Citation: *City of Dawson* v. *TSL Contractors Ltd., et al.,* 2002 YKSC 59

Date: 20021106
Docket: S.C. No. 02-A0095
Registry: Whitehorse

IN THE SUPREME COURT OF THE YUKON TERRITORY

BETWEEN:

CITY OF DAWSON

PLAINTIFF

AND:

TSL CONTRACTORS LTD. and 831594 NWT LTD. c.o.b. as FERGUSON SIMEK CLARK and the said FERGUSON SIMEK CLARK

DEFENDANTS

REASONS FOR JUDGMENT OF MR. JUSTICE VEALE

INTRODUCTION

[1] The City of Dawson (Dawson) filed a Writ of Summons and Statement of Claim on October 7, 2002 claiming negligence and breach of a construction contract against TSL Contractors Ltd. (TSL) and Ferguson Simek Clark (FSC). Dawson and TSL have an arbitration hearing set on November 18, 2002 for three weeks. FSC is not a party to the arbitration. TSL brings this application for a stay of proceedings pursuant to s. 9 of the *Arbitration Act*, R.S.Y. 1986, c. 7, so that the arbitration hearing can proceed. Dawson opposes and wishes to proceed in court to avoid a multiplicity of proceedings and possible inconsistent results.

[2] I have ordered a stay of proceedings between Dawson and TSL pending the completion of the arbitration.

[3] Section 9 of the *Arbitration Act* reads as follows:

> 9. Where a party to a submission or a person claiming through or under him commences legal proceedings against any other party to the submission or any person claiming through or under him, in respect of a matter agreed to be referred, a party to such proceedings may, after service upon him of a statement of claim and before he takes any step in the proceedings, apply to a judge for a stay of proceedings, and the judge, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission and that the applicant was, at the time when the proceedings were commenced, ready and willing to do all things necessary to the proper conduct of the arbitration and still remains ready and willing to do so, may make an order staying the legal proceedings.

ISSUES

[4] The issues to be determined are:

1. What discretion does the court have to stay proceedings under s. 9 of the *Arbitration Act*?
2. Are Dawson and TSL parties to a written agreement to submit differences to arbitration and, if so, has a matter been agreed to be referred?
3. Is there sufficient reason why the matter should not be referred to arbitration, such as a multiplicity of proceedings or other factors?

There is also a requirement in s. 9 that TSL must be ready and willing to do all the things necessary for the proper conduct of the arbitration. Dawson did not make any issue about this. I find that TSL is ready and willing to proceed to the arbitration hearing and no further discussion is required on that issue.

THE FACTS

[5] I find the following facts:

a) TSL and Dawson entered into a stipulated price contract (the “Contract”), dated September 15, 2000, pursuant to which TSL agreed to act as prime contractor for the construction of an arena recreation facility in Dawson (the “Project”), to be completed by July 31, 2001. It remains uncompleted, and TSL has abandoned the Project.

b) The Contract is a standard construction document CCDC 2, which contains dispute resolution provisions. Disputes are to be resolved in the first instance by the consultant under the Contract, then referred to mediation. If mediation is not successful, one of the parties may choose to ultimately resolve the dispute by final and binding arbitration.

c) FSC is the consultant in the Contract but not a party to it. Thus, FSC is not a party to, or bound by, the arbitration. FSC signed a contract (the architect contract) to provide architectural and design services for Dawson in 1999. The architect contract does not contain an arbitration clause.

d) By letter dated October 5, 2001, TSL delivered to the project consultant FSC and to Dawson a Notice of Dispute, referring matters in issue between Dawson and TSL to mediation. There were eight items of dispute under the Contract where the consultant FSC had either not issued interpretations or interpretations were unacceptable to TSL.

e) The involvement of FSC in the dispute has been known to both TSL and Dawson for some time. By a letter dated November 21, 2001 from TSL to FSC and copied to Dawson's solicitors, the following was stated on this issue:

> There are a number of matters of dispute between TSL and Dawson. Some of those matters relate to the design information prepared by FSC and involve errors in the drawings and specifications. In addition, TSL challenges FSC's conduct as consultant under the Agreement. FSC has not discharged its obligation to act impartially.
>
> The purpose of this letter is to notify you of these allegations which we believe will establish a breach in the rendering or failure to render professional services.
>
> The disputes between TSL and Dawson are set to proceed to mediation under CCDC 40 *Rules for Mediation and Arbitration of Construction Disputes*. While we note that FSC has no obligation to attend the mediation proceedings under these rules, we encourage you to do so as it may assist the parties in resolving the disputes.
>
> If this matter is not resolved through mediation, we intend to initiate legal action against FSC on behalf of TSL. Accordingly, we urge you to advise your professional liability insurer and to obtain legal counsel.

f) By letter dated November 23, 2001, counsel for Dawson wrote counsel for TSL and stated the following:

> I indicated that in order to have a reasonable expectation of achieving a fruitful result at mediation, it was our client's view that it would be imperative to have the consultant attend the mediation. Our client has attempted to ensure that the consultant would be available and willing to attend the mediation, however, our client has not been successful in obtaining a commitment from the consultant to attend. I have been told that Mr. Turner-Davis is not available on those dates.

g) Dawson and TSL waived mediation requirements, and TSL gave notice of its election to proceed by way of arbitration.

h) The Notice to Arbitrate was delivered in December 2001, and by letter dated January 22, 2002, TSL informed Christopher O'Connor that he was appointed to act as arbitrator. Dawson and TSL apparently agreed that Christopher O'Connor met the two mandatory criteria in the CCDC Rules of being an experienced and skilled commercial arbitrator and having knowledge of the relevant construction industry issues.

i) In its letter dated January 18, 2002, agreeing to the appointment of Christopher O'Connor as arbitrator, counsel for Dawson stated:

> The appointment of Mr. O'Connor, or rather our client's agreement to his appointment, as single arbitrator under clause 8.3 of the *Rules for Arbitration of CCDC to Construction Disputes*, is provisional on your client agreeing to Mr. O'Connor acting as a single arbitrator on all disputes to be arbitrated between our respective clients. Our client will be making claims against your client relating to expenses incurred and damages suffered as a result of the project not being completed within the contract time. Notification of such claims were given to your client by letter of July 19, 2001, from Mr. Shewen.
>
> The agreement to appoint Mr. O'Connor as an arbitrator is not to be construed as an admission that the issues that have been raised are not eligible for, or best resolved by, litigation, or that our client has waived any right to have these matters litigated.

j) The parties have exchanged pleadings within the arbitration, including TSL's amended statement of claim consisting of 59 paragraphs and Dawson's amended statement of defence and counterclaim consisting of 56 paragraphs.

The facts and issues raised in the arbitration proceeding are similar and interrelated to those raised in the court pleadings of Dawson, except that the court pleadings include FSC as a party and claims in negligence, as well as breach of contract.

k) A number of pre-hearing steps, including document discovery and the exchange of expert reports, have taken place pursuant to a schedule established by the arbitrator. The following is a summary of the initial Arbitrator's Orders:

i. Arbitrator's Order No. 1 arose from a pre-arbitration conference call on February 1, 2002 and set a tentative hearing date in June 2002;

ii. Arbitrator's Order No. 2 arose from a pre-arbitration conference call on March 14, 2002 and set dates for delivery of pleadings and delivery of expert reports;

iii. Arbitrator's Order No. 3 arose from a pre-arbitration conference call on May 1, 2002. It set a hearing date of July 29 to August 9, 2002 and June 28, 2002 for exchange of expert reports;

iv. A further Arbitrator's Order was the result of Dawson's application for an order permitting examinations for discovery based on written submissions dated June 7, 2002. TSL delivered response submissions dated June 14, 2002 and Dawson replied. The arbitrator ordered examinations for discovery of two days in length on a representative of each party, to be completed prior to July 29, 2002.

l) TSL delivered the following expert reports:

   i. Report of PBK Architects Inc., including opinions prepared by Peter Dandyk and Ian McKay (the PBK report);

   ii. Report of AMEC Earth & Environmental Limited prepared by Dr. James M. Oswell; and

   iii. Report of JDE Construction Management Ltd. prepared by John Dawson-Edwards.

m) TSL also relies on a report of EBA Engineering Consultants Ltd. dated April 29, 2002, prepared for Dawson.

n) Dawson delivered the following expert reports:

   i. Letter of JR Paine & Associates Ltd. dated February 28, 2002;

   ii. Letter of JR Paine & Associates Ltd. dated March 18, 2002;

   iii. Letter of Arctic Foundations of Canada Inc. dated May 21, 2002; and

   iv. Letter of JR Paine & Associates Ltd. dated June 21, 2002.

o) Dawson brought an application before the arbitrator objecting to the admissibility of the PBK report filed by TSL. Both parties filed written submissions.

p) Dawson objected to the PBK report because, among other things, it concluded that FSC, the architect and consultant, was negligent. In response to a letter from

the solicitor for Dawson, dated July 2, 2002, FSC once again, by letter dated July 8, 2002, declined to be a party to, or be bound by, the arbitration.

q) By Arbitrator's Order No. 4, dated July 17, 2002, the arbitrator declined to exclude the PBK report, as it would be premature to do so without having heard all the evidence.

r) On July 29, 2002, the date set for the arbitration hearing, Dawson applied for an adjournment before the arbitrator in Whitehorse. Arbitrator's Order No. 5 granted the adjournment to August 7, 2002 so that the parties could conduct one further day of examination for discovery of the other party and proceed to hearing on August 7, 8 and 9, 2002. Dawson was also directed to prepare a documents brief.

s) On August 7, 2002, Dawson brought an application to adjourn the hearing to November 2002. TSL opposed. Arbitrator's Order No. 6 adjourned the hearing to November 18, 2002 for three weeks. The arbitrator stated:

> I caution the parties that I will not grant any further adjournments unless there are very strong and pressing reasons for doing so. The lack of availability of witnesses, or other problems with counsels' schedules, would not fit such an exception, in my mind, although I leave my mind open to events which may transpire between now and then.

t) On July 26, 2002, TSL filed a builder's lien against Dawson's property and counsel for Dawson expected a writ to be filed by TSL.

u) By letter dated Sept. 25, 2002, TSL advised Dawson that it would not be commencing an action on the builder's lien.

v) Dawson filed its Writ of Summons and Statement of Claim on October 7, 2002, claiming breach of the contract and negligence against TSL. Dawson also included FSC as a party defendant claiming breach of contract and negligence. Dawson did not make its geotechnical consultant or specialized foundation contractor party defendants.

w) TSL filed its application for a stay of proceedings on October 22, 2002.

ISSUE 1: What discretion does the court have to stay proceedings under s. 9 of the *Arbitration Act*?

[6] Dawson and TSL are both in agreement that the court has a wide discretion under s. 9 of the *Arbitration Act*. In *Gulf Canada Resources Ltd.* v. *Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), the court pointed out that s. 6 of the *Arbitration Act*, R.S.B.C. 1979, c. 18 (which is similar to s. 9 of the present Yukon statute), had been replaced by s. 8 of the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14. Section 8(2) says "the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed." The result is that court decisions after the 1986 legislation must be read with some care as the discretion provided in the present Yukon *Arbitration Act* has been curtailed in British Columbia.

[7] However, in *Gulf Canada Resources*, *supra*, Hinkson J.A. found that it had a "residual jurisdiction" pursuant to s. 8 of the *International Commercial Arbitration Act*, *supra*, and stated at paragraph 36:

> Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.

[8] This interpretation was not followed by the British Columbia Court of Appeal in *Prince George (City)* v. *McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.). The *Prince George* case dealt with a municipal construction contractor. The City of Prince George and the contractor had an arbitration clause, but the consultant did not have an arbitration clause with the City of Prince George. The City of Prince George and the contractor agreed to arbitrate the contractor's delay claims. The City of Prince George then sued the contractor for negligence and breach of contract. In the same action, the City of Prince George sued the consultant for negligence. The Court of Appeal, after reviewing the authorities, stated at paragraph 37:

> These authorities establish that, as a general principle, the mere fact that there are multiple parties and multiple issues which are interrelated and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

The Court of Appeal made specific reference to the Hinkson decision on *Gulf Canada Resources*, *supra*, at paragraph 54:

> In my view, nothing in the reasons of Hinkson J.A. supports the view that if any of the named litigants, on whichever side of the record they are found, are not party to the arbitration agreement, the one who is must be denied the right to invoke the arbitration clause in the agreement to which it is a party.

[9] I note that the *Prince George* case was considering s. 15(2) of the *Commercial Arbitration Act*, S.B.C. 1986, c. 3, which has the same wording as s. 8(2) of the *International Commercial Arbitration Act*.

[10] I have concluded that the arbitration statutes in British Columbia do not give discretion to the courts to refuse a stay of proceedings by the mere fact that multiple parties and multiple issues arise in the litigation. However, under the Yukon *Arbitration Act*, the courts retain a wide discretion to consider whether factors such as multiple parties and multiple issues may be sufficient reason to refuse a stay of proceedings. I will discuss the exercise of this discretion under Issue 3.

ISSUE 2: Are Dawson and TSL parties to a written agreement to submit differences to arbitration and, if so, has a matter been agreed to be referred?

[11] The applicable dispute resolution provisions of the Contract are:

> 8.1.1 Differences between the parties to the *Contract* as to the interpretation, application or administration of the *Contract* or any failure to agree where agreement between the parties is called for, herein collectively called disputes, which are not resolved in the first instance by findings of the *Consultant* as provided in GC 2.2 – ROLE OF THE CONSULTANT, shall be settled in accordance with the requirements of Part 8 of the General Conditions – DISPUTE RESOLUTION.
>
> . . .
>
> 8.2.6 By giving a notice in writing to the other party, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved

by arbitration under the latest edition of the Rules for Arbitration of CCDC 2 Construction Disputes. The arbitration shall be conducted in the jurisdiction of the *Place of the Work*.

. . .

8.2.8 If neither party requires by notice in writing given within 10 *Working Days* of the date of notice requesting arbitration in paragraph 8.2.6 that a dispute be arbitrated immediately, all disputes referred to arbitration as provided in paragraph 8.2.6 shall be

.1 held in abeyance until
(1) *Substantial Performance of the Work*,
(2) the *Contract* has been terminated, or
(3) the *Contractor* has abandoned the *Work*.
whichever is earlier, and

.2 consolidated into a single arbitration under the rules governing the arbitration under paragraph 8.2.6.

[12] Counsel for Dawson submitted that 8.1.1 does not expressly cover the alleged violation of the contract sought to be arbitrated. In fact, the use of the word “differences” as to “interpretation, application or administration of the *Contract*” is very broad. I find that paragraph 8.1.1 either expressly or implicitly covers the dispute.

[13] Counsel for Dawson also suggested that the arbitration should be held in abeyance as there was not “substantial performance of the work.” However, TSL has abandoned the work, and hence, the arbitration is ready to proceed.

[14] I have found that the facts and issues referred to arbitration are similar and interrelated to those raised in Dawson’s court pleadings. However, counsel for Dawson submits that since its court pleadings raise allegations of negligence and include an added party, TSL has failed to meet the precondition of s. 9 of the *Arbitration Act* that the negligence allegation “was a matter agreed to be referred.”

[15] I reject this submission. The issues relating to FSC have been a part of the arbitration from the beginning. Dawson has bound itself to arbitration under the Contract. I have concluded that it would be unseemly to allow Dawson to escape that contractual obligation simply by filing court proceedings that raise allegations of negligence in addition to the breach of contract issues already before the arbitrator. I am of the view that the facts and issues in the arbitration pleadings are similar to those in the court proceeding. TSL has met the condition that the court case contains “a matter agreed to be referred” to arbitration. Section 9 of the *Arbitration Act*, *supra*, does not require that all parties and legal issues in the court proceeding must be part of the arbitration.

[16] Dawson has submitted that the arbitrator has no jurisdiction to deal with the issues that relate to the alleged negligence of FSC. While that is not an issue to be determined in this application, TSL points out that the arbitrator may have jurisdiction to deal with issues that relate to FSC by the following terms of the Contract:

> 6.5.1 If the *Contractor* is delayed in the performance of the *Work* by an action or omission of the *Owner*, *Consultant*, or anyone employed or engaged by them directly or indirectly, contrary to the provisions of the *Contract Documents*, then the *Contract Time* shall be extended for such reasonable time as the *Consultant* may recommend in consultation with the *Contractor*. The *Contractor* shall be reimbursed by the *Owner* for reasonable costs incurred by the *Contractor* as the result of such delay.
>
> . . .
>
> 9.2.1 If either party to the *Contract* should suffer damage in any manner because of any wrongful act or neglect of the other party or of anyone for whom the other party is responsible in law, then that party shall be reimbursed by the other party for such damage. The reimbursing party shall be subrogated to the rights of the other party in respect of such wrongful act or neglect if it be that of a third party.

I conclude that Dawson and TSL are parties to an agreement to submit differences to arbitration and they have done so.

ISSUE 3: Is there sufficient reason why the matter should not be referred to arbitration, such as a multiplicity of proceedings or other factors?

[17] Counsel for TSL concedes that the onus is on TSL to show that there should be a stay of proceedings in the court action. As stated earlier, the court has a wide discretion to determine whether there is sufficient reason not to refer the disputes to arbitration.

[18] Dawson submits that it cannot achieve substantive justice on the issue of the negligence of FSC because FSC is not a party to the arbitration and FSC refuses to be bound by the findings of the arbitrator. In other words, Dawson faces the possibility that there may be inconsistent findings of fact if the arbitration and its court proceeding against FSC proceed concurrently. Dawson submits it is possible that it will lose the arbitration with TSL based on findings about FSC by the arbitrator and lose the court proceeding against FSC on the same facts.

[19] TSL, on the other hand, submits that it has invested a significant amount of time and money in the arbitration proceeding and should not be deprived of its contractual right to arbitrate, especially on the eve of the arbitration hearing.

[20] I have no doubt that Dawson puts forward its preference to litigate in good faith. However, the fact that FSC is not a party to the arbitration is ultimately the responsibility

of Dawson as owner of the project. Dawson must be taken to have experience in municipal contracts and had the opportunity to bring FSC under an arbitration clause. Conversely, the failure to bind FSC to the arbitration cannot be laid at the feet of TSL, who has participated in the arbitration with Dawson in good faith.

[21] It is generally recognized that multiplicity of proceedings is a strong, but not a decisive, ground in refusing a stay of proceedings (see Mustill & Boyd, *Commercial Arbitration*, 2nd ed. (Butterworths: London, 1989) at 477, para. (c)). It was put this way in *Bulk Oil (Zug) A.G.* v. *Trans-Asiatic Oil Ltd. S.A.*, [1973] 1 Lloyd's L.R. 129 at 137:

> Where there are disputes under two related agreements of which only one contains an arbitration clause the Court will exercise its discretion to allow both disputes to proceed to litigation together if (among other reasons relevant to the discretion) a stay of the litigation relating to one of these disputes would be liable to cause substantial injustice to the party which wants them to be litigated together. In this connection the Court will take into consideration whether or not the party seeking to litigate both disputes together is in some way to be held responsible for the dilemma in which he finds himself.

[22] In the circumstances before this court, Dawson was informed as early as November 21, 2001 that TSL was relying on FSC design errors and FSC's conduct as a consultant as part of its claim. Dawson submits that this wasn't really brought home until it received the PBK report on June 28, 2002. In either case, Dawson had the opportunity to commence its court action before substantial financial and time commitments were made in the arbitration process. Even taking the June 28, 2002 date, Dawson continued to participate in six days of examination for discovery, made two applications in the arbitration, and applied for the adjournment of the hearing date

to November 18, 2002. It would be most prejudicial to TSL to deny its contractual right to an arbitration process so close to completion. I am also of the view that Dawson's concern about an inconsistent result from two different forums is a possibility only, not a factual certainty. Furthermore, it is a dilemma of its own making. To find this failure on Dawson's part to be "a sufficient reason" to refuse a stay of proceedings would make the contractual arbitration clause an empty promise.

[23] In conclusion, I am of the view that Dawson is the author of its own dilemma. The concern about the possibility of inconsistent findings is precisely that — a possibility — and not a sufficient reason to deny TSL its contractual right to arbitration at this late stage of the arbitration proceeding. I order a stay of proceedings as between Dawson and TSL pending the completion of the arbitration. Dawson shall pay costs to TSL for this application on Scale 4 forthwith, as it is not certain the court action against TSL will proceed.

[24] I thank both counsel for their excellent written and oral submissions.

_____

Veale J.

Timothy S. Preston, Q.C.	Counsel for the Plaintiff
Lyle E. Braaten	Counsel for the Defendant TSL Contractors Ltd.