LITIGATION - CANADA

Court stays action against son of former Iranian president in favour of litigation in England

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AUTHORS

Michael D Schafler

Thomas Wilson

Background

In 2005 Houshang Bouzari, a Canadian citizen and resident of Ontario, brought an action in Ontario against Medhi Hashemi Bahremani, the son of a former Iranian president, for damages arising from his alleged abduction, incarceration and torture in Iran.(1)

Without submitting a defence, Hashemi brought a motion to stay the Ontario action on the basis of *forum non conveniens* (ie, that it was not the most appropriate forum), submitting that England was the clearly more appropriate forum.(2) Hashemi, who had no connection to Ontario, had in the years following Bouzari's alleged abuse been living and studying in England but, by the time the motion was heard, was prohibited from leaving Iran pending the resolution of various charges against him.(3) Bouzari was a frequent visitor to England and, in addition to owning real property, operated a business there.(4) Hashemi's motion was dismissed at first instance, prompting his appeal.

In allowing the appeal and staying the action in favour of litigation in England, the court held that the motion judge had made two reversible errors:

- Contrary to the first-instance decision, there was no reason to believe that Hashemi would be able to travel to Canada to defend the action.(5)
- The motion judge improperly concluded that were the action to proceed in England, Bouzari would be deprived of juridical advantages available in Ontario.(6)

A number of factors, including evidence that Hashemi would be unable to instruct counsel in Ontario properly, weighed in England's favour as the clearly more appropriate forum.

First-instance decision

The parties agreed that Bouzari's claim could not proceed in Iran, its natural forum. Accordingly, the issue before the motion judge was whether Ontario or England was the most appropriate jurisdiction.(7)

Citing the leading Supreme Court decision on *forum non conveniens*, the motion judge noted that the onus was on Hashemi, the party requesting the stay, to show that England was clearly more appropriate than Ontario.(8) According to the motion judge, this burden had not been discharged by Hashemi owing, in part, to inconclusive evidence "with respect to Hashemi's ability to physically attend in court in Ontario or England".(9) Additional factors – including the location of Bouzari's witnesses and Canadian laws against kidnapping, false imprisonment, assault and torture – buttressed the court's conclusion that Hashemi had failed to satisfy the *forum non conveniens* test.(10)

Developments

Evidence submitted after the motion judge's decision played into the appeal court's ruling. Notably, Hashemi's Iranian counsel delivered affidavits confirming that if Hashemi provided instructions to his Ontario lawyers regarding the action, he could be imprisoned in Iran.(11) The same lawyer swore a further affidavit suggesting that his client's recent efforts to obtain entry to Canada had been unsuccessful and that Hashemi had been issued a UK visa, enabling him to defend an action brought there should the appeal be successful.(12)

Appeal decision

The Ontario Court of Appeal confirmed that the motion judge's decision was discretionary and "worthy of deference, absent an error of law or a clear and serious error in the determination of the relevant facts".(13) However, the court found that the motion judge had made two reversible errors.

First, where the motion judge had ruled that there was insufficient evidence to support Hashemi's submission that he would be unable to defend himself in Ontario on account of being unable to enter Canada, the court held that Hashemi's past unsuccessful attempts at entry amply supported the inference that he would be similarly denied in the future – in fact, this was the only reasonable conclusion to make.(14)

Second, the motion judge noted that Bouzari's claim relied on international conventions ratified by the government of Canada. Because Hashemi tendered no evidence indicating that similar conventions had been ratified in England, the motion judge concluded that Bouzari would suffer a loss of juridical advantage if the action were brought in England.(15) In reaching this conclusion, the motion judge made two errors. First, the party requesting a stay on the basis of *forum non conveniens* does not carry the burden of proving that the law of the proposed foreign jurisdiction will afford the same benefits to the plaintiff as the law of the jurisdiction in which the action is initially brought; rather, the responding party carries the burden of establishing a loss of juridical advantage. Further, Bouzari had:

> "*adduced no evidence on the motion that an English court would apply English law, rather than the substantive law of Ontario or indeed Iran, the lex loci delecti, and that, if English law were to apply, that its provisions would result in a juridical advantage.*"(16)

In any event, consistent with existing jurisprudence, the court noted that the loss of juridical advantage factor should, owing to the principle of comity, be applied only with an abundance of caution.(17)

Having concluded that there were reversible errors in the motion judge's decision, the court undertook a fresh *forum non conveniens* analysis. The twin objectives of determining the most appropriate forum to hear the dispute (fairness to the parties and providing an efficient dispute resolution procedure) favoured the matter being brought in England:(18)

- Hashemi had no connection to Ontario or Canada and, once he was able to leave Iran, would still have no ability to enter Canada in order to participate in the proceeding.(19) The possibility that Hashemi would be able to attend at trial in England, when weighed against the certainty that he would be unable to attend in Ontario, militated in favour of the matter being brought in England.(20)
- Bouzari was a frequent visitor to England with real property and business connections there.(21) Before returning to Iran to clear his name, Hashemi had been a resident in England and had, as from September 2012, held a series of visas permitting entry to England.(22)
- With the exception of Bouzari himself, most witnesses were located in Europe or Iran; convenience to the parties favoured the matter being brought in England.(23)
- Hashemi had already consented to the action being brought in England.(24)

Comment

The appeal court's decision offers several lessons to litigants contemplating or currently engaged in

forum non conveniens motions. Although they should not rely too heavily on this factor, owing to the principle of comity, parties opposing a stay of proceedings in Canada must, wherever possible, lead evidence as to the loss of juridical advantage that they would actually suffer should the matter be heard in the proposed alternative jurisdiction. Such evidence should include submissions not only on the law of the jurisdiction in which the action is brought, but also on the law of the proposed jurisdiction and applicable law of the dispute, be it the *lex loci delecti* or otherwise.(25)

The ruling demonstrates the court's flexibility and willingness to draw reasonable inferences from the available evidence; even though Hashemi was not legally precluded from entering Canada, the court concluded from his past failed attempts that he was effectively barred.

Finally, even where a *forum non conveniens* motion is decided at first instance, counsel on appeal should remain sensitive to changing facts and, where appropriate, tender fresh evidence. Thus, the Ontario Court of Appeal was swayed by the two new affidavits submitted by Hashemi's Iranian counsel suggesting that Ontario was not a viable forum.

For further information on this topic please contact Michael D Schafler or Thomas Wilson at Dentons Canada LLP by telephone (+1 416 863 4511) or email (michael.schafler@dentons.com or thomas.wilson@dentons.com).The Dentons website can be accessed at www.dentons.com.

Endnotes

(1) *Bouzari v Bahremani*, 2015 ONCA 275 at paras 2, 10 and 18.

(2) *Ibid* at para 5.

(3) *Ibid* at paras 5 and 15.

(4) *Ibid* at para 49.

(5) Bahremani had, in fact, unsuccessfully attempted to gain entry into Canada on three separate occasions (*Ibid* at paras 16-17).

(6) *Ibid* at para 6.

(7) *Bouzari v Bahremani*, 2013 ONSC 6337 at para 19 (SCJ).

(8) *Ibid* at paras 2 and 23 citing *Club Resorts Ltd v Van Breda*, 2012 SCC 17 at paras 108-109.

(9) *Ibid* at para 23.

(10) *Ibid* at paras 24-32.

(11) *Bouzari v Bahremani*, supra note 1 at paras 31 and 33.

(12) *Ibid* at para 33.

(13) *Ibid* at para 38.

(14) *Ibid* at paras 42-43.

(15) *Ibid* at para 44.

(16) *Ibid* at para 45.

(17) *Ibid* at para 46.

(18) *Ibid*, at para 47.

(19) *Ibid* at para 48.

(20) *Ibid* at para 52.

(21) *Ibid* at para 49.

(22) *Ibid.*

(23) *Ibid* at para 50.

(24) *Ibid* at para 51.

(25) *Ibid* at para 45.
