CITATION: Integrated Team Solutions PCH Partnership, LED (ITS) PCH Inc. v. Mitsubishi Heavy Industries Inc., 2024 ONSC 3791
COURT FILE NO.: CV-22-252
DATE: 2024/07/03

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
INTEGRATED TEAM SOLUTIONS PCH PARTNERSHIP, LED (ITS) PCH INC. and LED (ITS) PCH LIMITED PARTNERSHIP Plaintiffs	John Teal, for the Plaintiffs
– and –	Shawn O'Connor for the Defendant, Mitsubishi Heavy Industries Inc.
MITSUBISHI HEAVY INDUSTRIES, LTD., S.D.M.O. INDUSTRIES carrying on business as KOHLER-SDMO, KOHLER Co., G.A.L. POWER SYSTEMS OTTAWA LTD., G.A.L. POWER SYSTEMS (1992) LTD., TOTAL POWER LIMITED, UNIVEX (ONTARIO) LIMITED, MULVEY & BANANI INTERNATIONAL INC. and ELLISDON DESIGN BUILD INC. Defendants	Thomas Conway, Julie Mouris and Mohammed Elshafie for the Defendants, S.D.M.O. Industries cob as Kohler-SDMO and Kohler Inc. Celina Stoan for the Defendants G.A.L. Power Systems Ottawa Ltd. and G.A.L. Power Systems (1992) Ltd. Kurt Pereira for the Defendant Total Power Limited Alycia Young for the Defendant Univex (Ontario) Limited Nadia Authier for Defendant Mulvey and Banani International Inc. Jason P. Mangano for the Defendant EllisDon Design Build Inc.
	HEARD: June 28, 2024 (Kingston)

REASONS FOR DECISION ON MOTION

CARTER J.

Overview

[1] This motion has been brought in the context of an action that arises from the catastrophic failures of two emergency generators located at the Providence Care Hospital in Kingston. The plaintiffs, who were retained to design, build, finance, and maintain the hospital, bring this action to recover damages arising from the two failures. Each of the named defendants was responsible for either the design, manufacture, supply, installation, testing, commissioning, or maintenance of the generators.

[2] The defendant Mitsubishi Heavy Industries, Ltd. designed and manufactured the two engines, and SDMO incorporated those engines into generators. There was a contract of sale for the two generators between GAL Power and SDMO, of which the plaintiffs were the intended beneficiaries. GAL Power then supplied and sold the SDMO generators to Univex. The generators were installed at the hospital in June 2016.

[3] SDMO and Kohler, seek an order staying these proceedings as against them on the basis that the Ontario Superior Court of Justice lacks jurisdiction over them. In the alternative, they say that Ontario is not an appropriate forum for the hearing. The plaintiff and all other defendants oppose the motion.

[4] Three issues arise:

a. Does Ontario have jurisdiction *simpliciter* over the subject matter of the action?

b. Is there any enforceable contract/forum selection clause that operates to oust the jurisdiction of the Ontario court?

c. If there is jurisdiction to hear the action, should the Ontario court decline jurisdiction because the moving parties have shown there is another forum that is clearly more appropriate?

[5] I will deal with each of these issues in turn.

Jurisdiction *Simpliciter*

[6] The plaintiffs concede that they bear the onus of establishing jurisdiction *simpliciter*.

[7] An Ontario court will assume jurisdiction over a foreign defendant where the plaintiff establishes a "good arguable case" for assuming jurisdiction through either the allegations in the statement of claim, or a combination of the allegations in the claim and evidence filed on the jurisdiction motion [*Ontario v. Rothmans Inc.*, 2013 ONCA 353, at paras. 53-54 and para. 101]. Allegations in the pleadings are accepted as true for the purposes of the motion unless contradicted by evidence filed by the party challenging jurisdiction [*Éditions Écosociété Inc. v. Banro Corp.*, 2012 SCC 18, at para. 38].

[8] A "good arguable case" is not a high threshold and means no more than the plaintiff has shown "a serious question to be tried" or a "genuine issue" or that the case has "some chance of success" [*Inukshuk Wireless Partnership v. 4253311 Canada Inc*., 2013 ONSC 5631 (S.C.J.), at para. 19].

[9] The Supreme Court of Canada enumerated four "presumptive connecting factors" in tort cases which entitle a court to assume jurisdiction over a dispute:

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 [*Club Resorts Ltd. v. Van Breda,* 2012 SCC 17 at para. 90].

[10] If no presumptive connecting factor applies or the defendant rebuts an applicable presumption, then the court does not have jurisdiction to decide the matter and must dismiss or stay the action [*Van Breda* at para. 81].

[11] SDMO and Kohler submit that none of the presumptive connecting factors apply in this case. The moving defendants neither reside, nor are they domiciled in Ontario. In addition, neither SDMO nor Kohler carries on business in the province, be it by maintaining an office or regularly visiting Ontario. The contract was not made in Ontario, and, finally, no tort is alleged to have been committed by either defendant in that province.

[12] In my view, the jurisdiction issue hinges on whether a tort was committed in the province. The moving defendants' primary position is that while the plaintiffs baldly plead a variety of tort claims, the claims against the SDMO and Kohler are, in essence, a claim for breach of a supply contract between SDMO and the defendant GAL Power, of which the plaintiffs plead that they are the intended beneficiaries or collateral parties. I disagree.

[13] The plaintiffs' claim is advanced primarily in tort, with other claims, including for breach of contract, alleged in the alternative against certain defendants. A significant majority of the statement of claim is focused on the negligence issues. It is alleged:

a. SDMO and Kohler "were, or ought to have been, aware of the required specifications for the emergency/standby generators on the Project as well as the specific operating environment at the Hospital" and they "collaborated or coordinated on the response to the Purchase Order [issued by the electrical consultant Univex (Ontario) Limited to GAL Power for the generators]";

b. as parties involved in the "supply" of the generators, including the engines, SDMO and Kohler "knew, or ought to have known, that they were a critical component of the Hospital's emergency planning infrastructure and, further, that any unreliability or faulty condition of the Generators or the Engines presented a real and substantial danger to the health and safety of the patients receiving treatment at the Hospital, to health care facility staff, and to the public at large and, further, represented a risk of property damage";

c. SDMO and Kohler "represented and warranted that they were experts in the field of emergency power generation", the plaintiffs "relied on the reputations,

representations, and expertise" and SDMO and Kohler "were aware of that reliance at all material times";

d. SDMO and Kohler owed the plaintiffs a "duty of care" and they knew, or ought reasonably to have known, that the plaintiffs would sustain property damage and other substantial losses and damages as a result of their negligence and/or breach of duty and/or breach of warranty and/or negligent misrepresentations and/or breach of contract and this was reasonably foreseeable at all material times;

e. the plaintiffs' losses were caused or contributed by the negligence of SDMO and Kohler, which negligence is particularized to include failing to investigate prior reports that engines of the same or similar design as the Engines had experienced similar failures, failing to provide adequate instructions and/or warnings, and misrepresenting that the Engines and the Generators were reliable and safe;

f. SDMO and Kohler are "vicariously liable for the negligence of any independent contractors engaged [by them]…on the basis that the Engines/Generators were inherently dangerous";

[14] To construe these pleadings as a breach of contract claim would do violence to the clear meaning of the language used. There is no subterfuge here, no ingenious disguise. The pleadings are precisely what they purport to be.

[15] The moving defendants make a further argument. They say that the pleadings in negligence are deficient. All the plaintiffs' claims, with the sole exception of the contractual claim, are pleaded by way of conclusory factual and legal statements. While a court should accept pleadings at face value, this obligation does not extend to accepting bald, conclusory statements of fact unsupported by material facts [*Abaxx Technologies Inc. v. Pasig and Hudson Private Limited*, 2024 ONCA 164, at paras 8, 17].

[16] The pleadings, noted above, go beyond mere conclusory statements. The basis for the duty of care is set out. So too is the nature of the negligence. Property damage is alleged. We are at a

very early stage in the litigation. Further detail is likely to emerge through discoveries. Whether the plaintiffs are ultimately able to prove the allegations remains to be seen. The point here is simply that the claims in tort have been sufficiently articulated such that it cannot be said they are mere placeholders for the supposed true claim in breach of contract.

[17] The question then becomes whether the torts were committed in Ontario. I find that they were.

[18] The place of commission of a tort is the jurisdiction substantially affected by the defendant's activities or its consequences, or where the important elements of the tort occurred. This has become known as the *Moran* principle. Pursuant to this principle, it is where the harm occurred that is relevant [*Kozlik's Mustard v. Acasi Machinery Inc.*, 2022 ONSC 2356 at paras. 26 and 29]. In this case, the property damaged allegedly occurred in Ontario. In addition, the locus of a failure to warn is the place at which the warning ought to have been received, and that place may be either where the user is located or where the goods are used [*Air Canada c. McDonnell Douglas Corp.*, [1989] 1 S.C.R. 1554 (S.C.C.)]. Again, the warning should have been received where the generators were used – Ontario. Furthermore, in a negligent misrepresentation case the tort occurs in the jurisdiction where the misinformation was received and acted or relied upon – once again Ontario [*Kozlik's Mustard* at para. 29].

[19] Finally, I can find nothing in the jurisprudence that would, as argued by the moving defendants, limit the *Moran* principle in such a way that it would not be applicable to the present scenario.

[20] For the foregoing reasons, I conclude that Ontario has jurisdiction *simpliciter* to hear the matter.

The Forum Selection Clause

[21] The moving defendants submit that even if this Court were to find that it has jurisdiction *simpliciter* over the claims against Kohler and SDMO, the presence of a clear, valid and enforceable exclusive jurisdiction clause in the contract with GAL Power renders Ontario an inappropriate forum for the disposition of these claims. As such, this Court should stay the

proceeding pursuant to Rule 17.06(2)(c) of the *Rules of Civil Procedure*, R. R.O. 1990, Reg. 194, because Ontario is "not a convenient forum for the hearing of the proceeding."

[22] A preliminary issue arises with respect to the evidentiary foundation for this submission. The plaintiffs and other defendants argue that the contract is not properly before the court. It has not been attached to an affidavit.

[23] Kohler and SDMO take the position that the contract was pleaded by the plaintiffs and forms part of the statement of claim pursuant to Rule 25.06(7) of the *Rules of Civil Procedure*. In my opinion, this submission misses the point. The issue is not whether the plaintiffs have made reference to the contract in the statement of claim (they have, albeit obliquely), the issue is whether the contract referenced by the plaintiffs is the same one as is contained in the moving defendants' motion record.

[24] The purported contract between SDMO and GAL Power is set out in four separate tabs in the motion record. The first tab contains a purchase order and the second an acknowledgment of receipt of order. At the bottom of the acknowledgment the following line can be found "[o]ur general sales conditions apply (available on request)." An SDMO document entitled "General Conditions of Sale" is attached at the third tab. The fourth contains a French version of the General Conditions of Sale.

[25] A reasonable argument could be made that the first two tabs form part of the pleadings. However, the same cannot be said for the second two tabs. In its crossclaim, GAL Power states:

> Specifically with respect to GAL's crossclaim against SDMO and Kohler Cp., GAL pleads that SDMO 's General Terms and Conditions purportedly associated with the sale and purchase of the generators are not valid and/or applicable under the laws of France. SDMO did not provide GAL with any General Terms and Conditions of Sale [emphasis added].

[26] This pleading, which refers to "purported" General Terms and Conditions that it never even received, cannot serve to incorporate the documents contained in the moving defendants' motion record into evidence. There is simply no way of knowing whether they are the same ones referenced in the acknowledgment. Nor has any evidence been led to bridge this evidentiary gap.

The General Terms and Conditions of Sale, which contain the forum selection clause, are therefore not properly before the court on this motion.

[27] If I am wrong with respect to that finding, I would note the following two additional points.

[28] First, the plaintiffs and all of the defendants with the exception of GAL Power are not privy to the contract. Third-parties cannot be bound by a contract made between others. The forum selection clause would not apply to them. The moving defendants have not argued any exceptions to this general rule [see for example *Baran v. Pioneer Steel Manufacturers Limited*, 2021 BCSC 491].

[29] Second, the clause would not be enforceable against GAL Power.

[30] Forum selection clauses purport to oust the jurisdiction of otherwise competent courts in favour of a foreign jurisdiction. In commercial contexts, absent exceptional circumstances, they are generally enforced [*Loan Away Inc. v. Facebook Canada Ltd.*, 2021 ONCA 432, at para. 20].

[31] The two-part test to determine whether such clauses should be enforced is the strong cause test. The first part compels the party which is seeking the stay based on the exclusive jurisdiction clause to establish that the clause is "valid, clear and enforceable and that it applies to the cause of action before the court" [*Douez v. Facebook, Inc.*, 2017 SCC 33, at paras. 1, 17 and 28].

[32] It is far from clear that the clause applies to the cause of action before the court.

[33] In its statement of defence, GAL Power has advanced claims in tort (and specifically in negligence, misrepresentation, and failure to warn) and, as an alternative, in contract against the moving defendants. There are 13 distinct allegations of tortious conduct. The reference to "disputes related to a supply" could, as the moving defendants argue, relate to claims in negligence. It could equally relate only to the provision (including timing of provision) of the generators and not to defects in manufacture. As a result, the first part of the test is not met.

Forum Non Conveniens

[34] Once jurisdiction is established, the litigation proceeds before the court of the forum unless a defendant raises an issue of *forum non conveniens*. At that point, the burden is on the defendant to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff in favour of another forum that is clearly more appropriate [*Van Breda* at paras. 102, 103, 108 ad 109].

[35] In determining whether to decline to exercise jurisdiction, this Court must engage in a contextual analysis and consider whether it would be fairer to the parties and more efficient to choose an alternative forum [*Van Breda* at para. 105]. The Supreme Court of Canada has outlined several factors to be considered in the *forum non-conveniens* analysis, including:

a. location of parties and witnesses;

b. the cost of transferring the case to another jurisdiction or of declining the stay;

c. the impact of a transfer on the conduct of litigation or on related parallel proceedings;

d. the possibility of conflicting judgments;

e. problems related to the recognition and enforcement of judgments;

f. the relative strengths of the connections of the two parties, and

g. whether declining jurisdiction would deprive the plaintiff of juridical advantage [*Van Breda* at para. 110].

[36] Despite the very able submissions of counsel for the moving defendants, the most appropriate forum for this matter is Ontario.

[37] The majority of the parties (all of the parties except Mitsubishi Heavy Industries, Ltd. in Japan, SDMO in France, and Kohler in the United States) are located in or carry on business in

Ontario. All parties, including the moving parties, have retained counsel in Ontario. Should this Court not assume jurisdiction, all parties would necessarily have to retain French counsel in order to pursue their claims and crossclaims. This would result in additional inconvenience and expense.

[38] The key witnesses, including the employees of the construction contractor, the parties who prepared the design parameters to be met by the generators supplied and installed at the project, the Ontario supplier, the design engineer that reviewed the electrical work, the parties who installed, tested, and commissioned the generators, and the parties who serviced and maintained them are all employees of the defendants located in Ontario.

[39] The key physical evidence of the generators/engines that caused the plaintiffs' damages are located in Ontario. Any expert inspections of the generators will have to be done in Ontario.

[40] The construction contract between the plaintiffs and the defendant, EllisDon Design Build Inc., was made in Ontario and provides for the exclusive jurisdiction of the Ontario courts.

[41] While it is true that some documents and witnesses may be located in France, the United States, and Japan, in our digital age they can easily be brought to Ontario – documents via email and witnesses via Zoom. Since the COVID-19 pandemic, examinations for discovery now routinely take place over Zoom or other virtual platforms. Similarly, trials can be conducted over Zoom or in a hybrid model where some witnesses are in person and others attend virtually over Zoom.

[42] The moving defendants have failed to show why the court should decline to exercise its jurisdiction and displace the forum chosen by the plaintiff in favour of another forum that is clearly more appropriate. The motion for a stay of proceedings is dismissed.

Costs

[43] If the parties are unable to agree on the quantum of costs for this motion by September 13, 2024, written submissions of no more than three pages, along with bills of costs and offers to settle,

may be provided to me at 10 day intervals and I will make a decision. Please file them with the court and also provide them to my assistant tina.gloyn@ontario.ca.

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Carter J.

Released: July 3, 2024

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SUPERIOR COURT OF JUSTICE

BETWEEN:

INTEGRATED TEAM SOLUTIONS PCH PARTNERSHIP, LED (ITS) PCH INC. and LED (ITS) PCH LIMITED PARTNERSHIP

Plaintiffs

– and –

MITSUBISHI HEAVY INDUSTRIES, LTD., S.D.M.O. INDUSTRIES carrying on business as KOHLER-SDMO, KOHLER Co., G.A.L. POWER SYSTEMS OTTAWA LTD., G.A.L. POWER SYSTEMS (1992) LTD., TOTAL POWER LIMITED, UNIVEX (ONTARIO) LIMITED, MULVEY & BANANI INTERNATIONAL INC. and ELLISDON DESIGN BUILD INC.

Defendants

REASONS FOR DECISION ON MOTION

Carter J.

Released: July 3, 2024