

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:)
)
STEPHEN SHANE and DONALD SHANE) Stephen J. Kelly, for the Plaintiffs
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)
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Plaintiffs)
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- and -)
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JCB BELGIUM N.V.) Antonin I. Pribetic, for the Defendant
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Defendant)
)
)
) **HEARD:** September 4, 2003

2003 CanLII 49357 (ON SC)

REASONS FOR DECISION

SMITH J.

[1] Stephen Shane and Donald Shane (“the Shanes”) operate a farm located just east of Ottawa, which produces corn, soybeans and wheat. In April of 2002, the Shanes purchased a tractor directly from JCB Belgium N.V. (“JCB”) located in Belgium. The tractor was transported to Ontario and on August 13, 2001, the tractor caught fire and burned, while being used by the Shanes on their farm in Ontario. The plaintiffs are claiming damages for negligent manufacture and design of the tractor and made their claim in Ontario where the damages were suffered. The defendant disputes the jurisdiction and claims that Belgium is the most convenient and appropriate forum.

[2] The court must decide if the Shanes can proceed with their claim for damages in Ontario where they reside and where the damages were suffered, or whether the Shanes must commence

their action in Belgium where the contract was made. The Court's decision will affect many consumers and businesses who purchase manufactured goods from a foreign jurisdiction and subsequently, suffer damages caused by a defect in the manufacture or design of the goods where they live or carry on business.

Background Facts

[3] The defendant, JCB Belgium is headquartered in Aarschot, Belgium and is the authorized distributor of JCB tractors in Belgium.

[4] The tractor was manufactured by JCB Landpower Ltd., which is located in Cheadle, Staffordshire, England. The manufacturer of the tractor is a wholly owned subsidiary of JC Bamford Excavators Limited located in Rocester, Staffordshire, England. The defendant, JCB Belgium is an indirect subsidiary of JC Bamford, the parent company of the manufacturer of the tractor in question.

[5] JCB tractors are also distributed and sold in Canada by JCB Excavators Limited, the shares of which are owned by JC Bamford Excavators Limited, the same company which owns the shares of the manufacturer of the tractor in question and 50% by the Bamford family. JCB tractors are sold in Canada through JCB Excavators and are manufactured by JCB Inc., which is a corporation located in Pooler, Georgia, U.S.A.

[6] The somewhat complicated corporate structure of the defendant and associated companies can be summarized as follows:

- (a) JCB tractors are manufactured in Staffordshire, England and in Georgia, U.S.A.
- (b) JCB tractors are sold in Canada and the U.S.A. and in Belgium and Europe through different distributors which are indirectly related to the parent company of the manufacturing companies of JCB tractors both located in England and in Georgia, U.S.A.
- (c) JCB tractors are sold throughout North America and Europe through different distributors.

[7] Rita Shane is the spouse of one of the plaintiffs and was born in Belgium and moved to Canada in 1980. Stephen Shane tested a JCB 3185 tractor at JCB Conley in Ottawa. The Shanes contacted JCB brokers in Belgium and found that the cost to purchase the same model JCB tractor was substantially lower and it also included several options not available on the tractor sold through the Canadian JCB distributor.

[8] The contract documents consist of a letter in English confirming the details of purchase from JCB Belgium and an invoice on a pre-printed Flemish form, which was completed in English. After the agreement was reached, the Shanes made arrangements to finance the tractor and to transport the tractor to Canada.

ISSUE NO. 1: Is there a real and substantial connection with Ontario?

[9] The criteria to consider to determine whether a real and substantial connection exist with the jurisdiction was set out in *Muscutt v. Courcelles*, [2002] O.J. No. 2128 (Ont. C.A.) and are as follows:

- a) the connection between Ontario and the plaintiffs' claim;
- b) the connection between Ontario and the defendant;
- c) unfairness to the defendant in assuming jurisdiction;
- d) unfairness to the plaintiff in not assuming jurisdiction;
- e) the involvement of other parties to the suit;
- f) would Ontario courts recognize and enforce the foreign judgment rendered on the same jurisdictional basis;
- g) whether the case is interprovincial or international;
- h) comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere.

[10] At the motion, the parties agreed that there was a substantial connection with Ontario that was sufficient for Ontario to assume jurisdiction simplicitor.

[11] However, JCB Belgium has claimed that Belgium is the *forum conveniens* and the most appropriate forum for this issue to be determined. Notwithstanding the parties' agreement, it is helpful for the analysis to review the factors involved in the substantial connection of test.

[12] Connection with claim

(a) In connection with Ontario is that the plaintiffs live and operate a farm in Ontario and the tractor caught fire in Ontario and, as a result, the damages occurred in Ontario. In addition, the main evidence involved in this trial, namely the damaged tractor is in Ontario and JCB tractors are also sold and distributed to Ontario.

[13] Connection with Defendant

(b) The distributor in Belgium is a separate corporation, but the distributor for JCB tractors in Belgium and the distributor for JCB tractors in Ontario are indirectly related to the parent company of the corporation, which manufactures JCB tractors. To summarize, JCB

tractors are distributed and sold across North America and Europe, albeit through different distributors. The shareholder of the manufacturing company of JCB tractors, sold both in Belgium and in Canada, is the same party.

[14] **Unfairness to Defendant**

(c) There is no unfairness to the defendant if Ontario assumes jurisdiction, as the defendant is an indirect subsidiary of JCB Bamford Excavators Limited, which fully owns the shares of the manufacturer of the JCB tractors. The defendant distributes JCB tractors in Belgium and sold this tractor to residents of Ontario, knowing the tractor would be used and operated in Ontario.

[15] Even though the contract is deemed to have been made in Belgium, the damages have occurred in Ontario. The main piece of evidence is in Ontario, and the claim for negligent manufacture and design, which is the main issue in this case, involve the manufacturer JCB Landpower Limited, which is based in Staffordshire, England.

[16] The Supreme Court of Canada has dealt with the issue of where an action can be commenced when the negligent design and manufacture of products is alleged. Where foreign defendant negligently designs and manufactures a product, in a foreign jurisdiction, which enters into Ontario by normal channels of trade and the manufacturer knows that it is reasonably foreseeable that its product would be used where the plaintiff used it, and the manufacturer knows or ought to know that if it is careless and negligent in the design or manufacture of the product, a user of the product may be injured or suffer damages then the courts of the forum in which the plaintiff suffered damages are entitled to exercise jurisdiction over that foreign defendant. *Moran v. Pyle National (Canada) Ltd.*, [1975] 1 S.C.R. 393 at page 20.

[17] In this case, the foreign manufacturer of the JCB tractors has not been sued, but the plaintiffs indicated they were not aware of the corporate structure involved prior to this date and will seek to amend their claim to include the manufacturer as an additional defendant.

[18] Justice Dickson discussed where a tort is committed at page 9 of the *Moran* decision:

Generally speaking, in determining where a tort has been committed, it is unnecessary, and unwise, to have resort to any arbitrary set of rules. The place of acting and the place of harm theories are too arbitrary and inflexible to be recognized in contemporary jurisprudence. ... By tendering his products in the market place directly or through normal distributive channels, a manufacturer ought to assume the burden of defending those products wherever they cause harm as long as the forum into which the manufacturer is taken is one that he reasonably ought to have had in his contemplation when he so tendered his goods.

[19] In this case, JCB tractors are sold in Europe and in Canada and in the United States through the normal distributive channels. The parent company JC Bamford Excavators Limited wholly owns the companies, which manufacture the JCB tractors in England and indirectly owns

the Belgian distributor. The Belgium distributor (the defendant) and JCB Excavators Limited, the distributor company for Canada and Ontario are both indirect subsidiaries of the parent company JC Bamford Excavators Limited.

[20] The manufacturer of JCB tractors is part of a large multinational corporate structure, which is fully aware that JCB tractors are being sold and distributed throughout Europe and North America. The fact that a farmer purchases a JCB tractor from a distributor in Belgium, who agrees to sell the tractor to a farmer in Ontario, as opposed to purchasing a JCB tractor from a distributor in Ontario, should not affect the plaintiffs' right to claim for damages for the negligent design and manufacture of the tractor in Ontario where he resides. The fact that the plaintiff chose to deal with one of two possible distributors of JCB tractors should not prevent the plaintiff from suing in Ontario when the damages to the plaintiff occur in Ontario. It was reasonably foreseeable by the defendant and the manufacturer that the JCB tractors would be widely distributed and sold throughout Europe and North America.

[21] **Unfairness to Plaintiff**

It would be unfair to the plaintiff for the Ontario Courts not to assume jurisdiction when the plaintiff farms in Ontario and buys a tractor to be used on their farm in Ontario. The plaintiffs suffered damages in Ontario when their tractor burned and as such they should not be required to incur the substantial additional expense of proceeding with a claim and proving their damages in Belgium.

[22] **Involvement of other parties**

The other parties involved include the manufacturer, who resides in Staffordshire, England. It is not clear that Belgium is a more appropriate jurisdiction when the essence of the claim is negligent design and manufacture against the manufacturer. I have already found that the reasoning in *Moran v. Pyle, supra*, applies, as it was reasonably foreseeable that the JCB tractors would be sold in different jurisdictions, including Ontario. The manufacturer who plans to sell products where the manufacturer knows its product will be used, and if they turn out to have been carelessly made or designed and cause damages, then the manufacturer should be prepared to defend the product where the damage has occurred.

[23] **Recognition by Ontario**

The Ontario Courts would recognize and enforce a foreign judgment rendered on the same jurisdictional basis.

[24] **International Case**

The case involves international trade, in this era of liberalized trade, manufacturers who distribute products to jurisdictions where they know the product will be used, and where damages in the jurisdiction in which the product is being used as a result of negligent design and

manufacture, then the court where the harm is suffered should have jurisdiction to deal with a claim for damages.

[25] **Comity**

The basis of the *Moran v. Pyle* decision of the Supreme Court of Canada is consistent with comity and the standards of jurisdiction and enforcement prevailing elsewhere.

[26] For all of the reasons set forth above, I find that there is a substantial connection between Ontario and the plaintiff's claim.

ISSUE NO. 2: Is Ontario the *Forum Conveniens* or the most appropriate jurisdiction for this action to be tried?

Breach of Contract

[27] The parties do not dispute that the United Nations Convention on the International Sale of Goods ("CISG") applies and that the CISG was incorporated into Ontario law by the passing of the *International Sale of Goods Act*. The contract is deemed to have been made where the offer was extended from. In this case, the offer was extended from Belgium and accepted by a fax sent from Ontario.

[28] The Shanes main claim is that the tractor was negligently manufactured or designed. The place where the tort occurred is either Staffordshire, England where the tractor was manufactured and designed, or where the damage occurs when the tractor catches fire and burns in Ontario. The contract is silent on which forum should apply to any claim for damages.

[29] Rule 17.02 of the *Ontario Rules of Civil Procedure* provide that a claim may be made in Ontario and served on a defendant outside of Ontario where the proceeding against the party consists of a claim or claims:

(f) Contracts – in respect of a contract where,

...

iv) a breach of the contract has been committed in Ontario, even though the breach was preceded or accompanied by a breach outside Ontario that rendered impossible the performance of the part of the contract that ought to have been performed in Ontario, or

(g) Tort committed in Ontario – in respect of a tort committed in Ontario, or

(h) Damage sustained in Ontario – in respect of damages sustained in Ontario arising from a tort, breach of contract, breach of fiduciary duty or breach of confidence.

[30] JCB Belgium has filed a notice of intent to defend by inadvertence and claims that they did not attorn to the jurisdiction of Ontario. I accept the explanation offered by JCB Belgium, and I will disregard the inadvertent filing of a notice of intent to defend and proceed to rule on the merits of the motion before me.

Analysis

[31] JCB Belgium claims that Belgium is the most convenient forum for the action to be heard for the following reasons:

(a) There is no real and substantial connection to Ontario.

[32] This ground was abandoned and the parties agreed that there is a real and substantial connections to Ontario, which is sufficient for Ontario to assume jurisdiction simplicitor.

(b) All transactions giving rise to the claim transpired in Belgium.

[33] The contract is deemed to have been made in Belgium, but the parties agree that the contractual provisions are governed by the CISG. The defendant was aware the tractor was being sold to Ontario and the fire and damages occurred in Ontario. The plaintiff's claim that the fire was caused by the negligent design and manufacture of the tractor. The tractor was designed and manufactured in Staffordshire, England.

[34] Clearly, all transactions related to the claims do not transpire in Belgium. In fact, the essence of the claims concerns the determining what caused the tractor to catch fire, in Ontario. This will involve expert witnesses examining the tractor, in Ontario. If there is a defect in the tractor's design, then this will be determined by experts examining the tractor, in Ontario.

(c) The tractor was purchased from Belgium and paid for in Belgium currency.

[35] This is not really a factor in determining the *forum conveniens*. There is no dispute about the price of the tractor and the parties agree that the terms of the contract are governed by the CISG.

(d) Contract in Flemish language

[36] The offer to sell the tractor made by JCB Belgium was made by letter prepared in the English language. The invoice consists of a one page pre-printed document prepared in Flemish and where the details of sale are entered in English.

[37] The translation cost would be minimal and is not a factor of any weight in the issues to be determined by the court.

(e) JCB Belgium consents to Belgium assuming jurisdiction.

[38] The fact that JCB Belgium consents to having the matter heard in Belgium is not surprising and that as they are contesting that Ontario is an appropriate forum to hear this claim. It would be more convenient for the defendant if the plaintiffs were required to commence their claim for damages in Belgium. The consent of the defendant to have a claim transferred to its jurisdiction is not a factor of any weight in determining the *forum conveniens*.

(f) Witnesses

[39] The defendant claims that all of the witnesses, except for the plaintiffs, reside in Belgium. The Shanes dispute this allegation and have produced a list of six witnesses who reside in Ontario, including an engineer, who will be an expert witness, the appraiser, the adjuster, as well as the two plaintiffs involved and Peter Shane, the wife of one of the plaintiff who negotiated the terms of the purchase of the tractor.

[40] The witnesses concerned with the manufacture and design of the tractor, will presumably come from either Staffordshire, England, or Georgia in the United States of America where JCB tractors are manufactured. The number of witnesses from Belgium would seem to be relatively small, other than Mr. Wetzels, who negotiated the sale of the tractor to the Shanes. The terms of the sale of the tractor are not in dispute. The claim concerns damages suffered in Ontario and a determination of the cause of the damage. The determination of what caused the tractor to catch fire is not connected to Belgium in this case.

(g) Belgium Law of Contract

[41] The law which the parties agree applies is the CISG and as such the application of Belgium contract law is not a factor of great weight. A greater factor is that the law where the tort occurred should be applied for claims in negligence. This proposition was clearly stated by the Supreme Court of Canada in *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022 p.15, where the court held that

From the general principle that a state has exclusive jurisdiction within its own territories ... it seems axiomatic to me that, at least as a general rule, the law to be applied in torts is the law of the place where the activity occurred, i.e., the *lex loci delicti*. There are situations, of course, notably where an act occurs in one place but the consequences are directly felt elsewhere, when the issue of where the tort takes place itself raises thorny issues. In such a case, it may well be that the consequences would be held to constitute the wrong. ...

[42] In this case the consequences, namely the fire destroying the tractor occurred in Ontario and the law of Ontario may well apply to the issue of negligent design and manufacture of the tractor. The negligent design did not take place in Belgium, but in Staffordshire, England and, as such, the law of Belgium would not apply to the question of negligence in any event.

(h) Plaintiffs not deprived of judicial advantage

[43] The plaintiffs claim that they should not be deprived of the availability of case management in Ottawa, which they state constitutes a juridical advantage. The defendant states that the legal procedures in Belgium are very different than in Ontario and that Ontario courts with case management are not superior to the legal procedures available in Belgium. In Belgium, the president of the court assumes an inquisitorial role and will generally receive written briefs from the lawyers for the parties and will appoint his or her own expert witnesses to report back to the court and a hearing will then be convened with witnesses, if necessary.

[44] Notwithstanding that the case management in Ottawa has been extremely successful and has resulted in a high settlement rates and has removed the backlog of civil cases, I do not find that on the evidence before me that the relative benefits of the legal procedures in Ontario and in Ottawa, in particular, are superior and create a substantial juridical advantage to those procedures available in Belgium. As a result, I find that this is not a factor of great weight in determining the most convenient and appropriate forum for the hearing of this action.

[45] The *forum non conveniens* test is a discretionary one where the real and substantial connection test is a legal rule. The factors, which the court must consider when determining the *forum conveniens*, were set out in *Muscutt v. Courcelles*, [2002] O.J. No. 2128 (Ont. C.A.), where Justice Sharpe stated as follows at page 12:

Courts have developed a list of several factors that may be considered in determining the most appropriate forum for the action, including the following:

the location of the majority of the parties

the location of key witnesses and evidence

contractual provisions that specify applicable law or accord jurisdiction

the avoidance of a multiplicity of proceedings

the applicable law and its weight in comparison to the factual questions to be decided

geographical factors suggesting the natural forum

whether declining jurisdiction would deprive the plaintiff or defendant of a legitimate juridical advantage available in the domestic court.

Location of Parties

[46] The plaintiffs reside in Ontario and the defendant resides in Belgium. There is no advantage to either, other than there are two plaintiffs and one corporate defendant.

Location of Witnesses and Evidence

[47] The witnesses concerning the terms of the contract, which are not in dispute, would be evenly split, the purchaser residing in Ontario and the vendor in Belgium. However, the witnesses concerning the negligent manufacture and design of the tractor would include expert witnesses, one of which is an engineer from Ontario, and other experts may be located in Staffordshire, England or in other locations. The location of the key evidence, namely the damaged tractor, is in Ontario. The witnesses concerning damages are the appraiser and adjuster, who are all located in Ontario. It is unknown where the defendant's key expert witnesses on negligent design and manufacture would be located, as no evidence was introduced by the defendant on this point. I find the location of witnesses and the key evidence strongly favours Ontario and not Belgium.

Contractual Provision

[48] The contract is silent on the jurisdiction in which any claim for damages must be brought and is also silent on the applicable law. The contract is made in Belgium, but governed by the terms of the CISG. The law applicable to the tort is either Ontario, where the damages occurred, or in Staffordshire, England, where the design and manufacture took place. This factor is therefore neutral, but does not favour Belgium, as Ontario law may apply to the tort claim if the comments in the *Tolofson* decision are followed.

Multiplicity of Proceedings

[49] If the claim proceeds in Ontario, there will be no multiplicity of proceedings. This will certainly be the case if the defendant manufacturer is joined as a defendant.

Applicable Law and Weight in relation to Factual Questions

[50] The applicable law of contract is the CISG which provides that the law of Belgium would apply to the contractual provisions. However, the terms of the contract are not in dispute and the factual questions to be determined are whether the tractor was negligently manufactured and designed, did the negligent design and manufacture cause the damages and the quantum of the damages. This applicable law to the tort of negligent design and manufacture will either be Ontario where the damages occurred or England where the tractor was manufactured.

[51] If the comments of the Supreme Court of Canada in *Tolofson* are followed that the tort has occurred where the damages are suffered, then the law of Ontario would apply. The weight of the applicable law in relation to the factual issues which have to be decided favours Ontario rather than Belgium

Geographical Factors

[52] There is no key geographical factor, which suggests natural forum other than that the damages occurred in Ontario and the key piece of evidence is in Ontario.

Judicial Advantage

[53] This was discussed earlier at paragraph [43] and I have found little weight should be accorded to this factor.

Onus

[54] I find that the plaintiffs' have satisfied the onus on them to demonstrate that the most convenient forum is Ontario, as set out by the Court of Appeal in *Frymer v. Brettschneider et al*, [1991] 19 OR. (2d) 69 (Ont. C.A.). In the *Frymer* decision the court held that where the plaintiff seeks to bring a foreigner into the jurisdiction and the defendant contests the jurisdiction, then the onus is on the plaintiff to demonstrate that Ontario is the appropriate forum.

[55] In *Mutual Life v. Peat Marwick et al* [1998] 172 D.L.R. (4th) 380 at 381, the court stated:

Having regard to the test to be applied, it seems to us that the question of the burden is largely irrelevant. That test was laid down by Sopinka J. on behalf of the Supreme Court of Canada in *Amchem Products Inc. v. British Columbia (Workers' Compensation Board)* [1993], 1 S.C.R. 897 at p. 921, 102 D.L.R. (4th) 96, as follows:

... the existence of a more appropriate forum must be *clearly* established to displace the forum selected by the plaintiff.

That language clearly places the onus on the moving party, ...

[56] A list of factors, similar to those set out in the *Muscutt* decision, to consider when determining the *forum conveniens* was also set out in the case of *Eastern Power v. Azienda Comunale Energia and Ambiente* (1999), 178 D.L.R. (4th) 409 (Ont. C.A.) at p. 415 and the court quoted from the following passage from *SDI Simulation Group Inc. v. Chameleon Technologies Inc.* (1994), 34 C.P.C. (3d) 346 (Ont. Gen. Div.) concerning the burden or onus to be satisfied:

In my view, on the basis of these authorities the test is not one of convenience, but one of "a more appropriate jurisdiction based on the relevant factors in which to litigate the plaintiff's claim".

[57] This *SDI Simulation* case was a breach of contract case and, as such, is distinguishable from the facts in the present case. The plaintiffs' claim in this case is a claim in tort for negligent design and manufacture. The defendant has not demonstrated that Belgium is the more appropriate jurisdiction in which to litigate the plaintiffs' claim and the plaintiffs have shown that Ontario is the more appropriate jurisdiction based on all the relevant factors discussed above.

[58] In weighing all of the factors set out in *Muscutt* by the Ontario Court of Appeal, I find that the balance of convenience favours Ontario assuming jurisdiction over the claim for damages, as the majority of the witnesses dealing with causation, negligence and damages are in Ontario and the key evidence, namely the tractor, is also located in Ontario and Ontario law may well apply to the tort of negligent design and manufacture of the tractor.

Disposition

[59] I have found that there is a real and substantial connection between Ontario and the claim for damages advanced by the plaintiffs in this action against JCB Belgium.

[60] I also find that the defendant has not demonstrated that Belgium is the more appropriate for more convenient forum for the hearing of this claim.

[61] I further find that Ontario is the most appropriate forum where the manufacture and its distributor of JCB tractors enters Ontario in the normal channels of trade, and where it is reasonably foreseeable that the product would be used in Ontario, and when the plaintiffs use the tractor in Ontario and where the plaintiffs suffer damages in Ontario, which it alleges are caused by the negligent design or manufacture of the product, then the defendant should be required to defend the design and manufacture of its product in Ontario.

[62] The plaintiffs shall have 10 days to make short submissions on costs, the defendant shall have 10 days to reply and the plaintiffs shall have 5 days to respond.

Mr. Justice Robert J. Smith

COURT FILE NO.: 02-CV-19871
DATE: 2003/11/14

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N:

STEPHEN SHANE and DONALD SHANE

Plaintiffs

- and -

JCB BELGIUM N.V.

Defendant

REASONS FOR DECISION

Mr. Justice Robert J. Smith

Released: November 14, 2003