NORTON ROSE FULBRIGHT

Legal update

No jurisdiction: Evidence carries the day to beat speculative conspiracy

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Class actions
Transnational litigation

A Canadian court's jurisdiction is based on the presence of a "presumptive connecting factor" between the claim and the forum.[1] However, a defendant's motion challenging jurisdiction must be brought at an early stage, before any discovery has taken place, when the only things in the court record may be the plaintiff's claim and the material filed on the motion.

A recent Ontario Superior Court of Justice decision clarifies when a plaintiff must provide evidence in response to a jurisdictional challenge, and how the evidence on such a motion will be assessed by the court.

Shah v LG Chem, Ltd.[2]

Shah concerned a class action against 26 corporations, including 20 foreign entities, that alleged a price-fixing conspiracy in respect of lithium ion batteries. Two Japanese defendants, NEC Corporation and NEC Tokin Corporation (together, NEC), brought a motion to stay the action against them on the basis of lack of jurisdiction.

The plaintiffs' claim pleaded that the 26 defendants (i) carried on business in Ontario and (ii) were parties to a conspiracy to fix the prices of lithium ion batteries in Ontario, either of which would be sufficient to make out the jurisdiction of the Ontario courts. However, the pleading did not single out the actions of any specific defendant and provided no details regarding the dates or locations of alleged meetings of the conspirators.

In support of their jurisdiction motion, NEC delivered an affidavit of a senior manager in sales who denied NEC participated in any price-fixing conspiracy, stated that NEC did not make sales or have a presence in Ontario during the relevant period, and testified that NEC had no information or control with respect to any re-sale of its products into Ontario by third parties that may or may not have occurred.

The plaintiffs' responding affidavit relied primarily on pleadings documents from parallel US proceedings. These documents had in turn been based on evidence from an American grand jury investigation. The plaintiffs also cross-examined NEC's witness on his affidavit, but did not pursue the witness's refusal to answer questions relating to the US allegations by moving to compel answers.

No good arguable case

The plaintiffs had pleaded two presumptive connecting factors, but NEC had put forward evidence contesting these allegations. The decision turned on the effect of this rebuttal evidence.

To make out jurisdiction, the plaintiff has to establish a "good arguable case" for the existence of one or more presumptive connecting factors. The court noted that facts pleaded in the statement of claim are presumed to be true if they are not challenged by the defendant, but where the defendant presents rebuttal evidence, there is a burden on the plaintiff to present evidence in support of its pleading.

The evidentiary requirement to make out a good arguable case is not demanding. In *Shah*, the court made analogy to the very relaxed "some-basis-in-fact" standard used on class action certification motions. This is much less than a balance of probabilities; however, as the decision in *Shah* demonstrates, the burden on the plaintiff is not non-existent.

The court rejected the plaintiffs' evidence from the US proceedings, observing that it amounted in some instances sixth-degree hearsay – it was what the plaintiffs' affiant had read on a website about the contents of an American pleading that was describing what the unidentified author of a document had heard from an unidentified speaker about what another unidentified speaker said was discussed at a meeting where a representative of NEC may or may not have been present.

Moreover, the Ontario court held that a US court decision that ruled the claim pleaded in the American proceedings against NEC was adequate under US pleadings standards did not assist the plaintiffs in demonstrating jurisdiction in Ontario, since the decision did not relate to the issue of jurisdiction.

Finally, the plaintiffs asked the court to draw an adverse inference from the refusal of NEC's witness to answer questions about the US proceedings. The court declined, holding that the refusals simply raised the question of why, if the plaintiffs believed that the refused answers would assist them, they had not exercised their right to move to compel the answers.

Having concluded that the plaintiffs had failed to show a good arguable case for any of the presumptive connecting factors, the court granted NEC's motion and stayed the case against NEC.

Conclusion

The *Shah* case provides a welcome roadmap for the consideration of evidence on jurisdiction motions, and litigants can draw a number of lessons from the decision.

First, unsupported allegations and speculation will not be enough to make out jurisdiction in the face of a robust challenge, and a defendant can be successful in stopping a claim where it can put forward cogent evidence of non-involvement.

Second, despite the inherent evidentiary challenges for plaintiffs in conspiracy cases, these cases will not receive a free pass. Plaintiffs commonly make a general pleading of conspiracy and then assert that the particulars of the tort are within the defendants' knowledge, but *Shah* demonstrates that the plaintiff must be able to provide some information on the defendants' involvement in the jurisdiction to survive a motion to stay.

Third, the court's careful treatment of documents from the US proceedings is welcome. Canadian class actions commonly parallel concurrent American proceedings, but using US documents, which have been taken out of their American legal context, in Canadian proceedings should be approached very cautiously.

Shah demonstrates that while the evidentiary threshold for showing jurisdiction is a low one, it cannot be met using hearsay and conjecture alone. The case provides the tools for a foreign defendant to stop a claim at an early stage if the plaintiff cannot substantiate the connection to Ontario.

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Footnotes

[1] *Club Resorts Ltd. v Van Breda*, 2012 SCC 17.

[2] *Shah v LG Chem, Ltd*, 2015 ONSC 2628 [*Shah*].

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