Date: 20240125
Docket: CI 21-01-30371
(Winnipeg Centre)
Indexed as: Rosser Holstein Ltd. v. Faresin Industries SPA et al
Cited as: 2024 MBKB 16

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

ROSSER HOLSTEIN LTD, plaintiff,	No one appearing for the plaintiff
-and-	
FARESIN INDUSTRIES SPA, BRODIE AG & INDUSTRIAL INC. and MAZERGROUP LTD., defendants,	No one appearing for the defendants Brodie AG & Industrial Inc. and Mazergroup Ltd. Aaron W. K. Challis Counsel for the defendant Faresin Industries SPA
-and-	
SPILA SRL, third party.	Joseph G. Aiello and David Barbour Counsel for the third party JUDGMENT DELIVERED: January 25, 2024

ASSOCIATE JUDGE BERTHAUDIN

[1] This motion filed by the third party Spila SRL (Spila) seeks an order staying the third party claim against it on the basis that the Manitoba Court of King's Bench lacks jurisdiction (jurisdiction *simpliciter*), or on the basis of the

doctrine of *forum non conveniens*. This motion was argued by teleconference with counsel for Spila and the defendant Faresin Industries SPA (Faresin) making submissions on the motion. Counsel for the other parties to the action did not attend or make submissions.

BACKGROUND

[2] The underlying action by the plaintiff Rosser Holstein Ltd. (Rosser) revolves around a fire which occurred in an agricultural feed mixer owned by Rosser and manufactured by Faresin. Rosser had purchased the mixer from the defendant Mazergroup Ltd. (Mazergroup), a local Manitoba retailer of agricultural products. Mazergroup had purchased the mixer from the defendant Brodie AG & Industrial Inc. (Brodie), an Ontario corporation which served as a Canadian distributor of products for Faresin. Brodie had purchased the mixer from Faresin.

[3] On the basis of this contractual chain, Rosser commenced action relating to the fire against the retailer Mazergroup, the distributor Brodie and the manufacturer Faresin. Each of the defendants filed statements of defence and crossclaims. Faresin in turn commenced a third party claim against Spila. Spila's involvement is that it manufactured a plastic hydraulic tank which was incorporated by Faresin into the manufacture of the mixer. The allegations in the statement of claim include that heat from the mixer's exhaust pipe and muffler caused the plastic hydraulic tank to melt, allowing oil to leak out and ignite the fire. While Faresin denies this cause of the fire, it commenced the third party

claim against Spila in the event that it is found liable to Rosser relating to any deficiency in the plastic hydraulic tank manufactured by Spila.

[4] The litigation is at the discovery stage. Examinations of some but not all of the parties have been conducted. A pretrial conference has not been held and trial dates have not been scheduled.

[5] It is notable for the purposes of the present motion that both Faresin and Spila are corporations incorporated pursuant to the laws of Italy and carry on business in that country. Faresin markets and distributes its equipment, including the mixer at issue, worldwide. For its part, Spila says that it is licensed to carry on business in Europe but not North America.

[6] There is no doubt that the contractual agreement between Faresin and Spila for production of the plastic hydraulic tanks was made in Italy. The documents outlining the contract are written in the Italian language. There is a dispute as to whether the contract included certain terms contained on Spila's website. These terms included that any disputes arising from the contract were to be heard exclusively in the Court of Modena, Italy. Spila alleges that its standard practice was to advise clients of these terms on its website. Faresin says it had no knowledge of these terms and they do not form part of the contract between the parties. The production of the plastic hydraulic tanks was done in Italy and, once the tanks were provided to Faresin in accordance with the contract, they were incorporated by Faresin into the mixers in Italy.

[7] The third party claim filed by Faresin against Spila alleges that the hydraulic tank was required to be made from cross-linked polyethylene and that Spila warrantied the tank against defects and deficiencies for a period of 24 months from the date of manufacturing. It also alleges that it was an express or implied term of the contract that the tank would be of merchantable quality, reasonably fit for its intended purpose and free from any deficiencies or defects. These claims are all pleaded as part of the breach of contract cause of action.

[8] Faresin also alleges in its statement of claim that it has a claim in negligence as against Spila, based on negligent manufacture or design of the tank.

[9] Spila relies on King's Bench Rules 17.02 and 17.06 in support of the motion to stay the third party claim based on the lack of jurisdiction for the Manitoba Court of King's Bench, and that this court is not the convenient forum for determination of this dispute.

ANALYSIS AND DECISION

JURISDICTION *SIMPLICITER*

[10] It is agreed between the parties that the jurisdiction alleged in this case is assumed jurisdiction. It is also agreed that the leading decision on assumed jurisdiction is ***Club Resorts Ltd. v. Van Breda***, 2012 SCC 17. The Supreme Court in that decision set out a list of non-exhaustive presumptive connecting factors entitling a court to assume jurisdiction over a dispute, with those factors set out below:

(a) the defendant is domiciled or resident in the province;

(b) the defendant carries on business in the province;

(c) the tort was committed in the province; and

(d) a contract connected with the dispute was made in the province.

[11] In the present scenario it is the third party, rather than the defendant, under consideration with respect to these factors. If the factors create a presumption of jurisdiction, it is a rebuttable presumption.

[12] I will consider each of these factors with reference to the arguments made by Spila and Faresin.

The third party is domiciled or resident in the province

[13] Spila is an Italian corporation and is not domiciled or resident in the Province of Manitoba. There is no dispute about this point.

The third party carries on business in the province

[14] There is no contention by Faresin that Spila carries on business in the Province of Manitoba. Spila says that it is based in Italy and carries on business in Europe.

The tort was committed in the province

[15] The tort in question is that alleged to have been committed by Spila in the design and manufacture of plastic hydraulic tanks. The design and manufacture of the tanks took place in Italy, not Manitoba.

A contract connected with the dispute was made in the province

[16] The contract between Spila and Faresin for the manufacture of the plastic hydraulic tanks was made between those parties in Italy. It is not connected to the Province of Manitoba.

[17] If the contract between Spila and Faresin is the only contract under consideration for the purposes of the presumptive connecting factors, that would seem to end the discussion. None of the four presumptive connecting factors connect the dispute between Spila and Faresin to the Province of Manitoba. Faresin argues, however, based in part on recent jurisprudence from courts in Ontario, that the jurisdiction *simpliciter* analysis should consider not only the circumstances of the party disputing jurisdiction, but assuming jurisdiction over the dispute as a whole, when it involves other parties. This analysis requires some elaboration and discussion of the relevant decisions.

[18] Faresin's argument starts with the following quotation from ***Van Breda*** at paragraph 83:

> **83** At this stage, I will briefly discuss certain connections that the courts could use as presumptive connecting factors. Like the Court of Appeal, I will begin with a number of factors drawn from rule 17.02 of the Ontario *Rules of Civil Procedure*. These factors relate to situations in which service *ex juris* is allowed, and they were not adopted as conflicts rules. Nevertheless, they represent an expression of wisdom and experience drawn from the life of the law. Several of them are based on objective facts that may also indicate when courts can properly assume jurisdiction. . . .

[19] While not suggesting that service *ex juris* (King's Bench Rule 17.02) is itself a presumptive connecting factor, Faresin argues that these service principles may be considered in the analysis, especially on the basis that the

threshold for determining assumed jurisdiction is low. Faresin points to King's Bench Rules 17.02(h) (Loss or Damage Sustained in Manitoba), 17.02(l) (Necessary or Proper Party) and 17.02(n) (Counterclaim, Crossclaim or Third Party Claim), as service principles which would point to Manitoba being the appropriate jurisdiction for determination of the dispute.

[20] Faresin argues that the presence in the litigation of multiple parties requires a court to consider more than just the circumstances of the party opposing jurisdiction. It relies on the 2022 Ontario Superior Court decision in ***Thind v. Polycon Industries***, 2022 ONSC 2322. In that decision, the court found that Ontario had jurisdiction *simpliciter* because one of the parties involved in the case was domiciled in Ontario, despite the defendant opposed to the jurisdiction having no such connection to that province. In ***Thind***, the court stated the following at paragraphs 40 and 41:

> **40** Where there are multiple defendants, some in Ontario and others outside of the jurisdiction, who are joint tortfeasors in an action having inseparable damages, I accept that the court in Ontario may assume jurisdiction *simpliciter* on the basis of the first presumptive factor: *Cesario* at paras 23-24; *Best* at paras 19-20; see also *Stapper v. Taylor*, 2021 ONSC 243 at para 33. Otherwise, a plaintiff would be forced to litigate in Ontario and bring separate actions against defendants in other jurisdictions, which makes little sense and raises the real and unjust prospect of inconsistent verdicts: *Cesario* at paras 24 and 27; *Khan* at para 22. In contrast, hearing the action in Ontario would avoid fragmented litigation and align with the overarching principles of fairness and efficiency on which the assumption of jurisdiction *simpliciter* is based …
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> **41** In this case, two of the three Defendants, Polycon and Trade-Mark, are located in Ontario and named as joint tortfeasors in the same action in which the Plaintiff is claiming inseparable or indivisible damages. On this basis, and applying the *Van Breda* principle of fairness and justice, I find that a sufficient real and substantial connection exists for the court to assume jurisdiction over all aspects of this action, including the aspect

> that involves MPW which is located in Ohio: *Cesario* at paras 23-24 and 28; *Khan* at paras 21-23. A dominant consideration for the real and substantial connection analysis is that the other Defendants, Polycon and Trade-Marks, are located in Ontario and, subject to the *forum non conveniens* test, their trial will take place here: *Canwest* at para 38. After evaluating the entire action, I find that the underlying requirements of order, fairness and justice would be served by trying the foreign claims against MPW together with the various claims against Polycon and Trade-Marks in Ontario, including the crossclaims in the action. Accordingly, I find that it would be appropriate for the court to assume jurisdiction over the entire action including the extraterritorial claims…

[21] ***Thind*** has been followed in two subsequent Ontario decisions but not considered, as far as I am aware, in any reported decisions from other provinces. It does not appear, however, that the concept of broadening the scope of consideration to connections to other parties to the litigation is settled even in Ontario. Spila pointed out the very recent Ontario Court of Appeal decision in ***Sinclair v. Amex Canada Inc.***, 2023 ONCA 142. In that decision, and without making any reference to ***Thind*** or the two Ontario decisions following ***Thind***, the court stated the following at paragraphs 18 and 19:

> **18** In furtherance of that focus, the application of the presumptive connecting factors is to be viewed from the perspective of the defendant who is disputing jurisdiction. Just because there is a presumptive connecting factor with respect to one defendant, who may not be disputing jurisdiction, does not mean that the court can avoid looking at the jurisdiction issue from the perspective of the defendant disputing jurisdiction. It is the failure to examine the jurisdiction issue from the position of the appellants that constitutes the error committed by the motion judge in her analysis.
>
> **19** In this case, Amex Canada does not quarrel with being subject to the jurisdiction of the Ontario Superior Court of Justice with respect to this claim, nor could it, given its connections to Ontario. However, that fact does not mean that everyone else, who has some connection with the subject matter of the claim, are then subject to that same jurisdiction. The position of each defendant must be looked at independently. As Fenlon J.A. said in *Hydro Aluminium Rolled Products GmbH v. MFC Bancorp Ltd.*, 2021 BCCA 182, 48 B.C.L.R. (6th) 106, at para. 10:

> A plaintiff must establish territorial competence against each party and cannot "bootstrap" its claim against the defendant by establishing jurisdiction against a different party: [citation omitted].
>
> In other words, there must be a presumptive connecting factor that attaches to each individual defendant. If there is not, jurisdiction is not established with respect to that defendant. If there is, then that defendant may still be able to rebut the presumptive connecting factor. It is not an all or nothing approach.

[22] It is difficult to reconcile the ratio of the two decisions on the topic of whether the scope of the presumptive connecting factor inquiry is limited to the party opposing jurisdiction, or broadened to include the other defendants to the action, even if those defendants are not opposing jurisdiction. Given that the ***Sinclair*** decision emanates from the highest court in the Province of Ontario, it must be concluded that the present position in that province arises out of that decision. That is, that the presumptive connecting factors are considered only in relation to the party opposing jurisdiction.

[23] No decisions from courts in Manitoba on this particular point were raised by counsel. While the decision from the Ontario Court of Appeal would not necessarily be considered binding in this province, it does have some persuasive effect.

[24] There is one additional distinguishing factor in this case that merits further consideration. That is, the party that is opposing jurisdiction is not a defendant, but a third party. Spila and Faresin disagree as to the effect of that distinction. Neither pointed out any case law in which that was the factual scenario under consideration.

[25] Spila's argument is that the third party claim is a distinct claim separate from the main action. It is a dispute between Spila and Faresin alone and the outcome of Rosser's claim against Faresin and the other defendants is not dependent in any way on Faresin's claim against Spila. Spila urges that the approach to the presumptive connecting factors must only consider Spila's position because it is not a party to the main action. In other words, Rosser chose to sue the retailer, distributor and manufacturer of the mixer, and the success or failure of its claim against those parties has nothing to do with the contract as between Spila and Faresin. Further, the fact that Spila is a third party (and not a co-defendant) distances it even further from the ***Thind*** analysis, based as it was on one of several defendants opposing jurisdiction. The rationale in ***Thind*** was that the plaintiff should not have to commence action in multiple jurisdictions arising out of the same cause of action. That is not a consideration here, as Rosser has chosen not to include Spila as a defendant.

[26] Spila further points out that the dispute between it and Faresin is a contractual claim, despite the reference in the third party claim to the alternative claim in negligence. Spila suggests that there is no negligence claim against it given that the parties arranged their business affairs through a contract and there is no tort claim relating to the sale of goods unless the good itself is determined to be inherently dangerous. (See the Supreme Court of Canada decision in ***1688782 Ontario Inc. v. Maple Leaf Foods Inc.***, 2020 SCC 35, on this point).

[27] For its part, Faresin argues that Spila's involvement in the litigation is essential and the plastic tank manufactured by it is specifically referred to in Rosser's statement of claim as the cause of the fire. Faresin suggests that Spila is a joint tortfeasor and that is why the third party claim includes claims in both contract and tort.

[28] Finally, Faresin argues that it is not in the same position as the plaintiffs in the various cases under consideration. Rather, it is a defendant who has been sued in a particular jurisdiction and has not chosen that jurisdiction itself. It is simply seeking contribution and indemnity from Spila as a third party given that the litigation was commenced by another party, Rosser, in Manitoba.

[29] In my view, the suggestion that there should be other considerations over and above the presumptive connecting factors set out in ***Van Breda*** is a mixing of the rationale based on jurisdiction *simpliciter* considerations with that behind the related principle of *forum non conveniens*. It conflates issues of convenience which are considered under the *forum non conveniens* principle with the determination of whether the court can assume jurisdiction under the jurisdiction *simpliciter*. This leads to the "jurisdictional overreach" referred to in ***Sinclair***.

[30] The application of the presumptive connecting factors to the present circumstances could not lead to a clearer outcome. There is no connection in the dispute between Faresin and Spila to the Province of Manitoba. All factors to be considered as presumptive connecting factors lead to the conclusion that the

Manitoba Court of King's Bench does not have jurisdiction over the subject matter of the dispute between those two parties.

FORUM NON CONVENIENS

[31] In the event that I am mistaken on the jurisdiction *simpliciter* issue, I will now assess *forum non conveniens*. The question under this doctrine is whether the Manitoba Court of King's Bench should exercise jurisdiction over the dispute at issue between Faresin and Spila. The parties are agreed that the burden of establishing that jurisdiction should be declined is on Spila.

[32] Spila points out the following in meeting its burden:

- All witnesses and the two corporations are located in Italy;
- All contracts, correspondence and specifications are in the Italian language. If the matter is proceeding in Manitoba, all would have to be translated;
- The interpretation of a contract written in the Italian language and made between Italian parties would be more conveniently dealt with by an Italian court;
- The main litigation in Manitoba would not involve any factual determinations that would be determinative of the third party claim between Faresin and Spila.

[33] Faresin points out the following in response:

- It would be more convenient and less expensive to have the third party claim litigated in Manitoba given the other witnesses and

experts, including the mixer and plastic tank, are located in or connected to Manitoba;

- The law to be applied on the claim for contribution and indemnity is Manitoba law. With respect to contract law principles, Faresin suggests that Manitoba courts are well equipped to consider foreign law;
- The court should want to avoid a multiplicity of proceedings. Staying the third party claim will result in proceedings in two separate countries involving the same facts and legal issues and the potential for conflicting decisions;
- On a related point Faresin suggests that the interests of justice support the third party claim staying in Manitoba, given that Faresin itself did not make the decision to litigate in Manitoba. It has been named as a defendant in a claim involving a potential defect in a part produced by Spila such that order and fairness dictate that all parties involved in the manufacture of the part should be included in the Manitoba litigation.

[34] It must be noted that the required standard to displace a chosen forum is high. The other forum must be "clearly more appropriate". (See ***Van Breda*** at paragraphs 108-109).

[35] The consideration of the above-noted factors related to whether there is a clearly more convenient forum leads me to conclude that Italy is clearly the more convenient forum for the determination of the dispute between Faresin and Spila.

[36] At least six factors identified in ***Van Breda*** are considered in the *forum non conveniens* analysis, as follows:

- The comparative convenience and expense for the parties to the proceeding and for their witnesses, in litigating in the court or in any alternative forum;
- The law to be applied to the issues in the proceeding;
- The desirability of avoiding multiplicity of legal proceedings;
- The desirability of avoiding conflicting decisions in different courts;
- The enforcement of an eventual judgment;
- The fair and efficient working of the Canadian legal system as a whole. (***Van Breda***, paragraph 105)

Comparative convenience and expense

[37] The comparative convenience and expense to the parties to litigate their dispute strongly favours Italy. The forming of the contract, design and manufacture of the plastic hydraulic tank, design and manufacture of the mixer, and all related witnesses, took place and are located in Italy. It is only the failure of the mixer and/or hydraulic tank, and the witnesses to the failure, that reside in Manitoba. Further, given that both Spila and Faresin are in Italy, the

location of the failure witnesses in Manitoba should be a neutral factor. If Faresin was not already a defendant in the existing Manitoba litigation, there would be no doubt that this is an Italian dispute.

Applicable law

[38] The contract between Faresin and Spila was formed in Italy. Although Spila denies that there can be a tort claim, any relevant acts or omissions which would ground such a theoretical tort claim took place during the design and manufacture of the plastic hydraulic tank in Italy. This factor strongly favours Italy as the clearly more convenient forum.

Avoiding multiplicity of proceedings and conflicting decisions

[39] There is no doubt that if the Faresin/Spila dispute is litigated in Italy, Faresin is at risk of suffering from conflicting decisions in the two jurisdictions. It could be held liable for Rosser's loss in Manitoba, potentially as a result of the failure of the plastic hydraulic tank, but be unsuccessful in Italy against Spila in relation to the same hydraulic tank. That being said, the same may be true if the claims were all litigated together in Manitoba. There is no certainty that the potential success of Rosser's claim against Faresin guarantees a successful result for Faresin against Spila on the third party claim.

[40] This factor slightly favours Manitoba as the convenient forum, however, in that a multiplicity of proceedings will be avoided if the Faresin/Spila dispute is litigated together with the main claim in Manitoba.

Enforcement

[41] It was not argued by either party that enforcement is a major issue here. Were it raised, I would consider Italy to be the more convenient forum from an enforcement perspective, given that Spila is located in that country.

Fairness and efficiency

[42] Regarding this issue, it is important to remember that litigating in Manitoba is not a choice made by Faresin, but a requirement given that it is already involved in the litigation as a defendant. The unusual nature of this case requires one Italian corporation to advocate for litigation in Manitoba against another Italian corporation which prefers the home country of both corporations to resolve the dispute. Nonetheless, the fair and efficient working of the Canadian legal system must be considered. For the other parties to the Manitoba litigation, the Spila/Faresin dispute can be seen as a distraction to the resolution of the litigation between Rosser and the named defendants. It is not required to be included in the Manitoba litigation for that dispute to be determined. The Manitoba litigation would proceed more efficiently without the inclusion of the dispute between the Italian corporations. It is only Faresin which would feel the unfairness of being included in litigation in two forums. I would consider this to be a neutral factor at best.

[43] Having considered the relevant factors, and if my conclusion regarding jurisdiction *simpliciter* is incorrect, I am convinced that Spila has met its burden of establishing that Italy is clearly the more convenient forum for determination of the dispute between Faresin and Spila

CONCLUSION

[44] My conclusion is that the Manitoba Court of King's Bench does not have jurisdiction over the subject matter of the dispute between Faresin and Spila. If that conclusion is incorrect, I conclude that Italy is clearly the more convenient forum for resolution of the dispute between those parties. In either case, the order is granted staying the third party claim.

[45] Should the parties be unable to agree on costs, an appointment may be made for brief submissions.

S. D. Berthaudin
Associate Judge