Date: 20080619

Docket: A-420-07

Citation: 2008 FCA 219

CORAM: **LINDEN J.A.**
SHARLOW J.A.
TRUDEL J.A.

BETWEEN:

MITSUI O.S.K. LINES, LTD.,
MOB COUGAR (PTE) LTD AND YUE YEW LOON

Appellants

and

MAZDA CANADA INC.

Respondent

Heard at Vancouver, British Columbia, on June 16, 2008.

Judgment delivered at Vancouver, British Columbia, on June 19, 2008.

REASONS FOR JUDGMENT BY: LINDEN J.A.

CONCURRED IN BY: SHARLOW J.A.
TRUDEL J.A.

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REASONS FOR JUDGMENT

LINDEN J.A.

[1] This is an appeal from a decision dismissing an application to stay this action, which was brought pursuant to subsection 50(1) of the *Federal Courts Act*, R.S.C., c. F-7, on the basis that the applicant had failed to persuade the Court that Canada was *forum non conveniens* [2007 FC 916].

FACTS

[2] The basic facts are unusual but not disputed. This civil action for damages arises out of the loss of 4,813 Mazda automobiles and 110 Isuzu trucks and salvage costs when THE COUGAR ACE,

the ship carrying them from Japan to New Westminster, B.C., Tacoma, Washington and Port Hueneme, California, took on a severe list of 60 degrees on July 24, 2006 while engaged in a routine ballasting operation on the high seas. Mazda Canada Inc., the Plaintiff, eventually lost 1563 automobiles that it had purchased, and Mazda Motors of America Inc. (Mazda USA) lost the rest of the Mazda vehicles (The Isuzu trucks that were lost were owned by another party). The ship, owned by MOB Cougar (PTE) Ltd., and chartered to MITSUI O.S.K. Lines Ltd. (Mitsui), was eventually towed to Portland, Oregon where the damaged vehicles were unloaded, inspected and later scrapped.

[3] Mazda Canada instituted this action in this Court, *in rem* against the ship and *in personam* against the owner, MOB COUGAR (PTE) Ltd., (Singapore), the Charterer, Mitsui O.S.K. Lines Ltd., (Japan), the Master and second engineer (Myanmar) and the Chief Engineer (Singapore). The *in rem* action has not been served; the Owner, Charterer and Chief Officer have been served; the Master and Second Engineer have not been served.

[4] Mitsui then sued in Japan, seeking a declaration of non-liability for the accident. It alleges that the loss was caused by an error of management of the ship which operates as a complete defence under the *Hague-Visby Rules*. It denies that the ship was not seaworthy and that the crew was not properly trained, as alleged by Mazda Canada in its action.

[5] In addition, Mazda USA sued in the U.S. District Court of Oregon, but that action was dismissed based on the jurisdiction clause in the contract. That clause 28 reads as follows:

> **28. LAW AND JURISDICTION**
> The contract evidenced by or contained in this Bill of Lading shall be governed by Japanese law except as may be otherwise provided for herein. Unless otherwise agreed, any action against the Carrier thereunder must be brought exclusively before the Tokyo District Court in Japan. Any action by the Carrier to enforce any provision of this Bill of Lading may be brought before any court of competent jurisdiction at the option of the Carrier.

[6] This case, we are informed, is now under appeal to the Circuit Court of Appeals of the 9th Circuit. In the meantime, however, Mazda USA has sued Mitsui in Japan. Since the trial of this action, the two cases being brought in Japan were consolidated, that is the Mitsui declaration action and the Mazda U.S.A. claim. They appear to be proceeding expeditiously. An action has also now been commenced for the loss of the Isuzu trucks in Japan.

Overview of the Law

[7] The accepted standard of review for discretionary decisions like this one is that the Court will not lightly interfere. In *Chinese Business Chamber of Canada v. Canada*, 2006 FCA 178, the Court stated:

> The Court may substitute its discretion for that of the Motions Judge if she gave insufficient weight to all the relevant considerations. In addition, the Court may intervene if the Motions Judge's conclusion was predicated upon an incorrect determination with respect to a question of law, or palpable and overriding error of fact.

(See also *VISX inc. v. Nidek Co.*, [1996] F.C.J. No. 1721 (C.A.); *Cottrell v. Chippewas of Rama Mnjikaning First Nation Band, 2007 FCA 288*; *Holt Cargo Systems Inc. v. ABC Containerline N.V. (Trustee of)*, (2001 SCC 90 at para. 98; *Cunningham v. Kwikwetlem Indian Band*, 2008 FCA 149). This, of course, does not mean that appellate courts will normally re-weigh all the evidence to see if

they agree with the decision on the merits. However, where errors of law are discovered, a certain amount of reevaluation may be required.

[8] The principles of law governing this matter are relatively well-settled now. It is clear that subsection 46(1) of the *Marine Liability Act* S.S. 2001, c.6 eclipses the former Canadian law in cases where parties by contract choose the jurisdiction in which the case will be tried. Such a clause in a contract of carriage is no longer controlling in Canada, but it may be considered as one of the factors to consider in deciding whether an allegation of *forum non conveniens* is made out ((*OT Africa Line Ltd. v. Magic Sportswear Corp.*, 2006 FCA 284).

[9] Subsection 46(1) allows a Canadian plaintiff to sue in Canada despite a clause like Clause 28 in this contract, if certain conditions are met. Subsection 46(1) reads as follows:

46. (1) If a contract for the carriage of goods by water to which the Hamburg Rules do not apply provides for the adjudication or arbitration of claims arising under the contract in a place other than Canada, a claimant may institute judicial or arbitral proceedings in a court or arbitral tribunal in Canada that would be competent to determine the claim if the contract had referred the claim to Canada, where	**46.** (1) Lorsqu'un contrat de transport de marchandises par eau, non assujetti aux règles de Hambourg, prévoit le renvoi de toute créance découlant du contrat à une cour de justice ou à l'arbitrage en un lieu situé à l'étranger, le réclamant peut, à son choix, intenter une procédure judiciaire ou arbitrale au Canada devant un tribunal qui serait compétent dans le cas où le contrat aurait prévu le renvoi de la créance au Canada, si l'une ou l'autre des conditions suivantes existe :
(*a*) the actual port of loading or discharge, or the intended port of loading or discharge under the contract, is in Canada;	*a*) le port de chargement ou de déchargement — prévu au contrat ou effectif — est situé au Canada;
(*b*) the person against whom the claim is made resides or has a place of business, branch or agency in Canada;	*b*) l'autre partie a au Canada sa résidence, un établissement, une

or	succursale ou une agence;
(*c*) the contract was made in Canada.	*c*) le contrat a été conclu au Canada.
(2) Notwithstanding subsection (1), the parties to a contract referred to in that subsection may, after a claim arises under the contract, designate by agreement the place where the claimant may institute judicial or arbitral proceedings.	(2) Malgré le paragraphe (1), les parties à un contrat visé à ce paragraphe peuvent d'un commun accord désigner, postérieurement à la créance née du contrat, le lieu où le réclamant peut intenter une procédure judiciaire ou arbitrale.

[10] This provision in subsection 46(1) merely opens the door for Canadian plaintiffs, allowing an action to be instituted. However, the Court may still decline the jurisdiction on the basis of *forum non conveniens*. (*OT Africa, supra*). Section 46(1) applies here because the intended port of discharge of the vehicles was New Westminster, B.C. The Plaintiff may therefore institute proceedings here, but *forum non conveniens* arguments remain available to the Defendants.

[11] The Trial Judge correctly understood these principles and sought to apply them, taking into account the established law governing the issue of *forum non conveniens* derived from *Spar Aerospace Ltd.* v. *American Mobile Satellite Corp*, 2002 SCC 78 (relying on the Quebec Court of Appeal decision *Lexus Maritime Inc. v. Oppenheim Forfait GmbH*, [1998] A.Q. No. 2059). That case set out a non-exhaustive list of ten factors to be weighed by the Court in making this determination:

a) the parties' residence, and that of witnesses and experts;

b) the location of the material evidence;

c) the place where the contract was negotiated and executed;

d) the existence of proceedings pending between the parties in another jurisdiction;

e) the location of the defendants' assets;

f) the applicable law;

g) advantages conferred upon the plaintiff by its choice of forum, if any;

h) the interests of justice;

i) the interests of the parties;

j) the need to have the judgment recognized in another jurisdiction.

[12] To stay an action because of *forum non conveniens* in Canada, it must be established that another forum is clearly more appropriate. In the case of *Amchem Products Inc. v. British Columbia (Workers Compensation Board),* [1993] 1 S.C.R. 897, para. 33 (relying on *Spiliada Maritime Corp. v. Cansulex Ltd.*, [1987] A.C. 460) Justice Sopinka stated that "the existence of a more appropriate forum must be clearly established to displace the forum selected by the plaintiff." Similarly, Lord Goff in [1987] 1 Lloyd's Rep. 1 explained that the applicant must "establish that there is another available forum which is clearly and distinctly more appropriate." [Emphasis added]

[13] Justice Lebel of the Supreme Court of Canada in *Spar Aerospace* relying on the Quebec Civil Code, article 3135, *Spiliada* and *Amchem* declares that in applying article 3135, which he indicates is consistent with the common law requirements, "the judge's discretion to decline to hear the action on the basis of *forum non conveniens* is only to be exercised exceptionally" [Emphasis added]. He cites for support *inter alia* to Talpis and Castel's article, "Interpreting the Rules of Private International Law" in *Reform of the Civil Code*, Vol. 5B, (1993), as follows:

> The plaintiff's choice of forum should only be declined exceptionally, when the defendant would be exposed to great injustice as a result.

[14] While some might wonder what the words “clearly”, “distinctly” or “exceptionally” add to the obligation of the defendant to convince the court on the balance of probabilities that the Judge should decline jurisdiction in the forum chosen by the plaintiff, those words have been employed in the cases, perhaps to emphasize that the plaintiff’s choice of forum should not be lightly interfered with. Therefore, it must be clear that the jurisdiction chosen by the plaintiff is inappropriate compared to another obviously superior jurisdiction. As Lord Carswell explained, in another context, there is only one standard of civil proof, balance of probabilities, but “in some contexts a court or tribunal must look at the facts more critically and more anxiously than in others before it can be satisfied of the requisite standard.” (See *Re Doherty* [2008] U.K.A.C. 33, para. 28).

Analysis

[15] The Trial Judge set out to consider these ten factors, expressing the view that six of them were “fairly neutral”, that is a), b), c), e), f) and j). He also discussed g) and i) but not d) nor h). He added 3 other factors which he thought should be examined: (1) the public policy of section 46(1), which he found would aid Mazda Canada; (2) Clause 28, to which he did not give much weight; and (3) the *in rem* procedure which he felt helped Mazda Canada. In the end, balancing all these factors he refused to grant the stay. Having considered the analysis of the Trial Judge, I have concluded that his discretion was, in all the circumstances, not properly exercised and must be reversed. He made errors of law requiring this Court to reassess his reasoning. He undervalued some factors (a), d), f)) to which he should have given greater weight. He placed weight on some factors which he should not have placed weight on. Also, there are important new facts in relation to factor a) that arose

following his decision so that he was unable to take them into account. In short, Japan, not Canada, is clearly the most appropriate forum for this litigation. A stay should be granted. Let me now elaborate on this overview.

[16] The most significant factor that affects this Court's decision is the ongoing proceedings between the parties in Japan, item d) on the list, which was largely ignored by the Trial Judge. First, an action has been launched by the appellant in Japan for a declaration of non-liability which includes as parties Mazda Canada, as well as Mazda U.S.A. That this action was started after the Canadian one, in my view, is not of any importance. Second, there is a civil action being pursued by Mazda U.S.A. in Japan for its losses, which has now been consolidated with the declaration proceeding. (This same action had also earlier included a claim for the losses of Mazda Canada, but that part of the claim was later withdrawn by Mazda Canada.) Mazda U.S.A.'s claim was launched because a law suit that it had started in the Oregon District Court for cargo that was lost and salvage costs was dismissed in favour of the Japanese Court on *forum non conveniens* grounds. (This decision is currently on appeal in the 9th Circuit Court of Appeal.) Third, more recently, a claim on behalf of the underwriters of the 110 Isuzu trucks that were lost was launched in Japan, which will likely be consolidated with the other two claims that are currently proceeding in Japan. (See Affidavit of Tetsuro Nakamura dated January 15, 2008.)

[17] It seems to this Court that these three complex and costly matters are proceeding expeditiously in Japan and will continue to do so. The Respondent was originally made a party to the Mazda U.S.A. action but then, for its own reasons, withdrew its claim in favour of attempting to proceed in

Canada, in another complex and costly proceeding. These new facts, many of which were not known to the Trial Judge, weigh very heavily in favour of Japan as the most appropriate forum for the adjudication of all these claims in order to avoid parallel proceedings. International comity would be served by this course. Japan is an important trading partner of Canada and the Japanese legal system is respected internationally, even though its discovery procedures may be less fulsome than ours. In my view, therefore, the Trial Judge gave this factor insufficient weight.

[18] Another significant factor to be considered is factor a) the residence of the parties, the witnesses and the experts. This litigation, which involves many millions of dollars, will require numerous potential witnesses and experts from several countries other than Canada, that is – Japan, U.S.A., Singapore, Myanmar and the Philippines. The overwhelming majority of the witnesses are not likely to be from Canada. Witnesses, most of whom are likely to be from Japan, will be needed to describe the facts concerning the dry docking of the vessel, the loading and inspection of the vessel prior to the voyage, and the preparation for the voyage and the ballasting. The employees of the appellants Mitsui and Mazda Japan who attended in Alaska and Portland to deal with the aftermath of the incident as well as others from different countries will be needed at the trial. Witnesses from Japan, none of whom were crew, will be required to explain the corporate structures of Mitsui and Mazda Japan, where they “reside”, and their relationship with each other. Those from Japan who supervised Seatrade Ship Management Pte Ltd., a Singapore company who supplied the crew and others involved will likely testify. There will also be a few crew witnesses to describe the facts of the ballasting incident who are located in Singapore, Myanmar and the Philippines, closer to Japan than Canada. There will be experts from the U.S.A., mainly testifying about the aftermath and

the damages. Very few witnesses from Canada will be needed, mainly to describe the contract with Mazda Canada and the losses it incurred. Wherever this trial is held, witnesses will have to be called from different countries and the costs will be significant for all of the parties; a trial in Japan will likely be the least costly overall. Note that the underwriters of both Mazda Canada and Mazda USA are the same, ACE USA, of Philadelphia, USA. Also, though English is supposed to be the language of the shipping industry, most witnesses would need translators wherever the trial unfolds. This factor of residence of witnesses, therefore, weighs very heavily in favour of Japan, but the Trial Judge found it to be a "fairly neutral" one, erroneously giving it insufficient weight, in my view.

[19] Another factor undervalued significantly by the Trial Judge was the potential treatment of the applicable law, factor f). This action, if it were to proceed in Canada, would have to apply Japanese law in accordance with Clause 28 of the contract of carriage. This is a weighty element to consider. (See *OT Africa, supra*). The Trial Judge downplayed this factor, referring to the fact that he was unaware of any differences between the Japanese and Canadian law on the issues involved in the case. There are, in this case, complicated legal questions that have not yet been resolved in Japan that should be decided in this litigation: the issue of due diligence in relation to the seaworthiness of the vessel prior to the voyage and its relationship to the issue of the defence of error in the management of the vessel under the *Hague-Visby Rules*. The legal treatment of the limitation clause with regard to the amount of damages must be unravelled. By handling these issues in Japan in Japanese by Japanese Judges and lawyers a more accurate picture of the complex legal issues of Japanese law will emerge. This would be preferable to dealing with these matters by affidavits translated into English, by Judges totally unaware of the actual Japanese jurisprudence and its legal

system. Moreover, all of these issues will form a significant aspect of the litigation that will proceed in Japan in any event, and will be resolved there. It makes little sense to engage in the same complex exercise in Canada, risking different results. The Trial Judge, in my view, gave insufficient weight to this factor.

[20] Another factor that was not properly weighed was the advantage to the plaintiff (g). The Trial Judge was persuaded that significantly greater damages would be available to the plaintiff in Canada than in Japan because Canada has adopted the 1996 protocol to the Convention on Limitation of Liability for Marine Claims of 1976, whereas Japan did not. It is, however, unclear whether the Japanese law or Canadian law would be applied to determine this issue in the Canadian Court. In any event, there is authority that the availability of higher damages in a jurisdiction is not a factor justifying the refusal of a stay, provided that substantial justice could be done in that jurisdiction (see: *Spiliada Maritime Corp. v. Cansulex*, [1987] A.C. 460; *"Herceg Novi"* and *"Ming Galaxy"*, [1998] 2 Lloyd's Rep. 454.)

[21] The reasoning of the Trial Judge on the other factors listed in *Spar Aerospace (supra)* is unimpeachable, that is, factors b), c), e) and i).

[22] The Trial Judge considered some factors which were not on the *Spar Aerospace* list, which is permissible because that is not an exhaustive list. He took into account (1) the public policy of Canada, (2) the action *in rem* and (3) the jurisdiction clause. As for (1), in my view, the Trial Judge was legally wrong to reason that subsection 46(1) evinced a policy that would favour Canadian

plaintiffs in their choice of a forum. Subsection 46(1) merely gives Canadian litigants a chance to choose Canada initially, where heretofore they were automatically barred from doing so by the usual jurisdiction clauses employed in most shipping contracts. The wording of the legislation and the jurisprudence based on it make it clear that subsection 46(1) does not grant Canadian courts jurisdiction; it only *allows* Canadian courts, if chosen by the plaintiff pursuant to subsection 46(1), to *consider* whether Canada is the most appropriate forum employing the usual *forum non conveniens* factors. (See *OT Africa, supra*.)

[23] As for (2), the Trial Judge's reasons about the advantages of the Canadian *in rem* procedure is beside the point, because that procedure is available, for what it is worth, only if Canada assumes jurisdiction, but not if it does not.

[24] As for (3), the use of the jurisdiction clause in the post subsection 46(1) world, the Trial Judge was correct to say that it would still be relevant and "cannot be ignored", but it should be given "little weight". He was right to say it does "not tip the scales in Japan's favour". In this case, however, the clause is not one of those offensive ones that gives jurisdiction to a Court that has little or no connection to the contract, which often treated Canadians so unfairly. On the contrary, here there exists a long-standing relationship between the parties, who have dealt with one another over many years on the basis that the Japanese courts will have jurisdiction in a context where Japan has a close connection to the arrangements made. In these circumstances, the jurisdiction clause is a factor that deserved to be given more weight favouring Japan, where it might not deserve such weight if the links with Japan were more tenuous.

[25] In conclusion, Japan is clearly the most appropriate forum to hear this case, as it is the one most closely connected to the parties and the facts of the case, the vessel was inspected, loaded and departed from Japan, Japanese law applies to the litigation, two (probably three) consolidated actions will be conducted there dealing with the same issues, the same law, and the same witnesses, and Japan was the jurisdiction contracted for by the parties.

[26] Consequently, the discretion of the Trial Judge was not exercised properly in accordance with the legal principles, it did not give sufficient weight to several factors and it gave too much weight to other factors as described above.

[27] The appeal will be allowed, the decision will be set aside and this action will be stayed. One set of costs for the appellants.

"A.M. Linden"

J.A.

“I agree,
K. Sharlow J.A.”

“I agree,
Johanne Trudel J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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