chambers judge dismissed the application, finding that the circumstances favoured resolution of the issues in China. The appellants appealed, alleging that the chambers judge erred in her assessment of the factors relevant in a forum non conveniens analysis.*

*Held: Appeal allowed. The judge erred in concluding that the circumstances provided a reasonable basis for the Chinese court to refuse to decline jurisdiction. There was no "real and substantial connection" between the facts underlying the claim and China. The judge's findings were based almost entirely on the circumstances of the parties, including that they were citizens of China and spoke Chinese fluently, and her findings failed to properly account for the absence of connection between the facts of the claim and China. The relevant factors and circumstances overwhelmingly favour the B.C. courts as the most convenient and appropriate forum to adjudicate the matter.*

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**Reasons for Judgment of the Honourable Justice Skolrood:**

[1] This is an appeal from an order dismissing the appellants' application for an anti-suit injunction to restrain the respondent from continuing a lawsuit brought in China.

[2] For the reasons that follow, I would allow the appeal.

## Background

[3] The background facts are relatively straightforward.

### The underlying dispute

[4] The appellant Ji Yao Wang is involved in the business of property development in the lower mainland of British Columbia. He is married to the appellant, Changxia Lv. The corporate appellants are companies controlled by Mr. Wang and Ms. Lv.

[5] The respondent, Lihua Fu, alleges that she loaned $3.65 million to Mr. Wang and/or his companies between April 2018 and February 2019 for the sole purpose of financing real estate projects being undertaken by Mr. Wang. Ms. Fu also alleges that Ms. Lv is either a partner of Mr. Wang, and therefore liable for the debts of the partnership, or that Ms. Lv received the funds and holds them on a constructive trust in favour of Ms. Fu.

[6] The appellants admit that Ms. Fu advanced the funds as alleged, however they deny the funds were a loan and instead take the position that the funds were an investment in a specific real estate project in Vancouver that failed, which resulted in Ms. Fu losing her investment.

[7] Ms. Fu originally commenced an action against the appellants in July 2020 in the Supreme Court of British Columbia. That action was resolved by a consent order which struck out the claim without prejudice to Ms. Fu's right to commence new proceedings. The circumstances surrounding the consent order and the striking of

the claim were not well explained, although counsel advised that the consent order followed an application by the appellants to strike the claim as disclosing no cause of action.

**The B.C. action**

[8] The present action was commenced on June 17, 2021, and an amended notice of civil claim ("ANOCC") was filed on September 26, 2022. The ANOCC advances a claim in debt based on the allegation that the funds provided by Ms. Fu were in the form of loans. Specifically, Ms. Fu alleges:

(a) Mr. Wang and Ms. Lv carry on a partnership for the purpose of carrying out real estate developments in B.C.;

(b) The corporate defendants are companies incorporated in B.C. through which the partnership carries out their real estate developments;

(c) In April 2018, Mr. Wang solicited loans from Ms. Fu on behalf of the partnership, or on his own behalf, totalling $3.65 million for the purpose of financing real estate projects. While not expressly stated in the ANOCC, it is clear that those intended real estate projects were in B.C.;

(d) Beginning in March 2019, Ms. Fu demanded repayment of the loan funds; however, apart from $60,000 paid in March 2020, the funds were not repaid;

(e) Mr. Wang and Ms. Lv diverted part of the loaned funds for their own benefit by using the funds to acquire, maintain, or reduce their mortgage debt on property owned by them in Vancouver, as well as other property owned by one of the corporate appellants in Richmond. Ms. Fu seeks orders that these properties are held in trust for her.

[9] The response to civil claim filed by the appellants on December 10, 2021 asserts that the funds were an investment.

**The Chinese action**

[10] On March 4, 2022, Ms. Fu commenced an action in China against Mr. Wang and Ms. Lv claiming recovery of the same debt she is claiming in B.C. Ms. Fu's acknowledged intention in doing so is to resolve the debt issue in China and, if successful, pursue recovery in B.C. against assets the appellants own here.

[11] The notice of civil claim filed in China is "bare bones" in nature and, with limited exceptions, pleads no material facts that deviate from those set out in the ANOCC. The one significant difference is that the claim is pleaded strictly as a loan to Mr. Wang. There is no allegation of a partnership between Mr. Wang and Ms. Lv; she is simply identified as Mr. Wang's wife. The other point to note is that the notice of civil claim provides Chinese addresses for each of Mr. Wang and Ms. Lv, as well as for Ms. Fu.

[12] The appellants allege that Ms. Fu has brought the Chinese action in order to take advantage of Chinese law under which wives are legally responsible for the debts of their husbands.

[13] On July 11, 2022, the appellants filed an application in the Chinese court objecting to that court's jurisdiction over the dispute. In the application, the appellants asserted:

(a) The money in issue was an investment in a real estate project in B.C., and not a loan;

(b) The investment was with the corporate appellants and not with Mr. Wang and/or Ms. Lv personally;

(c) The case should be treated as a foreign-related civil case which, under the Interpretation of the Supreme People's Court on the Application of the Civil Procedure Law of the People's Republic of China (the "Interpretation statute"), is not under the exclusive jurisdiction of the Chinese court;

(d) The case should be under the more convenient jurisdiction of the Canadian court because the main facts in dispute took place in Canada, where all of the parties lived at the material time;

(e) Chinese law does not apply to the dispute; and

(f) Ms. Fu already commenced an action in the Supreme Court of British Columbia which was ongoing and, as such, the parties had chosen that court as the proper forum to resolve the dispute.

[14] The appellants' application was dismissed on August 5, 2022. The Court cited Article 530 of the Interpretation statute, which states (as set out in the translated version of the Chinese court decision):

> If a foreign-related civil case meets the following circumstances, the people's court may rule to dismiss the plaintiff's lawsuit, [and] inform him to file in a more convenient court:
>
> (1) The defendant makes a request that the case should be under the jurisdiction of a more convenient foreign court, or raises an objection to jurisdiction;
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> (2) There is no agreement between the parties to choose the jurisdiction of the court of the People's Republic of China;
>
> (3) The case does not fall under the exclusive jurisdiction of the courts of the People's Republic of China;
>
> (4) The case does not involve the interests of citizens, legal persons or other organizations of the People's Republic of China;
>
> (5) The main facts of the dispute do not occur within the territory of the People's Republic of China, and the laws of the People's Republic of China do not apply to the case, the people's courts have major difficulties in determining the facts and applying the law;
>
> (6) Foreign courts have jurisdiction over the case, and it is more convenient to hear the case in a foreign court.

[15] The Court also cited Article 531 of the Interpretation statute, which stipulates that where both the Chinese courts and the foreign court have jurisdiction and the parties each file a lawsuit in a different jurisdiction, if, after judgment is granted in the Chinese court, the foreign court or a party applies to the Chinese court to recognize

and enforce a foreign judgment, the Chinese court will not do so unless an international treaty jointly concluded or acceded to by the two parties provides otherwise.

[16] The court then stated:

> In this case, the defendants [Ji Yao] Wang and Changxia Lv sued by the plaintiff are citizens of the People's Republic of China and have a fixed domicile in China, and part of the savings of the defendant Changxia Lv has been seized during the litigation process. This case obviously involves the interests of citizens of the People's Republic of China, and the Supreme Court of British Columbia, Canada has not ruled on this case, nor has it been recognized by the People's Republic of China.

[17] The appellants appealed the ruling and on October 26, 2022, their appeal was dismissed. The appellate court held:

> After review, this court held that, according to the nature of the civil legal relationship reflected in the [respondent's] complaint, this case is a private loan dispute. The appellant's claim that this case was actually an investment dispute and subsequently a foreign-related case was inconsistent with the basis of the [respondent's] claim, and this court rejects it. According to Article 24 of the Civil Procedure Law of the People's Republic of China, this case shall be under the jurisdiction of the people's court in the place where the defendant is domiciled or where the contract is performed. The place of domicile of the defendants [Ji Yao] Wang and Changxia Lv in this case are both Decheng District, Dezhou City, Shandong Province, which belong to the jurisdiction of the court of the original instance. The court of first instance, as the people's court of the defendant's domicile, has jurisdiction over this case. Whether the nature of the funds claimed by the [respondent] can be established and whether the claims can be protected is not a matter of review at the jurisdictional objection stage, and both parties can make their arguments in accordance with the law in the substantive trial. The appellant's grounds for appeal that the court of first instance had no jurisdiction is not tenable and is not accepted by this court.

## The Judge's Decision

[18] The appellants filed their application for an anti-suit injunction on October 24, 2022. Ms. Fu filed her response on November 15, 2022. The application was heard on November 17, 2022 and the judge rendered oral reasons for judgment on November 18, 2022. At the time of the hearing before the judge, the Chinese action was scheduled to commence trial on Monday, November 21, 2022. Thus, the judge was put in the difficult and unfortunate position of having to give her decision

in a complex matter in a very short turn-around time. We were advised by counsel during the hearing of the appeal that the trial in China did not proceed on November 21, 2022. No new date has been set.

[19] The judge considered the two-stage test for granting an anti-suit injunction as established by the Supreme Court of Canada in *Amchem Products Incorporated v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897, 1993 CanLII 124 and as applied and summarized by this Court in *Li v. Rao*, 2019 BCCA 264 at paras. 46–47. In *Amchem*, the Supreme Court established certain procedural requirements that must be satisfied before the court will entertain an application for an anti-suit injunction. First, it must be established that a foreign proceeding is pending. Second, it is "preferable" that an application to stay the foreign proceeding has been brought and rejected by the foreign court (*Amchem* at 930–931; *Li* at para. 46).

[20] Where these procedural requirements are met, the court proceeds with the two-stage substantive test, described in *Li* as follows (*Amchem* at 931–932):

> [47] With respect to the substantive test, the first stage of the analysis is to determine whether there is another forum that is clearly more appropriate than the domestic forum. If, applying the principles of *forum non conveniens*, the foreign court could reasonably have concluded there was no alternative forum that was clearly more appropriate, then the domestic court should dismiss the application, thereby giving respect to comity. If, however, the domestic court finds that the foreign court assumed jurisdiction in a manner inconsistent with the principles of *forum non conveniens* and that it could not have reached its conclusion by applying those principles, then the court must proceed to the second stage of the analysis.
>
> [48] At the second stage of the analysis, a court must not grant an anti-suit injunction if "it will deprive the plaintiff of advantages in the foreign forum of which it would be unjust to deprive him": *Amchem* at 932, citing *SNI Aérospatiale v. Lee Kui Jak*, [1987] 3 All E.R. 510 at 522 (J.C.P.C.). Circumstances that amount to an injustice commonly include a loss of juridical advantage, a factor also considered in the first stage, but an injustice may also arise from other circumstances.

[21] The judge found that the procedural prerequisites were met in that the Chinese action was outstanding and the appellants had applied for and been denied a stay of that action (para. 21). She then considered the first stage of the substantive

test: whether the Chinese court, applying the principles of *forum non conveniens*, could reasonably have concluded that there was no alterative forum that was more appropriate.

[22] The judge noted that a number of factors have been identified in the case law, as well as in the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003, c. 28 [*CJPTA*], that will inform the *forum non conveniens* analysis (paras. 23–26).

[23] She observed that Article 530 of the Interpretation statute, cited by the first instance Chinese court, sets out a number of factors that, while less expansive, are nonetheless consistent with a *forum non conveniens* analysis. Thus, she found that she "[could not] conclude that the Chinese Court assumed jurisdiction in a manner inconsistent with the principles of *forum non conveniens*" (paras. 28–29).

[24] The judge then considered the various circumstances raised by the parties with respect to the *forum non conveniens* analysis:

(a) **Comparative convenience and expense** (*CJPTA*, s. 11(2)(a)): The judge found that comparative convenience and expense favoured the Chinese courts because the parties are resident and domiciled in China, they are fluent in Chinese and do not speak or read English, the central document in the dispute is written in Chinese, and the Chinese action is at a more advanced stage than the B.C. proceeding (paras. 31–34);

(b) **Applicable law** (*CJPTA*, s. 11(2)(b)): The judge found this factor to be neutral given that neither jurisdiction is preferable in determining and applying the correct law (para. 36);

(c) **Desirability of avoiding a multiplicity of legal proceedings** (*CJPTA*, s. 11(2)(c)): The judge found that Ms. Fu was entitled to bring her action in China and that resolution of the central debt versus investment issue in China will narrow any remaining issues in B.C. The judge therefore found this factor to be neutral (paras. 40–41);

(d) **Desirability of avoiding conflicting decisions** (*CJPTA*, s. 11(2)(d)): Based upon Ms. Fu's representation that she would not pursue aspects of the B.C. claims that are addressed in the Chinese action, the judge found the risk of conflicting decisions to be low. Thus, she found this factor to be neutral (paras. 42–43);

(e) **Enforcement of an eventual judgment** (*CJPTA*, s. 11(2)(e)): The judge noted that, as set out in the initial decision of the Chinese court, a Canadian judgment will not be enforced in China absent an international treaty to that effect, whereas a B.C. court has the ability to enforce foreign judgments. The judge therefore found that this factor favours the Chinese courts (paras. 45–46);

(f) **Where the cause of action arose**: The cause of action arose in B.C., thus the judge found that this factor favours the B.C. courts (para. 47);

(g) **Where the parties do business**: The judge found that the business at issue took place in B.C., thus this factor favours the B.C. courts (para. 48);

(h) **Where the loss occurred**: The judge found that because the alleged loss is a monetary claim, the location of the loss is not a material consideration and found this factor to be neutral (para. 50);

(i) **The fair and efficient working of the Canadian legal system** (*CJPTA*, s. 11(2)(f)): The judge found that fairness and efficiency favour the Chinese courts (para. 54).

[25] The judge then summarized her findings:

> [56] There are many significant circumstances which favour the resolution of the issues raised in the Chinese courts. These include the comparative convenience and expenses of the parties, the enforcement of the judgment, and the fair and efficient workings of the Canadian legal system. While there are certain circumstances in relation to the issues which favour the B.C. courts, I am not satisfied that they outweigh the close connections of the parties and the action to China as established by the plaintiff.

[26] Given this conclusion, the judge found it unnecessary to consider whether Ms. Fu would be unjustly deprived of juridical advantages if she was enjoined from proceeding with the Chinese action (para. 58).

**Issues on Appeal**

[27] The appellants allege the following errors:

(1) The judge erred in law in failing to properly consider the law and principles applicable to multiplicity of proceedings;

(2) The judge erred in law with respect to the law and principles of forum shopping;

(3) The judge erred in her assessment of the factors relevant in a *forum non conveniens* analysis, in particular, by giving inordinate weight to the factors of language and residence; and

(4) The judge was clearly wrong in her decision.

[28] All of these alleged errors are simply different formulations, or reflect different aspects, of the central issue on appeal: did the judge err in her application of the test for granting an anti-suit injunction as established in *Amchem*? Specifically, did she err in finding that the Chinese court assumed jurisdiction in a manner not inconsistent with the principles of *forum non conveniens*?

**Legal Framework**

[29] The parties agree that *Amchem* establishes the test for granting an anti-suit injunction. As noted above, that test was applied by this Court in *Li*. The essential elements of the test are set out above at paras. 19–20. It is also useful to highlight other principles emanating from *Amchem* and *Li* that are relevant to the issues on this appeal.

[30] In *Amchem*, the Court noted that an anti-suit injunction, like a stay of proceedings, is a mechanism developed by the courts to control the choice of forum

by the parties with a view to ensuring, where possible, that the action is tried in the jurisdiction that has the closest connection with the action and the parties (at 912). That said, the two mechanisms have certain key differences as noted by Justice Savage in *Li*:

> [42] While a stay of proceedings and an anti-suit injunction both concern selection of the appropriate forum for resolving a dispute, they have a crucial difference. With a stay of proceedings, the domestic court determines for itself whether it should take jurisdiction. With an anti-suit injunction, the domestic court can be said to "in effect" determine jurisdiction for the foreign court. While an anti-suit injunction operates *in personam* on the plaintiff in the foreign suit, rather than on the foreign court itself, it has the effect of restraining continuation of a proceeding in the foreign court: *Amchem* at 912–913.

[31] Justice Savage went on to note that because an anti-suit injunction affects the foreign court, issues of comity arise and therefore an anti-suit injunction should only be entertained if a serious injustice would occur because of the failure of a foreign court to decline jurisdiction (*Li* at para. 44, *Amchem* at 914). The "serious injustice" issue is to be determined in accordance with the two-step test identified in *Amchem* (see para. 20 above). The first step, again, involves consideration of the principles of *forum non conveniens*; specifically, whether the foreign court could reasonably have concluded that there was no alternative forum that was clearly more appropriate in light of those principles.

[32] As the judge noted (at para. 23), the principles of *forum non conveniens* are concerned with determining which jurisdiction has the closest connection to the action and the parties. As she also noted, the court must consider all of the relevant circumstances, both those developed at common law (see for example *SC International Ent. Inc. v. Consolidated Freightways et al.*, 2002 BCSC 767 at para. 27) and those set out in s. 11(2) of the *CJPTA* as follows:

> (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.

[33] If the domestic court finds that the foreign court assumed jurisdiction in a manner inconsistent with the principles of *forum non conveniens*, then the domestic court must consider whether granting the anti-suit injunction would unjustly deprive the plaintiff of an advantage in the foreign court (*Amchem* at 932, *Li* at para. 48).

[34] As Savage J.A. noted in *Li*, the potential loss of juridical advantage is a factor in both steps of the *Amchem* test, first as part of the *forum non conveniens* analysis and then second, in considering whether a serious injustice would result (para. 48). In *Amchem*, the Court held that this factor should not be considered in isolation and that the existence of an advantage, whether juridical, personal, or arising out of other circumstances, must be assessed in light of the parties' connection to a particular jurisdiction (at 919). Justice Sopinka said (at 920):

> …The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with a forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

[35] Justice Sopinka expanded on this idea in his discussion of the second step of the test (at 933):

> When will it be unjust to deprive the plaintiff in the foreign proceeding of some personal or juridical advantage that is available in that forum? I have already stated that the importance of the loss of advantage cannot be assessed in isolation. The loss of juridical or other advantage must be considered in the context of the other factors. The appropriate inquiry is whether it is unjust to deprive the party seeking to litigate in the foreign jurisdiction of a judicial or other advantage, having regard to the extent that the party and the facts are connected to that forum based on the factors which I have already discussed. A party can have no reasonable expectation of advantages available in a jurisdiction with which the party and the subject matter of the litigation has little or no connection. Any loss of advantage to the foreign plaintiff must be weighed as against the loss of advantage, if any, to the defendant in the foreign jurisdiction if the action is tried there rather than in

> the domestic forum. I pointed out in my discussion of the test for determining the *forum non conveniens* that loss of juridical advantage is one of the factors and it will have been considered in step one. It will also be considered in the second step to determine whether, apart from its influence on the choice of the most appropriate forum, an injustice would result if the plaintiff is allowed to proceed in the foreign jurisdiction. The loss of a personal or juridical advantage is not necessarily the only potential cause of injustice in this context but it will be, by far, the most frequent. Indeed most of the authorities involve loss of juridical advantage rather than personal advantage. Nonetheless, loss of personal advantage might amount to an injustice if, for example, an individual party is required to litigate in a distant forum with which he or she has no connection.



**Standard of Review**

[36] While the appellants frame the first two alleged errors as errors of law, the decision whether to grant an anti-suit injunction is discretionary and involves a question of mixed fact and law. As such, the decision is entitled to deference on appeal. The appellate standard of review in respect of discretionary orders was articulated by the Supreme Court of Canada in *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19:

> [27] A discretionary decision of a lower court will be reversible where that court misdirected itself or came to a decision that is so clearly wrong that it amounts to an injustice: *Elsom v. Elsom*, [1989] 1 S.C.R. 1367, at p. 1375. Reversing a lower court's discretionary decision is also appropriate where the lower court gives no or insufficient weight to relevant considerations: *Friends of the Oldman River Society v. Canada (Minister of Transport*), [1992] 1 S.C.R. 3, at pp. 76–77.

See also *Kish v. Sobchak Estate*, 2016 BCCA 65 at para. 34.

[37] In *Garcia v. Tahoe Resources Inc*., 2017 BCCA 39, leave to appeal to SCC ref'd, 37492 (8 June 2017), this Court confirmed that a deferential standard applies to a review of the lower court's weighing of the *forum non conveniens* factors (at para. 56). Justice Garson, at para. 55 of that decision, cited *Breeden v. Black*, 2012 SCC 19 where Justice Lebel said:

> [37] …As stated in [*Club Resorts Ltd. v. Van Breda*, 2012 SCC 17] the discretion exercised by a motion judge in the *forum non conveniens* analysis "will be entitled to deference from higher courts, absent an error of law or a clear and serious error in the determination of relevant facts" (para. 112). In the absence of such an error, it is not the role of this Court to interfere with the motion judge's exercise of his discretion.

[38] Further, in *Giustra v. Twitter, Inc.*, 2021 BCCA 466, Justice Grauer noted that the *CJPTA* codifies the analytical framework for the doctrine of *forum non conveniens* and emphasizes the discretionary nature of the doctrine (para. 81).

## Discussion

[39] While I propose to address the appeal under the single issue of whether the judge erred in applying the *Amchem* test, it is useful to first address the alleged errors identified by the appellants concerning forum shopping and multiplicity of proceedings.

### Forum shopping

[40] The appellants submit that this is not the usual type case in which an anti-suit injunction is brought. As Savage J.A. observed in *Li* (at para. 41), an anti-suit injunction is typically applied for by the plaintiff in a domestic action to restrain the domestic defendant from commencing or continuing a proceeding in a foreign court. Here, it is the plaintiff, Ms. Fu, who has sued in the foreign court despite twice commencing actions in British Columbia. The appellants submit this is a "rather obvious case of forum shopping".

[41] While there are problems with how Ms. Fu has proceeded, which I will return to, I agree with her that "forum shopping" is not a legal principle giving rise to a stand alone ground of appeal. Rather, it is more in the nature of a label that is attached where a party has commenced an action in an inappropriate jurisdiction or forum, based upon a consideration of the *forum non conveniens* principles. Justice Donald of this Court made this point in *Marchand (Guardian of) v. Alberta Motor Assn. Insurance Co*. (1994), 89 B.C.L.R. (2d) 293, 1994 CanLII 1696 (Chambers):

> [10] Since *Amchem*, *supra*, forum shopping is not so much a basis of objection to jurisdiction as a condemnatory label applied after the real analysis has taken place. The labelling does not add anything to the decision making process. The task is to determine which jurisdiction has the closest connection to the case. The factors involved in that analysis should not be affected by the motive of the party in choosing the disputed jurisdiction because it is only rational to sue in the most advantageous place.

[42] In *Amchem*, Sopinka J. noted that it has become more difficult in modern times to identify one clearly appropriate forum for certain types of litigation; there may be several that are equally suitable alternatives (at 911–912). He then said (at 912):

> This does not mean, however, that "forum shopping" is now to be encouraged. 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 and not to secure a juridical advantage to one of the litigants at the expense of others in a jurisdiction that is otherwise inappropriate. …

[43] Thus, the appellants' allegation that Ms. Fu has engaged in forum shopping does not, by itself, support the appeal.

**Multiplicity of proceedings**

[44] The appellants also allege that the judge erred in failing to properly consider the law applicable to multiplicity of proceedings. They cite *Boehringer Ingelheim (Canada) Ltd. v. Englund*, 2007 SKCA 62, in which the Court of Appeal for Saskatchewan stayed a proposed class proceeding in Saskatchewan as an abuse of process on the basis that it was, in all material respects, identical to a class proceeding commenced in Ontario. In doing so, the Court distinguished the abuse of process doctrine from the concept of *forum non conveniens*:

> [34] It is well established that the commencement by a plaintiff of more than one action in the same jurisdiction against a defendant in relation to the same dispute or matter is an abuse of process. As Sir George Jessel observed over one hundred years ago, "It is *prima facie* vexatious to bring two actions where one will do". See: *McHenry v. Lewis*, [1883] 22 Ch. D. 397.
>
> …
>
> [36] We believe the same concerns which motivate the courts to characterize the bringing of multiple actions in a single jurisdiction as an abuse of process can also apply, in appropriate circumstances, where the multiple actions have been brought in two or more jurisdictions. In saying this, we recognize that, in the development of the English case law, there is some overlap between abuse of process terminology and the doctrine of *forum non conveniens*. The English courts resisted the concept of *forum non conveniens* for many years. The leading case on the question of whether a domestic action should be stayed on the basis that related litigation was being prosecuted in a foreign court was *St. Pierre v. South American Stores (Gath & Chaves), Ltd*., [1936] K.B. 382 (C.A.). In that decision, Lord Scott stipulated that a defendant

> seeking a stay must satisfy the court that the continuation of the action would "work an injustice because it would be oppressive or vexatious to him or would be an abuse of the process of the Court in some other way". In a series of cases including *Atlantic Star v. Bona Spes*, [1974] A.C. 436, *MacShannon v. Rockware Glass Ltd*., [1978] A.C. 795, *The Abidin Daver*, *supra*, and culminating in *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460, the House of Lords modified the meaning of "oppressive" and "vexatious" and moved forward to ultimately endorse, both in name and in substance, the doctrine of *forum non conveniens.* As a result of that jurisprudential journey, there are cases which discuss what are in fact *forum non conveniens* issues by using the language of abuse of process.
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> [37] It can be readily seen, however, that the doctrine of abuse of process has an identity separate and distinct from the concept of *forum non conveniens*. Abuse of process is ultimately aimed at preventing the misuse of the courts. *Forum non conveniens* is grounded in judicial [comity] and concerned with ensuring that cases are litigated in an appropriate forum. In our opinion, neither the *forum non conveniens* concept itself, nor the enactment of *The Court Jurisdiction and Proceedings Transfer Act*, operates to preclude a court from preventing an abuse of process simply because the abuse is the product of proceedings in multiple jurisdictions. The status of a Saskatchewan proceeding which has an extra-jurisdictional counterpart will normally be resolved through the application of *The Court Jurisdiction and Proceedings Transfer Act*. But this does not preclude the doctrine of abuse of process from being engaged in an appropriate case[.]
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> …
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> [41] In overall terms, the respondents' actions in this case appear to fall solidly within the reach of the doctrine of abuse of process. In this regard, we refer to the analysis of I.H. Jacob, *supra*, at pp. 42-43:
>
> > It is not easy to classify the manifold and diverse circumstances of abuse of process which may be dealt with by the summary powers of the court under its inherent jurisdiction. Without attempting to be exhaustive, one may perhaps tentatively suggest that such abuses may fall within one or more of the following categories of proceedings:
> >
> > (a) proceedings which involve a deception on the court, or are fictitious or constitute a mere sham;
> >
> > (b) proceedings where the process of the court is not being fairly or honesty used but is employed for some ulterior or improper purpose or in an improper way;
> >
> > (c) proceedings which are manifestly groundless or without foundation or which serve no useful purpose;
> >
> > (d) multiple or successive proceedings which cause or are likely to cause improper vexation or oppression.

[45] The appellants cite *Boehringer* in support of their submission that Ms. Fu's conduct amounts to an abuse of process in that she initially commenced

proceedings in B.C. but now intends to pursue the Chinese action in order to take advantage of the Chinese law that makes a wife liable for her spouse's debts. The appellants submit that liability on this basis is "morally and legally repugnant" in B.C. and that proceeding in this manner offends the principle against multiple proceedings.

[46] While I agree with the Court in *Boehringer* that the doctrine of abuse of process is separate from, and has a different objective than, the principles of *forum non conveniens*, it does not assist the appellants in this appeal. The appellants did not allege abuse of process in their notice of application seeking an anti-suit injunction nor did they argue it before the judge below. Further, as reflected in *Boehringer*, the doctrine of abuse of process is a means by which a superior court with inherent jurisdiction can protect its own processes. Thus, the remedy where an abuse of process is established will typically be a stay of the proceeding in that court. That is not what was sought here. Rather, the appellants sought to have the Supreme Court exercise *in personam* jurisdiction over Ms. Fu by restraining her from proceeding in the Chinese court through the mechanism of an anti-suit injunction. This approach engaged the principles of *forum non conveniens*, not abuse of process.

[47] In my view, the issue of multiple proceedings, which underlies the appellants' abuse of process argument, like the issue of forum shopping, does not give rise to a stand alone ground of appeal. Rather, the desirability of avoiding a multiplicity of legal proceedings is one factor to consider in the *forum non conveniens* analysis (see s. 11(2)(c) of the *CJPTA* at para. 32 above).

[48] That said, I disagree with Ms. Fu's submission that multiplicity of proceedings concerns do not arise in this case. According to Ms. Fu, multiple proceedings are necessary and inevitable because she seeks to execute against assets that are located in both B.C. and China. She submits that concerns of multiplicity of proceedings in different jurisdictions arise only if the proceedings involve the same question or issue being decided concurrently in two different courts.

[49] This submission ignores the fact that both the present action and the Chinese action are based upon the exact same facts and circumstances, specifically the provision of funds by Ms. Fu for the purpose of funding real estate development projects being undertaken by Mr. Wang and/or his companies. While she has changed her claim somewhat in the Chinese action to allege a personal loan to Mr. Wang and removing the claim of partnership between Mr. Wang and Ms. Lv (and instead relying on the fact that Ms. Lv is Mr. Wang's spouse), this does not alter the fact that the actions are essentially identical. Multiple enforcement proceedings in different jurisdictions are not uncommon. However, that is fundamentally different from litigating the underlying claims multiple times in multiple venues.

***Forum non conveniens***

[50] Turning to the central issue on the appeal, in my respectful view, the judge erred in finding that the Chinese court assumed jurisdiction in a manner consistent with the principles of *forum non conveniens.* I note that the judge actually framed her finding on this point in the negative, i.e., that the Chinese court did not assume jurisdiction in a manner that was inconsistent with those principles (at para. 29), however the meaning is the same. It is true, as the judge stated, that the Chinese court considered Article 530 of the Interpretation statute. However, the appellants' challenge to the Chinese action was based upon an alleged lack of jurisdiction in the Chinese court, and the Court's decision, confirming its jurisdiction, was founded upon the appellants' citizenship and domicile in China. The question of whether there was a more appropriate or convenient forum, i.e., the B.C. courts, was not addressed by the Chinese court. The limited scope of the application was confirmed by the Chinese appeal court when it stated in its decision: "[t]he appellant's grounds for appeal that the court of first instance had no jurisdiction is not tenable and is not accepted by this court" (emphasis added). The appellate decision was also, on its face, based upon the domicile of the appellants.

[51] The *Amchem* test, however, requires an assessment of whether the foreign court, applying the principles of *forum non conveniens*, could reasonably have concluded that there was no other more convenient forum, not whether the foreign

actually did apply the principles and come to that conclusion. The judge was alive to this distinction and accordingly went on to consider various circumstances that, in her view, provided a reasonable basis for the Chinese court to refuse to decline jurisdiction. In my respectful view, the judge erred in coming to this conclusion.

[52] I do not propose to review all of the circumstances considered by the judge and her analysis of those factors. The exercise is not one of applying a "checklist" approach to all of the factors set out in the *CJPTA* or in the case law. Rather, the court must look at the totality of the circumstances to determine if one jurisdiction is clearly more appropriate: *Breeden* at para. 37.

[53] I will instead address certain factors that, in my respectful view, were misinterpreted or misapplied by the judge. Before doing so, it is useful to underscore certain points about the parties' dealings and the claims advanced by Ms. Fu, some of which I have touched on above. Specifically:

(a) Mr. Wang has been active in the real estate development business in B.C. since 2008 and, through his various companies, has developed numerous projects;

(b) The funds at issue in this proceeding were intended for a development located in Vancouver;

(c) The contract pursuant to which the funds were provided, whether characterized as a loan or an investment, was made in B.C.;

(d) The funds provided by Ms. Fu were drawn from bank accounts controlled by her in B.C.;

(e) At the time the funds were advanced, all parties lived in Vancouver;

(f) Ms. Fu commenced an initial action in B.C., which was subsequently dismissed by way of a consent order;

(g) She then commenced the present action in which she advances the allegations summarized at para. 8 above;

(h) Ms. Fu subsequently commenced the Chinese action in which she pleads no material facts different from the B.C. action, other than listing all of the parties' addresses as being in China.

[54] When the relevant facts and circumstances, including those pleaded by Ms. Fu, are considered in their entirety, it is clear that while the parties have a connection to China by virtue of their residence at the time the Chinese claim was filed and their language, there is no connection, let alone a "real and substantial connection", between the facts underlying the claims and China. This leads to the inescapable conclusion that the Chinese court did not, and could not have, assumed jurisdiction in a manner consistent with the principles of *forum non conveniens*. The judge's finding to the contrary was, in my view, based almost entirely on the circumstances of the parties, primarily Ms. Fu, and failed to properly account for this absence of a connection between the facts of the claim and China.

[55] This error manifested itself in the judge's consideration of many of the *forum non conveniens* factors. For example, she found that the law to be applied to the dispute is a neutral factor, given the absence of any evidence that the Chinese court would not be capable of applying B.C. law. However, while the courts of B.C. routinely deal with foreign law, typically proven by way of expert evidence (see: *Allen v. Hay* (1922), 64 S.C.R. 76 at 80–81, 1922 CanLII 25), there was no evidence about the mechanism, if any, by which the Chinese court would receive and consider B.C. law. Further, the question is not simply if the Chinese court could apply B.C. law, but rather whether the fact that B.C. law governs the dispute supports a finding that the B.C. courts are a more appropriate forum. In my view, there is an advantage to having disputes determined in the courts of the jurisdiction whose laws apply to the dispute. That is particularly so here where the parties chose to contract in B.C. and where the subject of the contract was property development projects in the province. B.C. law is not only relevant to the substantive dispute but also to

procedural matters, such as issues about the production of documents relating to the property development, including banking documents, as well as the attendance of third-party witnesses. B.C. law, both procedural and substantive, will govern those matters.

[56] This latter point also goes to the question of comparative convenience. The judge found this factor to favour China given the residence of the parties in China, language issues, and the fact that the central document in issue is written in Chinese. However, she failed to consider that all of the other relevant documents, including those of the corporate defendants in the B.C. action who are alleged to have received some or all of the funds, are located in B.C. In addition, it must be remembered that Ms. Fu twice decided to commence actions in the Supreme Court of British Columbia to pursue her claims, presumably because she recognized that the B.C. courts have the most direct connection to the facts of the claims and because she believed it convenient for her to litigate here.

[57] The judge's primary focus on the residence of the parties is also evident in her finding that while unusual, it was not improper for Ms. Fu to commence proceedings in two jurisdictions given that "she has a substantial connection to China, by virtue of the residency of her and the defendants in that country" (at para. 40). I agree with the appellants that the judge did not give full consideration to the fact that Ms. Fu was pursuing a multiplicity of proceedings based upon the same underlying facts. While, as discussed above, this is not a stand alone ground of appeal, this factor considered as part of the *forum non conveniens* analysis strongly favours the B.C. courts.

[58] Another factor that the judge, in my view, erroneously characterized as neutral, is the location of the loss. She noted that Ms. Fu has advanced a monetary claim, thus the location of the loss is not a material consideration. This fails to account for the fact that the funds were transferred in B.C. for the purposes of B.C. real estate projects and that Ms. Fu will have to prove her loss by reference to B.C. banking and other documents. Further, Ms. Fu has again alleged that Mr. Wang and

Ms. Lv diverted some of the funds towards properties located in B.C. and she seeks a declaration of trust over those properties. That is a claim that, if successful, could only be enforced in B.C. In the circumstances, the location of the loss is a material factor favouring the B.C. courts.

[59] The final statutory factor set out in s. 11(2)(f) of the *CJPTA* is the fair and efficient working of the Canadian legal system as a whole. The judge found that this factor favours the Chinese courts in part because the determination of the Chinese action will narrow the issues that may ultimately have to be litigated in B.C. (paras. 51 and 54).

[60] In my view, this factor is intended to capture or reflect the cumulative effect of all of the other relevant facts and circumstances that inform the *forum non conveniens* analysis. In other words, the fair and efficient working of the Canadian legal system as a whole is enhanced when legal disputes are resolved by the forum most clearly and directly connected to the parties and facts involved in the dispute. Conversely, the system is undermined when parties attempt to litigate in a forum where that connection is lacking for some perceived strategic or other advantage.

[61] Here, as I have discussed, the relevant facts and circumstances overwhelmingly favour the B.C. courts as the most convenient and appropriate forum. Thus, it would be antithetical to the fair and efficient working of the Canadian legal system for this dispute to be litigated in the Chinese courts where the only or principal connections are the residence and language of the parties.

[62] For these reasons, I find that the judge erred in holding that the Chinese court assumed jurisdiction in a manner consistent with the principles of *forum non conveniens*. As noted, a discretionary decision may be reversed where the lower court gives no or insufficient weight to relevant considerations or where the decision is clearly wrong. In my respectful view, that is what occurred here and, accordingly, it is open to this Court to intervene.

[63] Given her finding, the judge did not consider the second part of the *Amchem* test: would granting the anti-suit injunction unjustly deprive Ms. Fu of advantages in the foreign forum? In my view, it is open to this Court to determine that issue.

[64] Ms. Fu submits that she will be deprived of two juridical advantages if the injunction is granted:

> (a) Article 1064 of the Civil Code of the People's Republic of China, subject to certain exceptions and qualifications, allows one spouse to be held liable for the other spouse's debts incurred during the marriage. Thus, it may be possible for Ms. Fu to establish Ms. Lv's liability simply by proving Mr. Wang is liable in debt, without the need to establish a partnership between them; and
>
> (b) Funds of Ms. Lv in the amount of 1,136,398.94 yuan have been seized in China by way of pre-trial execution.

[65] With respect to the first point, Ms. Fu's position runs afoul of Sopinka J.'s observations in *Amchem* (see paras. 34–35 above) that an alleged loss of advantage must be considered in light of all of the relevant factors, most importantly the extent of the connection of the parties and the facts to the foreign jurisdiction. As Sopinka J. noted, a party cannot claim to be prejudiced from the loss of an advantage where the party chose the jurisdiction in order to realize that advantage and not by reason of a real and substantial connection (at 933). That is the situation here, where it is apparent that Ms. Fu commenced the Chinese action, and tailored her claim therein, to take advantage of the Chinese law despite, as I have found, there being no real and substantial connection between the facts of the claim and China.

[66] Similarly, the fact that Ms. Fu has been able to obtain pre-judgment execution against Ms. Lv's funds is not sufficient, in my view, to overcome the absence of a real and substantial connection. In any event, we have not been presented with any

evidence or law to indicate that Ms. Lv's funds will necessarily be released if Ms. Fu is required to first proceed with her action in B.C.

[67] Ms. Fu has therefore not established that she will be unjustly deprived of an advantage in the Chinese courts if the anti-suit injunction is granted. Further, I am satisfied that a severe injustice will occur if the anti-suit injunction is not granted (*Li* at para. 44, *Amchem* at 914).

**Disposition**

[68] For these reasons, I would allow the appeal and grant an anti-suit injunction as follows:

> Lihua Fu is restrained from proceeding with, or in any way taking any steps to pursue her action, (2022) Lu 1402 Min Chu No. 2296, against Ji Yao Wang and Changxia Lv, commenced March 4, 2022 in the Decheng District People's Court of Dezhou City, People's Republic of China, pending determination of the within action.

"The Honourable Justice Skolrood"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Mr. Justice Fitch"