COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Larc Developments Ltd. v. Levelton Engineering Ltd.,* 2010 BCCA 18

Date: 20100118
Docket: CA037113

2010 BCCA 18 (CanLII)

Between:

Commonwealth Insurance Company

Plaintiff

And

Larc Developments Ltd. and Rita A. Carle

Appellants (Defendants)

And

Levelton Engineering Ltd.

Respondent (Third Party)

Corrected Judgment: The paragraph numbering of the judgment was corrected at paragraph 14; and, from paragraph 33 onwards on March 19, 2010.

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Chiasson
The Honourable Mr. Justice Frankel

On appeal from: Supreme Court of British Columbia, April 29, 2009 (*Commonwealth Insurance Company v. Larc Developments Ltd.*, S076455)

Counsel for the Appellant: S.H. Stephens

Counsel for the Respondent: E. Flores

Place and Date of Hearing: Vancouver, British Columbia
December 15, 2009

Place and Date of Judgment: Vancouver, British Columbia
January 18, 2010

Written Reasons by:
The Honourable Mr. Justice Chiasson

Concurred in by:
The Honourable Madam Justice Newbury
The Honourable Mr. Justice Frankel

Reasons for Judgment of the Honourable Mr. Justice Chiasson:

Introduction

[1] Since 1977 the law of this Province has been that a demand for particulars is a step in a proceeding that, under applicable legislation, disentitles a party from obtaining a stay of the proceeding in favour of arbitration. In this case, the Chambers judge ordered a stay because the demand for particulars was accompanied by an indication that the demanding party might seek a stay in favour of arbitration.

2010 BCCA 18 (CanLII)

[2] For the reasons that follow, I would allow this appeal and set aside the stay of proceedings.

Background

[3] This action concerns claims arising out of the construction of leaky condominiums. The defendants were involved in the development of the project. On December 5, 2008 they initiated third party proceedings against a number of entities including Levelton Engineering Ltd. Levelton filed an appearance on December 18, 2008.

[4] The contract between the defendants and Levelton provided that "[a]t the option of [Levelton], all unresolved disputes shall be referred to and finally resolved by arbitration…".

[5] On December 29, 2008, counsel for Levelton wrote to counsel for the defendant stating:

> Further to our letter dated December 22, 2008, we are writing to demand further and better particulars of certain allegations contained in the Third Party Notice. Specifically:
>
> 1. Paragraph 12 of the Third Party Notice sets out alleged "Defects and Deficiencies." Such alleged Defects and Deficiencies are then generally referred to in paragraphs 30, 31 and 33 in specific reference to Levelton Engineering Ltd.

2. With respect to paragraph 12:

a. Subparagraph a, is it alleged that the condensation problems had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

b. Subparagraph b, is it alleged that the water ingress in the ceiling assemblies had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, identify all units alleged to have suffered water ingress in the ceiling assemblies and advise what it was that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

c. Subparagraph c, is it alleged that the installation and freezing of "frost free" hose bibs had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

d. Subparagraph d, is it alleged that the water ingress into units due to the inadequate or inappropriate application of waterproof membrane had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, which units were involved, when did the water ingress occur in respect of each unit and what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

e. Subparagraph e, is it alleged that the design, installation and/or supply of materials with respect to the porticos over the entry doorways to the units at Boxwood Green, and in particular defects in respect to drainage had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, which units are alleged to have suffered this defect or deficiency and what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

f. Subparagraph f, is it alleged that the design and construction of the roof and deck rails had

2010 BCCA 18 (CanLII)

anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency?

g. Subparagraph g, is it alleged that the water ingress through cracks in the parking garage had anything to do with the work or services provided by Levelton Engineering Ltd.? If it is, what was it that Levelton Engineering Ltd. did, or failed to do in respect of that alleged defect or deficiency? Further, where and when did the cracks first appear and was a claim made under the membrane manufacturer's warranty? If a warranty claim has been made please provide details of that claim.

We would be grateful if these particulars could be provided within two weeks of the date of this letter, as they are required for the preparation of a Statement of Defence.

In addition, we have reviewed the contract between our client and yours dated July 15, 2003 and note that paragraph 3.6 deals with Dispute Resolution. It is quite clear in our view that the dispute that is raised in the Third Party Notice is subject to this provision. Therefore, the litigation cannot proceed until mediation and if necessary, arbitration has occurred between our clients. In the circumstances we would expect your client to discontinue the Third Party proceedings against our client in order to avoid forcing us to apply to the Court for a stay of proceedings. If it is ultimately found that your client is liable to the plaintiff for any matter that may have been within the contractual responsibility of our client then we would be pleased to discuss mediation and arbitration in accordance with paragraph 3.6.

We look forward to receiving the particulars or your advice that the Third Party proceedings will be discontinued against Levelton Engineering Ltd. at your earliest convenience. If you do not receive instructions to discontinue these proceedings then please be advised that we will be seeking instructions to proceed with an application to the Court for an order staying these proceedings.

[6] No particulars were delivered and the third party proceedings were not discontinued.

[7] On February 10, 2009, Levelton applied for a stay of proceedings in favour of arbitration, which was granted on April 29, 2009 pursuant to s. 15(1) of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55:

2010 BCCA 18 (CanLII)

> 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

2010 BCCA 18 (CanLII)

The Chambers judgment

[8] The judge referred to the applicable legislation and contract provisions and noted that the defendants opposed a stay on the basis Levelton had taken a step in the litigation. This was based on *Fofonoff v. C and C Taxi Service Limited* (1977), 3 B.C.L.R. 159 (S.C.), which held that a demand for particulars is a step in a proceeding because Rule 19(17) of the *Rules of Court* requires a demand before an application for an order for particulars can be made under Rule 19(16).

[9] The judge also referred to J. Kenneth McEwan & Ludmila B. Herbst, *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations,* looseleaf (Aurora, Ont.: Canada Law Book, 2004), at paras. 21-23:

> [21] The portions of the text said to be relevant to the application at bar are as follows. First under the heading 30.40.40, "Step in a Proceeding":
>
>> Determining whether a step has been taken requires an objective approach. The court must ask itself whether on the facts the parties should be held impliedly to have affirmed the correctness of the proceedings and his or her willingness to go along with the determination by the courts of law instead of arbitration. In this regard "a step in the proceedings" means something in the nature of an application to the court and not mere talk between solicitors or solicitors' clerks nor the writing of letters but the taking of some step such as taking out a summons or something of that kind which is in a technical sense a step in the proceedings.
>
> [22] However, the "writing of letters" exemption is not absolute. For example a letter by counsel suggesting that the other party commence an action in which his or her clients would file a defence and seek full discovery of facts and documents is held to be a waiver of any right to arbitration that existed prior to the letter. See also the discussion of demands for particulars in s. 3, 40.40.80 following.
>
> [23] Under that heading the following is said to be of relevance:

> The exchange of letters reflecting a demand for particulars has been held to be the taking of a step which amounts to a step in the proceedings such that an application for a stay is barred where the rules of court require a demand before the motion can be brought, as in British Columbia.
>
> In this context but not under legislation where a prior application for particulars by letter is not mandatory, a demand for particulars appears to be a form of proceeding.

2010 BCCA 18 (CanLII)

[10] The judge found the defendants' submission based on the law of attornment and their assertion that at common law a party cannot attorn conditionally unhelpful.

[11] He distinguished *Fofonoff* stating:

> [26] It is clear from Ruttan J.'s judgment in *Fofonoff* that what [makes] a demand for particulars under Rule 19(17) a step in a proceeding, is the implicit assertion that it will, if necessary, be followed by a formal application under Rule 19(16). Where, as here, it is clear and explicit in the letter seeking particulars that the next formal step contemplated by the applicant was not to bring an application under Rule 19(16), even if necessary, but rather to seek to divert the dispute away from the court and into arbitration. It cannot be said objectively that the applicant was affirming the correctness of the proceedings or demonstrating a willingness to "go along with a determination by the courts of law."

Discussion

Step in the proceeding

[12] *Fofonoff* has been followed a number of times in the trial court (for example: *Reuna Ventures Ltd. v. Refco Futures (Canada) Ltd.*, [1996] B.C.J. No. 2148 (S.C.) per Lowry J., as he then was, in Chambers, at para. 4, "A demand is a step in the proceedings. Requiring adherence to the Rules is not."), but it does not appear to have been reviewed by this Court.

[13] In *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd* (1993), 81 B.C.L.R. (2d) 359, this Court considered whether a demand for discovery of documents was a step in the proceedings. In para. 5 Hollinrake J.A. referred to the position of the appellant:

> [5] The appellant submits that this Court should apply the principles set out by Ruttan J. in *Fofonoff v. C and C Taxi Service Limited* (1977), 3 B.C.L.R. 159 (S.C.) and conclude that service of a demand for discovery of documents is taking a step in the proceedings which bars a stay order under s.15(1).

2010 BCCA 18 (CanLII)

[14] In the result, the Court concluded it did not have to decide whether the demand was a step in the proceedings as envisioned in s. 15(1) because the demand was made in the context of s. 15(4) – interim measures of protection.

[15] It was not contended before us that *Fofonoff* was decided wrongly. In my view, the reasoning in the case is correct. The legislation under consideration in *Fofonoff* was substantively the same as the present s. 15(1). Mr. Justice Ruttan reviewed and considered authorities in Ontario and England. He quoted from *Ives & Barker v. Willans,* [1894] 2 Ch. 478 at 484:

> The authorities shew that a step in the proceedings means something in the nature of an application to the Court, and not mere talk between solicitors or solicitors' clerks, nor the writing of letters, but the taking of some step, such as taking out a summons or something of that kind, which is, in the technical sense, a step in the proceedings.

Ruttan J. continued on p. 162:

> But as Mr. Turnham in our present case submits, we have here not just an exchange of letters, but a procedure which shall be followed to secure a statement of particulars. It is the first stage in the proceeding to be followed by an application to Court if necessary. Thus it is in a technical sense at law "a step in the proceedings".

[16] I agree with that conclusion. As the authors of *Commercial Arbitration in Canada* note in para. 3:40.40, the question is whether a party has affirmed a willingness to have the matter resolved by the court or in arbitration. A demand for particulars does so.

Effect of demand in this case

[17] In my view, the issue in this case was not whether Levelton took a step in the proceeding. In this Province that question is answered by the delivery of a demand for particulars pursuant to the *Rules of Court*. In this case, it was clear a demand for

particulars was made. The issue is: can the implications of taking that step be rendered nugatory by considering whether or not a party intended to embrace the jurisdiction of the court? I think not.

[18] The authors of Commercial Arbitration in Canada commented on s. 15(1) of the Commercial Arbitration Act as follows:

> Under s. 15(1) of British Columbia's *Commercial Arbitration Act* and s. 8(1) of its *International Commercial Arbitration Act*, the application for a stay of proceedings may be made before or after entering an appearance and before the delivery of any pleadings or the taking of any other step in the proceedings. Accordingly, where a defence has been filed and delivered, the application for a stay of proceedings should be dismissed, even where the filing party indicated at an early stage that it wished the matter to be arbitrated–there is no ambiguity in the wording of the section, and, in any event, taking a purposive approach to interpretation (the section was intended to prevent the mischief of a party to an arbitration agreement having both the benefit of the court process and, if that did not achieve its purpose, the benefit of arbitration) would lead to the same result. (pp. 3-34-.1 – 3-35)

[19] I agree with these observations. A party should not be entitled to take the benefit of the litigation process – obtaining particulars – while preserving the ability to reject that process in favour of arbitration.

[20] It is instructive to place the stay provision into an historical legal context.

[21] In *Boutsakis v. Kakavelakis,* 2008 BCCA 13, 77 B.C.L.R. (4th) 113, this Court affirmed the fact that, absent a stay provision, a court cannot refuse to proceed with a case merely because the parties have agreed contractually to arbitrate. Madam Justice Newbury quoted from Fletcher Moulton L.J. in *Doleman & Sons v. Ossett Corporation*, [1912] 3 K.B. 257, a decision of the English Court of Appeal:

> ... the Legislature by the *Common Law Procedure Acts* introduced the machinery which is now provided for by s. 4 of the *Arbitration Act, 1889*. It enables the defendant to an action brought in breach of an agreement to proceed by arbitration to apply to the Court to stay the action, and the Court is given power so to do. Prior to the statutable provisions the Court could not refuse to settle any such dispute which was brought before it, because it not only had the jurisdiction but also the duty to decide that dispute if called upon so to do. It has under these provisions power to refuse its aid to a person who appeals to it in breach of an agreement to decide the matter by arbitration. But the statute very properly requires that the necessary

2010 BCCA 18 (CanLII)

> application so to do should be made by the defendant immediately on appearance and before taking any step in the action. If the defendant allows the action to proceed for a while, he cannot subsequently withdraw it from the Courts. If the Court thus refuses its assistance to the plaintiff, he is driven to have recourse to arbitration as his sole means of obtaining redress, and thus the original agreement to submit the matter to arbitration is indirectly enforced.
>
> The present position, therefore, of agreements to refer to private tribunals may be shortly expressed thus. The law will not enforce the specific performance of such agreements, but, if duly appealed to, it has the power in its discretion to refuse to a party the alternative of having the dispute settled by a Court of law, and thus to leave him in the position of having no other remedy than to proceed by arbitration. [Emphasis added by Newbury J.A.]

2010 BCCA 18 (CanLII)

[22] The stay provision acts to limit access to the litigation process. The limitation began as discretionary. It now is mandatory.

[23] The section under consideration in *Fofonoff* was permissive. It stated that the court "may" stay the litigation "if satisfied that there is no sufficient reason why the matter should not be referred…and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration".

[24] In its *Report on Arbitration* (Vancouver: The Commission, 1982) at pp. 30-35, the Commission considered competing positions favouring complete access to the court, particularly for questions of law and the evaluation of disputed evidence and upholding a contractual commitment to arbitrate. It concluded, at p. 34 that "the court should continue to have the power to refuse a stay of litigation…the person commencing litigation in breach of an arbitration agreement should continue to bear the onus of convincing the court a stay should not be granted".

[25] It was the Commission's view that the "conditions as to taking no steps in the litigation, and being ready and willing to arbitrate, are too rigid," but they are relevant to the exercise of the court's discretion. Its recommendations were the basis for the original s. 15 in the *Commercial Arbitration Act*, S.B.C. 1986, c. 3, which is the present legislation.

[26] The original section provided the court "shall stay" unless the party opposing the stay showed good reason why court proceedings should continue. In determining whether there is good reason, the court was entitled to consider 12 factors, the last of which was "any other matter the court considers significant". The provision incorporated the recommendation of the Commission's report at pp. 34-35.

2010 BCCA 18 (CanLII)

[27] In contrast, the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14, which adopted the United Nations *Model Law on Commercial Arbitration*, provided in s. 8 for a mandatory stay.

[28] Pursuant to the *Miscellaneous Statutes Amendment Act (No. 2)*, S.B.C. 1988, c. 46, s. 11, the original s. 15 of the *Commercial Arbitration Act* was replaced with the provisions of the international Act, plus s. 9 of that Act which dealt with interim measures of protection. That section remains today.

[29] Granting a stay of proceedings no longer is discretionary if the court is satisfied the commitment to arbitrate is not void, inoperative or incapable of being performed (*Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368, 61 B.C.A.C. 254 leave to appeal refused [1995] S.C.C.A. No. 467; *MacKinnon v. National Money Mart Co.*, 2004 BCCA 473, 203 B.C.A.C. 103, 50 B.L.R. (3d) 291, leave to appeal granted). Party autonomy, the ability of parties to chose their forum, which is a core value of the Model Law, was recognized, but respect for that right constrains the right of unlimited access to the court.

[30] Cast in this light, a party who seeks to deprive the other side of its right of access to the court must not be equivocal. As noted by Fletcher Moulton L.J., it is appropriate that a party make clear its intention at the outset and not allow the action to proceed with its participation.

[31] Levelton urges an analogy based on the law of attornment. Although there are significant differences in the law of attornment and the law applicable to stays in favour of arbitration, in my view, the analogy is not misplaced. The law generally recognizes the right of litigants to their choice of forum. While usually the right of an

opposing party to challenge that choice is preserved, at common law any step taken which invokes the jurisdiction of the court will result in attornment even if the party has reserved or is pursuing a challenge to jurisdiction.

[32] It is not inappropriate to apply the same strictures to a stay application authorized by legislation that permits access to the court to seek a stay provided a step after appearance is not taken in the proceedings.

2010 BCCA 18 (CanLII)

[33] In my view, the judge erred by being concerned with whether Levelton objectively affirmed its willingness to participate in the litigation process. This led him to conclude Levelton had not taken a step in the litigation because it appeared its next action would be to seek a stay and not to obtain an order for particulars. That inquiry was not relevant in the circumstances of this case.

[34] Once it is determined that a demand for particulars has been made under the *Rules of Court*, a step in the proceedings has been taken and a stay under s. 15 of the *Commercial Arbitration Act* no longer is available. A party cannot render the step nugatory by suggesting it may seek to refer the matter to arbitration. It cannot undo what has been done. The orderly administration of justice requires certainty in these matters.

[35] Whether a request for information is a demand for particulars under the *Rules* depends on the language of the request. Although no specific wording is required, the demand in this case was for information required to prepare a statement of defence. It clearly was a demand for particulars.

[36] By making a demand for particulars which were “required for the preparation of a Statement of Defence”, Levelton was acting pursuant to Rule 19(17). It was relying on the authority of the *Rules of Court*. The demand was itself a step in the proceeding. As counsel for the defendants points out, a party may never seek an order for particulars for any number of reasons. That does not make the demand any the less a step in the proceedings. Ruttan J. was alive to this as is evidenced by his use of the phrase “if necessary”. Had Levelton sought an order for particulars, it

could not be contended seriously that the defendants could object on the basis no demand had been made pursuant to Rule 19(17).

[37] In my view, a request for information solely to determine whether a claim is subject to arbitration – whether the arbitration agreement is void, inoperative or incapable of being performed – would not be a bar to obtaining a stay of proceedings in favour of arbitration. In such a case, a party clearly would not be relying on the authority of the *Rules of Court* to advance its position in the litigation. It would not be affirming its acceptance of the litigation process.

2010 BCCA 18 (CanLII)

[38] This was the situation in *No. 363 Dynamic Endeavours Inc.* An *ex parte* order was obtained freezing funds. The respondent brought an application to set aside the order and delivered a demanded for discovery of documents. The order was set aside, in part, based on documents obtained through the demand. This Court concluded the demand had been made in the context of s. 15(4), the granting of interim measures of protection, and was not a step in the proceedings as contemplated by s. 15(1). This Court stated in para. 23:

> [23] … The argument, as I see it, is that the demand for discovery of documents here was not served with a view to pursuing the defence of the action, but rather for the purpose of protecting the rights of the respondent in the face of the ex parte order obtained by the appellant freezing the funds in the bank.

This led to the observation that "it is the pursuit of the defence itself that brings an activity within s. 15(1)".

[39] I do not decide whether Rule 19(16) would be available to a party to obtain an order for particulars to determine whether a claim is subject to arbitration or whether some other procedure would be preferable in the context of an application for a stay. Generally, an applicant for an order for particulars under the *Rules of Court* must establish that the particulars are required to plead, for discovery, or to narrow the issues to be tried.

Conclusion

[40] I would allow this appeal and set aside the stay of proceedings.

"The Honourable Mr. Justice Chiasson"

I agree:

"The Honourable Madam Justice Newbury"

I agree:

"The Honourable Mr. Justice Frankel"

2010 BCCA 18 (CanLII)