COURT FILE NO.: 06-CV-304380PD1
DATE: 20070213

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

LILYDALE COOPERATIVE LIMITED	)	*Jamieson Halfnight*,
	)	for the Plaintiff
	)	
Plaintiff	)	
	)	
- and -	)	
	)	
	)	
MEYN CANADA INC., MEY-CAN EQUIPMENT LTD., MEYN FOOD EQUIPMENT INC., EMK NV AND ELBOMA MOORTGAT KONSTRUKTIE NV	)	*Robert B. Cohen*,
	)	for the Defendants
	)	
	)	
	)	
	)	
Defendants	)	
	)	
	)	
	)	
	)	**HEARD:** November 16, 2006

DAY J.

REASONS FOR DECISION

[1] The plaintiff, Lilydale Cooperative Limited ("Lilydale"), suffered a disastrous fire at its poultry processing plant in Edmonton, Alberta (the "Lilydale Plant") on January 29, 2004. It is alleged that the fire occurred in a thermic oil heater that was designed and manufactured by EMK Nv, also known as Elboma Moortgat Konstruktie Nv (collectively "EMK"), a Belgian corporation. The plaintiff alleges that the fire at the Lilydale Plant was caused or contributed to by defects in the heater, improper installation of the thermal oil circulation pump (the "pump"), the installation of an incorrectly sized burner or process unit or both.

Lilydale alleges that it suffered $16 million in damages to the Lilydale plant, equipment and stock and other business losses.

The Alberta Action

[2] Lilydale commenced an action against Meyn Canada Inc., Meyn-Can Equipment Ltd., and Meyn Food Equipment Inc. (collectively "Meyn") and EMK in the Court of the Queen's Bench in Alberta, action number 0403 24820 (the "Alberta action"). The statement of claim in the Alberta action was issued December 22, 2004.

The Ontario Action

[3] Lilydale commenced these proceedings in a statement of claim issued January 19, 2006.

[4] Both counsel concur that the Ontario action and the Alberta action are basically identical.

Issues

[5] The defendant, Meyn, brings this motion pursuant to section 106 of the *Courts of Justice Act*, R.S.O. 1990 c.C.43 to stay these Ontario proceedings on the following bases:

1) these proceedings are abusive, having been commenced more than one year after almost identical proceedings were commenced in Alberta, and

2) the evidence and other related factors in this litigation are much more closely connected to Alberta than to Ontario.

The *Forum Non Conveniens* Test

[6] Under the doctrine of *forum non conveniens*, a Canadian court can stay a proceeding if there is clearly a more appropriate jurisdiction in which the case should be tried than the one chosen by the plaintiff: *Amchem Products Inc. v. British Columbia (Workers Compensation Board),* [1993] 1 SCR 897. The purpose of this doctrine is to ensure that the action is tried in the jurisdiction with the closest connection to the action and to discourage forum shopping: *Frymar v. Brettschneider* (1990), 19 OR (3d) 60 at 79(C.A.).

[7] The factors to consider under this doctrine include:

(i) The location of the majority of the parties;

(ii) The location of key witnesses and evidence;

(iii) Contractual provisions that specify applicable law or accord jurisdiction;

(iv) The avoidance of multiplicity of proceedings;

(v) The applicable law and its weigh in comparison to the factual questions to be decided;

(vi) Geographical factors suggesting natural forum;

(vii) Whether declining jurisdiction would deprive the plaintiff of a legitimate juridical advantage available in the domestic forum.

(See *Muscutt et al. v. Courcelles et al.* (2002), 60 O.R. (3d) 20 (C.A.) at para. 41).

Meyn's Position

[8] The defendant/appellant Meyn takes the position that a stay of the Ontario Action is appropriate by applying the following factors that connect the action to Alberta:

1. Lilydale carries on business in Alberta;

2. Lilydale's plant where the fire occurred is in Edmonton, Alberta;

3. Lilydale would have contracted with Meyn from Lilydale's office in Alberta;

4. The heater was shipped directly from EMK in Belgium to the Lilydale Plant in Alberta, without inspection or modification in Ontario;

5. The pump was shipped to the Lilydale Plant in Alberta, without inspection or modification by Meyn;

6. The heater and the pump were assembled and installed at the Lilydale Plant in Alberta;

7. The assembly and installation of the heater and pump at the Lilydale Plant occurred in Alberta;

8. Witnesses to the fire would have been located in Alberta;

9. The investigation of the fire would have taken place in Alberta by local authorities including the local fire department authorities; and

10. Alleged damages to the buildings, equipment, stock and business of Lilydale would presumably be occasioned in Alberta.

[9] For the above reasons, the defendant/appellant states that the issues in the proceedings are much more closely connected to Alberta than to Ontario. They also take the position that Meyn played no role in the manufacture or design of the heater or the pump.

[10] The defendant moving party also focuses on the majority of witnesses for the purposes of determining the issues in these proceedings as being located in or near Alberta. They would include employees, executives and accountants of Lilydale, employees of the installing company, persons engaged in the maintenance of the heater from February 1994 to January 2004, fire officials, insurance adjusters and experts engaged to investigate the cause of the fire.

Lilydale's Position

[11] In contrast, Lilydale takes the position that the action is sufficiently connected to Ontario. To begin with, they assert that it was Meyn's Ontario office that delivered the production line proposal to Lilydale in August 1993. Following that, once Lilydale selected Meyn to supply the production line and supervise its installation, it was again Meyn's Ontario office that sent a confirmation of the sale to Lilydale in Edmonton.

[12] Lilydale contends that Meyn is, essentially, a sales organization that subcontracted the design and manufacture of the production line in issue to Meyn's parent company. Since the parent company is located in the Netherlands, and all the documents evidencing the contract for the supply of the production line appear to have been generated at Meyn's office in Mississauga Ontario, Lilydale contends that the law of the contract for the supply of the production is Ontario law. This point was not argued at any length by either party. To perform the terms of its contract with Lilydale, Meyn in Ontario did the following:

1) arranged for the design and engineering of the production line by its Netherlands based parent company;

2) selected appropriate component parts for the production line, as directed by its parent company in the Netherlands;

3) placed orders from Ontario to companies in Europe (e.g., the thermic oil heater component was ordered from EMK in Belgium) and in Ontario for component parts for the production line;

4) arranged for the component parts to be delivered to Lilydale; and

5) arranged to have representatives of its parent company travel from the Netherlands to supervise the installation and commissioning of the production line.

[13] Lilydale's position is that *prima facie*, the Ontario jurisdiction exists as a matter or right. It has long been considered appropriate for a claimant to pursue a manufacturer/supplier of defective goods in the supplier's jurisdiction of domicile. In *Frymer v. Brettschnieder*, [1994] O.J. No. 1411 (C.A.), the Ontario Court of Appeal found that when a defendant is served locally and wishes to challenge the plaintiff's choice of forum, the defendant will bear the burden or proof. Specifically, the court held:

> Essentially, I would conclude that when the plaintiff chooses a forum in which jurisdiction exists "as of right", in the sense that the defendant is a resident of that jurisdiction, the defendant has the burden of showing that another forum is the convenient one.

[14] Meyn is located in this jurisdiction at 7015 Ordan Drive, Unit 12, Mississauga, Ontario. According to Lilydale, this court therefore has jurisdiction over the matter because Meyn is located in Ontario. In these circumstances, Meyn bears the burden of proving Ontario is *forum non conveniens* and that the action should be stayed.

[15] Lilydale further asserts that its claim has a multi-national/multi-jurisdictional scope based on the following:

1) Meyn is located in Ontario;

2) Meyn's parent company, which designed the production line, manufactured a number of its component parts, and sent a representative to commission the production line, was and remains located in the Netherlands;

3) it is expected that the individuals from Meyn's parent company who were involved in the design and manufacture of the production line, are located in Europe, probably the Netherlands;

4) the defendant EMK Nv is located in Belgium where it manufactured the boiler in issue; and

5) Meyn's former CEO, Bill Cooper, who has knowledge of the sale of the production line was in Meyn's Ontario office but has since left the company and is said to be located somewhere in the United States.

Procedural Bar to Litigating in Alberta

[16] Lilydale claims that on January 29, 2004 the thermic oil heater malfunctioned causing the catastrophic fire in issue. Lilydale contends the fire was caused by a latent manufacturing defect, namely a steel plug that was welded into the piping of the thermic oil heater and which remained there after the production line's installation and up to the time of the fire.

[17] Neither party disputes that Lilydale's claim is statute barred in Alberta because of Alberta's *Limitations Act*. Indeed, Meyn's primary defence to the Alberta action is that Alberta's ten year limitation period was missed by Lilydale, such that the proceeding is statute barred in Alberta.

[18] The Alberta *Limitations Act* provides for a ten year ultimate limitation period that applies regardless of whatever substantive law of another jurisdiction may or may not apply to the rights and obligations of the parties.

[19] The fire that is responsible for Lilydale's losses, and which was allegedly caused by a latent manufacturing defect in Meyn's product, appears to have occurred at least 10 years after the supply of the production line and more than 10 years after manufacture and sale.

[20] Because of jurisdictional concerns, Lilydale commenced recovery actions in both Alberta, where the fire occurred, and in Ontario, where the defendant Meyn is located, carries on its business, and from where it sold the production line to Lilydale.

[21] On March 10, 2006, Meyn was served with both the Ontario statement of claim and the Alberta statement of claim. Following service of the statements of claim, Meyn delivered

a notice of intent to defend the Ontario action, but shortly afterwards it delivered pleadings, including third party notices, in the Alberta action. Meyn then delivered its productions in the Alberta action, even though EMK and the third parties, Meyn, have not defended the action. Meyn then, after it had built a record in Alberta, moved to stay the Ontario proceedings and has refused to deliver a defence to it, despite Lilydale's request that it do so. As a result, Lilydale moved for a stay of the Alberta proceedings, but that motion has been adjourned pending the outcome of this motion.

Analysis

[22] As mentioned above, the Supreme Court of Canada and the Ontario Court of Appeal have held that to determine if a forum is *non conveniens* the question is whether there is another forum elsewhere which is clearly more appropriate for the pursuit of the action **and** securing the ends of justice. Put another way, unless an alternative forum is shown by the moving party to be clearly more appropriate for the pursuit of the action **and** securing the ends of justice, the court should not stay these proceedings. See the Supreme Court of Canada in *Amchem Products Inc. v. B.C. (Workers' Compensation Board),* [1993] S.C.J. No. 34, [1993] 1 S.C.R. 897.

[23] This action is a complex commercial matter with international dimensions. For example, Meyn is located in Ontario where it performed all of its contractual duties; Lilydale is located in Alberta; the subcontractor designer, Meyn's parent company, was located in the Netherlands; EMK is located in Belgium. In cases such as this , courts find it difficult to conclude that one forum is clearly more convenient than another. See *Upper Lakes Shipping v. Foster Yeoman Ltd.,* [1993] O.J. No. 1586 (Gen. Div.).

[24] In *Amchem Products Inc., supra,* Justice Sopinka speaking for the court said at page 919:

> The only recent decision of this Court on the subject is *Antares [Shipping Court v. The Ship "Capricorn",* [1977] 2 S.C.R. 422, which], while an admiralty case in the Federal Court, discusses the general principles relating to *forum non conveniens*. At p. 448, Ritchie J., for the majority, stated the test that should be applied when the court is asked to stay an action on this ground.

> In my view the overriding consideration which must guide the Court in exercising its discretion by refusing to grant such an application as this must, however, be the existence of some other forum more convenient and appropriate for the pursuit of the action and for securing the ends of justice.

[25] Counsel for the plaintiff responding party emphasize the concluding words of that quote, "**and** for securing the ends of justice", and so implied the existence of two standards: the first considers the existence of some other forum more convenient and appropriate to the pursuit of the action, and the second contemplates securing the ends of justice. In the latter respect, counsel for the plaintiff responding party advises the court that pursuit of the action in Alberta is precluded by the *Limitations Act* of Alberta. Thus, he submits, the action should be pursued in Ontario to secure the ends of justice without interference by the Alberta *Limitations Act*.

[26] It is clear that given the Alberta *Limitations Act*, the plaintiffs would suffer a loss of juridical advantage if they were barred from proceeding in Ontario. Considering juridical advantage, on page 919 of *Amchem*, Sopinka J. goes on to say:

> In my view there is no reason in principle why the loss of juridical advantage should be treated as a separate and distinct condition rather than being weighed with the other factors which are considered in identifying the appropriate forum.

At page 920 he adds:

> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question. If a party seeks out a jurisdiction simply to gain a juridical advantage rather than by reason or real or substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping". On the other hand, a party whose case has a real and substantial connection with the forum has a legitimate claim to the advantages that that forum provides. The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

An analysis of the above quoted portion on page 920 of Sopinka J.'s decision, and applying it to the facts at hand may be appropriate.

First:

> The weight to be given to juridical advantage is very much a function of the parties' connection to the particular jurisdiction in question.

Apart from the majority of factors that appear to favour Alberta, the weight to be given to the position of the plaintiff respondent is very much a function of Meyn's connection to the jurisdiction of Ontario.

Second:

> If a party seeks out a jurisdiction simply to gain juridical advantage rather than by reason of a real and substantial connection of the case to the jurisdiction, that is ordinarily condemned as "forum shopping".

Indisputably, the plaintiff respondent is seeking jurisdiction in Ontario to gain juridical advantage which, in the context of this quote, appears appropriate because the defendants, Meyn, are located in Ontario.

Third:

> On the other hand, a party whose case has a real and substantial connection with the forum has a legitimate claim to the advantages that that forum provides.

The plaintiff moving party claims a real and substantial connection with Ontario by virtue of the defendant, Meyn, residing in Ontario thereby giving it a legitimate claim to the advantages that that forum provides, namely, permitting the action to proceed without being precluded at the outset by the Alberta Limitation Act.

Fourth:

> The legitimacy of this claim is based on a reasonable expectation that in the event of litigation arising out of the transaction in question, those advantages will be available.

Again, the plaintiff moving party claims its legitimacy of claiming in Ontario is based on a reasonable expectation that the advantage to it will be a available.

The decision of Sachs J. of this court in *Pickering v. T.D. Trust*, reported at 16 CPC (6th) 49, is illuminating. At page 53, Justice Sachs had this to say:

> The Ontario Court of Appeal [in *Eastern Power Ltd. v. Azienda Comunale Energia & Ambiente* (1999), 39 C.P.C. (4th) 160 (Ont. C.A.)] considered the test for the determination for the appropriate forum set out in *Amchem*. In doing so they approved the following factors in applying the test:
>
> a) the location where the contract is dispute was signed;
>
> b) the applicable law of the contract or tort;
>
> c) the location where the majority of the witnesses reside;
>
> d) the location of key witnesses;
>
> e) the location where the bulk of the evidence will come from;
>
> f) the jurisdiction in which the factual matters arose;
>
> g) the resident or place of business of the parties; and
>
> h) loss of juridical advantage.
>
> These factors are not to be applied in a mechanical manner. Rather, the ones that are important, having regard to the real nature of the dispute, are to be given weight in deciding which is the most natural and appropriate forum.

[27] The defendant moving party uses that rationale to say that the Meyn defendants are conduits only and that their location in Ontario should not be an important factor. The plaintiff takes the opposite position for an entirely different reason: in that the real nature of the dispute would not have an opportunity to be addressed in Alberta owing to the Alberta *Limitations Act,* therefore, that factor should be given paramount importance in the selection of jurisdiction.

[28] I refer now to *Gotch v. Ramirez*, a 2000 decision of Nordheimer J. reported at [2000] O.J. No. 1553. The circumstances in *Gotch v. Ramirez* are remarkably similar to those in the present case. The circumstances and issue before Justice Nordheimer are succinctly captured in paragraph 11 of his decision.

> In this case, the accident occurred in Pennsylvania. As I shall discuss below, the law to be applied to the issues arising from the accident would be the law of Pennsylvania. The majority of witnesses reside in Pennsylvania as do the key witnesses (except for Christian Ramirez whose location is unknown). The bulk of the evidence regarding the accident would have to come from Pennsylvania. The residence of the parties is neutral (one in Pennsylvania; one in Ontario and one unknown). There is, however, a clear loss of juridical advantage to the plaintiff if he is required to litigate the matter in Pennsylvania since his claim, both counsel acknowledge, will be statute-barred. The issue is whether that fact is sufficient to tip the scales in favour of the plaintiff.

[29] The case at hand parallels *Gotch v. Ramirez* in six important respects. In *Gotch*, the convenience factors tied the action to Pennsylvania, while in this case, the same factors connect the proceedings to Alberta. In both cases, however, the convenience factors favoured a jurisdiction in which the claim was statute barred.

1. In *Gotch*, the accident occurred in Pennsylvania. In the present case, the accident occurred in Alberta.

2. In *Gotch*, that case, the law to be applied to the issue arising from the accident would be the law of Pennsylvania. In the present case, the law to be applied to the issues arising from the accident would be the law of Alberta.

3. In *Gotch*, the majority of witnesses resided in Pennsylvania and they were the key witnesses. In the present case, the majority of witnesses would be expected to reside in Alberta.

4. In *Gotch*, the bulk of the evidence regarding the accident would have come from Pennsylvania. In the present case, the bulk of the evidence regarding the accident would be expected to have come from Alberta.

5. In *Gotch*, residence of the parties is neutral (one in Pennsylvania, one in Ontario and one unknown). In the present case, the residence of the parties is neutral (one in Ontario, one in Alberta and some in Europe).

6. In *Gotch*, there would have been, however, a clear loss of juridical advantage to the plaintiff if he had been required to litigate the matter in Pennsylvania. That is, both counsel before me acknowledged that in that case, the claim would have been statute barred. On the facts of the present case, there also would be a clear loss of juridical advantage to the plaintiff if he were required to litigate the matter in Alberta, since the claim would be statute barred.

[30] I come now to the deciding language by Justice Nordheimer contained at paragraph 16:

> In the end result, however, it seems to me that the loss of juridical advantage to the plaintiff arising from the limitation period issue is sufficient to outweigh all of the other considerations, the majority of which favour Pennsylvania as the appropriate forum for this litigation. I note that this is not the normal situation where the plaintiff has chosen his or her own jurisdiction to commence the action and is attempting to force the defendant to litigate in the plaintiff's "backyard". Rather, here the plaintiff has come to the defendant's jurisdiction to prosecute the claim. As a consequence, it seems to me that the costs issues are very much less of a concern than would otherwise be the case. The plaintiff is the one who will bear the costs of bringing himself …[and others]… to Ontario. While there may be some costs to the defendant to also bring witnesses to Ontario, that is not such a serious concern as to outweigh the plaintiff's loss of his claim which would be the result if the stay is granted …

[31] Clearly, Justice Nordheimer focused very heavily on the consequences to the plaintiff who would most certainly lose the opportunity to have his case heard on its merits in the alternative jurisdiction. It is clear that Justice Nordheimer, recognizing that most of the connecting circumstances in *Gotch v. Ramirez, supra*, would have occurred outside of Ontario, still found in favour of the Ontario jurisdiction in the interest of securing the ends of justice. In the circumstances of this case, I am drawn to the same conclusion.

[32] Specifically, Justice Nordheimer said that in the end result, the loss of juridical advantage to the plaintiff arising from the limitation period was sufficient to outweigh all of the other considerations, the majority of which favoured Pennsylvania as the appropriate forum for that litigation. Therefore, even if I find that all the other factors point to Alberta as the appropriate forum, following Justice Nordheimer, the loss of juridical advantage occasioned by the Alberta limitation period may well be enough to justify a refusal of the stay.

[33] The decision of Master Glustein in *Kennedy v. Hughes* dated September 29, 2006 was brought to the attention of the court. On the issue of *forum non conveniens* the Master had this to say:

> The decision is *Gotch* does not support the proposition that once an action is statute-barred in another jurisdiction, a motion for a stay based on *forum non conveniens* must fail. To the contrary, Nordheimer J. relied on the decision of Sopinka J. in *Amchem Products Inc. v. B.C. (Workers' Compensation Board),* 1993 CanLII 124 (S.C.C.), [1993] 1 S.C.R. 897 ("*Amchem*"), in which he held that a juridical advantage to be obtained in a jurisdiction is only one factor to be considered, and cannot trump all other factors.

[34] I do not see that language occurring in the decision of Nordheimer J. in *Gotch v. Ramirez.* The language in *Gotch v. Ramirez*, quoted above speaks for itself and focuses heavily on favouring a jurisdiction which will not be statute barred so long as there is a basis for applying that jurisdiction in the first place.

[35] Master Glustein's observation evokes seeking out a dependable principle upon which to rely. A review of the cases above recited, applied cumulatively, establishes the following sequencing of principles. In the ordinary course, connecting factors are added up and weighed against each other to determine the more appropriate forum. Then seeking the ends of justice is layered into the mix as another factor. But if a party has a real and substantial connection with the jurisdiction of its choice, and if that forum is required to secure the ends of justice, then that forum will trump the other factors. Unless I come to that conclusion, I am unable to make sense of the principles emerging from the cases above recited to apply to the circumstances of this case.

[36] In addition, it cannot be said with certainty at this stage in the present case, that Ontario law will not be applicable (see *Ontario New Home Warranty Program v. General Electric Company,* [1998] 36 O.R. 3rd 787. That leaves this court with a decision as to whether or not *Gotch v. Ramirez* should be followed. A review of a number of cases indicates that it should be followed by the court in the present circumstances on the basis of the principle of *stare decisis*. For example, see *R. v. Cameron,* [1984] O.J. No. 683:

> The decisions of an ordinary superior Court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on that court itself, will be followed in the absence of strong reasons to the contrary.

[37] Given that I cannot find anything even approaching strong reasons to the contrary, I find it appropriate to follow the reasoning of Justice Nordheimer in *Gotch v. Ramirez* in virtually parallel circumstances. In applying that reasoning, it is my conclusion that the Motions Plea for an Order staying these proceedings bearing Court File No. 06-CV-304380PDI (the Ontario Action) is dismissed.

[38] As to the alternative plea in the motion, it is not within the power and prerogative of this court to make a finding regarding the Court of Queen's Bench of Alberta action bearing number 0403 24820.

[39] If the parties are unable to come to terms as to costs, I will be available to make a determination by appointment.

DAY J.

Date: February 13, 2007

COURT FILE NO.: 06-CV-304380PD1
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Plaintiff

- and -

MEYN CANADA INC., MEY-CAN EQUIPMENT LTD., MEYN FOOD EQUIPMENT INC., EMK NV AND ELBOMA MOORTGAT KONSTRUKTIE NV

Defendants

REASONS FOR JUDGMENT

DAY J.

Date: February 13, 2007