Alberta Court of Queen's Bench
Borowski v. Heinrich Fiedler Perforiertechnik GmbH
Date: 1994-08-12

J.K. Friesen, for plaintiff.

S.M. Anderson, for defendants.

(Doc. Edmonton 9403-04783)

August 12, 1994.

[1] MURRAY J.:– The application was initially brought to stay or set aside the Statement of Claim and the ex parte Order granted by Madam Justice Nash on March 18, 1994 which restrains and enjoins the Defendants from disposing of or removing certain of their assets from the Province of Alberta, directs ex-customers of the Defendants to pay monies into Court and restrains and enjoins another customer from disposing of the purchase monies arising from certain sales. The Defendants say that the Alberta Courts have no jurisdiction and if they do, the dispute should be remitted to the State of Georgia for arbitration.

[2] Heinrich Fiedler manufactures and sells equipment to forest industries on a worldwide basis. By an agreement, signed in Germany on March 9th, to be effective the 13th day of April 1992, the Plaintiff assumed the duties of regional sales manager for Heinrich Fiedler Perforier-technik GmbH ("Heinrich Fiedler") for British Columbia, Saskatchewan, Alberta, Washington, Oregon and California (hereinafter referred to as the "contract"). His salary was set at $66,000, he was entitled to certain collateral benefits, the use of a car and an expense account.

[3] The contract anticipated that Heinrich Fiedler would form a wholly owned subsidiary company in the United States, likely in the State of Georgia, which explains the arbitration provision location and the governing law. Heinrich Fiedler was permitted to assign its interest in the agreement to that company. Paragraph 5 of the agreement contains a two-year restrictive covenant in the event of termination which territorially is extremely broad. The termination provisions provided:

> 7. *Termination*
>
> a) Each party may terminate this Agreement by thirty (30) days written notice. It is expressly agreed that neither party can make any claim for damages, further compensation or other severance payment due to the termination of this Agreement.

There is a clause providing for termination for cause without notice but as yet no one has suggested it is applicable. The contract also contains arbitration and governing law clauses which read as follows:

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11. *Arbitration*

Any controversy or claim arising out of or relating to this Agreement as the breach hereof shall be submitted by the parties to binding arbitration by submitting same for arbitration in accordance with its Commercial Arbitration Rules to the American Arbitration Association and judgment upon any award rendered in such arbitration may be entered in any court having jurisdiction thereof. The arbitration proceeding shall be conducted in Atlanta, Georgia.

12. *Governing Law*

In anticipation of the assignment of this Agreement to a wholly owned subsidiary of Employer most likely to be found under the laws of the State of Georgia, the governing law of this Agreement and the performance thereof shall be construed, interpreted, applied and governed in all respects in accordance with the laws of the State of Georgia without giving regard to the rules or conflicts of law.

[4] In May of 1992 Heinrich Fiedler provided the Plaintiff with a travel expense floater of $6,000 which was to remain in place until termination of employment and at that time it was to be used to offset any outstanding travel expense claims.

[5] By a letter dated October 14, 1992 Heinrich Fiedler wrote Borowski as follows with respect to termination:

> As agreed upon with you today, the contract between Heinrich Fiedler Perforiertechnik GmbH, Weidener Str. 9, D-8400 Regensburg (Employer) and yourself will be complemented as follows:…
>
> 3. Termination
>
> Termination will be 6 months to the month's end instead of 30 days following the month's end, notice has to be given in writing …

The Defendants do not agree that the contract was so amended.

[6] The Defendant, Fiedler Corporation, was incorporated in the State of Georgia in August 1993, to deal with selling of the parents' equipment in North America. The contract was assigned to Fiedler Corporation as contemplated.

[7] By letter of August 19, 1993 Heinrich Fiedler advised the Plaintiff that his territory was now British Columbia, Alberta and Saskatchewan. A new proposed employment contract between Fiedler Corporation and the Plaintiff was enclosed; however, it was never executed.

[8] The practice followed by the Plaintiff when he obtained an order from a customer was to forward that order to Heinrich Fiedler who would then ship the item to him and invoice him in his trade name, Western Screen Tech. When the goods arrived from Germany the Plaintiff would deliver them to the customer and invoice the customer in the name of Western Screen Tech. Payment would be made and the Plaintiff would then forward all the monies to Heinrich Fiedler. The Plaintiff says that in reality, property in the

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goods never passed to the Plaintiff or Western Screen Tech but rather that trade name was used simply as a conduit to accommodate the wishes of Heinrich Fiedler.

[9] By letter dated October 27, 1993 Heinrich Fiedler confirmed that the contract had been assigned to Fiedler Corporation and that his pay, travel and office expenses would now be paid from Atlanta. His office expenses continued to be paid from Germany. There was reference made to the contract and the method of payment of bonus monies. That document concluded insofar as the contract was concerned by saying "all other agreements are invalid". Whether or not the Plaintiff ever agreed to what was stated in the October 27th letter such as to alter the terms of the contract is in dispute. Certainly the August 19th draft contract was never executed. In addition, by the October 27th letter, Heinrich Fiedler advised the Plaintiff not to use the name Western Screen Tech anymore when dealing with its customers.

[10] By letter dated February 2, 1994 Fiedler Corporation, after referring to the failure of the Plaintiff to attend a meeting in Montreal on that date, terminated his employment and enclosed a document which reads:

> Termination
>
> Herewith, we give Mr. Borowski his notice on schedule and as stipulated in the Employment Agreement dd April 13th, 1992 according to Seven "termination" on March 11, 1994.

On February 7th counsel for the Plaintiff wrote Heinrich Fiedler proposing terms of settlement and seeking advice on certain matters. On March 15th the Plaintiff commenced these proceedings claiming six months' salary and loss of benefits in the total sum of $58,002 as well as back salary and monies owing totalling $28,413.49.

[11] On March 18th Madam Justice Nash granted an injunction to the Plaintiff ex parte enjoining the Defendant from disposing of or removing from Alberta certain assets, directing one customer of Fiedler Corporation to pay purchase monies into Court and enjoining another from disposing of purchase monies arising from sales made to it.

[12] On the 28th of March 1994 the present application was filed pursuant to R. 27 which specifically provides that such application shall "not be deemed to be a submission to the jurisdiction of the Court". I have since been advised by counsel that the Defendants intend to continue doing business in Alberta and will be attorning to the jurisdiction of this Court.

[13] By Order dated May 20, 1994 I directed:

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1. The Defendants (Applicants), or either of them, may post a bond, the form of which is attached, as surety in the amount of $86,415.49 with the Court of Queen's Bench;

2. The cost of the bond, which is $1,000.00, shall be paid, upon the obtaining of the bond, in equal shares by the Plaintiff (Respondent) and the Defendants (Applicants) and the eventual cost of the bond shall be in the cause;

3. Upon the Defendants (Applicants), or either of them, posting a bond in the amount of $86,415.49 with the Court of Queen's Bench, and serving a filed copy upon the Plaintiff (Respondent), the following is immediately effective:

(a) Paragraphs 1, 2, 3, and 4 of the ex parte Order, granted by Madam Justice Nash in the within action on March 18, 1994 (the "ex parte Order"), are set aside; and

(b) The Plaintiff (Respondent) is directed to return, within a reasonable time, as mutually agreed, to the Defendants (Applicants) all items listed in paragraph 1 of the ex parte Order.

I understand this has now been acted upon and completed.

[14] Should these proceedings be stayed pending disposition of the matters in dispute by way of arbitration in Georgia or, if not, in Alberta?

[15] The Defendant argues that para. 11 is worded such as to require that the rights of the parties shall be determined by arbitration as a condition precedent to an action being brought and until this has taken place, no Court has jurisdiction to hear the matters in dispute, assuming they fall within the scope of that arbitration clause. A similar clause was considered by the Ontario High Court of Justice in the case of *Planned Sales Ltd. v. Einson-Freeman International* (*Americas*)*Ltd.*, [1955] O.W.N. 443. I do not read the judgment of Mr. Justice McLennan as doing anything more than finding that that was an appropriate case to grant a stay and refer the matter to arbitration in New York. In my opinion, para. 11 is not a "*Scott v. Avery*" clause such that arbitration is a condition precedent to Court action.

[16] The clause in *Scott v. Avery* (1856), 5 H.L. Cas. 811, 10 E.R. 1121, read [p. 1123 E.R.]:

> "… the obtaining the decision of such arbitrators on the matters and claims in dispute, is hereby declared to be a condition precedent to the right of any member to maintain such action [at law] or suit [at equity]."

At common law an agreement to oust the jurisdiction of the Courts was invalid. However, if the parties agreed that their rights were to be determined by arbitration as a condition precedent to the accrual of a complete cause of action and therefore to the Courts having jurisdiction, such an agreement was valid. This was the case in *Scott v. Avery* (supra). Reference is made to the judgment of Lord Coleridge at pp. 1133 and 1134 and those of Lord Justices Scrutton and Atkin in the case of *Czarnikow v. Roth,Schmidt & Co.* (1922), 92 L.J.K.B. 81 (C.A.), at pp. 86 and 87 respectively.

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[17] The wording of the clause is the key. If the covenant is framed so there will be no cause of action until after arbitration, then the parties must arbitrate before seeking a remedy in the courts of law, but, if the wording is such that the arbitration will only arise after a cause of action has arisen then the courts are not excluded. See Bramwell B. in *Horton v. Sayer* (1859), 157 E.R.993.

[18] To my mind, para. 11 does not require that before a cause of action accrues to the benefit of either party, there must first be a determination by arbitrators of either liability, quantum of damage, or both. I would refer to the cases of *Karlsen Shipping Co. v. Sefel J. & Associates Ltd.* (1977), 2 Alta. L.R. (2d) 170 (T.D.); *Scotia Realty Ltd. v. Olympia & York SP Corp.* (1992), 9 C.P.C. (3d) 339 (Ont. Gen. Div.); and *Northwestern Utilities Ltd. v. Peyto Oils Ltd.* (1983), 49 A.R. 1 (Q.B.). In the result, I am of the opinion that para. 11 does not oust the jurisdiction of this Court to consider this matter.

[19] If the *Arbitration Act*, S.A. 1991, c. A-43.1, is applicable, s. 5(2) provides that a "*Scott v. Avery*" clause in a contract is to be treated as any other arbitration agreement. The term is defined:

> 1(1) …
>
> (*a*) "arbitration agreement" means, subject to subsections (2) and (3), an agreement or part of an agreement by which 2 or more persons agree to submit a matter in dispute to arbitration.

Certainly para. 11 is an arbitration agreement within the scope of that definition.

[20] Paragraph 12 of the contract provides that the governing law of the contract is to be that of the State of Georgia but that does not oust the jurisdiction of this Court. In my view, the position is properly stated by Culliton C.J.S. in the Saskatchewan Court of Appeal in *E.K. Motors Ltd. v. Volkswagen Canada Ltd.*, [1973] 1 W.W.R. 466. In that case the relevant covenant stated [p. 467]:

> "5) This Agreement is subject to the laws of the Province of Ontario and to the exclusive jurisdiction of her Courts."

His Lordship considered two questions. Firstly, what the proper law of the contract was and, secondly, whether the parties had agreed to oust the jurisdiction of the Saskatchewan Courts. At pp. 469 and 470 he stated:

> To oust the jurisdiction of the Saskatchewan courts it would be necessary to so agree in specific and definite terms. In *Westcott v. Alsco Products of Canada Ltd.* (1960), 45 M.P.R. 394, 26 D.L.R. (2d) 281 (Nfld. C.A.), Furlong C.J. stated at p. 284:
>
> "In order to oust the jurisdiction of the Newfoundland Courts it would have been necessary to have said so in express terms in the contract. This could have been done very simply by merely adding the word 'exclusive' before 'jurisdiction' in the clause. This has not been done, and it may well be that the parties deliberately

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> refrained from doing anything more than giving a concurrent jurisdiction to the Ontario Courts."
>
> I am in full agreement with the foregoing statement of Furlong C.J. In my opinion it clearly states the law. To hold otherwise would simply mean that parties could not, by contract, agree upon one court only having jurisdiction.

Paragraph 12 of the contract does not have this effect.

[21] Section 2(1) of the *Arbitration Act* provides:

> 2(1) This Act applies to an arbitration conducted under an arbitration agreement or authorized or required under an enactment unless
>
> (*a*) the application of this Act is excluded by an agreement of the parties or by law, or
>
> (*b*) Part 2 of the *International Commercial Arbitration Act* applies to the arbitration.

The Plaintiff takes the position that para. 11 excludes the application of this Act and the Defendants that Pt. 2 of the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 ("I.C.A.A."), applies and therefore the *Arbitration Act* does not.

[22] I do not agree with either submission. The Plaintiff says that because para. 11 specifies that the arbitration will be conducted in accordance with the commercial arbitration rules of the American Arbitration Association, that such constitutes an agreement to exclude the application of the *Arbitration Act.* Section 3 of the *Arbitration Act* permits the parties to agree expressly or by implication to vary or exclude any provision of that Act except with respect to seven matters, four of which are intended to ensure that the parties will receive due process and adjudication according to law and the fifth that the parties be treated equally and fairly. I do not have the American Arbitration Association rules or the relevant laws of the State of Georgia before me but I have heard nothing to suggest that these basic rights would be infringed. Those may be problems for another day. Section 39 deals with the right of a Court to allow the tribunal an extension of time in which to make its decision and s. 5(2), as mentioned, deals with "*Scott v. Avery*" clauses. For the purposes of this application and in determining whether or not to grant a stay of this action pending completion of arbitration, the provisions of the *Arbitration Act* which have not been varied or excluded are applicable.

[23] The Defendants say that the provisions of the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 ("I.C.A.A."), apply to this case. The I.C.A.A. defines the term "Convention" to mean the Convention of the Recognition and Enforcement of Foreign Arbitral Awards and the term "International Law" to mean the Model Law on International Commercial Arbitration. Both the Convention and Model Law apply in Alberta. Sections 2(2) and 4(2) of the I.C.A.A. provide:

> 2…

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(2) The Convention applies to arbitral awards and arbitration agreements whether made before or after the coming into force of this Part but applies only *in respect of differences arising out of commercial legal relationships,whether contractual or not.*

4…

(2) The International Law applies to *international commercial arbitration agreements and awards*, whether made before or after the coming into force of this Part.

[24] The issue is whether or not para. 11 is a "commercial legal relationship" as contemplated by s. 2(2) of the Convention and an "international commercial arbitration agreement" as contemplated by s. 4(2) of the Model Law.

[25] I was referred to very few authorities on this question. Our Court of Appeal in the case of *Pinebrook Golf & Country Club v. Alberta* (*Assessment Appeal Board*) (1984), 65 A.R. 236, dealing with the question of whether or not the lands of the golf course were "non-commercial recreation" lands as contemplated by regulations made under the *Municipal Taxation Act*, adopted the words of Mr. Justice Walsh of the Alberta Supreme Court in *R. v. Wah Kee*, [1920] 3 W.W.R. 656 at 656, where His Lordship said:

> I read the word "commercial" in the sense of relating to commerce partly on the *ejusdem generis* principle and partly because that is its ordinary and generally understood meaning. I do not think that it would occur to very many people that a man whose occupation is that of washing other people's dirty linen is carrying on a commercial business. The word "commercial" conveys to the mind the idea of dealing or trading in some article of commerce and that idea is strengthened here by the words "commercial * * business" being linked up with the words stores and shops. In a sense, of course, every business which has profit for its object and which of them has not, is a commercial business, but how absurd it would be for instance to call a boot-black's stand a commercial business.

The question in the *Wah Kee* case was whether or not a laundry operated by the Defendant was a commercial business.

[26] The following are some dictionary definitions of the terms "commerce", "commercial" and "trade". *The Shorter Oxford English Dictionary*, Third Edition, defines the word "commerce" as "Exchange between men of the products of nature and art; buying and selling together; exchange of merchandise, *esp.* on a large scale between different countries or districts." It defines the word "commercial" as "Engaged in commerce; trading. Of or relating to commerce or trade. Such as passes current in the transactions of commerce. Viewed as a matter of profit and loss." It defines the word "trade" as "Passage or resort for the purpose of commerce; hence, the buying and selling or exchange of commodities for profit; commerce, traffic, trading." *The Random House College Dictionary*, Revised Edition, defines the word "commerce" as "an interchange of goods or commodities, esp. on a large scale; trade; business." It defines the word "commercial" as "pertaining to, or characteristic of commerce, engaged in commerce, prepared, done, or

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acting with emphasis on saleability, profit or success." It defines the word "trade" as "act or process of buying, selling, or exchanging commodities, at either wholesale or retail prices, within a country or between countries: *domestic trade*',*foreign trade*; business, barter, dealing. TRADE is the general word: a *brisk trade between the nations.* COMMERCE applies to trade on a large scale and over an extensive area." *Webster's Third New International Dictionary* defines the word "commerce" as "the exchange or buying and selling of commodities esp. on a large scale and involving transportation from place to place." It defines the word "commercial" as "of, in or relating to commerce, as occupied with or engaged in commerce; related to or dealing with commerce." It defines the word "trade" as "the business of buying and selling or bartering commodities, exchange of goods for convenience or profit, commerce." The *Gage Canadian Dictionary* defines the word "commerce" as "buying and selling in large amounts between different places; business." It defines the word "commercial" as "of, for or having to do with commerce; made done or operating mainly for profit, especially at the expense of quality, artistic merit, etc." It defines the word "trade" as "the process of buying and selling; exchange of goods; commerce; an exchange; a bargain; business deal." There are other meanings for these words but these are some of the more appropriate in considering the issue in question.

[27] I agree with Hughes J.A. in the case of *New Brunswick* (*Minister of Municipal Affairs*)*v. Ashley Colter* (*1961*)*Ltd.* (1970), 10 D.L.R. (3d) 502 (N.B.C.A.), at p. 505, that given its ordinary and generally understood meaning, the term "commercial" relates to the buying, selling and exchange of commodities for profit.

[28] We are not concerned with a taxing statute in this case as was the situation in the above-noted cases. What we have is a contract of employment whereby the Plaintiff agreed to become the regional sales manager of the Defendant for a defined geographical area for an indeter-minant period of time. In consideration for his performing his duties, the Defendants agreed to pay the Plaintiff an annual salary, a possible bonus and other collateral benefits.

[29] The Defendants urged upon the Court that in reality the Plaintiff was an independent contractor. They point to a letter from the Defendant to the Plaintiff of February 2, 1994 wherein the president of Fiedler Corporation referred to an allegation that the Defendant had wished to work as an "independent representative" for Fiedler Corporation instead of being an employed sales engineer. He goes on to say that they had arranged the Montreal meeting for February 2nd to discuss that subject but since the Plaintiff called it off, they were terminating his contract. I do not read that letter as

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evidencing an agreed change in the employee/employer relationship. The Defendants also point to the fact that the products were shipped by the Defendant, the invoices were directed to the Plaintiff by his trade name, Western Screen Tech, and he in turn invoiced the customers under that name. Some of the correspondence between the Plaintiff and Defendants uses that trade name as well. In his affidavit the Plaintiff deposes that this was done in this way on the instructions of the Defendant. By its letter of October 27, 1993, Fiedler Corporation stated:

> 3rd Representation in Canada
>
> Heinrich Fiedler GmbH & Co. KG will be represented in Canada by the Fiedler Corporation, Atlanta, USA. You are employed by the Fiedler Corp. and therefore you have to address to all customers correspondingly (no Western Screen Tech anymore). Status: like your colleagues in the USA.

[30] In my opinion, the evidence before this Court does not alter the fact that this was a contract of employment giving rise to the status of master and servant and was not a contract for services to be performed either by an agent or by an independent contractor. This is not the type of relationship which one would consider to be a "commercial" legal relationship or as containing an agreement which one might describe as an "international commercial arbitration agreement." The relationship between the Plaintiff and Defendant has none of the earmarks of a "commercial" relationship as outlined in the dictionary definitions and indeed by our Court of Appeal and the Supreme Court of Alberta in the *Pinebrook Golf Club* and *Wah Kee* cases. As was the case in *Wah Kee*, I do not think it would occur to very many people that a contract creating the relationship of master and servant would be a commercial legal relationship or agreement.

[31] The Convention contains the following footnote:

> May 1987
>
> "The Government of Canada declares that it will apply the Convention only to differences arising out of legal relationships, whether contractual or not, which are considered as commercial under the laws of Canada, except in the case of the Province of Quebec where the law does not provide for such limitation."

It is interesting to note as well that the Legislature of British Columbia in its *International Commercial Arbitration Act* specifically includes a definition of "commercial" which in turn includes a list of fifteen different relationships which are considered to be "commercial". This list does not include a relationship of employer and employee.

[32] Were I to have found otherwise, I am bound by the decision of our Court of Appeal in *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 85 Alta. L.R. (2d) 287 [[1992] 3 W.W.R. 716]. Reference is also made to the British Columbia Court of Appeal decision in

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Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd. (1992), 43 C.P.R. (3d) 390.

[33] Do the matters in dispute fall within the ambit of para. 11? As pointed out by Kerans J.A. in the *Kaverit Steel* case at p. 295:

> In the absence of particulars, I can only say that the claim in question must be and is referred to arbitration *if* it relies upon the existence of a contract between the parties. If a claim is made out free of that reliance, it can go to trial. [Emphasis in original.]

The wording of the arbitration clause in *Kaverit Steel* provided [p. 289]:

> "Any dispute arising out of or in connection with this Agreement shall be finally settled without recourse to the courts, in accordance with the Rules of Conciliation and Arbitration of the International Chamber of Commerce, by one or more arbitrators designated in conformity with those Rules …"

[34] The wording of para. 11 is not as clear as one might wish. The relevant part reads:

> Any controversy or claim arising out of or relating to this agreement *as the breach hereof* shall be submitted by the parties to binding arbitration … (emphasis added)

The Defendants take the position that the word "as" should be read as "or" and refer to a similarly worded arbitration clause in the *Planned Sales Ltd.* case (supra) where the word "or" was used rather than "as". I have nothing before me to indicate that the parties intended the use of the word "or". The rules of interpretation assume that the words of a contract were intended to be used and to have a meaning unless to do so would give an absurd result, or unless the term cannot be meaningfully interpreted. The term "hereof refers to the employment contract. In my opinion, the words "as the breach hereof qualify the words "any controversy or claim". Thus, para. 11 only applies to a controversy or claim relating to an alleged breach of the contract. This is consistent with my view that arbitration is available only after a cause of action has accrued.

[35] Do the claims of the Plaintiff arise out of or are they related to an alleged breach of the contract? The Statement of Claim alleges facts giving rise to two causes of action:

1. for damages in the amount of $58,002 as a result of the Defendants purporting to terminate the contract without giving notice in accordance with its terms as amended;

2. for breach of contract in failing to pay the Plaintiff his salary for the month of February and March 1994 in the amount of $14,334; payment in lieu of 16 days' vacation in the sum of $5,289 and office and travel expenses of $8,790.49.

The Defendants do not dispute that they owe the Plaintiff $28,413.49 but say that they will be advancing a claim for damages and will be claiming that they are entitled to set those

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damages off against the amounts which they admit to owing the Plaintiff. Both claims of the Plaintiff are claims arising out of an alleged breach of the contract and in my opinion falls squarely within para. 11.

[36] The Defendant has not filed a Statement of Defence or counterclaim. The only knowledge I have of their position is contained in their written submission where they request a number of forms of relief from this Court in addition to a stay of this action and referral of the dispute to arbitration in Georgia. The majority of these claims arise by reason of the Order of Madam Justice Nash which by reason of my Order of May 20th are no longer alive.

[37] The damage claims alleged by the Defendants are based on the undertaking given by the Plaintiff to this Court when Madam Justice Nash granted her Order. In my opinion, this Court is the only forum that can determine whether or not loss or damage has resulted from one of its Orders and, if so, what the amount was. Such a claim would not fall within the ambit of the arbitration clause. There is also a claim by the Defendants for return of business documents and other assets which are not specified. There is no specific provision in the contract requiring return of these assets. There may well be a dispute as to which party certain assets belong. It would seem to me that an application in replevin would be appropriate.

[38] Counsel for the Defendant asks this Court to restrain and enjoin the Plaintiff from contacting customers of the Defendants pursuant to para. 5 of the contract. If the Defendants take the position that the Plaintiff is in violation of para. 5 then they can bring the appropriate application and the matter can be dealt with. I would expect that the validity of that provision would be an issue which would have to be decided by this Court insofar as it affects this Province. If para. 5 is valid then any damages which are alleged to have resulted may be issues within the scope of para. 11.

[39] The theory behind the 1991 *Arbitration Act* is that if the parties agree to submit their disputes to arbitration then one party should be able to hold the other to it.

[40] Section 6 of the *Arbitration Act* prohibits the Court intervening in matters governed by it with certain exceptions which are not applicable in this case. Section 7 requires this Court to stay the Plaintiff's action unless it is established that one or more of five grounds set out in s. 7(2) apply. The only two possible grounds are:

> (*c*) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;
>
> (*e*) the matter in dispute is a proper one for default or summary judgment.

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[41] The Plaintiff takes the position that the issue to be decided with respect to his claim for damages in lieu of notice turns on whether or not para. 7 of the contract was amended to provide for six months' notice. Plaintiff's counsel relies upon the decision of Mr. Justice O'Leary of this Court in the case of *Shell Canada Ltd. v. Vector Energy Inc.* (1989), 101 A.R. 226, where one question was whether or not a letter between the parties constituted an amendment to the contract. The wording of the arbitration clause read [p. 229]:

> "15.1 Any controversy arising out of this contract that cannot be resolved by discussion between the parties hereto shall be submitted to arbitration …"

At p. 231 His Lordship held:

> It cannot, however, be construed as an agreement to submit to arbitration the question of what documents or declarations make up the agreement of which the submission to arbitration is an integral part."

If the issue is whether or not there is a valid contract between the parties then I agree with His Lordship. That is not the case here.

[42] In this case, as noted earlier, the wording of para. 11 is "any controversy or claim arising out of or relating to this Agreement…" In my opinion, the controversy as to whether the contract notice period is thirty days or six months and whether or not the October 14, 1992 letter constituted an amendment to para. 7 is a controversy related to the agreement. The "subject matter" of the dispute is an action for breach of contract and damages in lieu of notice. What the proper notice period is, is one of the facts which the tribunal will have to determine. Breach of contract actions frequently involve a determination of whether there has or has not been a variation in a term of the contract. I feel that it would be defeating the underlying basis upon which the new *Arbitration Act* is founded to refuse to stay arbitration proceedings because such a dispute is one of the issues. In my view, the proper approach is to look at the Statement of Claim and determine what the cause of action is. If it falls within the scope of the arbitration clause then that issue or matter in dispute should be referred to arbitration. I agree with the observation of Mr. Justice Hickman in the *Gulf Canada Resources* case (supra) where he stated at p. 397:

> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

His Lordship was concerned with s. 8(1) of the Convention. To my mind, the same reasoning should be applied insofar as the *Arbitration Act* is concerned.

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[43] Were I to have found that the *Arbitration Act* did not apply and that the common law was what I must look to in determining whether or not to grant a stay, I would grant a stay. I have considered the judgment of Lord Macmillan in *Heyman v. Darwins Ltd.*, [1942] A.C. 356, [1942] 1 All E.R. 337 (H.L.). In my opinion there is not sufficient reason why the claim for damages in lieu of notice should not be referred to arbitration. The findings of the arbitral tribunal will be subject to such judicial review as the law of the State of Georgia permits.

[44] Based upon the pleadings as they presently exist and the admission by the Defendants that they owe the Plaintiff the sum of $28,413.49, the claim for unpaid wages, benefits and expenses is properly the subject matter of a summary judgment application. In my opinion s. 7(2)(*e*) of the *Arbitration Act* applies and the Statement of Claim insofar as that cause of action is concerned should not be stayed. The Defendants' position that they have a right to set-off in respect of damages is, at this point in time, speculative. The only claim for damages which has been suggested to this Court arises by virtue of the Order of Madam Justice Nash. Assuming that the *Arbitration Act* does not apply then, in my opinion, at common law the claim for wages, benefits and expenses owing would not be stayed. What is there to arbitrate when the claim is admitted? If the Defendants wish to advance a claim for set-off then the procedures are available in this Court and can be made use of by the filing of appropriate material if the Defendants so wish.

[45] The reasoning of Anderson J. in the case of *Dome Petroleum Ltd. v. Burrard Yarrows Corp.* (1983), 48 B.C.L.R. 370 (S.C.), is sound. His Lordship, dealing with a very similar situation, found that where one of the claims is undisputed it cannot be said to fall within the arbitration clause. I appreciate that the wording of para. 11 uses the terms "Any controversy or claim …" However, implicit in any arbitration agreement is the requirement that there be some difference or dispute between the parties. The Defendants have taken the position that this agreement is governed by the I.C.A.A. The definition of "Arbitration agreement" in the Model Law and the wording of art. II(1) in the Convention bear this out. The definition of "arbitration agreement" in the *Arbitration Act* is to like effect.

[46] In the result, I hereby stay the Plaintiff's claim for damages in lieu of notice and direct that the same be dealt with by arbitration in the State of Georgia as agreed upon. The claim for unpaid wages, benefits and expenses may proceed in this Court.

[47] The bond and letter of credit are a mere substitution for the assets frozen by Madam Justice Nash's Order. The Order was granted to free up the assets and prevent any further unnecessary or potential damages accruing either to the Plaintiff or Defendant

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as a result. If the ex parte injunctive relief was inappropriate that issue should be dealt with now that we have the Defendants' position before the Court.

[48] I am of the view that the injunctive relief granted by the Order of Madam Justice Nash should be set aside. As stated in *Aetna Financial Services Ltd. v. Feigelman* (1985), 15 D.L.R. (4th) 161 [[1985] 2 W.W.R. 97] (S.C.C.), the factors to consider when deciding whether or not the Court should exercise its discretion and grant a Mareva injunction are:

1. the Plaintiff must have a strong prima facie case;

2. the Plaintiff must have a belief that the Defendant has assets in the jurisdiction;

3. the Plaintiff must be willing to provide security for the Defendant's damages caused by the injunction; and

4. there must be a real risk that the remaining significant assets of the Defendant in the jurisdiction are about to be removed or disposed of to render the judgment nugatory.

[49] The materials before this Court do not establish any real risk that the assets in question would have been removed from the jurisdiction of this Court for the purpose of defeating any judgment the Plaintiff might recover. The Plaintiff had physical possession of the assets at his residence and at the time there was no present or imminent risk that the Defendants would remove the assets from Alberta. The Defendants, through their counsel, have advised this Court that they intend to attorn to its jurisdiction. Ms. Kite, in her affidavit, deposed that the Defendant did not intend to cease doing business in Alberta and did not intend to deal with the assets in question in any manner other than in the normal course of business. This does not mean that the assets would necessarily remain in Alberta. The Defendants say that they intend to continue doing business with their customers who are located in Alberta and have asked this Court to restrain and enjoin the Plaintiff from contacting those customers.

[50] In my opinion, what Madam Justice Nash's Order effectively did was to grant execution before judgment. Mr. Justice Estey in the *Feigelman* case (supra) at pp. 166 and 167 quoted and adopted what Sir Robert Megarry V.C. said in *Barclay-Johnson* v. *Yuill*, [1980] 3 All E.R. 190 at 193:

> In broad terms, this establishes the general proposition that the Court will not grant an injunction to restrain a defendant from parting with his assets so that they may be preserved in case the plaintiff's claim succeeds. The plaintiff, like other creditors of the defendant, must obtain his judgment and then enforce it. He cannot prevent the defendant from disposing of his assets pendente lite merely because he fears that by the time he obtains judgment in his favour the defendant will have no assets against which the judgment can be enforced. Were the law otherwise, the way would lie open

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> to any claimant to paralyze the activities of any person or firm against whom he makes his claim by obtaining an injunction freezing their assets.

Since my Order with respect to the bond was in lieu of the injunctive relief part of Her Ladyship's Order, it too should be set aside. However, the Plaintiff does not have the assets in his possession now. It may be that there are reasons why the bond should remain in place pending disposition of the litigation and/or arbitration, particularly with respect to the claim which is not in dispute. In the circumstances I would grant the Plaintiff sixty days from the date of this Order to make any further application he may wish in this regard, during which time the bond in question will remain in place subject to the terms of my Order of May 20th.

[51] The parties may speak to the issue of costs if they cannot agree.

Application allowed in part.

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