

Court of Queen's Bench of Alberta

Citation: Lamb v. AlanRidge Homes Ltd., 2009 ABQB 170

Date: 20090317
Docket: 0701 13211
Registry: Calgary

Between:

Brian Lamb and Melina Lamb

Plaintiffs/Respondents

- and -

AlanRidge Homes Ltd., Jager Homes Inc., Capital Drywall Alberta Inc., Callaway Contracting Inc., John Doe 1 To 10, XYZ Corporation 1 To 10

Defendants/Appellants

**Reasons for Judgment
of the
Honourable Mr. Justice A.D. Macleod**

Introduction

[1] The Defendant AlanRidge Homes Ltd. (AlanRidge) appeals the Master's decision refusing to stay this action against AlanRidge and the other Defendants pursuant to the *Arbitration Act*, R.S.A. 2000, c. A- 43. It requires the court to consider the meaning of section 7 and in particular, section 7(1), section 7(5) and the relationship between those two sub-sections.

Background

[2] The Plaintiffs entered into a construction agreement with AlanRidge on January 18, 2004. That agreement is a standard form agreement utilized by the building industry and contains at clause 24 the following under the heading "arbitration":

If any dispute arises between the Parties with respect to any matter in relation to this Agreement, the dispute shall be settled through binding arbitration in accordance with the arbitration rules adopted by the [Alberta New Home Warranty] Program...

[3] The Plaintiffs took possession of the home in January 2005 and immediately identified a number of defects and deficiencies. The most serious of those deficiencies was the discovery of extensive mould and moisture in the basement, which remains undeveloped. This concern relates both to the value of the home and to the Plaintiffs' ability to enjoy the home in good health.

[4] The Plaintiffs commenced arbitration proceedings against AlanRidge in May 2006. AlanRidge filed a response to the arbitration application, but no further steps were taken until the Plaintiffs filed a Statement of Claim on December 20, 2007. The Statement of Claim named, in addition to AlanRidge, Jager Homes Inc. (Jager), Capital Drywall Alberta Inc. (Capital), and Callaway Contracting Inc. (Callaway) as Defendants. The Plaintiffs are alleging negligence in the construction of the home as against all of the Defendants and breach of contract against AlanRidge and Jager. Jager is a party because the Plaintiffs allege that it assumed all of the liability and obligations of AlanRidge. Jager has filed a Statement of Defence denying that it has assumed the obligations of AlanRidge which is its parent company. The other two Defendants were sub-contractors to AlanRidge and they have, as part of their defence, claimed that they were merely doing what AlanRidge had told them to do. Accordingly, both Capital and Callaway have cross claims against AlanRidge in the litigation.

[5] AlanRidge takes the position that, pursuant to the arbitration clause and s. 7 of the *Arbitration Act*, this court must stay the proceedings brought by the Plaintiffs. Alternatively, it says that the court should stay the proceedings against all of the Defendants pending the outcome of the arbitration, and in the further alternative, it asks the court to stay the action against AlanRidge alone.

[6] The Plaintiffs are quite prepared to continue to arbitrate the deficiencies other than the principal ones for which they claim joint and several liability against the builder and the other Defendants. They take the position that s. 7(5) of the *Arbitration Act* applies to these latter claims, and that the action against the Defendants should be allowed to proceed.

Section 7 of the *Arbitration Act*

[7] Section 7 of the *Arbitration Act* reads as follows:

Stay

- 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.

Section 5(3) of the *Judicature Act*, R.S.A. 2000, c. J-2 confirms that this court has jurisdiction and the power to prevent the multiplicity of actions.

[8] Rather than file a Statement of Defence to the action, AlanRidge filed a Notice of Motion returnable before the Master requesting an Order staying this action against either all of the Defendants or against AlanRidge alone on the basis of s. 7. The Master dismissed the application and it is from this decision that AlanRidge appeals. In my view, this is essentially a question of law as to how to apply s. 7. The Standard of Review is one of correctness.

Issues

[9] The issue for this Court's consideration is how s.7(1) and s.7(5) should be applied to the facts of this case.

Analysis

[10] AlanRidge argues that, pursuant to s. 7(1) of the *Arbitration Act*, the court is obliged to stay a proceeding where the matter in dispute is subject to an arbitration agreement. It relies on the following statement of the Alberta Court of Appeal in *Babcock and Wilcox Canada Ltd.*, 2005 ABCA 82, 363 A.R. 103, at para. 12:

In summary, s. 7(1) of the *Arbitration Act* makes arbitration a condition precedent to litigation when the parties have agreed their disputes shall be submitted to arbitration, and the previous distinction between ordinary clauses and *Scott v. Avery* clauses no longer exists. In those circumstances, a court must stay parallel litigation, unless the narrow exceptions contained in s. 7(2) apply. Parties to an arbitration agreement, like parties to any contract, can agree that arbitration is not mandatory. But unless they use appropriate permissive language, s. 7 applies [...].

[11] The Plaintiffs concede that, in general, s. 7(1) makes arbitration a condition precedent to litigation if the parties have agreed to resolve their disputes through arbitration. However, where a dispute includes matters falling outside the scope of the arbitration clause, or parties who are not subject to the litigation clause, the Plaintiffs submit that s. 7(5) of the *Arbitration Act* should apply to allow the action to proceed.

[12] In *Crystal Rose Home Ltd. v. Alberta New Home Warranty Program* (1994), 163 A.R. 96 (Alta. Master), Master Funduk found that the mandatory language of s. 7(1) of the *Arbitration Act* requires the court to stay a proceeding where the dispute between the parties falls within the scope of the arbitration clause. Subsection 7(5) "can apply only if there are arbitrable and non-arbitrable claims" (*Crystal Rose*, para. 111). Therefore, to determine whether and how s. 7(5) applies in this case, the relevant inquiry is whether all of the Plaintiff's claims fall within the scope of the arbitration clause.

[13] The arbitration clause contained in the construction agreement applies to "any matter in relation to" the agreement. AlanRidge contends that this phrase should be interpreted broadly,

such that the claims in both breach of contract and tort are covered by the agreement. The Plaintiffs contend that their claims against AlanRidge in negligence and vicarious liability are not “in relation to” the construction agreement, and so do not fall within the scope of the arbitration clause.

[14] In *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 120 A.R. 346 (C.A.), application for leave to appeal dismissed [1992] S.C.C.A. No. 117, Kerans J.A. found that the scope of the matters covered by an arbitration agreement is for the parties themselves to decide in negotiating the wording of the arbitration clause (*Kaverit Steel*, para. 28). He stated, at para. 29:

The submission before us limits itself to disputes “arising out of or in connection with” the contract. I agree with the comments of Evans, J., in *Overseas Union Insce. v. AA Mutual*, [1988] 2 Lloyd’s L.R. 63 (U.K.Q.B.), at p. 67. He first described a narrower form of submission, typically using only the words “under the contract,” where only the rights and obligations created by the contract can be referred. He contrasted that to the form of submission before us when he said, at p. 67:

Conversely, if the parties agree to refer disputes arising ‘in relation to’ or ‘in connection with’ their contract, a fortiori if the clause covers disputes arising ‘during the execution of this contract’ (*The Damianos*, [1971] 1 Lloyd’s Rep. 502; [1971] 2 Q.B. 588) or in relation to ‘the work to be carried out hereunder’, a common form in construction contracts, then both as a matter of language and of authority some wider category may be intended.

The arbitration clause at issue in *Kaverit Steel* applied to disputes “arising out of or in connection with” the contract. At para. 30, Kerans J.A. stated:

In my view, this submission extends beyond the rights and duties created by the contract. A dispute meets the test set by the submission if either claimant or defendant relies on the existence of a contractual obligation as a necessary element to create the claim, or to defeat it. [emphasis added]

[15] The contract in *Kaverit Steel* was governed by the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 which, unlike the *Arbitration Act*, expressly applies to both contractual and non-contractual commercial relationships. Therefore, the Plaintiffs submit that *Kaverit Steel* should not be relied upon in this case. However, Kerans J.A.’s reasoning with respect to the wording of the arbitration clause is equally applicable to agreements governed by the *Arbitration Act*. As Master Funduk stated in *Crystal Rose* at para. 100:

I agree that it is the arbitration agreement that governs the scope of the arbitration. Whether the International Act or the local Act applies is not relevant to the interpretation of the arbitration agreement as long as the agreement does not in some way run afoul of the appropriate Act. [emphasis added]

[16] At issue in *Crystal Rose* was whether the common law duty of the defendant to provide the plaintiff builder with reasonable notice was a “matter in relation to” the agreement for the purpose of the arbitration clause. At para. 98, Master Funduk approved of the approach in *Kaverit Steel* as follows:

I prefer the approach of *Kaverit Steel*. It focuses on the intention of the parties based on the language used. “In relation to” and “in connection with” extends the arbitration beyond rights and duties created by the contract [...].

In the result, Master Funduk held that the claim based on the defendant’s common law duty was arbitrable, and stayed the proceedings pursuant to s. 7(1).

[17] More recently, in *Babcock*, the Alberta Court of Appeal held that “the scope of the [arbitration] agreement depends on the wording of the arbitration clause” (*Babcock*, para. 14). In that case, the arbitration clause stated:

Any dispute or difference arising between the parties hereto as to the construction of this Agreement, the rights, duties or obligations of either party hereunder or any matter arising out of or concerning the performance of the Work by or the compensation to the Contractor[...]shall be submitted to arbitration [...]

Fruman J.A. found that this clause was broad enough to include claims in both tort and contract, as the claims in tort were a “repetition and recasting of the contract claims, and the existence of a contractual obligation is a necessary element to create or defeat the tort claims” (*Babcock*, para. 15).

[18] The Plaintiffs argue that the claims in negligence and vicarious liability do not arise out of the construction contract, relying on the decision of Gray J. in *Radewych v. Brookfield Homes (Ontario) Ltd.*, [2007] O.J. No. 2483 (Ont. S.C.J.), aff’d 2007 ONCA 721. In that case, the court considered s. 7 of the *Ontario Arbitration Act*, S.O. 1991, c-17, which is essentially identical to s. 7 of the *Alberta Arbitration Act*.

[19] The plaintiffs in *Radewych* purchased a home from Brookfield, and alleged that it was improperly constructed. They brought claims for breach of contract and breach of statutory warranty against Brookfield, and claims in negligence against Brookfield and its co-defendants. The agreement was subject to an arbitration clause contained in the *Ontario New Home Warranties Plan Act*, R.S.O. 1990, c. O.31. Pursuant to s. 7(1) of the *Ontario Arbitration Act*, Brookfield argued that the matter should be submitted to arbitration. The arbitration clause applied only to the arbitration of differences “arising out of the contract”. Gray J. found that the action in negligence was a separate cause of action that did not arise out of the agreement (*Radewych*, paras. 21-22). Therefore, s. 7(5) of the *Arbitration Act* applied. Given that the claims were overlapping, Gray J. held that it would not be appropriate to grant a partial stay of the proceedings, as such a result could require a duplication of resources and could produce inconsistent findings (*Radewych*, para. 23). The plaintiff’s action was allowed to proceed.

[20] I do not find the reasoning in *Radewych* to be persuasive with respect to the negligence and vicarious liability claims in the instant case. The arbitration clause in *Radewych* was contained in the *Ontario New Home Warranties Plan Act*. Gray J. found that the Act was concerned only with warranty claims and did not extend to fraud or negligence (*Radewych*, para. 17). In this case, the arbitration clause is not part of a statutory scheme. It is contained in the construction agreement itself and should be read in conjunction with and in light of that agreement.

[21] Furthermore, in this case, I find that the alleged negligence arose out of the performance of the agreement. The arbitration clause applies to “any matter in relation to” the agreement. The wording is similar to the arbitration clauses in *Kaverit Steel* and *Crystal Rose*. I accept AlanRidge’s submission that the claims in tort and negligence arise out of the construction of the house, which is the very subject matter of the agreement. Performance of contractual obligations may give rise to actions in tort and in negligence, and those actions may be a repetition and recasting of the breach of contract claim. The Plaintiffs cannot circumvent the arbitration agreement simply by recasting the cause of action.

[22] I find that all of the claims made against AlanRidge, including those in negligence and vicarious liability, are matters in relation to the construction agreement. Therefore, all of the claims against AlanRidge fall within the scope of the arbitration clause. If this were the end of the matter, I would be bound to stay the proceedings and allow the arbitration to proceed pursuant to s. 7(1) of the *Arbitration Act*.

[23] However, the Plaintiffs raise a second argument in favour of applying s. 7(5) in this case. They submit that several of the parties to the action are not bound by the arbitration clause. As the claims involving both parties and non-parties to the arbitration clause are closely related, the Plaintiffs contend that it would not be appropriate to allow them to proceed in separate forums.

[24] Courts have found that where an action is brought against multiple defendants, only some of whom are party to an arbitration clause, s. 7(5) of the *Arbitration Act* will apply. In *New Era Nutrition Inc. v. Balance Bar Co.*, 2004 ABCA 280, 357 A.R. 184, the plaintiff and defendant entered into an agreement containing an arbitration clause. The defendant’s assets were then acquired by a third party, who was not subject to the arbitration clause. A dispute arose, and the plaintiff invoked the arbitration clause but also filed a Statement of Claim against both the defendant and the third party in relation to the same issues.

[25] To determine the appropriate forum in which to resolve the dispute, Conrad J.A. considered the legislative intent behind s. 7 of the *Arbitration Act*. She found that the Act was intended to “discourage duplicative proceedings where there are overlapping matters that cannot be reasonably divided” (*New Era*, para. 6). At para. 37, she stated:

First, s. 7(4) indicates that the effect of a refusal to stay the action is to prohibit an arbitration from commencing or continuing, and renders anything already done in connection with the arbitration without effect. Second, s. 7(5) deals with a stay of the litigation in the situation where not all of the matters in dispute are covered by

the arbitration agreement. It allows the court to stay those parts of an action, covered by an arbitration agreement, provided the matters can be reasonably separated. If the matters in dispute cannot be reasonably separated, then the litigation continues and the arbitration is stayed by virtue of s. 7(4).[emphasis added]

[26] Erb J. applied s. 7(5) in *Olymel S.E.C. v. Premium Brands Inc.*, 2005 ABQB 312. She relied on *New Era* for the proposition that “the ability to conveniently separate the issues respecting the different parties is the key in how to proceed” (*Olymel*, para. 21). At para. 25, she concluded:

[...] The forum best equipped to hear all of the issues among the three parties and to avoid multiple proceedings is the litigation process. Allowing arbitration to proceed would necessitate litigation on the issues involving Quality and because of the intermingling of issues among all three, it cannot be separated from the whole. [emphasis added]

[27] Similarly, in *Frambordeaux Developments Inc. v. Romandale Farms Ltd.*, [2007] O.J. No. 4917 (Ont. S.C.J.), Thorburn J. applied s. 7(5) of the Ontario *Arbitration Act* as follows, at para. 34:

The courts have held that where one of the parties to the action is not subject to an arbitration clause, and the claim involving the non-party to the arbitration clause and the claim sought to be submitted to arbitration both contain closely related facts and issues in dispute, a partial stay is not reasonable. The court should instead exercise its discretion to deny the stay of proceedings and allow the entire matter to proceed in one forum. [emphasis added]

[28] The agreements at issue in *Olymel* and *Frambordeaux* contained arbitration clauses, but also entitled the parties to seek injunctive relief and other remedies through court proceedings. However, in my view, the outcome of those cases did not turn on the fact that both litigation and arbitration were provided for in the agreements, but rather arose out of a concern to avoid multiple proceedings with respect to the same issues.

[29] The Ontario Court of Appeal applied s. 7(5) in a similar manner in *Radewych*, discussed above, which is factually similar to the case at bar. The plaintiffs purchased a home from Brookfield. They then commenced an action against Brookfield, but also the architect and subcontractor, alleging that the home was improperly constructed. Brookfield brought a motion to dismiss or stay the action pursuant to s. 7(1) of the Ontario *Arbitration Act*, arguing that the plaintiffs’ claims were subject to an arbitration clause. Gray J. found that the claims against the architect and subcontractor were not subject to the arbitration agreement. He declined to grant a partial stay of the action on the following basis, at para. 23:

In my view, it would not be appropriate to grant a partial stay. To do so would potentially delay the resolution of the entire matter and that could produce a

significant duplication of resources and potentially inconsistent findings. Such a course would be contrary to the policy reflected in section 138 of the Courts of Justice Act which, simply stated, provides that "as far as possible, multiplicity of legal proceedings shall be avoided." It is preferable, in my view, that all of the various claims, against all of the defendants, be determined in one proceeding.

As only part of the plaintiff's claim arose under the arbitration clause, s. 7(5) of the *Arbitration Act* applied, and the action was allowed to proceed.

[30] Similarly, in this case, neither Jager nor any of the subcontractors are party to the arbitration clause contained in the construction agreement. Therefore, the clause deals with only some of the matters in dispute, and s. 7(5) of the *Arbitration Act* applies.

[31] AlanRidge argues that the Plaintiffs should not be allowed to avoid arbitration by adding parties to the claim who are not subject to the agreement. It contends that such an outcome would be particularly unfair in this case, as the agreement specifically contemplates the use of subcontractors. AlanRidge relies on the finding of Kerans J.A in *Kaverit Steel* that, while parties who are not subject to an agreement containing an arbitration clause cannot be required to partake in arbitration, the claims against them can be stayed pending the outcome of the arbitration if it is "just and equitable" to do so (*Kaverit Steel*, para. 21). Despite the possibility of contradictory findings, the arbitration in *Kaverit Steel* was allowed to proceed, and the litigation stayed pending arbitration.

[32] The agreement in *Kaverit Steel* was governed by the *International Commercial Arbitration Act*. Unlike the more recent decision in *New Era*, *Kaverit Steel* does not consider s. 7(5) of the *Arbitration Act*. As the *Arbitration Act* governs the contract in this case, the decision in *New Era*, which holds that multiple proceedings and contradictory outcomes are to be avoided, is the more relevant authority.

[33] AlanRidge further submits that to stay the arbitration would be "dramatically opposed to the purpose and intent of the Act." It relies on *International Resource Management (Canada) Ltd. v. Kappa Energy (Yemen) Inc.*, 2001 ABCA 146, 281 A.R. 373 for the proposition that the *Arbitration Act* was introduced in order to "hold parties to their bargains and to create some certainty and speed" (*Kappa*, para. 3). However, Côté J.A. expressed concern about holding outside parties to an arbitration clause. At para. 8 of *Kappa*, he made the following remarks in *obiter*:

One might wonder why the entire suit should be stayed. Why should the court stay the claim so far as it relates to all the other defendants? They never were parties to the written contract. Only one is even suggested as a substituted contractual party. See s. 7(5) of the *Act* on stays being limited to the matters dealt within the arbitration agreement. However, no one has argued that point, and those other defendants have not appealed and are not parties to this appeal. So that question is not open on this appeal. [emphasis added]

Kappa was decided prior to *New Era* and *Radewych*, both of which include an analysis of the effect of s. 7(5) in cases involving parties who are not subject to an arbitration clause. In my view, the principles set out in *New Era* and *Radewych* govern the case at bar.

[34] Having found that s. 7(5) of the *Arbitration Act* applies, I must determine whether the issues concerning each of the defendants can be reasonably separated. On the facts of this case, I find that the claims against AlanRidge, Jager and the subcontractors are inextricably linked to one another, and cannot be reasonably separated.

[35] Pursuant to s. 5(3)(f) of the *Alberta Judicature Act*, this court has the power to prevent the multiplicity of actions. The matters in dispute with respect to each defendant in this case overlap such that they cannot be reasonably separated for the purposes of s. 7(5) of the *Arbitration Act*. Following the decision in *New Era*, I conclude that the Plaintiff's action should be allowed to proceed and the arbitration stayed.

[36] The appeal is accordingly dismissed.

[37] Costs may be spoken to by correspondence.

Heard on the 3rd day of November, 2008.

Dated at the City of Calgary, Alberta this 17th day of March, 2009.

A.D. Macleod
J.C.Q.B.A.

Appearances:

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