

In the Court of Appeal of Alberta

Citation: Lamb v. AlanRidge Homes Ltd., 2009 ABCA 343

Date: 20091019
Docket: 0901-0120-AC
Registry: Calgary

Between:

Brian Lamb and Melina Lamb

Respondents
(Plaintiffs)

- and -

AlanRidge Homes Ltd.

Appellant
(Defendant)

- and -

**Jager Homes Inc., Capital Drywall Alberta Inc., Callaway Contracting Inc., John Doe 1 to
10 and XYZ Corporation 1 to 10**

Not Parties to the Appeal
(Defendants)

The Court:

**The Honourable Mr. Justice Jean Côté
The Honourable Mr. Justice Clifton O'Brien
The Honourable Mr. Justice Jack Watson**

Memorandum of Judgment

Appeal from the Order by
The Honourable Mr. Justice A.D. Macleod
Dated the 17th day of March, 2009
Filed on the 17th day of April, 2009
(2009 ABQB 123, Docket: 0701-13211)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant, AlanRidge Homes Ltd. (AlanRidge), appeals a decision of a chambers judge affirming a master's decision dismissing AlanRidge's application to stay legal proceedings brought by the respondents Brian and Melina Lamb (the Lambs). AlanRidge also makes application for leave to reconsider this Court's decision in *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184.

[2] Both the appeal and the incidental application fail, as we have concluded that the governing legislation does not permit an appeal from the decision in question.

II. Factual Background

[3] The Lambs entered into a construction agreement to build a house with AlanRidge. The agreement contained a mandatory binding arbitration agreement in standard form, in accordance with the Alberta New Home Warranty Program (the Program).

[4] The Lambs alleged various defects in the house, and invoked arbitration pursuant to the Program. This process was held in abeyance for a period of time, at their request. A year and a half after serving notice to arbitrate, the Lambs issued a Statement of Claim naming AlanRidge and certain subcontractors as defendants.

[5] AlanRidge applied to stay the action under section 7 of the *Arbitration Act*, R.S.A. 2000, c. A-43 (the *Act*).

III. The Legislation

[6] Section 7 of the *Act* provides:

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

- (a) a party entered into the arbitration agreement while under a legal incapacity;
- (b) the arbitration agreement is invalid;

- (c) the subject matter of the dispute is not capable of being the subject of arbitration under Alberta law;
 - (d) the motion to stay the proceeding was brought with undue delay;
 - (e) the matter in dispute is a proper one for default or summary judgment.
- (3) An arbitration of the matter in dispute may be commenced or continued while the motion is before the court.
- (4) If the court refuses to stay the proceeding,
- (a) no arbitration of the matter in dispute shall be commenced, and
 - (b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.
- (5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that
- (a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and
 - (b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.
- (6) There is no appeal from the court's decision under this section.

IV. Decision of the Chambers Judge

[7] The chambers judge found that all of the claims made against AlanRidge in the legal action were within the scope of the arbitration agreement. He concluded, however, that both arbitrable and non-arbitrable claims were imbedded in the lawsuit, and that the latter including claims in negligence against the subcontractors and other defendants. Consequently, he found that the arbitration agreement covered only some matters in dispute in the legal action.

[8] The chambers judge then considered whether he should grant a partial stay under section 7(5) of the *Act*. He found that these claims were "inextricably linked to one another" such that they could not be reasonably separated. Relying on this Court's interpretation of section 7 of the *Act* in *New Era*, he determined the application to stay the action should be dismissed, and that the arbitration should be stayed, instead, to avoid a multiplicity of proceedings: 2009 ABQB 170. He distinguished the decision of this Court in *Kaverit Steel Crane Ltd. v. Kone Corp.* (1992), 120 A.R. 346, 87 D.L.R.

(4th) 129; leave to appeal dismissed, [1992] S.C.C.A. No 117, on the ground that the arbitration agreement in that case was governed by the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 (now R.S.A. 2000, c. I-5 (the *International Act*)), rather than the domestic statute applicable both here and in *New Era*.

[9] Subsequently, at a hearing before entry of his formal order, the chambers judge varied his directions orally so that the arbitration was stayed only in part, thereby allowing the arbitration to proceed with respect to certain issues not within the scope of the legal action.

V. Appellant's Submissions

[10] The appellant submits that while the decision of the chambers judge involved an interpretation of section 7 of the *Act*, his order staying the arbitration was not made under that section, so that subsection (6) is not applicable. It submits that the presence of other parties in the legal action does not permit a court to invoke section 7(5), and further submits that the comments of this Court in *New Era* regarding multiple parties were *obiter dicta* and that *New Era* is otherwise distinguishable. Additionally, the appellant submits that this Court's interpretation of section 7 in *New Era* was wrong, and seeks leave to have it reconsidered.

VI. Decision

[11] We have concluded that the decision of the chambers judge was made under section 7, so that subsection (6) applies, and no appeal lies to this Court. The appellant, in its notice of motion seeking a stay of the legal proceedings, specifically cited and relied upon section 7 of the *Act*. The chambers judge's decision not to grant the stay was clearly made under the section.

[12] The appellant is correct in pointing out that the chambers judge referred, in his written Reasons at para. 35, to the power of the court to prevent multiplicity of actions pursuant to section 5(3)(f) of the *Judicature Act*, R.S.A. 2000, c. J-2. However, it is evident from his subsequent oral reasons varying the stay that the chambers judge granted the stay of the arbitration ancillary to section 7(4) of the *Act*. In any event, the refusal to grant the stay of the legal action, which was at the heart of the application, was made under section 7.

[13] The appellant invited us to construe section 7(6) narrowly, so that it does not protect a decision based upon an alleged erroneous interpretation of section 7. It points out that arbitration pursuant to agreement is a substantive right, and submits that the same policy consideration that underlies the *International Act*, requiring parties to arbitrate when they have agreed to do so, even if it results in a multiplicity of parties, should also be applied to the domestic statute.

[14] In our view, section 7(6) reflects an equally important policy consideration, namely that the process of determining whether the parties should proceed with arbitration, or legal proceedings, should not become bogged down by resort to the appeal process. The legislature obviously intended that the decision of the Court of Queen's Bench should be final, so as to promote an expeditious determination of the forum to hear the disputes of the parties.

[15] In these circumstances, we interpret section 7(6) in accordance with its plain meaning. We would note that the Ontario Court of Appeal in applying like legislation reached the same result, albeit with brief discussion of the issue: *Radewych v. Brookfield Homes (Ontario)Ltd.*, 2007 ONCA 721, [2007] O. J. No. 4012, at paras. 3-4.

[16] As an appeal from the chambers judgment is foreclosed, we make no determination of its correctness. Section 7 is far from a model of clarity and, in particular, the intended scope of subsection (5) is far from clear. Moreover, the interpretation accepted by the chambers judge which gives priority to the litigation in order to avoid a multiplicity of proceedings, is contrary to the reasoning in *Kaverit Steel*, which gave primacy to arbitration under the *International Act*. This difference may be accounted for, of course, by the different wording of the statutes.

[17] Similarly, two recent decisions of the B.C. Court of Appeal, namely *Seidel v. Telus Communications Inc.*, 2009 BCCA 104, (2009) 304 D.L.R. (4th) 564, [2009] B.C.J. No. 469 (QL), and *MacKinnon v. Money Mart*, 2009 BCCA 103, (2009) 304 D.L.R. (4th) 331, [2009] B.C.J. No. 468 (QL), are said to broaden support for the policy in *Kaverit Steel*, but there the legislative language is also significant. In light of our Legislature's policy as expressed in section 7(6) of the *Act*, we are unable to reach that interesting debate in this context. A motion in the case of *Seidel* is pending before the Supreme Court.

[18] This appeal demonstrates a lack of clarity in the existing Alberta legislation, and suggests that legislative review and amendment may be appropriate, especially in circumstances in which appellate review of decisions under section 7 is precluded.

[19] The appeal is dismissed, as must be the ancillary application.

Appeal heard on October 6, 2009

Memorandum filed at Calgary, Alberta
this 19th day of October, 2009

Côté J.A.

O'Brien J.A.

Watson J.A.

Appearances:

M.J. Donaldson

K.S. Burron

for the Appellant

T.S. Mah

for the Respondents

M. Katyal

for Capital Drywall Alberta Inc.