

Citation: Polar Foods v. Jensen  
2002 PESCTD 63

Date: 20020924  
Docket: S-1-GS-18910  
Registry: Charlottetown

**PROVINCE OF PRINCE EDWARD ISLAND  
IN THE SUPREME COURT - TRIAL DIVISION**

BETWEEN:

POLAR FOODS INTERNATIONAL INC.

PLAINTIFF  
(RESPONDENT)

AND:

JENSEN TUNA INC.

DEFENDANT  
(APPLICANT)

BEFORE: MADAM JUSTICE JACQUELINE R. MATHESON

John K. Mitchell, QC  
John Washington

Solicitor for the Plaintiff  
Solicitor for the Defendant

Place and Date of Hearing

Charlottetown, Prince Edward Island  
June 12, 2002

Place and Date of Judgment

Charlottetown, Prince Edward Island  
September 24, 2002

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Supreme Court of Prince Edward Island - Trial Division  
Matheson J.

Date Heard: June 12, 2002

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( 7 pages)

**CIVIL PROCEDURE - Motion to Strike a Statement of Claim - Jurisdiction - Forum non  
conveniens**

**Cases Referred to:** *3315207 Canada Inc. v. Decoexsa Global Logistics* (1998), 171  
Nfld. & P.E.I.R. 63; *Amchem Products Inc. v. British Columbia (Workers'  
Compensation Board)* (1993), 102 D.L.R. (4<sup>th</sup>) 96; *Antares Shipping Corp. v. The Ship  
"Capricorn"*, [1977] 2 S.C.R. 422; *Tomlinson et al. v. Turner and Big Wheels  
Transport & Leasing Ltd.* (1993), 108 Nfld. & P.E.I.R. 346, (P.E.I.S.C.A.D.)

**Civil Procedure Rules Referred to:** Prince Edward Island Rules of Civil Procedure, Rule  
21.01(3); Rule 46.01(1)

John K. Mitchell QC

Solicitor for the Plaintiff

John Washington

Solicitor for the Defendant

**Matheson J.:**

[1] This is a motion for an order staying the action on the grounds that this court does not have jurisdiction over the subject matter or in the alternative an order requiring the trial to be held in Louisiana, U.S.A. The defendant, Jensen Tuna Inc., argues that pursuant to Civil Procedure Rules 21.01(3)(a) this court is without jurisdiction to hear the matter and pursuant to **Civil Procedure Rule** 46.02(a), the balance of convenience substantially favours the holding of the trial in Louisiana and Prince Edward Island is not a *forum conveniens*.

[2] Jensen Tuna Inc. ( the defendant) is a company, incorporated pursuant to the laws of Louisiana with head office in the state of Louisiana, which carries on the business of purchasing and selling seafood. Polar Foods International Inc.(the plaintiff) is a company, incorporated under the laws of Prince Edward Island with offices in Charlottetown, P.E.I., which carries on a similar business. The plaintiff issued a statement of claim against the defendant in this matter in the Supreme Court of Prince Edward Island. The defendant has not submitted to the jurisdiction of this court and has not filed a defence, as it maintains that the state law of Louisiana is the proper law to be applied in this case.

**Evidence:**

[3] In its statement of claim issued January 25, 2002, the plaintiff claims that it and the defendant, entered into an oral agreement under the terms of which the defendant, through its employee/agent David Maginnis would keep in close contact with the plaintiff concerning the grading of tuna and the price to be paid for tuna in Atlantic Canada; the plaintiff would bid on tuna in Atlantic Canada, based on the U.S. market demand and price information supplied by the defendant; in reliance upon the defendant's advice as to the U.S. market conditions, the plaintiff would purchase tuna, package it and deliver it to the defendant's agent at the Halifax, Nova Scotia airport, for delivery to the defendant's customers; the plaintiff and defendant agree that the plaintiff would make an average net profit of \$2.00 to \$5.00 per pound and defendant would settle each tuna shipment within one or two weeks.

[4] On this application, David Maginnis filed an affidavit in which he stated that the defendant agreed to locate purchasers for the plaintiff's seafood product, but he did not guarantee any net profit per pound of tuna sold. He further stated that it would be impossible to guarantee a price on the sale of tuna because of market fluctuation, the quality of the product and the time delay between when the product was purchased on Prince Edward Island and when it was eventually sold.

[5] Maginnis also stated that throughout the life of the agreement between the parties, business was conducted between the parties out of the defendant's head office in Louisiana, all contact made with the purchasers of product was made by the

defendant out of its head office in Louisiana, all payments for the purchases of the product was received by the defendant at its head office in Louisiana and all payments made by the defendant to the plaintiff were made out of the defendant's head office in Louisiana. He further stated that the company's assets are located in Louisiana and the principal administrators of the company are located in Louisiana. The majority of the purchasers of the product who could be possible witnesses reside in the United States rather than P.E.I. Neither he, nor any representative of the defendant visited P.E.I. during the verbal agreement in dispute, and all tuna product which is the basis of this dispute was sold by the defendant and purchased by clients of the defendant in Louisiana, California, Japan or jurisdictions, other than P.E.I. Based on the availability of witnesses and related information Maginnis believes the action should be tried at substantially less inconvenience and expense in Louisiana, rather than in P.E.I.

[6] The parties agree there was an oral agreement made by telephone between David Maginnis, for the defendant and Frank Milligan and Garth Jenkins, for the plaintiff; that the plaintiff began to purchase and ship tuna to the defendant in mid-August, 2001 through October 2001; that the tuna were purchased by the plaintiff in Prince Edward Island and Nova Scotia and shipped to an agent for the defendant in Halifax for delivery; that the defendant paid for the tuna shipped to them in Halifax. The dispute arises from whether there was any agreement as to how much net profit the plaintiff could expect to make and what obligations, if any, the defendant had to keep the plaintiff apprised of the selling price and grading of each tuna, in a timely manner and whether it failed to do so.

[7] The plaintiff purchased and shipped 91 tuna to the defendant. Garth Jenkins, a director of the plaintiff, filed an affidavit in which he stated that the initial contact between the plaintiff and the defendant was between Frank Milligan for the plaintiff and David Maginnis for the defendant, by telephone, when Milligan was in Prince Edward Island and Maginnis was in Louisiana. Maginnis subsequently contacted Jenkins by telephone and the plaintiff accepted his offer to take their tuna on consignment and worked out arrangements, as set out in the statement of claim. As part of the contract, the plaintiff would rely on the defendant's expertise and advice concerning marketing conditions in the U.S. and pricing. Relying on this information, Milligan would calculate the price paid for certain grades of tuna which would allow the anticipated net profit in the range of \$2.00 - \$5.00 per pound. Jenkins stated that after August 17, Maginnis was in daily contact with Milligan concerning pricing. They would agree on a price range that would be paid for certain grades of tuna and, in reliance upon information received from Maginnis, Milligan would purchase tuna on behalf of the plaintiff. The plaintiff then began to ship tuna to the defendant's agents in Halifax for delivery to the defendant's customers. The defendant accepted delivery of the tuna in Halifax. Jenkins stated one of the terms of the agreement was that each shipment was to be settled quickly. The defendant was to forward to the plaintiff the

information on the selling price of the tuna so the plaintiff would know whether they sustained a profit or loss on each tuna. The first settlements arrived on a timely basis and showed that the plaintiff was making money in the range expected. Thereafter the settlements did not come on a timely basis.

[8] The plaintiff was in daily contact with the defendant and during those conversations about settlements, the defendant kept assuring the plaintiff that it was making money, the U.S. market was strong and made promises that settlements would be sent. The defendant would then forward money to the plaintiff, but not the settlement documents, so the plaintiff could never ascertain which tuna were being sold and was unaware whether they were making money or losing it.

[9] The plaintiff alleges the defendant failed to provide the settlements within the time agreed upon. In particular, the plaintiff alleges the defendant represented there was no problem with the grading, the plaintiff was making an average net profit in range of \$2.00 - \$5.00 per pound; and while one tuna sold at a loss, the market was such that they would make it up off other tuna to keep the average net profit between \$2.00 - \$5.00 a pound, and that the U.S. market was such that the plaintiff should continue shipping tuna to the defendant and the plaintiff would continue to profit from such arrangements. The plaintiff is alleging these post-contractual representations were negligently made and were untrue. The plaintiff states that because the defendant failed to settle within the time agreed, which would have alerted the plaintiff very early on that the tuna were selling at a loss, the plaintiff continued shipping tuna to the defendant and sustained more losses.

[10] The plaintiff does not dispute the amount for which the defendant sold the tuna and, accordingly, there is no need to have the defendant's customers as witnesses. The issue in dispute is the accuracy of the post contract representations, based on the discussions between Dave Maginnis, Garth Jenkins, Betty Jenkins, Frank Milligan and Stacey Mossey, all of whom are residents of Prince Edward Island, except Maginnis.

[11] The plaintiff's position is that the losses were sustained by the plaintiff on P.E.I. Business was conducted out of the plaintiff's office in Charlottetown. The plaintiff made arrangements through its P.E.I. office to have the tuna delivered to the defendant at Halifax Airport and the defendant took delivery of the tuna at Halifax. All of the key witnesses are in Prince Edward Island, except Maginnis. All the plaintiff's corporate records are in P.E.I., as are the records of settlement and records of the amount of money paid by the plaintiff for tuna, and the plaintiff's other costs, as well as the plaintiff's telephone records and financial records. The plaintiff further stated that negligent misrepresentations were received and acted upon on P.E.I. The plaintiff claims it would be much more expensive to hold a trial in Louisiana, because the currency exchange rate disadvantages Canadians. In addition, the trial could be held

within a reasonable period of time in Prince Edward Island.

**Law:**

[12] Under Civil Procedure Rule 21.01(3) the defendant may make a motion to have the action stayed or dismissed on the ground that:

21.01(3) (a) the court has no jurisdiction over the subject matter of the action; . . .

[13] Under Civil Procedure Rule 46.01(1) the plaintiff is entitled to name the place where he proposes the action to be tried in the statement of claim. If the defendant is dissatisfied he may, on motion, apply to have the trial moved to another place and the court will so order where it is satisfied that:

46.02 (a) the balance of convenience substantially favours the holding of the trial in another place; or

(b) it is likely that a fair trial cannot be held at the place named in the statement of claim.

[14] The onus is on the defendant to show that the balance of the convenience substantially favours the holding of a trial in another place.

**Jurisdiction:**

[15] At the hearing, counsel for the defendant conceded there is a connection with Prince Edward Island on which one could base a claim for jurisdiction. However, he argued that even if P.E.I. does have jurisdiction the court should refuse to exercise it on the basis of *forum non conveniens*. Consequently, I conclude that the issue of jurisdiction itself is not in serious dispute. What is disputed is whether P.E.I. is the most appropriate jurisdiction.

**Forum non conveniens:**

[16] In **3315207 Canada Inc. v. Decoexsa Global Logistics** (1998), 171 Nfld. & P.E.I.R. 63, Mr. Justice DesRoches of the Prince Edward Island Supreme Court Trial Division dealt with an issue of *forum conveniens*. In discussing the burden of proof, he applied the position of Justice Sopinka of the Supreme Court of Canada in **Amchem Products Inc. v. British Columbia (Workers Compensation Board)** (1993), 102 D.L.R. 4<sup>th</sup> 96 where he stated at p. 111:

. . . While the standard of proof remains applicable in civil cases, I agree with the English authorities that the existence of a more appropriate forum must be

clearly established to displace the forum selected by the plaintiff. This was a position adopted by McLachlin J.A. (as she then was) in *Avenue Properties Ltd. v. First City Development Corp.* (1986), 32 D.L.R. (4<sup>th</sup>) 10...She emphasized that this had particular application where there were not parallel foreign proceedings pending.

The position of Justice Sopinka in *Amchem* was adopted by the Court of Appeal in this province in *Tomlinson et al. v. Turner and Big Wheels Transport and Leasing* (1993), 108 Nfld. & P.E.I.R. 346, (P.E.S.C.A.D.) where Chief Justice Carruthers stated at p. 349:

The conclusions reached by Mr. Justice McQuaid in *Oulton Agencies Inc. v. Nolloffice Inc.* (1988), 66 Nfld. & PEIR 207...are basically the same as those quoted above and I quote from Mr. Justice McQuaid at p. 210 as follows:

It is clear from a full reading of these several authorities that the following general principles apply:

- (a) that the plaintiff's choice of forum will, prima facie, prevail;
- (b) that the onus of establishing otherwise lies upon the defendant;
- (c) that the onus falling upon the defendant is to establish the existence of an alternate forum more appropriate for the pursuit of the action and for securing the ends of justice;
- (d) that the balance must be strongly in favour of the defendant;
- (e) the defendant must satisfy the court that the continuation of the action in the forum of the plaintiff's choice would work an injustice upon the defendant because it would be oppressive or vexatious, or would be an abuse of the process of the court in some other way.

There lies, therefore, a heavy onus upon the defendant in his application for a change of forum, but not necessarily an insurmountable one.

[17] Counsel agreed that the leading case on forum conveniens is *Amchem*. The defendant acknowledges there would be an initial increase in cost of a trial in Louisiana. However, the contract was originally made in Louisiana, because that is where the offeror received acceptance of the offer. Jenkins confirmed by telephone that the plaintiff would accept the defendant's offer and this confirmation was received by



the defendant in Louisiana. To establish there was not a negligent misrepresentation, as alleged by the plaintiff, the defendant says it has to lead evidence as to the type of tuna received, the condition of the tuna when received and the date the tuna was received. They have to lead evidence as to why they paid what they did for the tuna to show that there wasn't negligence misrepresentation, when Maginnis said he would pay a certain amount of dollars for B Grade tuna and the price was eventually lower, because the grade was lower. The majority of the purchasers live in California. The eventual purchasers are necessary witnesses to the defendant to show it made the best efforts to sell the tuna. The defendant also states that all books, documents and records in relation to the final sale of the product are located in Louisiana, as well as all assets of the company. There is reciprocal enforcement of judgments between Prince Edward Island and Louisiana, but there would be additional costs to enforcing a P.E.I. judgment in Louisiana. Defendant's counsel agrees there are substantial connections to Prince Edward Island, but argues it is an injustice for the defendants to have to come to Prince Edward Island to defend. It is not an injustice to require the plaintiff to commence a suit in Louisiana, which contains the defendant's assets.

[18] The plaintiff argues that the crux of the case is post contract negligent misrepresentation. The Louisiana and the Prince Edward Island purchasers were familiar with each other's grading levels. They both had the same information about grading and costs. Delivery of the tuna was taken by the defendant in Canada and shipped to California where the buyer determined it was not a proper grade, therefore he was going to pay less. The defendant in Louisiana knew this, but the plaintiff seller in Prince Edward Island did not. The plaintiff called the defendant to inquire if it was making money. The defendant replied the grading is okay, the market is strong and we're making money so keep supplying tuna. It is these post-contract representations that the plaintiff is relying on, not the pre-contract representations. The purchasers are irrelevant, because the issue is not what the grading or the selling price was, but did the defendant have an obligation to tell the plaintiff the tuna were not selling for the price the plaintiff thought they were getting, or that the grading was not as anticipated, and, if so, why did the defendant not do so?

[19] The plaintiff argues the only defence witness with regard to the relevant issue is Maginnis. From the plaintiff's point of view they require four witnesses from the plaintiff and one from the defendant. The plaintiff argues that the damage was sustained in Prince Edward Island and Polar's financial records are here. All records relevant to this part of the transaction are here, including Polar's records of the price paid and received, and the records of settlement. Both the purchase price and the sale price are here so there is no need for Louisiana records.

[20] I am informed by counsel that Louisiana does have reciprocal enforcement of judgments with Prince Edward Island. However, there will be some additional costs

incurred by the plaintiff in seeking to enforce the judgment in Louisiana, assuming it is successful in its claim. Plaintiff's counsel states it is prepared to take its chances on the enforcement. Other than an agreement by counsel that there is a form of discovery in Louisiana, there was no evidence placed before me with regard to procedural rules in Louisiana.

[21] In ***Amchem*** the Supreme Court of Canada quoted with approval the following formulation of "forum non conveniens" from ***Antares Shipping Corp. v. The Ship "Capricorn"***, [1977] 2 S.C.R. 422 at 448:

...the overriding consideration which must guide the Court in exercising its discretion by refusing to grant [an application to stay an action on the ground of *forum non conveniens*] must ...be the existence of some other forum more convenient and appropriate for the pursuit of the action for securing the ends of justice.

[22] Applying this test to the facts of this case, it appears that the defendant has not met that test. The witnesses to the alleged misrepresentations would be Maginnis from the defendant and a number of employees from the plaintiff. Maginnis is the only witness not present in P.E.I. It would not work an injustice or a hardship on the defendant to bring one witness and his telephone records for the relevant period to P.E.I., if the latter were necessary. It would work a hardship on the plaintiff to require it to pursue this action in Louisiana, because not only would it be required to bring a number of its witnesses and records to Louisiana, but its costs would increase by at least 50 % considering the currency exchange rate between the Canadian and U.S. dollar. Conversely, a trial in P.E.I. would be considerably less expensive for the defendant. The plaintiff is prepared to "take its chances" on enforcement of a judgment in Louisiana.

[23] The defendant has not established that Louisiana is a more convenient or appropriate forum for the pursuit of this action and accordingly I dismiss this application.

September 24, 2002

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Matheson J.