Date of Release: September 13, 1991

No. C914875
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

1991 CanLII 1735 (BC SC)

BETWEEN:	
BRIAN HARPER PLAINTIFF	REASONS FOR JUDGMENT OF THE HONOURABLE
AND:	
KVAERNER FJELLSTRAND SHIPPING A.S. DEFENDANT	MR. JUSTICE HOUGHTON IN CHAMBERS

APPEARANCES:

JOHN BROMLEY, ESQ. - Counsel for the Plaintiff

MARK D. ANDREWS, ESQ. - Counsel for the Defendant

DATE OF HEARING: August 20, 1991

This is an application for an order pursuant to Section 8 of the ***International Commercial Arbitration Act*** S.B.C. 1986 c.14, as amended, and Article II.3 of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards as enacted by the ***Foreign Arbitral Awards Act,*** S.B.C. 1986, c.74, staying the within proceedings.

Section 8(2) of the ***International Commercial Arbitration Act*** requires a stay to be ordered unless a court determines that the arbitration is null and void, inoperative or incapable of being performed.

Briefly, the facts are as follows. The Plaintiff is a businessman from Victoria. The Defendant is a Norwegian company engaged in international marine business. In February, 1991 representatives of the Defendant and Plaintiff discussed a proposed joint venture to establish and operate a high speed ferry service between Vancouver and Victoria. A letter of intent was signed between the Defendant and a company controlled by the Plaintiff outlining the structure of the proposed joint venture. The letter of intent included an agreement to arbitrate in London in the case of disputes.

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The Plaintiff claims he made various efforts and expenditures with respect to the proposed ferry service after the relationship was established between the parties. On June 12, 1991 the parties to this action entered into an agreement called the "Framework Agreement", setting out the proposed corporate structure and funding, providing for the purchase and ownership of vessels, division of profits and losses and the obligations of the parties and the timetable for the establishment of the ferry service.

The Framework Agreement contained the following arbitration agreement:

> " Any dispute arising out of or in connection with this agreement shall be referred to arbitration in London, England. Each Party shall nominate its own arbitrator who shall be a person experienced in commercial and shipping matters. English law shall apply. "

The Framework Agreement contained a number of subject clauses. Paragraph 5 reads "Subjects.....5.3 A signing of the purchase agreement for the vessels between the owner and Kvaerner Fjellstrand by June 19, 1991 with 10% pro rata down payment by each party. "

It is common ground that the Plaintiff was unable to come up with the funding.

The Plaintiff on July 11, 1991 commenced this action claiming:

> The Plaintiff's claim against the Defendant is for breach of confidence and unjust enrichment in that the Plaintiff and the Defendant have been working towards a joint venture to establish a ferry operation between Victoria and Vancouver, British Columbia. During the course of those efforts, the Plaintiff has expended monies, inter alia, to arrange for a moorage for the ferry, arrange for Canadian Steamship Inspection approval, and arrange for the remission of duty. The Defendant has wrongfully refused to continue to deal with the Plaintiff and has and is continuing to make use of the efforts of and results achieved by the Plaintiff to establish the ferry service without compensating the Plaintiff. The Defendant is and has been using, wrongfully, for its own benefit the information gathered by the Plaintiff with respect to the establishment of the ferry service which information was provided to the Defendant by the Plaintiff on a confidential basis.

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The first issue for the Court to consider is whether there is an enforceable arbitration agreement.

In 1986 Canada acceded to the Convention of the Recognition and Enforcement of Foreign Awards and B. C. passed the ***International Commercial Arbitration Act*** designed to protect and facilitate international arbitrations. In ***De La Garge*** v. ***Worsnop & Co.*** (1927) All E.R. 673 CLAUSON, J. said in dealing with a similar application to the one at bar:

> "The point which is made by the plaintiff who opposes this application is this: he says that the subject matter in dispute is the question whether the first condition referred to in cl. 5 has, or has not, been fulfilled, and that that is a matter within the arbitration clause. He says that, if that condition has not in fact been fulfilled -- and he says that it has not -- the contract is at an end, and that it is settled by authority which is binding on this court that, if the contract is at an end, the arbitration clause contained in that contract is no longer effective and can no longer be treated as a binding submission, and, accordingly, the provisions as to the stay of the

> action in the Arbitration Act, 1889, would not apply. In my opinion, that argument is based on a fallacy. If it be the fact that the condition has not been fulfilled, the result no doubt is this, that the obligation of the plaintiff to purchase has come to an end and cannot be enforced against him; but it has come to an end, not be reason of the occurrence of some event outside the consideration of the contracting parties, but by reason of certain events which have occurred, and which, by reason of the non-fulfilment of a condition, namely, the condition stated in cl. 5, subject to which the contract was expressly made, has resulted in his no longer being under an obligation to purchase.
>
> This dispute, whether or not, according to the true construction of cl. 5 in the light of the circumstances which have occurred, the plaintiff is or is not released from his obligation to purchase, seems to me to be a dispute arising as to a "clause, matter or thing in this agreement contained or otherwise relative thereto." The plausibility of the plaintiff's argument arises out of the fact that there are cases where a contract having been entered into with an arbitration clause comes to an end, not because one of the parties to the contract is, according to its terms as construed with reference to the events which have happened, released from his primary obligation under it, but because the contractual relation between the parties is destroyed, either owing to some fraud or some entirely external circumstance supervening, such a circumstance as supervened in the case in the Privy Council, which has been referred to of ***Hirji Mulji*** v. ***Cheong Yue Steamship Co.*** (2) where the contract had been frustrated by reason of the interposition of the Government by requisitioning the ship which was the subject-matter of the contract. It is true that if, for some reason of that kind, that is to say, by reasons of something occurring dehors the contract, the contract is brought to an end; when it is brought to an end the clause providing for submission to arbitration will die with it, but that does not seem to me to be this case. I see no reasons for doubting that this submission clause is still a binding contract between the parties, and that, in this particular case, there are plainly rights arising from the contract originally entered into which have to be worked out as between the parties. That, indeed, is really recognised by the plaintiff, when, in the endorsement of his writ, he claims that return of the deposit which has been paid under the contract."

The reasoning of CLAUSON, J. is applicable to case before me. The parties are released from their obligation to proceed with the purchase and operation of the vessel. However, there may be claims arising from the contract and the negotiations leading up to it. Whether the Defendant has wrongfully refused to continue to deal with the Plaintiff or has continued to make

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use of the efforts and results achieved by the Plaintiff to established the ferry service without compensating the Plaintiff would appear to arise directly out of the contract the parties have agreed to refer to arbitration.

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In addition, the principle of separability as stated in ***Pima Paint Corporation*** v. ***Flood & Conklin Mfg. Co.*** 388 US 395 is applicable.

In ***Bremer Vulka*** v. ***South India,*** (1981) 1 Lloyd's Law Reports, 253, Lord Diplock said at page 259:

> "The Arbitration Clause constitutes a self-contained contract collateral or auxiliary to the shipbuilding agreement itself."

The Court notes that Section 16 of the ***International Commercial Arbitration Act*** which applies to arbitrations to be held in British Columbia, states in sub-paragraph 1:

> 16. (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the invalidity of the arbitration clause.

This confirms that the British Columbia Legislature accepts the doctrine of separability.

The arbitration clause in the contract states: "Any dispute arising out of or in connection with this agreement shall be referred to arbitration."

It appears to be clear that the claims set out in the endorsement on the writ arise in connection with the contract for the purchase and operation of a ferry.

In ***Government of Gilbraltar*** v. ***Kenney and Another,*** (1956) 3 ALL E.R., 22 Sellers, J. held that a quantum meruit claim is one arising out of the contract and within an arbitration agreement.

The wording of the clause is wide and unambiguous. It was the parties intention to refer all the disputes arising out of this particular transaction to arbitration.

There will be an order staying all further proceedings in this action until further order. The Defendant is entitled to its costs of this application.

"HOUGHTON, J."

Kamloops, B. C.
September 10, 1991

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