COURT OF APPEAL FOR YUKON TERRITORY

Citation: ***Dawson (City) v. TSL Contractors Ltd. et al.***
2003 YKCA 0003

Date: 20030228
Docket: CA030268
YU0488

Between:

City of Dawson

Appellant
(Plaintiff)

And

TSL Contractors Ltd. and 831594 NWT Ltd. carrying on business as Ferguson Simek Clark, and the said Ferguson Simek Clark

Respondents
(Defendants)

Before: The Honourable Madam Justice Southin
The Honourable Mr. Justice Braidwood
The Honourable Mr. Justice Hall

Oral Reasons for Judgment

C.F. Willms J.L. Francis	Counsel for the Appellant
J.M. Moshonas G.R. MacLennan	Counsel for the Respondent TSL Contractors Ltd.
Place and Date of Hearing:	Victoria, British Columbia February 28, 2003

[1] **HALL J.A.**: This is an appeal from the order of Veale J. pronounced October 29, 2002, granting a stay of proceedings in an action between the City of Dawson (the "City") as plaintiff and the defendants, TSL Contractors Ltd. ("TSL") and Ferguson Simek Clark ("FSC"), in the Supreme Court of the Yukon Territory, pursuant to s.9 of the ***Arbitration Act***, R.S.Y. 1986 c. 7.

[2] The background of the matter is that a contract was entered into between TSL and the plaintiff City to build a recreational facility in Dawson. This contract was entered into in September of 2000. Dawson had engaged FSC to do preparatory drawings and also to arrange for the tender documents on the proposed project. TSL was the successful tenderer and ultimately entered into the aforesaid contract with the City.

[3] A problem later arose, largely centred around difficulty concerning the installation of concrete pads for the ice rink portions of the structure. One of the complications, obviously, in the North is that if thawing of the soil occurs then construction works are heavily impacted because of the nature of the terrain and the climate. It seems that the difficulties here on the project resulted in controversy as to whether or not FSC, the consultant, had done something wrong,

or if the City had done something wrong, or if TSL had done something wrong.

[4] The contract price was stipulated at $6,844,000. Substantial amounts of that sum have been paid but certain amounts allegedly remain outstanding. The contract between TSL and the City contained provisions that provided for mediation and arbitration of disputes related to the contractual undertaking. There appear to have been no written executed contract extant between the City and FSC. FSC had initially been engaged by the City to assist in preparing drawings and ultimately to oversee the contract for the construction. Under the terms of the contract between the City and TSL, FSC had a certain role to play in approving expenses and payments and the giving of directions and the like. That is a quite usual situation where a firm of engineers or architects is employed to perform such functions in a construction setting.

[5] Controversies between TSL and the City were outstanding, certainly by the summer of 2001. TSL was seeking to resolve matters at issue in one method by trying to have certain of the works requirements removed from the contract. That, however, was apparently not agreeable to the other party, the City. There were also issues outstanding as to substantial

performance. Ultimately, as I understand it, it is alleged that TSL abandoned the project. Even to this day the project is not fully completed.

[6] The legal history of this matter is that in the fall of 2001 there was some attempt made to proceed to mediation. Mr. Fitzpatrick, a Vancouver lawyer, was notified that his services would be required. That mediation did not proceed, perhaps, because the City was not very enthusiastic about this method of proceeding. However I do not think it is particularly relevant as to why mediation did not proceed; the fact is simply that it did not proceed. Then, near the end of that year, TSL gave notice that it was prepared to waive the mediation process, as it was entitled to do, and it gave notice to the appellant that it wanted arbitration of the matters in issue. The City was not entirely content with that methodology of dispute resolution but in correspondence replying to that notice, it said that, while reserving the right to object to that methodology of proceeding, it was prepared to proceed with, among other things, the appointment of an arbitrator. Mr. O'Connor, a Vancouver lawyer, was appointed as arbitrator early in 2002 and proceeded to move forward with the arbitral proceedings. When I say "move forward with arbitral proceedings", what Mr. O'Connor did was

to have a number of meetings and he issued a number of orders. Those orders included directing the manner in which the arbitration would proceed, including the filing of a statement of claim, and a statement of defence and counterclaim, in a way that was analogous in many ways to an action in court.

[7] The parties also commissioned expert reports and discoveries were ordered and were conducted. The timing of matters was that by the summer of 2002 a number of expert reports had been prepared and exchanged between the parties. Tentatively, it had been decided that the arbitration hearing would proceed in August 2002. That did not occur, perhaps due to two circumstances, first, one being a controversy that arose over the admissibility of an expert report that appeared to attribute fault to FSC and, secondly, there may have been some difficulty with the scheduling of counsels' time. The upshot of it was that the arbitration hearing was put over until November of 2002. Mr. O'Connor, the arbitrator, indicated that he would not be particularly amenable to any further adjournment of the hearing unless there was some very substantial reason for adjournment. In the meantime, in the summer of 2002, TSL had filed a claim of lien, as it is entitled to do under the legislation. That, according to Mr. Willms, counsel for the defendant appellant before us today,

led the City to conclude or believe that there would likely be litigation in the matter to address the issues raised in a xxxx action.

[8] In late September of 2002, TSL advised the appellant that it did not intend to proceed further with the lien proceedings. I gather that TSL had 90 days from the date of filing in July to make that decision and in the end elected not to proceed with any action to enforce the lien. Within two weeks of the notification of that decision to the City, the City commenced action against TSL and FSC. This action was the one that ordered to be stayed by Veale J. From that decision the appellant City has appealed to this Court.

[9] The circumstances are that apparently there are some claims alleged against FSC, perhaps by both parties, the City and TSL, that may be characterized as "tort claims", although it seems to me that the essence of this action does, and must, revolve around the contract entered into between the City and TSL relating to the construction of this recreational project.

[10] FSC, early on in the arbitration proceedings in 2002, was invited to become a party to such proceedings but resisted that suggestion. It continued, as late as the summer of 2002, when in July it was again invited to be a participant, forcefully resist any such suggestion. Through its solicitor

it said it would enter the proceedings in any way, and neither would it be agree to be bound by any findings made in the arbitration. That was a right that FSC had because in the agreement between it and the City there was no arbitration provision. As I have observed, it did not seem there was any written agreement between the parties but, in any event, there was no arbitration provision in any agreement between them. That led to the difficulties that are argued today by the appellant and that were argued before Veale J.

[11] It is suggested that because the Yukon Statute is what I might call an earlier type of statute, a form of legislation which has been overtaken by amended legislation in both the United Kingdom and in British Columbia, that the task facing Veale J. was one that afforded him a rather wider jurisdiction than would be the case if one were dealing today, say, in British Columbia, with such an application. A case that perhaps is illustrative of the modern or current approach is a case that is referred to in the joint book of authorities, ***Prince George (City) v. McElhanney Engineering Services Ltd.*** (1995), 9 B.C.L.R. (3d) 368 (C.A.). Counsel for the appellant referred us to the case of ***Intertec International Technische Asistenz G.M.B.H. et al v. Neptune Bulk Terminals et al***, [1985] 5 W.W.R. 231 (B.C.C.A.), a case decided under the

earlier legislative regime. As I said, that regime is no longer extant in British Columbia.

[12] We were also referred by counsel to a number of English cases, including ***Taunton-Collins v. Cromie***, [1964] 2 All E.R. 332 (C.A.), and a later case that followed that case and referred to it with approval in 1997, ***Palmers Corrosion Control Limited v. Tyne Dock Engineering Ltd. et al***., [1997] EWCA Civ. 2776 (C.A.).

[13] There are differences and distinctions, obviously, between all these cases. It seems to me that it can be said that the ***Intertec*** case was a case of considerably more complication between the various parties to the proceedings in that case. There in the result arbitration was not favoured over court proceedings because of the possible inconsistent results that might occur. A similar conclusion was reached by the English Court of Appeal in the ***Palmers Corrosion*** case, *supra*. ***Taunton-Collins v. Cromie***, supra, has some apparent similarities to the case at bar although I am not sure that it is, in all respects quite the same situation. Obviously, those are helpful authorities but, in the end, it comes down to assessing each individual case to determine what is an appropriate order to best meet the ends of justice.

[14] What seems to me that can certainly be said about this case is that it is primarily a contract case. The exact scope of the arbitration clause that is extant here, which has been referred to by counsel as one that may not be as wide as some arbitration clauses is at issue between the parties. However, the width of it, it seems to me, pursuant to the case of ***Heyman v. Darwins***, [1942] 1 All E.R. 337 (H.L.) is a matter, in the first instance, for the arbitrator to decide. I think that that result flows certainly from the judgment of Mr. Justice Hinkson in a case referred to in ***Prince George (City) v. McElhanney Engineering Services Ltd.***, *supra*, namely, ***Gulf Canada Resources Ltd. v. Arochem International Ltd.*** (1992), 66 B.C.L.R. (2d) 113 (C.A.

[15] What weighs very substantially in my mind in this case is the circumstance that the arbitration proceedings here had proceeded along for several months. A considerable amount of time, effort and money had been expended in those proceedings and they were, virtually, ready for hearing in August of 2002. They had been tentatively scheduled for hearing later in the year when these proceedings intervened and Veale J. made the order that he did.

[16] It seems to me that whilst there always exists some possibility of inconsistent findings when one is faced with a

circumstance of this sort, any such consideration is rather outweighed by the circumstances that there has been here a considerable body of time, effort and money expended, as I have observed, in getting the arbitration process ready for hearing. What can be appropriately said here is some comments I found in a case cited in the joint book of authorities, ***Producers Pipelines Inc. v. Bridges Energy Inc.*** (1993) 20 C.P.C. (3d) 365 (Sask. Q.B.). There Mr. Justice Gerein observed as follows:

> 17. The within motion was brought some ten months after the first action was commenced and some eight months after the second. Both periods of time are substantial. However, when addressing delay what I consider more important that the passage of time is what has transpired during that time and what prejudice or harm may flow therefrom. In this case it is considerable.
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> 18. The two actions have progressed to the point where the plaintiff could take steps to set the matter down for trial. The only thing remaining to be done is for the defendants to examine for discovery, if in fact they intend to do so. In bringing the actions to the stage at which they are now, there has been a considerable expenditure of time and money. The defendants obviously are prepared to throw away their monetary investment, but the plaintiff obviously is not prepared to follow suit and it should not be compelled to do so. In short, the delay on the part of the defendants in seeking a stay or their acquiescence in the court proceedings, however one may choose to view it, has played a central role in the plaintiff being in its present position. <u>It would be grossly unfair to wipe out what has been done and require the plaintiff to start anew.</u>
>
> (emphasis added)

That case was somewhat the obverse of this case. I say that because in that case court proceedings had been ongoing for quite some time when one party sought to invoke an arbitration clause contained in the agreement. Gerein J. said that, in effect, it was too late and that too much time and effort had been expended to now seek to change to another mode of proceedings.

[17] While, as I said, each case will be dependent on its own particular facts, it seems to me that the comments made by Gerein J. in that case could fairly be made in the circumstances of the case at bar.

[18] At the end of the day, what must be considered always is the interests of justice. It seems to me that, generally speaking, it would be unjust to now require TSL to now suddenly shift from the arbitration process that has proceeded so far and to undertake new proceedings under the court process. I understand what Mr. Willms submits concerning the potential perceived difficulties about possible inconsistent findings but I am not convinced that, in the broad sense, there is any real possibility of injustice here. It seems to me that Veale J. ultimately came to the correct conclusion in ordering a stay of proceedings. I am not sure that I would necessarily endorse all that he said in his Reasons about the

Zug case referred to by counsel, but I believe that on a broad view of matters, and in particular in paying heed to the very salient circumstances of the time and money expended on the other proceedings, and their state of readiness, that the decision reached by Veale J. is one with which I am in respectful agreement.

[19] I do not consider that it has been demonstrated on this appeal that in the result there was any error in the decision made in the court below. Accordingly, I would dismiss this appeal.

[20] **SOUTHIN J.A.:** I agree.

[21] **BRAIDWOOD J.A.:** I agree.

[22] **SOUTHIN J.A.:** The appeal is dismissed.

"The Honourable Mr. Justice Hall"