COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Li v. China Mobile Group Sichuan Company Limited,* 2024 BCCA 356

Date: 20241018
Docket: CA49463

Between:

Li Xiangdong also known as Li Xiang also known as Xiang Li, also known as Xiangdong Li also known as James Li, and Yao Hong also known as Hong Yao also known as Christine Yao

Appellants
(Defendants)

And

China Mobile Group Sichuan Company Limited

Respondent
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Madam Justice Fisher
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated October 13, 2023 (*China Mobile Group Sichuan Company Limited v. Li*, 2023 BCSC 1800, Vancouver Docket S2110876).

Counsel for the Appellants:	M.T. Hoogstraten E.J. Olmstead M. Aspiazu
Counsel for the Respondent:	C. Ferris, K.C. S.K. Hayes, K.C. S.A. Lucyk
Place and Date of Hearing:	Vancouver, British Columbia September 20, 2024
Place and Date of Judgment:	Vancouver, British Columbia October 18, 2024

Written Reasons by:
The Honourable Madam Justice Fisher

Concurred in by:
The Honourable Justice Dickson
The Honourable Justice Winteringham

Summary:

The defendants in an action applied to stay proceedings on the basis that China was the more appropriate forum. The underlying action concerns allegations against the appellants of breach of contract and fraud in respect of events that occurred in China prior to 2010. The appellants had since left China and reside in British Columbia. The chambers judge found that most of the forum non conveniens factors favoured China but concluded that the appellants had not established that China was a clearly more appropriate forum. A key factor in his analysis was the appellants' likely non-participation and their refusal to make any assurances to participate in any Chinese action. The appellants assert that the chambers judge erred in considering the absence of assurances of participation in hypothetical litigation as a determinative factor, and failing to consider a temporary stay pending an attempt to commence civil proceedings in China.

Held: Appeal dismissed. The chambers judge applied the correct legal test and weighed the relevant circumstances. There is no basis on which to interfere with his discretionary decision not to decline to exercise jurisdiction.

Reasons for Judgment of the Honourable Madam Justice Fisher:

[1] This is an appeal from an order dismissing an application to stay the proceedings below on the basis that a foreign jurisdiction, in this case China, is the more appropriate forum in which to determine the plaintiff's claim.

[2] The circumstances of this matter are unusual. The appellant Li Xiangdong is a former employee of the respondent, China Mobile Group Sichuan Company Limited (China Mobile). In March 2010, China Mobile uncovered suspicious activity implicating Li in accepting bribes and money laundering, with assistance from his wife, the appellant Yao Hong. After China Mobile requested further information from Li, he and Yao surreptitiously left China and travelled to Canada, where they have lived since. Criminal investigations have been ongoing in China since 2010 regarding Li's suspected receipt of bribes, and since 2012 regarding Yao's suspected money laundering. The authorities in China have seized or frozen all known assets of the appellants in China.

[3] In March 2019, China Mobile learned that the appellants were living in British Columbia and owned property here. In December 2021, it filed a notice of civil claim in British Columbia, naming the appellants and two unknown defendants. The claim

alleges, *inter alia*, breach of contract, fraud, unjust enrichment, and fraudulent conveyance under Chinese law and seeks trust remedies in respect of the appellants' British Columbia properties under British Columbia law. The appellants filed a response to the civil claim asserting that the court lacks jurisdiction over them in respect of the claims advanced by China Mobile, or alternatively that the court ought to decline jurisdiction on the basis of *forum non conveniens*. They also denied all the facts alleged in the notice of civil claim.

[4] The appellants brought an application under s. 11 of the *Court Jurisdiction and Proceedings Transfer Act*, S.B.C. 2003 c. 28 [*CJPTA*] and Rule 21-8(2) of the *Supreme Court Civil Rules* seeking to have the proceedings dismissed or stayed in favour of China as the clearly more appropriate forum. Despite the numerous factors connecting China with the action and the parties, the chambers judge dismissed the application, relying mainly on the effect of the defendants' likely non-participation in any Chinese action.

Forum non conveniens

[5] Despite the appellants' pleading, there was no dispute in the court below, or in this Court, that the courts in this province have jurisdiction over the appellants as persons ordinarily resident in British Columbia: s. 3(d) of the *CJPTA*. At issue is the exercise of discretion to decline to exercise the court's jurisdiction as the *forum non conveniens*.

[6] The common law *forum non conveniens* test has been codified in s. 11 of the *CJPTA*:

> 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.
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> (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
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> > (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,
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> (c) the desirability of avoiding multiplicity of legal proceedings,
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> (d) the desirability of avoiding conflicting decisions in different courts,
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> (e) the enforcement of an eventual judgment, and
>
> (f) the fair and efficient working of the Canadian legal system as a whole.

[7] In *Teck Cominco Metals Ltd. v. Lloyd's Underwriters*, 2009 SCC 11, Chief Justice McLachlin described s. 11 as creating "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" and requiring that all the relevant factors listed be considered in every case (at para. 21). These factors, set out in s. 11(2), are mandatory but not exhaustive: *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 41–42 [*Van Breda*]. There may be other relevant circumstances that factor into the *forum non conveniens* analysis in any individual case.

[8] As the parties seeking a stay, the appellants must show that China is a clearly more appropriate forum. This standard acknowledges that a plaintiff has a *prima facie* entitlement to its chosen forum, and the normal state of affairs is for jurisdiction to be exercised once it is properly assumed. As Justice LeBel explained in *Van Breda*:

> [109] … 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. …
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> [Emphasis added.]

The decision below

[9] China Mobile argued before the chambers judge that there is a threshold requirement in the *forum non conveniens* analysis, i.e., the alternative forum must be available to the plaintiff. Its position was that it could not pursue a civil case against the appellants in China while they are the subject of an ongoing criminal investigation. Both parties adduced opinion evidence from experts on Chinese law on this question. The judge accepted the evidence of both experts but was unable to make any specific findings, save that the situation in China is unclear and he was not convinced that a Chinese court would necessarily be unwilling to hear all or part of the case. In any event, he did not find it necessary to resolve the question of this proposed threshold requirement, as he considered "a more traditional application of the factors" to support his decision: at paras. 24–25.

[10] The chambers judge found that most of the relevant factors favoured China as the clearly more appropriate forum, including:

a) China Mobile is resident in China and has no assets in Canada;

b) all of the witnesses are in China, save the appellants, and it will be challenging to secure the participation of the Chinese witnesses in a Canadian proceeding;

c) Chinese law will apply to the dispute;

d) Chinese litigation will involve less expense, particularly for translation;

e) there is an ongoing criminal investigation in China considering the same facts;

f) a trial in Canada will necessarily be long and expensive; and

g) a non-exclusive jurisdiction clause in Li's employment contract, if applicable, suggests that the dispute should be resolved in China.

[11] Despite this finding, the judge found these factors to be overwhelmed by several "countervailing concerns". His key concern was the appellants' "failure to provide any assurance that they are actually prepared to defend any matter brought in China, even though it is their proposed alternate jurisdiction": at para. 2. He also expressed this concern as "the effect of the [appellants'] likely non-participation in any Chinese action": at para. 49. His other countervailing concerns related to the difficulty of enforcing a Chinese judgment in Canada, especially a default judgment.

[12] The chambers judge compared the assurances the appellants refused to provide to commitments made by the defendant/appellant to this Court in *Zhao v. Zhou*, 2019 BCCA 12 [*Zhao*]. In *Zhao*, the chambers judge had refused to grant a stay of B.C. proceedings where the subject matter was more closely connected to China, primarily on the basis that the defendant had evaded service of the plaintiff's initial claim in China, which had impeded the plaintiff from proceeding there. By the time of the appeal, however, the defendant assured the Court that he would accept service of and defend the plaintiff's Chinese action. Justice Groberman, for the Court, concluded that these promises, if kept, effectively dealt with the concerns of the chambers judge:

> [31] In the result, I am of the view that it was premature for the judge to determine that the Supreme Court of British Columbia should exercise territorial competence in this matter. Instead, it should do so only if it becomes clear that the Chinese courts are unable to adjudicate the matter.

[13] The Court therefore imposed a temporary stay of six months to determine whether the defendant was being forthright and whether the claims could proceed efficiently in China.

[14] The chambers judge considered the assurances given in *Zhao* to be essential to the outcome, and rejected the appellants' argument that the defendant in *Zhao* was in a better position to provide such assurances given that Chinese pleadings had already been filed:

> [35] … While correct, this distinction is insufficient to avoid the conclusion that the absence of assurances is material. The plaintiff has the benefit of the BC pleading. There is little reason to expect that the core allegations of

> wrongdoing would be substantively different in any Chinese pleading. Further, the defendants could have placed conditions on its assurances, for example, by conditioning the commitments on a requirement that the Chinese pleadings advance substantively similar allegations.

[15] In any event, the judge found it reasonable to infer that the appellants were not prepared to provide assurances of participation due to concerns about potential arrest should they return to China, which further illustrated why China is not a clearly more appropriate forum:

> [37] … If the litigation is advanced in BC, the defendants should be able to remain in Canada without risking further jeopardy in China.

[16] The appellants suggested that Chinese litigation could simply proceed without their involvement, as China Mobile could take default judgment against them. The chambers judge rejected this argument. He held that the *forum non conveniens* analysis contemplates the forum most appropriate for *trying* the case, such that the availability of default judgment is not a proper consideration. He also found that China Mobile's ability to obtain a default judgment in China was uncertain: at paras. 42–44.

[17] The judge concluded:

> [49] In sum, although the analysis weighing against China as an appropriate forum rests mainly on one factor, being the effect of the defendants' likely non-participation in any Chinese action, I find that the importance of this factor, particularly when coupled with the other factors above, heavily outweighs any countervailing factors. The defendants have not established that China is a clearly more appropriate forum.

On appeal

[18] The appellants assert three errors by the chambers judge:

1. considering irrelevant factors in his *forum non conveniens* analysis, namely:

    a) the appellant's unwillingness to commit to participate in hypothetical proceedings in China;

b) the difficulty of enforcing a hypothetical Chinese judgment; and

c) considering default judgment to be inferior to a judgment after a "full trial";

2. failing to consider as an appropriate remedy the availability of a temporary stay pending an attempt to commence civil proceedings in China; and

3. basing his decision on unreliable evidence.

[19] China Mobile's position is that the judge appropriately exercised his discretion to refuse to stay the proceedings and made no legal error requiring intervention by this Court.

Standard of review

[20] The exercise of discretion in a *forum non conveniens* analysis under s. 11 of the *CJPTA* will be entitled to deference, absent an error of law or a clear and serious error in determining relevant facts: *Van Breda* at para. 112; *Breeden v. Black*, 2012 SCC 19 at para. 37; *JTG Management Services Ltd. v. Bank of Nanjing Co. Ltd*., 2015 BCCA 200 at para. 44. Therefore, the standard of review in this appeal is deferential with respect to the weighing of the *forum non conveniens* factors. The correctness standard applies only where a point on appeal raises a question of law: *Garcia v. Tahoe Resources Inc*., 2017 BCCA 39 at paras. 55–56. Giving no or insufficient weight to a relevant circumstance in the discretionary weighing exercise under s. 11 is an error of law: *Garcia* at para. 126. The relevant circumstances included in s. 11 are legal criteria, "and their definition as well as a failure to apply them or a misapplication of them raise questions of law": *British Columbia (Minister of Forests) v. Okanagan Indian Band*, 2003 SCC 71 at para. 43.

Analysis

[21] It is my view that the chambers judge went too far in seeking numerous, broad-ranging assurances from the appellants and in generally discounting the availability of default judgments in the *forum non conveniens* analysis. However, as I

explain below, I do not consider these errors to be material to the judge's ultimate weighing of the relevant circumstances. I would dismiss the appeal.

1. Relying on irrelevant factors

[22] The appellants submit that the chambers judge erred in principle by relying on the absence of a commitment to participate in hypothetical proceedings in China as a single, determinative factor in the *forum non conveniens* analysis. They say this is contrary to the principles of natural justice because they are entitled to notice of the nature of the claim that would be advanced in China, and further, that the courts in this province do not require a defendant's participation in an action as a pre-condition to accepting jurisdiction.

[23] I find little merit in the appellant's natural justice argument in the circumstances here. The notice of civil claim filed by China Mobile outlines in considerable detail the factual allegations against the appellants, the relief sought under the applicable Chinese law and the legal basis under Chinese law for each claim. It cannot be said that the appellants have no notice of the substantive nature of the claims that would be advanced against them in China. The fact that China Mobile has not commenced an action in China is not unusual given its decision to pursue the appellants in the jurisdiction where they reside.

[24] I am of the view, however, that the chambers judge went too far in seeking such broad-ranging assurances from the appellants. In his words (at para. 12), the appellants declined to commit to:

a) responding to any Chinese litigation;
b) making themselves available as witnesses in any Chinese litigation, either in person or virtually;
c) honouring any Chinese default judgment; or
d) not advancing public policy arguments to defeat any subsequent effort to enforce a Chinese judgment in Canada.

[25] I agree with the appellants that a party in their position should not be required to make these kinds of commitments before any litigation in the foreign jurisdiction is

commenced. In *Zhao*, the defendant's promises were specific to his previous conduct in avoiding service of a Chinese action brought by the plaintiff, which had caused the case to be dismissed. The temporary stay was expressly intended to test the strength of the defendant's promises, as well as to determine if the claims could proceed in China.

[26] That said, the chambers judge sought these assurances from the appellants in the context of their proposal of China as a more appropriate forum. Had they made some kind of voluntary commitment, the judge may well have exercised his discretion differently in light of the many factors that favored China as the more appropriate forum. Although he articulated his "key factor" in different ways—first, as the "defendants' failure to provide any assurance that they are actually prepared to defend any matter brought in China" (at para. 2), and second, as "the effect of the defendants' likely non-participation in any Chinese action" (at para. 49)—it is apparent that the judge was concerned about the effect of the appellants' likely non-participation in an action in China, rather than their refusal to commit to participate *per se*. Not only was it reasonable for him to infer that the appellants would not likely participate, he also considered their concerns about potential arrest to be reasonable. In my opinion, the judge made no error in taking the likely non-participation of the appellants into account as a relevant circumstance in the *forum non conveniens* analysis. As China Mobile points out, it is odd for litigants to seek a stay in favour of a jurisdiction which they have avoided for many years.

[27] This leaves the question of whether the chambers judge placed undue weight on this factor, to the extent that it was determinative in the exercise of his discretion. In my opinion, he did not.

[28] Although the effect of the appellants' likely non-participation in China was clearly a "key" factor, it was not the only factor that tipped the balance in the judge's weighing exercise. Also important were the likely difficulty in enforcing any Chinese

judgment, the availability of assets in Canada, and the desirability of avoiding a multiplicity of proceedings:

> [45] The likely difficulty enforcing any Chinese judgment in Canada also favours Canada as the more appropriate forum: [*Sikhs for Justice v. The Republic of India*, 2020 ONSC 2628] at para. 90. I note once again that the defendants declined to commit to refrain from arguing public policy grounds in defence of any effort to enforce a Chinese judgment in Canada.
>
> [46] Further, based on the information in the record, Canadian litigation offers a more direct route to resolution and, if successful, recovery. Canadian litigation would likely have fewer service and subpoena challenges than any Chinese litigation. In terms of enforcement, there are assets in Canada in contrast to the situation in China, where the defendants accept that, at best, the status of their property is "unclear".
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> [Emphasis added.]

[29] It is apparent that the judge considered the likely non-participation of the appellants to impede China Mobile's ability to proceed with an action in China, as well as its ability to enforce an eventual judgment in British Columbia. He did not consider the possibility of obtaining a default judgment to be a legitimate alternative to a full trial and he was concerned about the uncertainty of obtaining a judgment in China, whether by default or at all, given the potential risks associated with the ongoing criminal investigation by Chinese authorities.

[30] I do not agree with the chambers judge's rather broad statement that "the availability of default judgment in the proposed alternative forum is not a proper lens through which to analyze the question of jurisdictional convenience": at para. 42. Generally, in the recognition of foreign judgments, the courts do not distinguish between a judgment after trial and a default judgment, in the absence of unfairness or other equally compelling reasons: *Beals v. Saldanha*, 2003 SCC 72 at para. 31. I appreciate, however, that the recognition in Canada of any foreign judgment from a non-reciprocating state, such as China, involves a more challenging process. The appellants acknowledge that raising certain natural justice or public policy defences in subsequent enforcement proceedings may be improper given the position they have taken in this matter, but any proper defences would nevertheless be open to them.

[31] In any event, I do not see the default judgment issue as forming a critical part of the judge's overall analysis. In my view, the judge did not err in his assessment of the likely difficulty in enforcing any Chinese judgment, nor in his concern about China Mobile's ability to proceed with a civil action in China. The expert evidence accepted by the judge raised doubts about the availability of proceedings in China, with or without the appellants' participation, and these were relevant considerations. It was not China Mobile's burden to show that the Chinese courts were unable to adjudicate their claims. Rather, it was the appellants' burden to show that China was the clearly more appropriate forum, and they failed to meet that burden.

[32] I would not, therefore, accede to this ground of appeal.

2. Failing to consider a temporary stay

[33] The appellants submit, in the alternative, that the chambers judge failed to adequately consider granting a temporary stay in order to address his concerns about the availability of a civil action in China. They seek the same remedy provided in *Zhao* but without a commitment to participate. Their position is that China Mobile should be required to commence an action in China to determine whether it could, in fact, proceed there.

[34] China Mobile submits that the availability of a temporary stay based on *Zhao* must be linked to evidence that the appellants would participate in litigation in China. In any event, China Mobile contends it should not be required to commence proceedings in China in light of the uncertain availability of an action there.

[35] The judge's reasons are silent on this point. However, when the reasons are considered in light of the record, it is quite clear that the judge considered the option of a stay but rejected it. The record shows that he raised the possibility of granting a temporary stay as a way to address the uncertainty of China Mobile proceeding in China, i.e., commence an action in China and come back here if you run into problems. It is implicit in his reasons that the judge did not consider it appropriate to require China Mobile to proceed in a jurisdiction not of its choice where the appellants were unlikely to participate. He ultimately determined that the evidence of

the uncertain situation in China was insufficient to meet the appellants' burden of proof.

[36] I see no basis on which this Court could interfere with the judge's exercise of his discretion in dismissing the application.

3. Unreliable evidence

[37] The appellants take issue with an affidavit adduced by an employee of China Mobile that sets out background facts underlying the allegations against the appellants, the criminal investigation in China, the company's knowledge about the appellants' whereabouts and assets in Canada, and the difficulties of proceeding against them in China. They submit that the chambers judge erred by giving improper weight to this affidavit. They point to the lack of information in the affidavit that would explain the affiant's familiarity with the matters deposed to, such as his position in the company and how long he has been employed. They also point to the judge's rejection of some of this evidence and submit it was an error to rely on any of the affiant's evidence.

[38] I find no merit in this argument.

[39] First, it is well known that judges may reject or qualify some of a witness' evidence and accept the rest: *R. v. R.E.M.*, 2008 SCC 51 at para. 65. Second, the essential background information in this affidavit is not controversial in the context of the application. The judge made little mention of this evidence, other than to temper the statement that China Mobile would make all relevant documents and witnesses available in Canada to those over which the company has control: at para. 11. Counsel for the appellants effectively conceded at the appeal that nothing turns on this point.

Conclusion

[40] The burden was on the appellants to show that China was the clearly more appropriate forum. The chambers judge concluded that they had failed to meet that burden. While there is no question that a trial of this action in British Columbia will be

extremely challenging for all the reasons that connect the action to China (most importantly the complex set of facts, the need for the evidence to be heard in translation and the need for expert evidence on Chinese law), the judge applied the correct legal principles to his analysis. I see no basis on which to interfere with his exercise of discretion in weighing the relevant factors.

[41] I would therefore dismiss the appeal.

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Justice Dickson"

I agree:

"The Honourable Justice Winteringham"