RE: THEODORE ROZSA V. BARCLAYS BANK PLC, BARCLAYS BANK PLC, USA, BARCLAYS BANK PLC, CARIBBEAN, RICHARD WALLACE, DARIER HENTSCH & CIE, FREDERIC WEBER, YVES-MICHEL BAECHLER, DARIER HENTSCH (CANADA) INC., WERNER JOLLER, UNITED INVESTMENT FUNDS INC., MARLENE PERKAL, JOHN SCHOLZ, CARIBE-USA LTD. AND DAVID JOHNSON

Rozsa v. Barclays Bank

File No. 165/01

Ontario Divisional Court

2001 A.C.W.S.J. LEXIS 14210; 2001 A.C.W.S.J. 611854; 104 A.C.W.S. (3d) 1046

May 2, 2001, Decided

KEYWORDS:

[*1]

CONFLICT OF LAWS -- Jurisdiction -- Forum non conveniens --Real and substantial connection -- Application for leave to appeal refusal to stay action against defendants on basis of choice of law clause that law of Switzerland governed -- Motions judge found that whole of impugned transaction had substantial connection to Ontario -- No conflicting decisions were in issue -- Decision involved exercise of discretion based on specific facts -- Motions judge considered relevant factors and recognized that although choice of law clauses were important, they were not conclusive -- No reason to doubt correctness of decision based on notion of reasonable expectations was made out -- Application for leave to appeal from 100 A.C.W.S. (3d) 991 was dismissed

COUNSEL: Paul French and Barbara McAfee, for the Responding Party, the Plaintiff
John B. Laskin, for Barclays, Defendants;
Christopher Bredt and Markus Kremer for the Respondents Darier Hentsch et al.

JUDGES: Then J.

Justice Then

[**1] The moving defendant, Darier Hentsch, seeks leave to appeal to the Divisional Court with respect to the decision of Coo J. to dismiss a motion to stay the action brought against them in Ontario by the plaintiff, Theodore [*2] Rozsa, and the cross-claim brought by Barclays Bank which has attorned to the jurisdiction of the Ontario courts with respect to the plaintiff's action against Barclays.

[**2] The facts are sufficiently set out in the endorsement of Coo J.

[**3] The moving defendant seeks leave to appeal under both branches of Rule 62.02(4).

[**4] Specifically, Mr. Bredt in his able argument submits that in assessing forum conveniens the decision of Coo J. is in conflict with inter alia Frymer v. Brettschneider (1994), 19 O.R. (3d) 60 (C.A.); Volkswagen Canada Inc. v. Auto Hans Frolich Ltd. , [1986] W.W.R. 380 (Alta. C.A.); Crockett v. Society of Lloyd's , [2000] P.E.I. J. No. 54 (QL) (S.C.T.D.); Puschmann v. UBS Bank (Canada) , [2001] O.J. No. 439 (QL) (S.C.J.) in not properly recognizing the legal significance of the choice of jurisdiction (Switzerland) clause in the contract between the plaintiff and the moving defendant.

[**5] Mr. Bredt also submits that the decision of Coo J. if not clearly wrong is open to serious debate because it has not recognized the significance of the parties "reasonable expectations" as explained by this court in Lemmex [*3] v. Bernard (2000), 51 O.R. (3d) 164. (See also: Amchem Products Inc. v. B.C (W.C.B.) , [1993] S.C.R. 897 at 91920.

[**6] Finally, it is submitted that in the absence of any real connection in the plaintiff's action to Ontario, Coo J. wrongly found that the mere attornment of Barclays Bank to the plaintiff's action was a sufficient link to Ontario especially in view of the expense to the plaintiff of conducting a separate action in Switzerland.

[**7] In my view, neither of the branches of the test under Rule 62.02(4) have been met for the granting of leave to appeal to this court.

[**8] First, I do not accept that there are conflicting decisions. In my view the decisions referred to the moving defendant are fact specific. Differing decisions based on different facts do not amount to "conflicting decisions". The determination to grant a stay based on forum conveniens is a matter of discretion. In exercising his discretion Coo J. did not do so based on a difference in the principles outlined in the so-called conflicting decision but did so by applying accepted principles in a different factual context.

[**9] In [*4] his endorsement, Coo J. specifically considered the relevant factors set out in the case law on forum conveniens :

[**10] (1) the jurisdiction in which the factual matters arose: the money transfer was between Geneva and Nassau (para. 9);

[**11] (2) the law governing the issues between the parties: the contract between Rozsa and Darier Hentsch is governed by Swiss law (para.7);

[**12] (3) where the parties reside or carry on business: Darier Hentsch in Switzerland, Barclays Bahamas in the Bahamas, United in Ontario and Rozsa in Calgary (paras. 1, 3, 5, 10);

[**13] (4) the location of witnesses: bankers in Geneva, Rozsa in Calgary, Wallace in Malta, Barclays witnesses from other than Canada and Switzerland, other defendants who have not defended in the Bahamas, California, New Jersey and New York, United in Ontario, employees of Darier Hentsch in Ontario and Quebec - all of which did "not direct the mind to any single place" (para. 11):

[**14] (5) the location of physical evidence not a matter of consequences in this case (para. 12);

[**15] (6) the presence of juridical advantages: there may be certain perceived juridical advantages to everyone in leaving the [*5] case in Ontario including, in particular, discovery (para. 13); and

[**16] (7) the avoidance of multiplicity of proceedings and the associated costs and inconvenience (paras. 14-15). With respect to this factor, Coo J. found in considering the totality of the litigation that it would be impossible to litigate "conveniently or at all" except without staggering additional expense to the litigation already in Ontario. Coo J. also found it was unrealistic to allow the plaintiff's claim to go forward against Barclays Bank but at the same time to bar Barclays' claim for contribution and indemnity against the moving defendant.

[**17] More specifically, Coo J. recognized, in line with the moving defendant's authorities, that choice of jurisdiction clauses, while not conclusive, are important to international commerce and are entitled to "great respect". He also found that Barclays could not, simply by attorning to the jurisdiction, deprive the moving defendants of their right to assert contractual obligations and of their argument that the litigation does not have a sufficient connection to Ontario.

[**18] In applying these principles, Coo J. concluded that it would be wrong to [*6] apply the choice of forum clause to certain aspects of this case. Rather, he found, on the whole of the transaction, that the action had a sufficiently real and substantial connection to Ontario to support the Ontario court "as a sensible and practical forum for disposition of all aspects of the matter." In my view, Coo J. was entitled on the record before him to make these findings.

[**19] There is no conflict with other decisions to warrant leave to appeal but merely a difference in result because of the application of the relevant principles. Moreover, it is not desirable to grant leave to clarify a confusion in jurisprudence as there is no confusion when the authorities are properly understood in their factual context.

[**20] Secondly, I accept the submissions of counsel for the respondent that there is no reason to doubt the correctness of Coo J. decision based either on "reasonable expectations" or on the basis of Barclays attornment to the jurisdiction of the court in Ontario.

[**21] I agree with Mr. Laskin who on behalf of Barclays Bank submits that the authorities the moving defendant relies on do not treat "reasonable expectations" as a separate or additional [*7] factor in the exercise of forum conveniens discretion. Lemmex , supra , dealt with reasonable expectations as relevant to jurisdiction

and not to forum conveniens . Amchem , supra , dealt with "reasonable expectations" as part of the discussion of juridical advantage as a factor in the exercise of forum conveniens jurisdiction.

[**22] I also agree with Mr. Laskin's submission that there is no error based on Barclays attornment. I agree with Mr. Laskin that John Russell and Company Limited v. Cayzer, Irvine and Company Limited , [1916] 2 A.C. 298 at 303-4 (P.C.) and the decisions based on this case are irrelevant to the issue of forum conveniens in the instant case as these authorities deal with jurisdiction and service ex juris .

[**23] Coo J. recognized that the Barclays' defendants could not, by attorning to the jurisdiction, pre-empt consideration of forum conveniens . Coo J. as I have stated exercised his discretion on accepted principles properly recognizing the link of the subject matter of the action to Ontario. There is nothing inconsistent with Lemmex , supra , and Puschmann , supra , as the difference in the result represents a different exercise [*8] of discretion based on appropriate principles to different facts. While the resolution of the issue of forum conveniens is of importance to the parties in this case, that resolution is entirely fact specific based on the discretionary application of appropriate principles by Coo J. In my view, there is no legal issue of general public importance within the meaning of Rankin v. McLeod, Young, Weir (1986), 57 O.R. (2d) 569 per Catzman J. or Greslik v. Legal Aid (1988), 65 O.R. (2d) 110 per Callaghan C.J. at p. 113.

[**24] The application for leave to appeal is dismissed.

[**25] On the issue of costs, I echo the opinion of Coo J. on the motion for stay as I view this application for leave to appeal as reasonably and legitimately brought and submitted to the Court. Costs to the responding parties in the cause. I am prepared to entertain written submissions within 2 weeks of the release of the endorsement as to the amount at which costs should be fixed.