COURT OF APPEAL FOR ONTARIO

CITATION: Mining Technologies International, Inc. v. Krako Inc., 2012 ONCA 847
DATE: 20121203
DOCKET: C55483

Winkler C.J.O., Pepall J.A. and Smith J. (*Ad Hoc*)

BETWEEN

Mining Technologies International, Inc.

Respondent/Plaintiff

and

Krako Inc., Krako International Services, Inc.,
Krako International Holdings Inc., Nik Korakianitis,
Infina Fund Limited, Infina Fund Ltd., Infinafund AG,
Infinafund Holdings AG, Zia Shlaimoun,
Stacey Dawes, Lionel Preston,
Aelite Financial Services LLC, Bunny Williamson,
Lantierst Ltd., Frontier Horizon Inc.,
Oussha Arda Shlaimoun, Athena Korakianitis,
Oss Financial Services Group, Oss Advisors Inc.,
Tyson Thompson, Floyd Howard Henry,
Doe Corporations 1 to 10, John Doe 1 to 10, and Jane Doe 1 to 10

Appellants/Defendants

David E. Wires and Samantha Wu, for the appellants

Norman Groot, for the respondent

Heard and released orally: November 22, 2012

On appeal from the order of Justice Gordon D. Lemon of the Superior Court of Justice, dated April 12, 2012.

ENDORSEMENT

[1] In its statement of claim, the respondent pleads that one of the defendants, Mr. Nik Korakianitis, who resides and carries on business in Ontario, and the appellant, Mr. Zia Shlaimoun, who resided in the UK but now resides in California, were partners. Together with Mr. Shlaimoun's sham companies, they entered into a contract with the respondent, made numerous misrepresentations and committed other wrongful acts, including conspiring against and defrauding the respondent of over $2,000,000.

[2] In its statement of claim, in support of service outside Ontario, the respondent relied on Rule 17.02 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, including subsection (f) in respect of a contract made in Ontario, and subsection (g) in respect of a tort committed in Ontario.

[3] Mr. Korakianitis and many of the other defendants have defended the respondent's action.

[4] The appellants filed affidavits in these proceedings. Mr. Shlaimoun was ordered to attend for cross-examination but refused to do so. The appellants then purported to withdraw the affidavits filed.

[5] The motion judge decided this case six days before the Supreme Court of Canada released its decision in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17,

[2012] 1 S.C.R. 572, and therefore he applied the test that had been articulated in that case by this court.

[6] Based on the materials before him, the motion judge was satisfied that the respondent's claim was for damages caused by a tort committed in Ontario and that jurisdiction was therefore presumed.

[7] He then proceeded to consider whether the appellants had rebutted the presumption that a real and substantial connection existed between this action and Ontario. He noted that there is a strong connection between Ontario and the respondent's claim. Both the respondent and the defendant Korakianitis carry on business in Ontario and Mr. Korakianitis is in partnership with Mr. Shlaimoun. As for the connection between Ontario and the appellants, it was clear that Mr. Shlaimoun had participated and been actively involved in this jurisdiction. The motion judge also noted that the affidavit of the respondent's representative was undisputed. The motion judge concluded that the appellants had failed to meet their onus.

[8] In substance, as stated above, the motion judge found a presumptive connecting factor which the appellants did not rebut. In addition to the presumptive connecting factor relied upon by the motion judge, it is clear from the record before us that there were numerous other presumptive connecting

factors present, including the commission of other torts in Ontario. We see no reason to interfere with the motion judge's conclusion.

[9] We also see no basis on which to interfere with the motion judge's decision regarding *forum non conveniens*. The appellants failed to demonstrate that there was another jurisdiction that was more appropriate than Ontario to try the action. Among other things, the UK and California actions were directed to the collection of evidence and preservation of assets, and by their nature were ancillary to the Ontario action and not a substitute for a proper determination of the merits of this dispute.

[10] As for the appellants' submission that the motion judge failed to address the motion to strike Mr. Lipic's affidavit, and therefore improperly relied on it, we do not give effect to this argument. It was implicit from the motion judge's reasons that he rejected the motion and this was reflected in the court order.

[11] The appeal is accordingly dismissed.

[12] Costs of the appeal are awarded to the respondent in the amount of $20,000, including taxes and disbursements.

"Winkler C.J.O."

"S.E. Pepall J.A."

"Patrick Smith J. (*ad hoc*)"