

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE**

**IN AND FOR NEW CASTLE COUNTY**

**CLEMENCE MICHAUD**, individually, )  
and as Personal Representative of the Estate )  
of Jean Provencher, Deceased, )

Plaintiff, )

V. )

C.A. No. 00C-06-156

**FAIRCHILD AIRCRAFT INCORPORATED**, )  
**FAIRCHILD DORNIER CORPORATION**, )  
**THE FAIRCHILD CORPORATION**, )  
**THE B.F. GOODRICH COMPANY**, and )  
**BFGOODRICH AEROSPACE COMPONENT** )  
**OVERHAUL & REPAIR, INC.**, )

Defendants. )

**MEMORANDUM OPINION**

Submitted: July 24, 2001

Decided: August 21, 2001

Robert Jacobs, Esquire, Jacobs & Crumplar, P.A., Wilmington, DE.; David E. Rapoport, Esquire and Paul D. Richter, Esquire, Rapoport Law Offices, P.C., Chicago, IL.

Anthony J. Flynn, Esquire and Timothy Jay Houseal, Esquire, Young Conaway Stargatt & Taylor, Wilmington, DE; J. Michael Johnson, Esquire, Gollatz, Griffin & Ewing, P.C., Wilmington, DE;

**DEL PESCO, J.**

Defendants, The B.F. Goodrich Company, a New York corporation, and BFGoodrich Aerospace Component Overhaul and Repair, Inc., a Delaware corporation (the “BF Goodrich Defendants”), have brought a motion to dismiss the amended complaint filed by the plaintiffs based on *forum non conveniens*.

### ***FACTS***

The plaintiffs are the surviving relatives of the flight crew who died in the airplane crash at issue in this case. They are as follows: Clemence Michaud (“Michaud”), wife of the deceased pilot, Jean Provencher; Lyne Stricker-Boulanger (“Stricker-Boulanger”), wife of the deceased first officer, Walter Stricker; and Hansulrich Stricker, Sr. (“Stricker”), father of the deceased first officer, Walter Stricker. Michaud brought suit against the defendants both individually and as personal representative of the Estate of Jean Provencher. Sticker-Boulanger brought suit against the defendants individually, as mother and natural guardian of the minor child, Ginger Stricker, and as personal representative of the Estate of Walter Stricker.

The case at bar arises out of the June 18, 1998 crash of an SA 226-TC Metroliner II aircraft (“the aircraft”) during an attempted emergency landing at Mirabel International Airport near Montreal, Quebec, Canada. All of the passengers and crew suffered fatal injuries in the crash. The accident was allegedly caused by an overheated brake assembly resulting in hydraulic failure and on-board fire that ultimately led to a failure of the left wing of the aircraft.

The aircraft was manufactured by Swearingen Aviation Corporation (“Swearingen”) in 1977, and initially sold to Empire Airlines on June 15, 1977. Empire

Airlines owned the aircraft for approximately nine years. On July 14, 1986, the aircraft was exported to Canada and registered by its new owner, Propair, Inc. Seven years later, on April 15, 1993, the aircraft was re-registered to its new Canadian owner, Somipar Aviation, Inc. Propair, Inc. again became the registered owner of the aircraft on June 6, 1996, and remained the owner of record until the day of the crash.

At the time of the accident, the aircraft was outfitted with a landing gear wheel brake assembly designed, manufactured, distributed and sold by The B.F. Goodrich Company and/or BFGoodrich Aerospace Component Overhaul & Repair, Inc. The component, identified as part number 2-1203, comprised the left outboard main landing gear wheel brake assembly, was manufactured by BF Goodrich in 1987. The alleged sequence of events is as follows. The brake assembly overheated shortly after takeoff of the aircraft, and the overheated brakes resulted in a fire in the left wheel well. The instrument panel of the aircraft did not reflect a warning that the brakes were overheated; however, it did reflect a left wing overheat warning light. The fire caused the tire in the left wheel well to explode, causing breaches in the hydraulic and brake fluid lines. As a result, the hydraulic and brake fluids spilled into the fire and caused it to spread rapidly, thus resulting in the left wing failure that caused the aircraft to crash.

The plaintiffs filed their initial complaint in Delaware on June 16, 2000. On August 31, 2000, the BF Goodrich defendants filed a motion to dismiss the complaint based on the doctrine of *forum non conveniens*, or in the alternative to stay proceedings. Plaintiffs then filed an amended complaint on October 19, 2000, and the BF Goodrich defendants' motion to dismiss was renewed on November 20, 2000 after this Court ruled on plaintiffs' discovery motions. The defendants argue that the proper forum for this

action is Canada, and that litigating in Delaware would cause them overwhelming hardship.

### ***FORUM NON CONVENIENS FACTORS***

Under Delaware law, it has been clearly established that a complaint will not be dismissed on the ground of *forum non conveniens* absent a showing of overwhelming hardship on the part of the defendant.<sup>1</sup> Defendants must satisfy this heavy burden to overcome the presumption afforded litigation plaintiffs under Delaware law that their choice of forum is proper.<sup>2</sup> This presumption is accorded even greater weight in cases where, as here, there is no other previously filed pending action involving these particular parties.<sup>3</sup> Although the presumption can be rebutted, it requires a defendant to establish that the case is “one of the rare cases where the drastic relief of dismissal is warranted based on a strong showing that the burden of litigating in this forum is so severe as to result in manifest hardship to the defendant.”<sup>4</sup>

In determining whether the defendant has met this burden, the six factors adopted by the Delaware Supreme Court in *General Foods Corp. v. Cryo-Maid*,<sup>5</sup> and recently

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<sup>1</sup> See *Williams Gas Supply v. Apache Corp.*, Del. Supr., 594 A.2d 34, 36 (1991); *ANR Pipeline Co. v. Shell Oil Co.*, Del. Supr., 525 A.2d 991 (1987).

<sup>2</sup> See *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*, Del. Supr., \_\_\_ A.2d \_\_\_, No. 526, 2000, Walsh, J. (July 25, 2001); *Warburg, Pincus Ventures, L.P. v. Schrappner*, Del. Supr., \_\_\_ A.2d \_\_\_, No. 198, 2000, 2001 WL 673717, Veasey, C.J. (May 31, 2001); *Ison v. E.I. duPont De Nemours & Co., Inc.*, Del. Supr., 729 A.2d 832 (1999); *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196 (1997); *General Foods Corp. v. Cryo-Maid, Inc.*, Del. Supr., 198 A.2d 681 (1964), *overruled in part on other grounds sub. Nom., Pepsico, Inc. v. Pepsi-Cola Bottling Co.*, Del. Supr., 261 A.2d 520 (1969).

<sup>3</sup> See *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1199 (1997) (stating that “judicial discretion is to be exercised sparingly where, as here, there is no prior action pending elsewhere). There is a pending action arising out of this same accident that has been filed by Propair, Inc., the owner/operator of the accident aircraft and its insurance carrier, American Home Assurance Company, against The B.F. Goodrich Company and other defendants in Superior Court, District of Montreal, Province of Quebec, Canada. However, the Canadian litigation does not involve these plaintiffs.

<sup>4</sup> *Warburg, Pincus Ventures, L.P. v. Schrappner*, Del. Supr., \_\_\_ A.2d \_\_\_, No. 198, 2000, 2001 WL 673717, Veasey, C.J. (May 31, 2001) (quoting *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1197 (1997)).

<sup>5</sup> Del. Supr., 198 A.2d 681 (1964).

applied in *Warburg, Pincus Ventures, L.P. v. Schrappner*<sup>6</sup> and *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining, L.P.*,<sup>7</sup> must be considered. These six factors are:

- (1) the relative ease of access to proof;
- (2) the availability of compulsory process for witnesses;
- (3) the possibility of the view of the premises;
- (4) whether the controversy is dependent upon application of Delaware law which the courts of this State more properly should decide than those of another jurisdiction;
- (5) the pendency or nonpendency of a similar action or actions in another jurisdiction; and
- (6) all other practical problems that would make trial of the case easy, expeditious, and inexpensive.<sup>8</sup>

Analysis under this test is fact-sensitive, given “the discretionary nature of the doctrine, combined with the multifariousness of the factors relevant to its application.”<sup>9</sup> However, under Delaware law, “[t]he issue is whether any or all of the *Cryo-Maid* factors establish that defendant will suffer overwhelming hardship and inconvenience if forced to litigate in Delaware.”<sup>10</sup> Thus, the defendant must present particularized evidence demonstrating that under the *Cryo-Maid* standard, requiring litigation to proceed in Delaware will result in overwhelming hardship.<sup>11</sup>

The BF Goodrich defendants’ central claim of hardship involves ease of access to proof and availability of compulsory process for procuring the testimony of witnesses.

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<sup>6</sup> Del. Supr., \_\_\_ A.2d \_\_\_, No. 198, 2000, 2001 WL 673717, Veasey, C.J. (May 31, 2001).

<sup>7</sup> Del. Supr., \_\_\_ A.2d \_\_\_, No. 526, 2000, Walsh J. (July 25, 2001).

<sup>8</sup> See *Warburg, Pincus Ventures L.P.*, 2001 WL 673717 at \*2; see also, *Ison v. E.I. duPont de Nemours & Co., Inc.*, Del. Supr., 729 A.2d 832, 837-38 (1999); *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1198-99 (1997).

<sup>9</sup> See *Warburg, Pincus Ventures, L.P.*, 2001 WL 673717 at \*3 (quoting *American Dredging Co. v. Miller*, 510 U.S. 443, 455, 114 S.Ct. 981, 127 L.Ed.2d 285 (1994)).

<sup>10</sup> See *Warburg, Pincus Ventures, L.P.*, 2001 WL 673717 at \*3 (quoting *Chrysler First Business Credit Corp. v. 1500 Locust Limited Partnership*, Del. Supr., 669 A.2d 104, 108 (1995)).

<sup>11</sup> *Mar-Land Industrial Contractors, Inc. v. Caribbean Petroleum Refining*, Del. Supr., No. 526, 2000, Walsh, J. (July 25, 2001) (citing to *Parvin v. Kaufmann*, Del. Supr., 236 A.2d 425, 428 (1967)).

The defendants argue that Delaware has no compelling interest in this case other than that BF Goodrich Aerospace Component Overhaul & Repair is incorporated in the state.

They assert that the plaintiffs are residents of either Canada or Switzerland, the accident occurred in Canada, aircraft and brake assemblies were sold, owned and operated outside of Delaware, witnesses to the accident are in Canada, documents relating to the aircraft are in Canada, and documents relating to the brake assembly are in Ohio. Furthermore, they assert that the only entity with a connection to Delaware, BF Goodrich Component Overhaul & Repair, Inc., did not design, manufacture, or sell the brake assembly in the aircraft.

This argument does not support a claim of hardship. Although the accident occurred in Canada and the maintenance records of the aircraft are also in Canada, the BF Goodrich defendants can obtain the relevant evidence from these sources, albeit with some difficulty. In addition, the defendants have access to evidence in Ohio involving the design, manufacture, and sale of the brake assembly at issue. The BF Goodrich defendants have failed to demonstrate that they do not have relative ease of access to proof in this case; therefore, they have not met the first factor.

Regarding the second factor, the availability of compulsory process for witnesses, the BF Goodrich defendants' do not specify any of the witnesses who are alleged to be beyond its reach and whose absence would adversely affect their defense. The defendants can obtain deposition testimony from witnesses who were involved in the design and manufacture of the brake assembly, performed maintenance on the aircraft, or who saw the accident. The difference to the BF Goodrich defendants in travel time and

expense involved in flying witnesses from Canada or Switzerland to Delaware, or from Ohio to Delaware cannot be deemed an overwhelming hardship to the defendants.<sup>12</sup>

As for the third factor, the possibility of a view of the premises, the defendants argue that the accident occurred in Canada and the aircraft wreckage is located there as well. They also argue that discovery may reveal that local factors may have contributed to the accident. While this factor favors the defendants, it is not substantial because the evidence would likely be presented in videotape or documentary form, rather than a view, in any event.

The BF Goodrich defendants next argue that the law of Canada governs the rights of the parties in this action, and that Canada has a more compelling interest in the outcome of this case than the Delaware courts. The courts of this State regularly decide controversies in which the parties are non-residents and where none of the events occurred in Delaware.<sup>13</sup> “It is not unusual for courts to wrestle with open questions of the law of sister states or foreign countries.”<sup>14</sup> Therefore, this argument carries little weight.<sup>15</sup>

The BF Goodrich defendants note that there is a pending companion action in Canada filed by the owner and insurance carrier of the aircraft against The B.F. Goodrich

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<sup>12</sup> See *Warburg, Pincus Ventures, L.P. v. Schrappner*, Del. Supr., 2001 WL 673717 at \*3, Veasey, C.J. (May 31, 2001). See also *States Marine Lines v. Domingo*, Del. Supr., 269 A.2d 223, 226 (1970) (“The defendant may not prevail on this ground because it failed to particularize sufficiently the hardship it claims in this connection. It did not name the witnesses it deemed necessary to call; or demonstrate their number; or show their relationship to this case; or explain why their testimony could not be presented in Delaware by deposition.”)

<sup>13</sup> *Taylor v. LSI Logic Corp.*, Del. Supr., 689 A.2d 1196, 1200 (1997).

<sup>14</sup> *Id.* (citations omitted).

<sup>15</sup> See *id.*

Company. However, this fact carries no weight in analyzing the fifth *Cryo-Maid* factor because the Canadian action involves different plaintiffs.<sup>16</sup>

Finally, the BF Goodrich defendants have failed to demonstrate the existence of other practical problems that would make the trial of the case in Delaware more difficult or expensive. As the plaintiffs have noted, The B.F. Goodrich Company is an international corporation that has several subsidiaries, many of which, including BF Goodrich Component Overhaul & Repair, have chosen to avail themselves of the laws of Delaware by incorporating in the state. The Court also finds it important that at the time the plaintiffs filed this action, Delaware apparently was the only forum in which plaintiffs could obtain personal jurisdiction over each of the defendants in this case.

Taking all of these *Cryo-Maid* factors together, this Court concludes that the BF Goodrich defendants have not established with particularity that they will suffer overwhelming hardship if required to litigate in Delaware.

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<sup>16</sup> *See id.*

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Defendants. )

**ORDER**

AND NOW, TO WIT, this \_\_\_\_ day of \_\_\_\_\_, 2001,

For the reasons set forth in the Court’s Memorandum Opinion of August 21,  
2001, the defendants’ Motion to Dismiss on the ground of *forum non conveniens* is

**DENIED.**

**IT IS SO ORDERED.**

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Susan C. Del Pesco, Judge