COURT OF APPEAL FOR ONTARIO

CITATION: Lilydale Cooperative Limited v. Meyn Canada Inc., 2015 ONCA 281
DATE: 20150422
DOCKET: C57995

Laskin, Cronk and Rouleau JJ.A.

BETWEEN

Lilydale Cooperative Limited

Plaintiff (Respondent)

and

Meyn Canada Inc., Mey-Can Equipment Ltd., and Meyn Food Equipment Inc., EMK NV and Elboma Moortgat Konstruktie NV

Defendants
(Appellants/Respondents by way of cross-appeal
Respondents/Appellants by way of cross-appeal)

and

Allied Boiler Services Inc. and Weishaupt Corporation

Third Parties (Respondents)

Derek V. Abreu, for the appellants/respondents by way of cross-appeal

Jamieson Halfnight and Anne Thompson, for the respondent Lilydale Cooperative Limited

Erin Hoult and David K. Badham, for the respondents/appellants by way of cross-appeal EMK NV and Elboma Moortgat Konstruktie NV

No one appearing for the respondents Allied Boiler Services Inc. and Weishaupt Corporation

Heard: December 2, 2014

On appeal from the order of Justice Andra Pollak of the Superior Court of Justice, dated April 2, 2014.

Laskin J.A.:

A. Overview

[1] The overriding question on this appeal is whether the motion judge erred in finding that Ontario law, rather than Alberta law, governed a contract between the appellant Meyn and the respondent Lilydale.

[2] Meyn is a multi-national enterprise, incorporated in Canada under the *Canada Business Corporations Act*, R.S.C. 1985, c. C-44. In Canada it operates only in Ontario. Lilydale is an Alberta corporation and operates a poultry processing plant in Edmonton. In 1993, Lilydale purchased from Meyn a "fryer and oven system" for its Edmonton plant. Lilydale used the fryer and oven system for 10 years, until January 2004, when a fire occurred in its plant. In January 2006, Lilydale sued Meyn in Ontario for negligence and breach of contract. It alleged that the fire and oven system was defective and caused the fire.

[3] The parties jointly brought a motion by special case[1] on an agreed set of facts to determine whether Alberta or Ontario law applied to the tort and breach

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[1] Under Rule 22 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, the parties may state a question of law in the form of a special case for the opinion of the court. The special case proceeds on an agreed statement of facts. Its purpose is to ask the court to decide a question that may dispose of all or part of a proceeding or shorten the hearing.

of contract claims. The issue is important because Alberta and Ontario have different ultimate limitation periods. Even taking into account discoverability, Alberta's ultimate limitation period is 10 years; Ontario's is 15 years. The parties agreed that Lilydale's cause of action arose no later than August 31, 1994. Therefore, as Lilydale did not sue until January 2006, if Alberta law applied, its action was statute-barred; if Ontario law applied, it was not.

[4] The motion judge found that Alberta law applied to the tort claim. Lilydale has not appealed that finding. The motion judge then found that Ontario law applied to the breach of contract claim. As the contract between Lilydale and Meyn did not have a choice of law clause, the motion judge applied the test for determining the applicable law, long recognized in our jurisprudence: which jurisdiction, Alberta or Ontario, had "the closest and most real connection" to the contract?

[5] The motion judge considered the four criteria typically used to assess the closest and most real connection: the nature and subject matter of the contract; the place of performance of the contract; the place of contracting; and the residence and domicile of the parties. She held that the first two criteria favoured Ontario, and that the last two criteria were neutral. She therefore concluded that Ontario law governed Lilydale's claim for breach of contract. Thus, the action was not barred by a limitation period.

[6] Meyn acknowledges that the motion judge stated the right test, but contends that she misapplied it. On its appeal, Meyn raises two issues: did the motion judge err in holding that the nature and subject matter of the contract favoured Ontario rather than Alberta; and did she similarly err in holding that the place of performance of the contract favoured Ontario?

[7] The respondent EMK[2] cross-appeals against Meyn. Meyn has crossclaimed against EMK in the contract action, and EMK seeks an order dismissing the crossclaim if the main appeal is allowed. EMK supports Meyn's position on the main appeal and raises a third issue: did the motion judge err in holding that the residence and domicile of the parties was a neutral criterion, rather than one favouring Alberta?

[8] Meyn also seeks to leave to appeal the motion judge's costs order. The motion judge awarded Lilydale costs of $35,000. Meyn contends that she ought to have ordered no or nominal costs, or costs in the cause, because the parties brought the motion for their joint benefit and because success on the motion was divided.

[2] EMK NV and Elboma Moortgat Konstruktie NV are not separate entities; EMK NV is an abbreviation of Elboma Moortgat Konstruktie NV.

B. Did the motion judge err in finding that Ontario law applied to Lilydale's breach of contract claim?

(a) The test for determining the applicable law

[9] Meyn and Lilydale did not include in their contract a clause for the law that would govern disputes between them. Absent such a clause, the motion judge applied the test first set out by the Supreme Court of Canada nearly 50 years ago in *Imperial Life Assurance Co. of Canada v. Segundo Casteleiro Y Colmenares*, [1967] S.C.R. 443. All parties agreed that this was the appropriate test. In *Colmenares*, relying on English authority, Ritchie J. set out the closest and most real or most substantial connection test, at p. 448:

> It now appears to have been accepted by the highest Courts in England that the problem of determining the proper law of a contract is to be solved by considering the contract as a whole in light of all the circumstances which surround it and applying the law with which it appears to have the closest and most substantial connection.
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> This test was adopted by the Privy Council in *Bonython v. Commonwealth of Australia*, [1951] A.C. 201, where Lord Simonds said at p. 219:
>
> > ... the substance of the obligation must be determined by the proper law of the contract, *i.e.*, the system of law by reference to which the contract was made or that with which the transaction had its closest and most real connexion.

[10] For the criteria that inform this test, Ritchie J. turned to Cheshire's text on private international law:

> The many factors which have been taken into consideration in various decided cases in determining the proper law to be applied, are described in the following passage from *Cheshire on Private International Law*, 7th ed., p. 190:
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> > The court must take into account, for instance, the following matters: the domicil and even the residence of the parties; the national character of a corporation and the place where its principal place of business is situated; the place where the contract is made and the place where it is to be performed; the style in which the contract is drafted, as, for instance, whether the language is appropriate to one system of law, but inappropriate to another; the fact that a certain stipulation is valid under one law but void under another … the economic connexion of the contract with some other transaction … the nature of the subject matter or its *situs*; the head office of an insurance company, whose activities range over many countries; and, in short, any other fact which serves to localize the contract.

[11] The motion judge focused on four criteria: the nature and subject matter of the contract, the place of performance of the contract; the place of contracting, and the domicile and residence of the parties. The motion judge's finding that the place of contracting was neutral is not contested on this appeal. Her findings on the other three criteria are in issue. I turn to them now. I do so with the standard of appellate review in mind. The motion judge's balancing of the four criteria she considered called for the exercise of her discretion. Unless, in exercising her

discretion, she made an error of law or an unreasonable finding of fact or balanced the criteria in an unreasonable way, this court should not interfere.

(b) The nature and subject matter of the contract

[12] The motion judge characterized the contract as one "for the design, delivery, and installation of the System for Lilydale." She held that this criterion pointed to Ontario.

[13] Both Meyn and EMK contend that the motion judge mischaracterized the nature of the contract. They say it was simply a contract for the sale and installation of a piece of equipment. And, as Meyn shipped the equipment "FOB",[3] title passed and the sale was effected on delivery in Alberta. Thus the subject matter of the contract shows that Alberta had the closest connection to it.

[14] I do not agree with this contention. Both Meyn and EMK have recharacterized the nature of the contract, contrary to the agreed statement of facts. Paragraph 11 of the agreed statement provides:

> In the summer of 1993, Lilydale solicited a proposal from Meyn for a fryer and oven system for use at the Plant in Edmonton. On August 6, 1993, Meyn faxed a proposal from Mississauga, Ontario, to Lilydale in Edmonton, Alberta, regarding the design and sale of a fryer and oven system by Meyn to Lilydale.

[3] Free on board.

[15] In other words, the parties agreed that the contract was not simply for the sale of a good; it was a contract for the *design* and sale of a fryer and oven *system* (my emphasis). The other facts agreed to by the parties amply supported this characterization. The system consisted of a number of different components. Meyn ordered these components from various suppliers and arranged for them to be shipped to Lilydale. Meyn also had to design the system. All of this – the ordering of the components and the design – was done in Ontario. The motion judge's finding that the nature and subject matter of the contract was more closely connected to Ontario was a reasonable finding.

(c) The place of performance of the contract

[16] The place of performance of the contract is related to its subject matter and, for determining the applicable law, is perhaps the most important criterion. The motion judge concluded that most of the contract was performed in Ontario – Meyn had to design the system, choose the components and arrange to obtain them. It did all of this in Ontario; it performed virtually no work in Alberta.

[17] Meyn and EMK submit that the motion judge erred in her finding on this criterion. They make three related points. First, they maintain that the obligations imposed by the contract were performed in Alberta. Under the contract, Meyn was obligated to deliver the fryer and oven system to Lilydale's plant in Edmonton and arrange for installation and start-up by a qualified technician. The

parties agreed that delivery, installation, and start-up took place at Lilydale's plant in Edmonton. Indeed, under the contract that was the only place these obligations could be performed.

[18] Second, they argue that the motion judge erred by failing to infer that Meyn performed work in Alberta. They point out that under rule 22.05 of our *Rules of Civil Procedure*, a motion judge on a special case is entitled to draw reasonable inferences from the agreed facts, and they contend the motion judge wrongly refused to draw any inferences.

[19] Third, Meyn and EMK argue that numerous cases have held that in a contract for the sale of goods, where the goods are shipped from one jurisdiction to another, the jurisdiction where delivery and installation and start-up take place is normally the jurisdiction whose law governs the contract – in this case, Alberta. They point, for example, to *Rôtisserie May's Ltée v. Stoel-Tek Inc.* (1990), 104 N.B.R. (2d) 255 (N.B. Q.B.), and *Oleet Processing Ltd. v. Puratone Corp.*, 2010 SKQB 69, 352 Sask. R. 190.

[20] I do not agree with any of these three points. On their first point, Meyn and EMK have again failed to take into account that this contract was not just for the sale of a piece of equipment, but also for the design of a system. And as I have said, the system was designed in Ontario. Thus this contract was partly performed in Alberta, and partly performed in Ontario. Another judge might have

found that performance of contract favoured Alberta instead of Ontario. But the motion judge's finding that most of the contract was performed by Meyn in Ontario was a reasonable finding, supported by the agreed statement of facts.

[21] On Meyn's and EMK's second point, the motion judge was well aware she was entitled to draw reasonable inferences from the agreed facts. She chose not to do so because Meyn and Lilydale disagreed on what inferences should be drawn. She did not err because she did not accept Meyn's view of what inferences were reasonable.

[22] Indeed, Meyn wanted her to infer it performed some work on the contract in Alberta. Yet the evidence on whether it did so was unclear. The agreed statement of facts says that the only work performed in Alberta by anyone other than Lilydale was by the third party, Allied Boiler, who went to the plant for a single day and mounted the burner and gas train to the boiler.

[23] On Meyn's and EMK's final point, I accept that in several cases of multi-jurisdictional contracts for the sale of goods the place of delivery has been held to be the place of performance. But this is not a general rule. See, for example, *General Refractories Co. of Canada v. Venturedyne Ltd.*, 2002 Carswell Ont. 36 (S.C.), at paras. 116-18. A motion judge has discretion to determine in any given case whether the place of delivery should be controlling. And as I have said, this

was not simply a contract for the sale of goods. It had a design component, and that component was performed in Ontario.

[24] For these reasons, the motion judge's finding that the place of performance of the contract pointed more to Ontario than Alberta was a reasonable finding.

(d) The domicile and residence of the parties

[25] The motion judge found that this criterion was neutral because Meyn is a resident of Ontario and Lilydale was resident in Alberta. Meyn does not contest her finding. But EMK does.

[26] EMK submits that this criterion favours Alberta because domicile and residence are not synonymous. As Lilydale is an Alberta corporation with its place of business in Alberta, both its domicile and residence point to Alberta. But as Meyn is a Canadian corporation with its place of business in Ontario, only its residence points to Ontario. This submission has little merit. The motion judge was justified in looking only to the residence of each company and in finding that, as they cancel each other out, this criterion was neutral.

(e) Conclusion on the applicable law

[27] The motion judge's findings on the relevant criteria were reasonable, as was her overall conclusion that the closest and most real connection to the contract was Ontario.

[28] Nonetheless, EMK argues that the motion judge's conclusion is inconsistent with the principles of order, fairness, and comity that underlie private international law. This argument was not made before the motion judge and I doubt we should consider it on appeal. But even if we do consider it, I see nothing unfair in requiring Meyn to adhere to the substantive law of Ontario, the law of its home jurisdiction in Canada. Meyn, a multi-national enterprise, could have inserted a choice of law clause in its contract with Lilydale. Had Meyn done so, it would undoubtedly have chosen Ontario, the only province in Canada where it operates. It seems to me more than a little ironic that despite its own close connection to Ontario, Meyn would seek to take advantage of Alberta law.

[29] I would dismiss Meyn's appeal from the motion judge's holding that Ontario is the jurisdiction with the closest and most real connection with the contract.

C. Did the motion judge err in awarding Lilydale its costs of the motion?

[30] The motion judge awarded Lilydale costs of the motion on a partial indemnity basis in the amount of $35,000. Meyn asked for leave to appeal on the question whether Lilydale is entitled to costs. It makes two submissions: the motion was brought jointly, for the benefit of both parties; and Lilydale was only partly successful on the motion, as its tort claim was found to be statute-barred. On either ground, Meyn submits that costs should be in the cause, or Lilydale should at most be entitled to nominal costs.

[31] I would deny leave to appeal costs. The motion judge exercised her discretion reasonably in awarding Lilydale costs. Although the parties brought the motion jointly, the proceedings were adversarial. At stake was Lilydale's ability to maintain its action. And, although its tort claim was found to be statute-barred, it can continue with its breach of contract claim. Its success in preserving its claim in contract entitled it to costs.

D. Conclusion

[32] I would dismiss Meyn's appeal and EMK's cross-appeal. The motion judge did not err in concluding that Ontario law governs Lilydale's breach of contract claim. I would also deny Meyn leave to appeal the motion judge's costs order. Lilydale is entitled to the costs of the appeal against Meyn and EMK jointly in the agreed on amount of $20,000, inclusive of disbursements and applicable taxes.

Released: April 22, 2015 ("J.L.")

"John Laskin J.A."
"I agree. E.A. Cronk J.A."
"I agree. Paul Rouleau J.A."