

SUPERIOR COURT OF JUSTICE – ONTARIO

RE: A1 PRESSURE SENSITIVE PRODUCTS INC. (Plaintiff) v. BOSTIK INC.
(Defendant)

BEFORE: Justice Stinson

COUNSEL: *Kevin D. Sherkin*, for the plaintiff/responding party

Jonathan M. Davis-Sydor, for the defendant/moving party

DATE HEARD: November 16, 2009

ENDORSEMENT

[1] This is a motion brought by the defendant, Bostik Inc., seeking to dismiss or permanently stay this action on the basis that the Ontario Superior Court of Justice has no jurisdiction over the matter pleaded in the statement of claim as there is no real and substantial connection between Bostik and Ontario or between the subject matter of the action and Ontario. In the alternative, the defendant seeks to have this action stayed on the ground that Ontario is not a convenient forum for the hearing of these proceedings.

FACTUAL BACKGROUND

[2] The plaintiff, A1 Pressure Sensitive Products Inc., is an Ontario company that carries on business as a manufacturer of pressure sensitive labels. It has only one manufacturing location, in Toronto, but its labels are sold throughout North America and are applied to bottled products which are in turn distributed broadly. The defendant is a Delaware corporation. Its head office is in Wisconsin, although it also has a manufacturing plant in Kentucky. The defendant is said to be the second largest manufacturer of adhesives in the world.

[3] In simple terms, the plaintiff's business involves the application of adhesive to paper stock. In the spring of 2006 it decided to change its then existing adhesive supplier. The plaintiff contacted various adhesive suppliers by telephone to enquire whether they would be interested in supplying adhesive to the plaintiff. The defendant, and others, responded to this request. Representatives of the defendant attended at the plaintiff's office in Ontario to give a presentation

concerning the defendant's hot melt adhesive products. Thereafter, the parties entered into negotiations for the purchase of adhesive.

[4] In May 2006, the defendant shipped adhesive to the plaintiff for a sample run and sent the plaintiff its first invoice. The plaintiff manufactured some print labels using the defendant's adhesive and sent the same to the defendant so it could perform tests to ensure that the printed labels met the following specifications:

- (a) that there was no "bleed through", meaning that an excessive amount of oils from the adhesive would not travel from the adhesive to the surface of the paper and cause discoloration of the labels;
- (b) that there was no flagging, meaning that the labels would not peel off the bottles to which they were applied; and
- (c) that the labels could be repositioned for up to 24 hours.

According to the plaintiff, the defendant advised that the test results indicated that the adhesive met the required specifications and in reliance on this the plaintiff began manufacturing label stock using the defendant's adhesive in the summer of 2006. Also according to the plaintiff, from spring to December 2006, representatives of the defendant attended at the plaintiff's Ontario premises multiple times to, among other things, monitor the production of label stock and to service the plaintiff's needs.

[5] In July 2006 the plaintiff decided to change its paper supplier. To ensure that the defendant's adhesive would continue to meet the plaintiff's performance specifications when applied to the new paper stock, the plaintiff asked the defendant to conduct further tests. According to the plaintiff, the defendant was supplied with bottles from one of the plaintiff's customers, upon which the printed labels were to be tested, together with samples of the labels utilizing the new paper. The plaintiff asserts that the defendant performed the necessary tests and advised the plaintiff that its adhesive was compatible with the new paper and that the plaintiff's performance specifications would continue to be met. The plaintiff asserts that in reliance on those test results, in October 2006 it began manufacturing its labels using the new paper stock.

[6] As events unfolded, however, the plaintiff began receiving complaints from its customers that labels manufactured with the new paper were flagging, or peeling off their products. As a result, the plaintiff incurred costs to reimburse customers to remedy the labelling problems, and to purchase new generic pressure sensitive label stock at a higher cost. It thus suffered out of pocket expenses, loss of profit and goodwill. In March 2007, the plaintiff was forced to shut down its manufacturing of pressure sensitive label stock, allegedly as a result of the problem with the labels that were manufactured incorporating the adhesive supplied by the defendant. In due course the plaintiff was forced to sell its hot melt coating line.

[7] As a consequence of the foregoing events, in November 2007 the plaintiff commenced this action for damages "for breach of contract, breach of warranty and [sic] fitness of the product." After the statement of claim was issued, it was served on the defendant in Wisconsin pursuant to rule 17.02, on the basis that the contract was made in Ontario and damages were sustained in Ontario arising from the defendant's breach of contract. In response, the defendant moved to stay the proceeding on the ground that Ontario did not have jurisdiction. While the defendant was successful on its initial motion, the Court of Appeal for Ontario allowed the plaintiff's appeal, finding that the original motions judge did not appear to have weighed the factors in *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.). The motion argued before me, therefore, was a rehearing of the original motion to stay.

ISSUES AND ANALYSIS

[8] The test regarding assumed jurisdiction by an Ontario court in an action involving a foreign defendant, is a two-step process. Initially, the so-called "real and substantial connection" test determines whether the Ontario court may assume jurisdiction. If the court is satisfied that it may, the second question is whether the Ontario court should assume jurisdiction or whether there is a more convenient forum for the action elsewhere.

[9] The real and substantial connection test is flexible, and supports a broad approach in which the forum need meet only a minimum standard of suitability, under which it must be fair for the case to be heard, because the forum is a reasonable place for the action to proceed. The test requires only a real and substantial connection, not the most real and substantial connection. The threshold of this jurisdiction test is sufficiently low to allow for a more detailed way of factors that occurs under the convenient forum test. The defendant's connection with the forum should simply be a relevant factor to be weighed, together with other factors, and not determinative of the choice of forum. See *Muscutt v. Courcelles, supra; Beals v. Saldanha*, [2003] 3 S.C.R. 416.

[10] I therefore turn to the factors enumerated by the Court of Appeal for Ontario in *Muscutt* that must be taken into account in assessing whether an Ontario court may assume jurisdiction against a foreign defendant:

1. Assessment of the *Muscutt* factors

(a) The connection between the forum and the plaintiff's claim

[11] As the Court of Appeal said in *Muscutt* (at para. 77):

The forum has an interest in protecting the legal rights of its residents and affording injured plaintiffs generous access for litigating claims against tortfeasors.

This rationale is not limited to torts: see *Morguard Investment Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at para. 49.

[12] In the present case, in my view, there is a significant connection between Ontario and the plaintiff's claim. The plaintiff is an Ontario corporation, and its only office and manufacturing plant are in Ontario. The adhesive supplied by the defendant was used by the plaintiff in Ontario to manufacture labels that were sold to customers in Ontario and elsewhere. In doing so, the plaintiff relied upon advice received in Ontario from the defendant. Having been forced to issue credits to its customers and to pay costs incurred by them, as well as suffering other losses, the plaintiff has suffered damages in Ontario. Its personnel, books, and records are kept in Ontario. I conclude based on these factors that there is a very strong connection between the plaintiff's claim and the Province of Ontario.

(b) Connection between the forum and the defendant

[13] The defendant argues that there is no connection between it and Ontario, being a Delaware corporation whose headquarters are in Wisconsin. While it has a Canadian affiliate, that company is based in Quebec and has no involvement in this transaction.

[14] While it is true that that defendant does not manufacture its products in Canada or Ontario, the defendant did come to Ontario to market its goods. Having been invited to do so, the defendant willingly sent its representatives to meet with the plaintiff at its Ontario plant, with a view to persuading it to become a customer. The defendant carried out initial and subsequent tests, which it communicated to the plaintiff in Ontario, again with a view to persuading the plaintiff to purchase its adhesive. It sold its adhesive to the plaintiff, knowing that it would be shipped to and consumed in a manufacturing process in Ontario.

[15] I therefore conclude that, while the defendant is a non-Ontario corporation, there is a not insignificant connection between Ontario and the defendant, given that Ontario is a market where the defendant's products were marketed and were consumed.

(c) Unfairness to the defendant in assuming jurisdiction

[16] The defendant argues that it would be unfair to require it to defend an action in Ontario, since it is a United States based business, that did business with the plaintiff at the plaintiff's instigation. While this is true to a point, it overlooks the fact that the defendant opted to respond to the plaintiff's invitation to demonstrate that its adhesive was suitable, both by coming to Ontario to make a presentation to the plaintiff and by providing the plaintiff in Ontario with test results.

[17] In *Beals v. Saldanha*, *supra*, Major J. wrote as follows (at para. 25):

In *Moran* [*Moran v. Pyle National (Canada) Ltd.* , [1975] 1 S.C.R. 393], ... at p. 409, it was recognized that where individuals carry on business in another provincial jurisdiction, it is reasonable that those individuals be required to defend themselves there when an action is commenced:

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.

That reasoning is equally compelling with respect to foreign jurisdictions.

[18] The foregoing comments are applicable to the present case. The defendant had actual knowledge that it was dealing with an Ontario company and that its adhesive was being shipped to Ontario for use here. In the circumstances, it is not unfair to the defendant to be required to defend itself in this jurisdiction.

(d) Unfairness to the plaintiff in not assuming jurisdiction

[19] The defendant argues that, having chosen to order from a US supplier and having chosen to ship its finished products back to the U.S., the plaintiff's circumstances have more connection to the United States than they do to Ontario, and therefore it would not be unfair to require the plaintiff to proceed in the U.S. court. In *Muscutt*, however, the court noted (at para. 88) "the need to consider the plaintiff's interest in access to the courts of his or her home jurisdiction." There must be a balancing of fairness to the plaintiff against fairness to the defendant.

[20] In this case, if Ontario were to refuse jurisdiction, the plaintiff would be compelled to litigate in Wisconsin or Kentucky, which would undoubtedly be inconvenient to the plaintiff, not to mention expensive, given the quantum of the damage claim. By being forced to litigate in the United States instead of Ontario, the plaintiff would lose the benefit of the "loser pays" cost feature of the Ontario civil justice system, with the result that even if it is successful in pursuing the defendant in its home jurisdiction, the total cost of doing so may well make it impracticable, a further element of unfairness.

[21] When balancing the elements of fairness to the plaintiff and fairness to the defendant, I conclude that it would be more unfair to force the plaintiff to litigate in the United States than it would to require the defendant to defend this claim in Ontario.

(e) Involvement of other parties to the suit

[22] There are no other parties to the litigation. I therefore consider this an irrelevant factor.

- (f) The court's willingness to recognize and enforce an extra-provincial judgment rendered on the same jurisdictional basis

[23] Although this factor specifically relates to extra-provincial judgments, *Beals, supra*, extended the real and substantial test to the recognition and enforcement of foreign judgments. This factor has been applied to the recognition of foreign judgments in subsequent cases: see *Doiron v. Bugge*, [2005] O.J. No. 4285 (C.A.) and *Research in Motion Ltd. v. Visto Corp.*, [2008] O.J. No. 3671 (Sup. Ct.). In my view, Ontario courts would be prepared to recognize a foreign judgment against an Ontario defendant rendered on the same jurisdictional basis. This factor favours the assumption of jurisdiction in the present case.

- (g) Whether the case is interprovincial or international in nature

[24] As this is an international case, this factor favours the defendant. As was said by Harvison-Young J. in *Guiliani v. Invar Manufacturing*, [2007] O.J. No. 3591 (Sup. Ct.) (at para. 26), however:

Although this case is international in nature, this factor is not meant to preclude the assumption of jurisdiction merely because the defendants are international. On these facts, this is a very weak factor.

Those comments apply to this case.

- (h) Comity and the standards of jurisdiction, recognition and enforcement prevailing elsewhere

[25] This factor requires me to consider whether an American court would assume jurisdiction on the same facts as the present case. As discussed in *Muscutt*, American courts apply a doctrine of "minimum contacts" which requires an act or conduct on the part of the defendant that amounts to personal subjection to jurisdiction.

[26] In the present case, the defendant has created a worldwide presence for itself, including a presence in Ontario, in order to attract worldwide and Ontario clients to use its goods and services. In particular, its representatives came to Ontario to promote its products and it willingly entered into a business relationship with the plaintiff which it serviced by sending its representatives to Ontario. In my view, having succeeded in attracting an Ontario client, the defendant could reasonably have anticipated that it would be held to account in this jurisdiction if there was a problem with its goods or services. As such, the defendant should reasonably have anticipated being "haled into court" in Ontario.

[27] I therefore conclude that the relationship between the defendant and Ontario meets the test of "minimum contacts".

Conclusion on the *Muscutt* factors

[28] Taking into account the foregoing factors, based on the evidence before me I conclude that there is a real and substantial connection between both the subject matter of this litigation and Ontario as well as between the defendant and Ontario. I therefore conclude that this is a case in which the Ontario court may assume jurisdiction. I now turn to the question whether the Ontario court should assume jurisdiction or if there is a more convenient forum for the action elsewhere.

2. Is Ontario a convenient forum for this action?

[29] The question to be determined in considering whether the court should grant a stay on the basis of the doctrine of convenient forum is whether there is clearly a more appropriate jurisdiction in which the case should be tried, than the forum chosen by the plaintiff. In *Frymer v. Brettschneider* (1994), 19 O.R. (3d) 60 (C.A.) at 79, Arbour J.A. described the purpose of the rule as follows:

The choice of the appropriate forum is designed to ensure that the action is tried in the jurisdiction that has the closest connection with the action and the parties. All factors pertinent to making this determination must be considered.

To determine the most appropriate forum for an action, Ontario courts have developed several factors to be considered. These are summarized in *Incorporated Broadcasters Ltd. v. CanWest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.) at para. 61. I will review the applicability of each in turn.

(a) The location where the contract in dispute was signed

[30] Somewhat surprisingly, there is a dispute between the parties concerning this fact. The plaintiff asserts that the contract for the supply of adhesive was made in Ontario, when the parties reached agreement as to the price per pound that would be paid. I am inclined to disagree with that position, since the plaintiff had no enforceable obligation to purchase at that stage of the parties' relationship; at best, the defendant offered to sell its product to the plaintiff at that price, which offer was accepted by the plaintiff when it issued a purchase order to the defendant.

[31] Significantly, however, whenever the defendant received a purchase order from the plaintiff (or any other customer) its practice was to issue what it describes as an "Order Confirmation". On the reverse side of the Order Confirmation there is a detailed set of "terms and conditions of sale". The first term states "this writing constitutes an offer or counteroffer by Bostik Inc. to sell the goods and/or services described on the front side hereof in accordance with these terms and conditions, is not an acceptance of any offer made by buyer and is expressly conditioned upon assent to these terms and conditions". As such, the defendant's Order Confirmation expressly converted the parties' legal relationship into one in which the defendant

was the offeror. The next step in the parties' relationship was the pick-up of the adhesive by the plaintiff's agent at the defendant's plant in Kentucky. On an offer-and-acceptance analysis, therefore, the contract of sale came into being when the plaintiff accepted the goods on the terms offered by the defendant, an event that occurred in Kentucky. Accordingly, the location where the contract in dispute was formed is Kentucky, and thus this factor favours that jurisdiction.

(b) The applicable law of the contract

[32] According to the terms and conditions of sale on the Order Confirmation, the contract is to be governed and construed according to the internal laws of the State of Wisconsin, without reference to the principles of conflicts of laws. Thus, this factor favours Wisconsin. In this connection, however, I note the comment by the Court of Appeal in its decision in this matter, (found at [2009] O.J. No. 916) setting aside the decision of the initial motions judge, as follows (at para. 4):

[T]he respondent's [defendant's] contract called for any dispute being resolved by the law of Wisconsin. ... A choice of law clause is only one factor to consider. It is not determinative. If the case were to be tried in Ontario, the court could apply Wisconsin law. This is a common occurrence.

(c) The location in which the majority of witnesses reside

[33] The plaintiff has identified thirteen potential witnesses, ten of whom live in Ontario, two in Quebec and one in New Jersey. On the defendant's side, there are a potential eighteen witnesses, of whom five reside in Wisconsin, six in Ontario, one in Quebec and the remaining six from six different states in the United States. If anything, this factor favours Ontario.

(d) The location of key witnesses

[34] The plaintiff did not expressly identify its key witnesses, while the defendant asserted that it has seven key witnesses all located in United States. The defendant argues that even if one were to consider all of the plaintiff's employee witnesses to be key, this factor does not favour Ontario and at best is neutral.

[35] What is apparent to me is that the various witnesses who may be called are located in a variety of jurisdictions, in various provinces and states. In other words, there is no single jurisdiction in which a preponderance of witnesses reside, which might point to that location as the most convenient one in which to try the case.

(e) The location where the bulk of the evidence will come from

[36] Each side points to physical evidence upon which it will rely. In the case of the plaintiff, its books and records relating to the manufacturing process, customer sales, and expenses it

incurred to remedy the problems arising from the defective labels are all here in Ontario. The plaintiff also points to the significant quantity of unused and defective labels that remain in its possession. For its part, the defendant refers to the records of its manufacturing and testing processes, as well as the so-called "retention samples" from each batch of product sold to the plaintiff, all of which materials are in Wisconsin.

[37] In my view, neither side will be required to produce at trial any significant quantity of physical evidence. With respect to the plaintiff's alleged losses, one assumes that these will be reflected mainly in the report of a forensic accountant; the defendant's testing results will presumably be reflected in another form of expert's report. I would not anticipate that the actual underlying physical items would form a significant part of the trial evidence. I therefore consider this to be a neutral factor.

(f) The jurisdiction in which the factual matter arose

[38] As best one can determine at this early stage in the litigation, at the heart of this dispute is the assertion by the plaintiff that it was assured by the defendant that the defendant's adhesive would perform satisfactorily when applied to the new paper that the plaintiff wished to use in its label manufacturing process. That communication would appear to have taken place between Wisconsin on the one hand and Ontario on the other, where each of the parties to the communication was located at the relevant time. As far as physical contact between the parties, their face to face meetings took place in Ontario. The application of the defendant's product to the plaintiff's label took place in Ontario. The defects were discovered by customers both in Ontario and in the United States. While the actual manufacture of the defendant's adhesive took place in Kentucky, according to plaintiff's counsel the quality of that product itself is not in issue, but rather its suitability for the application designated by the plaintiff.

[39] While it may thus be said that there are multiple jurisdictions in which the factual matters arose, the most significant among these is Ontario. This factor therefore favours Ontario.

(g) The residence or place of business of the parties

[40] As previously noted, the plaintiff is located in Ontario, while the defendant is located in Wisconsin and Kentucky. I will treat this as a neutral factor.

(h) Loss of juridical advantage

[41] The juridical advantage that the plaintiff enjoys in Ontario is the so-called "loser pays" cost system. The plaintiff will incur a significant expense to litigate in the United States where, even if successful, it will not be in a position to recover its legal expenses from the defendant. By contrast, if successful in Ontario, either party can look to the opposite one to be compensated for its cost of participating in the proceeding. This factor therefore favours Ontario.

Conclusion on convenient forum

[42] Of the eight factors, three are neutral, one favours Kentucky, a second favours Wisconsin and three favour Ontario. While determining convenient forum is not merely an exercise in mathematics, it would seem to me looking at all the factors, they favour Ontario as the most convenient forum. The underlying principle is rooted in "reasons of justice, necessity and convenience": see *Morguard, supra*, at para. 35. Further, "the discretion not to exercise jurisdiction must ultimately be guarded by requirements of order and fairness, not a mechanical counting of contacts or connections": see *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at 326.

[43] This is a case in which the events and relationship giving rise to the dispute span multiple jurisdictions, ranging from how the business contact originated and developed, through to the problems that are said to have been experienced by end users. Even if no forum can be identified as the most appropriate, the domestic forum wins out by default: see *Anchem Products Inc. v. British Columbia (Workers' Compensation Board)*, [1993] 1 S.C.R. 897 at para. 53. That said, the one jurisdiction that had involvement in virtually all aspects of the events is Ontario, in that the defendant's product was utilized in a manufacturing process in Ontario that led to the distribution of the plaintiff's product in Ontario and elsewhere. In my view, no other jurisdiction could be identified as being more convenient than Ontario for the resolution of this dispute. I therefore conclude that Ontario is the convenient forum for this litigation.

CONCLUSION AND DISPOSITION

[44] For these reasons, the motion of the defendant is dismissed. If the parties are unable to agree as costs, they may make brief written submissions (no more than four pages each) pursuant to the following timetable:

Plaintiff – within ten days;

Defendant – response within five days thereafter; and

Plaintiff – reply (if any) within five days thereafter.

Stinson J.

DATE: December 18, 2009