CITATION: 10379875 CANADA INC v. TIW Industries Ltd./Les Industries TIW Ltee, 2024 ONSC 4908
COURT FILE NO.: CV-19-00628860-0000
DATE: 20240906

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 10379875 CANADA INC. and HEWARD STUDIO INVESTMENTS INC./ INVESTISSEMENTS HEWARD STUDIO INC. Plaintiffs

AND:

TIW INDUSTRIES LTD./ LES INDUSTRIES TIW LTEE, AKZO NOBEL N.V., AKZO NOBEL COATINGS LTD. / AKZO NOBEL PEINTURES LTEE, AKZO NOBEL WOOD COATINGS LTD., AKZO NOBEL PEINTURES BOIS LTEE, AKZO NOBEL SALT LTD. / SEL AKZO NOBEL LTEE, COVERIGHT SURFACES CANADA INC., NOURYON CHEMICALS LTD., NOURYON PULP AND PERFORMANCE CANADA INC./ NOURYON PATE ET PERFORMANCE CANADA INC., NOURYON CHEMICALS LLC., PPG ARCHITECTURAL COATINGS CANADA, INC./ PPG REVETEMENT ARCHITECTURAUX CANADA, INC., PPG CANADA INC., PPG INDUSTRIES, INC., TEK PLASTICS LIMITED, CANADIAN ERECTORS LIMITED / LES ERECTEURS CANADIENS LIMITEE, and CANERECTOR INC. Defendants

BEFORE: Merritt J.

COUNSEL: *Barry Weintraub* and *Patrick Healy*, Counsel for the Defendant/Moving Party Akzo Nobel N.V.

Richard Butler and *Alessia Petricon-Westwood*, Counsel for the Plaintiffs/Responding Parties

HEARD: **June 18, 2024**

JURISDICTION MOTION ENDORSEMENT

OVERVIEW

[1] The Plaintiffs own 65 Heward Avenue, Toronto, Ontario ("65 Heward"). They seek damages from the Defendant Akzo Nobel N.V. ("NV") and others caused by environmental contamination at 65 Heward. The Plaintiffs also seek declarations, including a declaration that the Defendants are jointly and/or severally liable for contamination at 65 Heward.

[2] NV is a Netherlands corporation. It has not defended the action or attorned to the jurisdiction. NV moves under r. 21.01(3)(a) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 to have the action against it dismissed on the basis that this court has no jurisdiction over it.

DECISION

[3] The claim against NV is stayed/dismissed. There is no real and substantial connection between the claim against NV and Ontario. The Plaintiffs have not established any of the presumptive connecting factors.

BACKGROUND FACTS

[4] The named Defendants include the historical owners of 65 Heward as well as various entities which the Plaintiffs allege are responsible for the liabilities of previous owners.

[5] NV is the parent of the Axel Novel group of companies which are in the paint manufacturing business.

[6] NV is a public limited liability company established under the laws of the Netherlands with its head office in Amsterdam. NV is the parent corporation of the Akzo Nobel group of companies, which does business around the world as a coatings and paint manufacturer. NV owns shares of Dutch holding companies which in turn own shares in Canadian corporations which carry on business in Canada.

[7] The Plaintiffs allege that NV acquired the liabilities of textile and chemical manufacturer Canadian Industries Limited ("CIL") when it acquired Imperial Chemical Industries PLC which is the successor corporation to CIL.

[8] The Plaintiffs allege that CIL owned 65 Heward from September 23, 1942 until November 17, 1975 and used 65 Heward for chemical refining, storage and distribution. The Plaintiffs do not plead when the alleged contamination occurred. The Plaintiffs also allege that NV divested those liabilities when it sold its North American architectural coatings business division to PPG Industries Inc.

POSITIONS OF THE PARTIES

[9] NV says the Plaintiffs have not discharged their burden of showing a presumptive connecting factor linking NV with Ontario under the test for jurisdiction in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 SCR 572. NV is neither domiciled nor resident in Ontario, does not carry on business in Ontario, is not a party to any contract made in Ontario and did not commit a tort in Ontario.

[10] The Plaintiffs say that the torts and causes of action occurred in Ontario. They say that NV carries on business in Ontario because it accepted liabilities for and/or indemnified against environmental contamination in Ontario. The Plaintiffs say that this court may assume jurisdiction because other defendants who are inseparable tortfeasors are domiciled or resident in Ontario. The

Plaintiffs say that Ontario has a substantial connection to NV's alleged negligent acts or omissions and that this is sufficient to ground jurisdiction.

THE ISSUE

[11] The issue is whether this court has jurisdiction over the claim against NV.

ANALYSIS

[12] Rule 21.01(3)(a) provides that a defendant may move before a judge to have an action stayed or dismissed on the ground that the court has no jurisdiction over the subject matter of the action.

[13] The parties agree on the test for jurisdiction. The test is whether there is a real and substantial connection between the subject matter of the litigation and the chosen forum: *Van Breda*, at paras. 22-34 and 67.

[14] The Supreme Court of Canada, at para. 90 of *Van Breda*, established the following presumptive connecting factors that *prima facie* entitle courts to assume jurisdiction over a dispute:

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

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

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

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

[15] The analysis has two stages: (i) determining whether a presumptive connecting factor exists that *prima facie* entitles the court to assume jurisdiction over the litigation; and, if so, (ii) deciding whether the presumption of jurisdiction is rebutted on the facts of the case: *Van Breda* at paras. 80-81; *Haaretz.com v. Goldhar*, 2018 SCC 28, [2018] 2 SCR 3, at para. 34.

Domicile and Residence

[16] NV is a resident in the Netherlands as demonstrated by a tax residency certificate under the tax treaty between Canada and the Netherlands.

[17] Akzo Nobel Coatings Ltd. and Akzo Nobel Wood Coatings Ltd. are Ontario companies and are 100% subsidiaries of NV. The fact that a parent company has subsidiaries in a jurisdiction is not a presumptive connecting factor under *Van Breda*.

[18] The group enterprise theory has been consistently rejected by Ontario courts*: Yaiguaje v. Chevron Corporation*, 2018 ONCA 472, 141 O.R. (3d) 1, at para. 76.

[19] There is no basis to ignore the corporate separateness principle as there is no evidence that any Ontario subsidiary is a mere puppet of NV and was incorporated for fraudulent or improper purposes or used for an improper activity: *Yaiguaje*, at paras. 70 and 77.

[20] The Plaintiffs rely on a recent line of cases starting with *Thind v. Polycon Industries*, 2022 ONSC 2322, where the court assumed jurisdiction in cases involving joint tortfeasors where some of the joint tortfeasors were domiciled in the jurisdiction.

[21] However, in *Sinclair v. Amex Canada Inc.*, 2023 ONCA 142, at para. 18, the Court of Appeal said:

> [T]he application of presumptive connecting factors must 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.

[22] The position of each defendant is to be considered independently. There must be an unrebutted presumptive connecting factor linking each defendant to Ontario for the court to assume jurisdiction over that defendant: *Sinclair*, at para. 19.

[23] This court is bound by the Court of Appeal decision in *Sinclair*, even though leave to appeal to the Supreme Court of Canada was granted: [2023] S.C.C.A. No. 154.

[24] In any event, the Plaintiffs have not pled any material facts to support the proposition that NV is a tortfeasor.

Carrying on Business

[25] NV does not carry on business in Ontario.

[26] The fact that NV is the parent of a group of companies which have some subsidiaries in Canada is not sufficient to establish that NV is carrying on business in Canada.

[27] NV has no offices in Ontario and no representative of NV has carried on NV's business in Ontario: *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44, 462 D.L.R. (4th) 642, at para. 36. I note that in *H.M.B. Holdings Ltd.* the court said that "carrying on business" as a presumptive connecting factor going to assumed jurisdiction may be a less onerous standard than "carrying on business" as a basis for traditional presence-based jurisdiction. However, the same requirements for "carrying on business" apply for both purposes: at para. 39.

[28] NV carries on business in the Netherlands. NV is governed by a Board of Management composed of executive directors and a Supervisory Board composed of non-executive directors. None of the directors are Canadian. Both the Board of Management and the Supervisory Board meet in Amsterdam and neither has ever met in Ontario. NV's Corporate Secretariat is based at

NV's head office in Amsterdam and it consists of three individuals none of whom are Canadian. NV's books and records are maintained in the head office in Amsterdam.

[29] The Plaintiffs say that the necessary jurisdictional connection exists when a party accepts environmental liabilities associated with an operation or property in Ontario or provides indemnities for environmental risks in Ontario. They say that NV connected itself to Ontario and is committed to defending claims arising out of those risks in Ontario.

[30] The Plaintiffs say that through various acquisitions, amalgamations and name changes, NV holds all or some of the liabilities of CIL.

[31] The Plaintiffs plead that CIL owned 65 Heward between 1942 and 1975 but do not plead when any contamination occurred. They say that there were potentially contaminating activities at 65 Heward and that there is contamination at 65 Heward. Through a series of corporate acquisitions and amalgamations, CIL became CIL-1954, which was acquired by ICI. ICI, including ICI Canada Inc., was then acquired by NV. NV then sold the decorative paints division to PPG. Through corporate amalgamations and acquisitions, the environmental liabilities that originated with CIL have flowed to the named Defendants. The Plaintiffs say that NV either accepted liability for or provided indemnities regarding environmental contamination.

[32] As set out above, the Plaintiffs plead that NV acquired Imperial Chemical Industries PLC (and thereby acquired some or all of CIL's liabilities for the Property) and also plead that PPG Industries Inc. acquired NV's North American architectural coatings business (collectively the "Pleaded Contracts").

[33] The Plaintiffs say that this case is similar to *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada et al.*, 2022 ONCA 862, 165 O.R. (3d) 189, leave to appeal refused, [2023] S.C.C.A. No. 24.

[34] In *Vale Canada*, an Ontario-based international mining company sued various insurers for environmental liabilities and defence costs incurred by Vale for polluting Ontario properties. The court held that the liability insurer connected itself to Ontario for jurisdictional purposes by underwriting insurance coverage for an Ontario risk: at para. 6. The court emphasized that "the approach to what constitutes carrying on business in Ontario in an insurance contract case might vary from the way that issue might be approached in a tort case": at para. 76.

[35] The court said at para. 102:

> [T]he issuance of an insurance policy, even if made outside of Ontario, can itself constitute carrying on business in Ontario so as to provide the necessary jurisdictional connection, depending on the location of the object of the insurance and of the performance contemplated under it.

[36] The key factor in *Vale Canada* was that the object of the insurance was a mining operation in Ontario and the performance of the obligations under the insurance involved doing environmental repairs in Ontario.

[37] In *Vale Canada*, the court considered that it would be commercially reasonable to expect that the insurer would be called on to answer the claims in Ontario because of the link between the insurance business activity and Ontario: at para. 108.

[38] As set out above, the Plaintiffs suggest that the Pleaded Contracts may contain indemnities or impose liability on NV. Even if this is true, it would not follow that it would be reasonable to expect that NV would be called to defend proceedings in Ontario, given that the Pleaded Contracts provide that they are governed by the laws of other jurisdictions as set out in more detail below.

[39] I was not pointed to any authority that stands for the proposition that assuming liabilities of a company, through a series of corporate acquisitions and amalgamations, or providing indemnities, is sufficient to find that a defendant carried on business in the jurisdiction where that company is located. In the absence of such authority, I do not find that NV carries on business in Ontario on this basis.

Tort Committed in Ontario

[40] The Plaintiffs plead unparticularized negligence against all Defendants but do not plead any material facts which would ground a tort claim against NV.

[41] *Ontario (Attorney General) v. Rothmans Inc.*, 2013 ONCA 353, 115 O.R. (3d) 561, relied on by the Plaintiffs, is distinguishable. In *Rothmans*, the plaintiffs alleged that the foreign defendants conspired with the Ontario defendants who committed the torts. There, although the plaintiffs failed to fully particularize the allegations of misconduct against each defendant, the court found that the conspiracy claim against each had some prospect of success and because of the nature of the conspiracy alleged, the plaintiff had established a good arguable case for assuming jurisdiction.

[42] Here, the statement of claim does not advance the core elements of a cause of action in tort against NV.

Contract Made in Ontario

[43] The first of the Pleaded Contracts is an agreement dated August 13, 2007 between NV and Imperial Chemical Industries PLC (the "ICI Agreement"). In the ICI Agreement NV acquired all of the share capital of Imperial Chemical Industries PLC. The ICI Agreement provides that it is governed by the law of England and the parties submit to the exclusive jurisdiction of the Courts of England and Wales in respect of any claim, dispute or difference arising under it. The terms of the ICI Agreement were finalized in London. The ICI Agreement was executed in London or Amsterdam. Neither of the individuals who executed the ICI Agreement on behalf of NV is Canadian.

[44] The second of the Pleaded Contracts is an agreement dated December 13, 2012 between NV and PPG Industries Inc. (the "PPG Agreement"). PPG Industries Inc. is a Pennsylvanian corporation. The PPG Agreement provides that all disputes, controversies and/or claims arising out of, under or in connection with it shall be finally and exclusively settled by binding arbitration

pursuant to the Rules of Arbitration of the International Chamber of Commerce. The PPG Agreement provides that it is governed by the laws of New York, United States. The PPG Agreement was executed in Amsterdam and neither of the individuals who executed it on behalf of NV are Canadian.

[45] A contract is "made" where it is signed: *Farrell v. Kavanagh*, 2017 ONSC 4776, at paras. 18 and 23; *Koutros v. Persico USA Inc.*, 2017 ONSC 3001, at paras. 31, 34, and 41.

[46] Neither of the Pleaded Contracts was made in Ontario.

Other Connections to Ontario

[47] The list of presumptive connecting factors is not exhaustive and allows for new factors to be identified that may also presumptively allow the court to assume jurisdiction: *Van Breda*, at para. 80.

[48] The Plaintiffs plead that NV and the other Akzo Nobel Defendants maintain a fund of approximately €79 million (as of 2019) "for environmental remediation efforts, including sites divested in prior years or derelict sites belonging to companies acquired in the past."

[49] The Defendants say that the Akzo Nobel group of companies files consolidated annual reports as required by Dutch law. Provisions for environmental costs are listed in the annual reports. These are present obligations and NV does not hold any provision for environmental costs.

[50] In any event, even if NV did hold a reserve of funds for environmental contamination claims, that is not a presumptive connecting factor under *Van Breda*.

[51] In the absence of any authority to do so, I would decline to create a new presumptive connecting factor being the maintenance of a contingency fund or reserve to cover damages such as those claimed by the plaintiff even if NV had such a fund.

COSTS

[52] If the parties cannot agree on the issue of costs, I will consider brief written submissions. These costs memoranda shall not exceed three pages in length (not including any bill of costs or offers to settle). The moving party NV shall file its costs submissions by September 20, 2024. The Plaintiffs shall file their costs submissions within 15 days of the receipt of NV's materials. NV may file a brief reply within five days thereafter. If submissions are not received by September 20, 2024, the issue of costs will be considered settled.

Merritt J.

Date: September 6, 2024