Court of Queen's Bench of Alberta

Citation: West Coast Installations Inc v Frazier Industrial Company, 2015 ABQB 257

2015 ABQB 257 (CanLII)

Date: 20150420
Docket: 1301 14981
Registry: Calgary

Between:

West Coast Installations, Inc.

Plaintiff

- and -

Frazier Industrial Company

Defendant

Corrected judgment: A corrigendum was issued on April 24, 2015; the corrections have been made to the text and the corrigendum is appended to this judgment.

Memorandum of Decision
of
A.R. Robertson, Q.C., Master in Chambers

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[1] These are two cross applications to decide whether this collection action, involving the enforcement of a claim commenced under the *Builders' Lien Act*, RSA 2000, c. B-7 should be referred to arbitration in New Jersey, which is what the contract between the plaintiff and defendant provides.

[2] The contract also provides that the laws of New Jersey apply.

Facts

[3] It is common ground that the work was done in Alberta and, aside from these two provisions in the contract, there is no connection with New Jersey. There is an unrelated claim that has been raised by the defendant in a counterclaim for purposes of set-off.

[4] The contract specifically provides for arbitration in New Jersey to resolve any conflicts, unless the parties agree otherwise. There is no express agreement "otherwise", that is, not to arbitrate New Jersey, but the plaintiff argues that the actions of the defendant indicated an agreement not to arbitrate in New Jersey by its pleadings in this case.

[5] The defendant has not only filed a statement of defence in this court, it has counterclaimed for monies arising out of a separate contract. The plaintiff, as defendant by counterclaim, has pled to that issue, anxious to have everything resolved in one place at one time. The plaintiff argues that the jurisdiction of the Alberta court has been accepted by agreement, reflected by the fact that both of the parties have delivered pleadings. By attorning to this court, the plaintiff says, the parties have agreed not to arbitrate in New Jersey.

[6] The selection of New Jersey law is not determinative. An Alberta court can hear a case involving the laws of another jurisdiction, as awkward as it may be to do so. It may require expert evidence as to what the laws are of the other jurisdiction, if the parties cannot agree.

[7] The defendant points out that the statement of defence expressly pled that Alberta was the wrong forum for the resolution of this dispute. Pursuant to Rule 3.57, a counterclaim must be filed and served on the defendant by counterclaim within the same time. Having raised the arbitration in its defence, it was not necessary to raise it again in the counterclaim.

[8] After the matter was initially argued orally, I was advised (by agreement between counsel) that a letter had been sent by the defendant to the plaintiff, after the statement of claim was served but before the defence and counterclaim were filed. The defendant not only said the matter should go to arbitration, but it also asserted that the agreement meant that there should have been no builder's lien registered and no statement of claim filed under the *Builders' Lien Act*. The defendant demanded that the lien be "immediately discharged".

Chronology of Court Proceedings

[9] The statement of claim was filed December 19, 2013 to enforce a builder's lien. It pleads that the statement of lien was filed on June 27, 2013.

[10] A consent order was granted, with the consent of both the defendant and the landowner (which was originally a defendant but against whom proceedings have since been discontinued), on May 28, 2014 allowing a bond to be posted by this defendant and discharging the lien from title.

[11] The statement of claim was amended on June 13, 2014 to increase the claim by another $98,196, not covered by the builder's lien. A statement of defence was filed on behalf of both the landowner and this defendant on July 9, 2014.

[12] Paragraph 12 of the statement of defence specifically states that, "This action is barred and should be dismissed in accordance with arbitration clause set out at paragraph 22 of the agreement…" On the same day, the defendant filed a counterclaim alleging negligence, damages, and a $19,456.14 claim in respect of work on a different project which, according to

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the claim, was performed in Alberta but which I am told by counsel was performed in British Columbia.

[13] The next day, on July 10, 2014, the plaintiff, as defendant by counterclaim, filed a statement of defence to the counterclaim. That same day, apparently immediately prior to the statement of defence to counterclaim being filed, the counterclaim was amended to delete the reference to the landowner. A partial discontinuance of claim as against the landowner was filed on July 21, 2014.

[14] On September 18, 2014 the plaintiff served its affidavit of records.

[15] On November 6, 2014, the defendant served a demand to arbitrate, raising in the document the same issues as were already the subject of the lawsuit in Alberta.

[16] On November 19, 2014 plaintiff brought its application for a declaration that the Alberta Court of Queen's Bench is the correct forum.

[17] On December 16, 2014 the defendant filed its application for a stay of proceedings because the matter should be resolved by arbitration in New Jersey.

The International Commercial Arbitration Act

The Text of the Act

[18] The applicable legislation addressing arbitration is the *International Commercial Arbitration Act*, RSA 2000, c. I-5. The *Act* defines "Convention" as meaning "the Convention on the Recognition and Enforcement of Foreign Arbitral Awards adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958, as set out in schedule 1".

[19] The *Act* defines "International Law" as meaning "The Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in schedule 2."

[20] Section 2(1) of the *Act* says, "Subject to this Act, the Convention applies in the Province."

[21] Section 4(1) of that act says, "Subject to this Act, the International Law applies in the Province."

[22] Section 10 provides:

> Where, pursuant to article II(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

The Convention

[23] The Convention, being Schedule 1 of the *Act*, states, in section 1 of Article I,

> This Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a State other than the State where the recognition and enforcement of such words are sought, and arising out of differences between persons, whether physical or legal. It shall also apply to arbitral awards not considered as domestic awards in the State where the recognition and enforcement are sought.

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[24] Section 3 of article II of the Convention states:

> The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[25] The important points to note are (a) the Convention addresses the conduct of the arbitration, not just the recognition and enforcement of arbitral awards, and (b) there is no stated deadline by which the request for referral to arbitration must be made.

The Model Law ("The International Law")

[26] Schedule 2 is the Uncitral Model Law on International Commercial Arbitration and section (1) of Article 1 provides, "This Law applies to international commercial arbitration, subject to any agreement in force between this State and any other State or States."

[27] Article 8 (found in Chapter II) provides as follows:

> (1) A court before which an action is brought in a matter which is the subject of the arbitration agreement shall, *if a party so requests not later than when submitting his first statement on the substance of the dispute*, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> [Emphasis added]

The Discrepancy

[28] Accordingly, there are similar provisions in both the Convention and in the Model Law. Both require the court to refer matters which are subject to an arbitration agreement to arbitration. However, there is a discrepancy between the two provisions quoted. Under the Model Law, it is only mandatory to refer the matter to arbitration, "if a party so requests not later than when submitting his first statement on the substance of the dispute".

[29] But if the request is not made then, the Model Law does not *prohibit* the reference to arbitration, and section (2) of Article 8 allows arbitral proceedings to continue, "while the issue is pending before the court."

Submissions

[30] The defendant submits that it has requested that the matter go to arbitration and that the Court has no discretion to refuse that request. It says the Convention makes that clear, notwithstanding the deadline set out in Article 8 of the Model Law. In the alternative, it says it met the deadline.

[31] It is the position of the plaintiff that the request for arbitration was first raised in the statement of defence, which, in the circumstances, would be the defendant's "first statement on the substance of the dispute", but that that is too late. Furthermore, as mentioned, the plaintiff argues that by filing a counterclaim including a claim arising out of a separate matter which is not subject to an arbitration agreement, the defendant has invoked the jurisdiction of the Alberta courts.

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[32] Further, the plaintiff points out that the arbitration agreement is not absolute and that the defendants actions amount to an agreement that the matter is not to go to arbitration.

[33] In *ABN Amro Bank Canada v. Krupp Mak Maschihnenbau Gmbh*, 91 O.A.C. 229, 1996 CarswellOnt. 1815, the Ontario Divisional Court was dealing with facts very similar to those here. The Court dealt with section 8 of the Model Law, which was adopted by Ontario legislation, but it was not dealing with a builder's lien claim (or construction lien claim, as they are known in Ontario).

[34] Nonetheless, pleadings were commenced in the Ontario courts and then the defendant wrote to counsel for the plaintiff pointing out the arbitration clause in their agreement. Defence counsel invited the plaintiff to review its claim to see whether it was prepared to have all aspects of the claim submitted to arbitration. Counsel for the plaintiff disagreed and demanded a statement of defence within the time limits provided in the *Rules of Civil Procedure*, so the defendant's counsel served its statement of defence and counterclaim, but in the pleading the defendant set out the terms of the arbitration clause and stated that the arbitration court in Zürich, Switzerland had sole jurisdiction thereunder.

[35] The matter initially came before the Ontario General Division Court. Haley, J. refused to refer the matter to arbitration: [1994] O.J. No. 3044, 21 O.R. (3d) 511. She held that the request contemplated by Article 8 required a formal court application. She held that neither the prior letter nor the plea contained in the defence satisfied the requirement of Article 8 that the party seeking the referral to arbitration make its request "not later than when submitting his first statement on the substance of the dispute".

[36] On appeal, the Divisional Court disagreed. The majority of the Court noted that article 8 of the Model Law did not require the party to make a request for arbitration *before* the delivery of the statement of defence, but rather "not later than when submitting his first statement on the substance of the dispute". The Court reviewed the analytical commentary contained in the report of the Secretary-General to the 18th session of the United Nations Commission on International Trade Law, which noted that a time element had been added for a request to refer the matter to arbitration. That is what appears in Article 8.

[37] Within paragraph 13 of its decision, after quoting from the commentary, the Court stated:

> I find that Krupp's statement of defence and counterclaim, in the context of the correspondence between counsel at the time, constituted a request "not later than when submitting [its] first statement on the substance of the dispute". The effect of [the ruling of the chambers judge below] is to require that a request be made before a party's first statement which is contrary to the express wording of both Article 8 and the Commentary. Indeed, it is a return to the requirement of a procedural plea at an earlier stage than any pleading, a concept which the Commentary makes clear has been done away with. *With the greatest of respect, it is too technical to require that Krupp should also have served a Notice of Motion before pleading or actually have appeared before a court on or before filing its first pleading*. Krupp was pursuing its motion to refer prior to, concurrent with and after filing its statement of defence. In fact, I do not understand that Krupp took any further step in the action in so far as it pertained to the matters Krupp sought to have referred to arbitration. Thus, it is untenable to contend that Krupp did not commit itself until it formally brought its motion or until it was

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> actually before the court. If this was the position of counsel for ABN from the outset, Krupp's counsel should have been so advised, given the state of the correspondence between counsel at the time.
>
> [Emphasis added.]

[38] *Ruhrkohle Handel Inter GmbH v. Fednav Ltd.*, [1992] F.C.J. No. 473, 144 N.R. 70, was a decision of the Federal Court of Appeal which was followed by the chambers judge in *ABN Amro Bank*. In *Ruhrkohle*, the parties who sought to have the claim referred to arbitration were the plaintiffs. Having started the court proceedings, after the defendants pled to the case in Federal Court, the plaintiffs applied to have the matter referred to arbitration. In light of section 8 of the Model Law, they were too late. At page 5 of the F.C.J. report, the Court said:

> For the [Commercial Arbitration] Code to be effective, the parties must know that in whatever court they make a request for reference to arbitration, such request shall be made, in order to deprive that court of any discretion, before *or at the very precise moment* they submit in that court their first statement on the substance of the dispute. That very precise moment may vary from one jurisdiction to another ....
>
> [Emphasis added.]

[39] Since *Ruhrkohle* was specifically referred to by the chambers judge in *ABN Amro Bank*, to the extent that it may be said to support the proposition that a formal application must be brought before defending, I must conclude that the Divisional Court did not agree. In any event *Ruhrkohle* is distinguishable on the facts, whereas the facts in *ABN Amro* are very similar to the facts of this case.

[40] I was also referred to two decisions of the Ontario Superior Court, General Division that did not follow the Divisional Court decision.

[41] The first was *Coldmatic Refrigeration of Canada Ltd. v. P.U.M.A. s.r.*, [1998] O.J. No. 1697, 21 C.P.C. (4th) 267, a decision of the Ontario Court of Justice (General Division). The Court referred to the chambers judge's decision in *ABN Amro Bank*, but not the Divisional Court's reversal of that decision. It appears that the Court in 1998 in *Coldmatic* was not advised of the reversal.

[42] Although it is correct to say that Ontario decisions are not binding upon me they are persuasive, and specifically in the context of interpreting and applying international arbitration legislation it is of obvious importance that to the extent the law be applied consistently it should be. I cannot properly follow a decision of the Ontario General Division which did not follow a decision which was binding upon it, being the Divisional Court decision from 1996.

[43] Counsel for the plaintiff also referred me to *Bouchan v. Slipacoff*, [2009] O.J. No. 156, another decision of the Ontario General Division, which also followed the 1994 *ABN Amro Bank* chambers judge's decision that had been reversed in 1996. Just as I cannot follow the *Coldmatic* decision, I cannot follow *Bouchan*. However, in addition, *Bouchan* involved a distinct oppression claim under the *Business Corporations Act*, RSO 1990, c. B 16 that was outside the scope of the arbitration clause. Accordingly, the dispute was not referred to arbitration for that reason, and so it is distinguishable.

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Analysis

[44] The Divisional Court made it clear in *ABN Amro Bank* that the request for arbitration can properly be made in the statement of defence, particularly when the request was previously made in correspondence. The Court held that Article 8 of the Model Law specifically allows the request to be made at that time.

[45] I agree. When a statement of claim is filed, the Court is "requested" in the prayer for relief to do something. No one expects that the decision will be made forthwith. The plea satisfies the requirement of limitations legislation without a corresponding motion for judgment. I see no reason why a "request" for the matter to be referred to arbitration in accordance with a contract between the parties cannot also be made in a pleading - it specifically satisfies the requirement of Article 8.

[46] A review of the decision of the Divisional Court makes it clear that the reference to the prior letter was simply a "belt and suspenders" approach to its decision. I do not see the letter as being an important element of the decision, although there was such a letter here as well. Here, the defendant specifically pled the arbitration agreement, and since the *Alberta Rules of Court* effectively require a counterclaim to be filed at the same time as a statement of defence (or, at least, before that time for delivery of the defence has run which in practical terms means that they are usually filed together), it is not surprising that it also pled its counterclaim, just as Krupp did in *ABN Amro Bank*.

[47] This is a different circumstance than the case that was before our Court of Appeal in *O'Hara v. Wawanesa Mutual Insurance Co.*, [1990] A.J. No. 812, 72 D.L.R. (4th) 759. In that case the Court was dealing with an application where the *Arbitration Act*, RSA 1980 c.A-43 applied. That legislation specifically required an application to be made before filing a statement of defence. (The current *Arbitration Act*, RSA 2000, c. A-43, does not say this – s. 7 requires the court proceedings to be stayed unless the application "was brought with undue delay".)

[48] This is also a different circumstance than the case before our Court of Appeal in *Hnatiuk v. Assured Developments Ltd.*, 2012 ABCA 97, 522 A.R. 3 at para. 43, where the defendant did not raise the question of the arbitration clause at all – it was first raised by the trial judge at the beginning of the trial. The defendant was held to have attorned to the jurisdiction of the Court.

[49] Given that the counterclaim was effectively due at the same time as the defence (where the request was made), the filing of the counterclaim without a repetition of the request cannot be seen as withdrawing the request. Without knowing for certain what a court might later do, it would have been imprudent not to file the counterclaim at the same time (so as to avoid the possibility of having to seek leave to file it late). I am not troubled by the fact that the counterclaim asked for set-off due to an outstanding debt it claims resulted from another project that was not subject to an arbitration clause. The existence of the debt claim is likely properly part of this claim anyway (in arbitration or court proceedings) and if the counterclaim were to proceed in court the set-off claim would properly have been part of the plea.

[50] Simply repeating the request to have the matter referred to arbitration in the counterclaim, filed at the same time as the defence, would have been pointless.

[51] That does not mean that the Alberta court has no jurisdiction. Section 8 of the *Builders' Lien Act* makes it clear that the parties cannot contract out of the remedies provided by it. Any such agreement "is against public policy and void."

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[52] That does not mean that the parties to a contract cannot agree to have the substance of any dispute referred to arbitration, but it means that the party who has done the work cannot be prevented from claiming a builder's lien and similarly the landowner or the general contractor cannot be prevented from providing security to stand in place of the lien under section 48 of the *Builders' Lien Act*. These are remedies available under the legislation.

[53] The courts have long accepted that the *Builders' Lien Act* and arbitration are compatible. Furthermore, the Model Law allows for recognition of local law having application in certain circumstances. Article 1, section (5) of the Model Law expressly states this:

> This Law shall not affect any other law of this State by virtue of which certain provisions may not be submitted to arbitration or may be submitted to arbitration only according to provisions other than those of this Law.

[54] As well, Article 9 of the Model Law specifically contemplates interim measures of protection, before or during arbitral proceedings, from a court.

[55] Cases addressing the peaceful co-existence of builders' lien claims and arbitrations include *Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*, 1992 CanLII 429 (B.C.S.C.); and *BWV Investments Limited v. Saskferco Products Inc.*, 1994 CanLII 4557 (SKCA).

[56] In *Tanar Industries Ltd. v. Kvaerner Enviropower Inc.*, 1994 CanLII 9242 our Court of Appeal said, in paragraph 46, that, "This court has stated more than once that when the parties agree to arbitration, the court shall favour giving effect to their agreement and preclude them from litigating in the courts". It is only in "exceptional circumstances" where a forum selection clause would be unenforceable: *TBM Transportation Ltd. v. Tri-Star Transport Ltd.*, 2011 ABCA 358. That case dealt with the selection of the courts of Saskatchewan to resolve disputes, but the principle applies equally here.

[57] As to the arguments about "attornment", the concept relates to whether the parties have accepted the jurisdiction of the court, but in the case of a claim under the *Builders' Lien Act*, the arguments do not apply. The parties cannot take away the court's jurisdiction: s. 8, discussed above. The question is whether the court should exercise its jurisdiction: *Momentous.ca Corporation v. Canadian American Association of Professional Baseball Ltd.*, 2010 ONCA 722, 103 O.R. (3d) 467 at para. 44.

Conclusion

[58] Accordingly, the application for stay of proceedings brought by the defendant (plaintiff by counterclaim) is allowed and the matter is referred to arbitration pursuant to the parties' agreement in, New Jersey. The security is to remain and the parties have leave to apply to the court for release of the security or other directions as may be appropriate after the conclusion of the arbitration proceedings, or upon settlement of the dispute.

[59] The plaintiff's application for a declaration that the defendant has waived its right and ability to rely on the arbitration clause, and that it has attorned to the Alberta Courts and related relief is dismissed.

[60] Costs may be spoken to, if the parties cannot agree.

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Heard on the 7th and 16th days of April, 2015.

Dated at the City of Calgary, Alberta this 20th day of April, 2015.

A.R. Robertson, Q.C.
M.C.C.Q.B.A.

Appearances:

Craig O. Alcock and Danielle Murynka
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Corrigendum of the Memorandum of Decision
of
A.R. Robertson A.R. Robertson, Q.C., Master in Chambers

The closing has been changed to Heard on the 7th and 16th days of April, 2015.

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