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ORIGINAL

IN THE SUPREME COURT OF BRITISH COLUMBIA

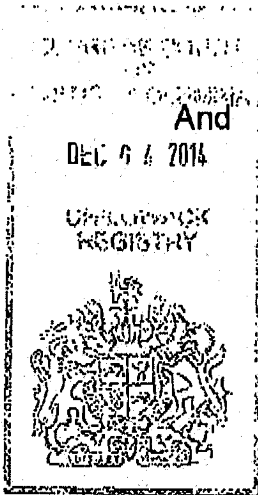
Date: 20141015
Docket: S27841
Registry: Chilliwack

Between:

Tiger Tool International Incorporated

Plaintiff

And



Cool-It Hi-Way Services Inc. and Steve (Saeed) Zaeri

Defendants

Before: The Honourable Mr. Justice Grist

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	A.R. Ayliffe
Counsel for the Defendants:	B.D. Loewen M.C. Toulch
Place and Date of Hearing:	Chilliwack, B.C. October 10, 2014
Place and Date of Judgment:	Chilliwack, B.C. October 15, 2014

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[1] **THE COURT:** The defendant's application is to stay this action, Chilliwack Registry No. S27841, to allow an arbitration to proceed in accordance with Clause 8.1 of a Distribution Agreement dated January 1, 2012. The application is brought invoking s. 15 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (now the *Arbitration Act*, R.S.B.C. 1996, c. 55).

[2] The plaintiff markets equipment used in the commercial trucking industry. The corporate defendant manufactures cooling units suitable for use in commercial trucks. The personal defendant is a shareholder and director of the corporate defendant.

[3] The Distribution Agreement dedicates the marketing and distribution of equipment manufactured by the corporate defendant exclusively to the plaintiff in all jurisdictions in Canada and the United States, except British Columbia. Mr. Zaeri is a party to the agreement and specifically covenants at Clause 17 not to act outside of the terms of the distribution agreement by marketing the equipment through any other entity he might participate in.

[4] The relevant chronology is as follows:

1. In the fall of 2013, the plaintiff, Tiger Tool International Incorporated ("Tiger"), withheld payments on three invoices issued by the defendant, Cool-It Hi-Way Services Inc. ("Cool-It"), for equipment supplied by Cool-It and complained of Cool-It and Mr. Steve Zaeri acting in breach of the Distribution Agreement by:

    (a) Selling equipment in jurisdictions exclusive to Tiger under the Agreement;

    (b) Supplying deficient goods; and

    (c) Failing to warrant the equipment supplied.

    The complaints did not specifically relate to the three unpaid invoices, and non-payment appears to have been employed to prompt

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satisfaction in respect of the more expansive claims of breach of the Distribution Agreement.

2. In March 2014, Cool-It brought an action in the Vancouver Registry to collect the money owing on the outstanding invoices. The action made no reference to the Distribution Agreement except to recite a clause that stipulates that invoices are to be paid within 30 days of delivery.

3. In May 2014, Tiger entered a Response to the action raising its claims of breach of the Distribution Agreement. No specific reference is made in the Response to the goods that were the subject of the invoices and it appears the claims of breach of the Distribution Agreement were raised to claim a set-off which would exceed the invoiced amounts. Mr. Zaeri was not a party to the Cool-It action and although he is named as participating in the breach of the Agreement, he is not joined as a party in the Vancouver action.

4. Shortly before the Response was filed, Tiger brought this action in the Chilliwack Registry reiterating the allegations of breach of the Distribution Agreement and claiming damages from Cool-It and Mr. Zaeri. This action was brought as a separate claim rather than a counterclaim in the Vancouver action as counsel were not agreed as to where the action should proceed.

5. Since January 22, 2014, the applicants have advanced their position to have the contract dispute arbitrated.

6. On June 10, 2014, Cool-It and Mr. Zaeri forwarded a copy of this application to Tiger to have the Chilliwack action stayed pending an arbitration to settle the outstanding disputes arising from the Distribution Agreement. The application was opposed and the matter was set for October 6, 2014.

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7. On May 9, on filing the Vancouver action, Tiger applied for an interim injunction restraining Cool-It and Mr. Zaeri from acts said to be in breach of the Distribution Agreement. The respondents Cool-It and Mr. Zaeri opposed the application and applied to adjourn the application pending this application for a stay. The application for adjournment was refused and the injunction was granted on terms on May 20, 2014, and was subject to a further presently outstanding application to set it aside.

8. By way of an email dated September 19, 2014, Tiger required a Response be filed to its Notice of Claim in the action by September 25, 2014. Cool-It and Mr. Zaeri filed the Response on September 25, and stated the position that the Response was being filed without prejudice to their outstanding stay application.

Analysis

[5] Parties have the contractual option to agree to settle disputes relating to their agreement by way of arbitration. The *Arbitration Act* and *Regulations* govern proceedings by way of arbitration and specifically s. 15 of the *Arbitration Act* provides:

> 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 filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> ...
>
> (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.

[6] The courts generally defer to arbitration proceedings invoked by a Notice to Arbitrate given in accordance with such a contractual provision. From *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474 (C.A.), at para. 36:

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[36] In *Boart Sweden A.B. v. N.Y.A. Stromnes A.B.* (1988), 41 B.L.R. 295 (Ont. H.C.), the court allowed an application for a stay of proceedings pending arbitration where there were multiple parties and multiple issues. The court said at 302-303:

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.
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> * * *
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> To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.
>
> It would also fail to give effect to the change in the law of international arbitration which, with the advent of art. 8 of the Model Law and the removal of the earlier wide ambit of discretion, gives the Courts a clear direction to defer to the arbitrators even more than under the previous law of international arbitration
>
> I conclude that nothing in the nullity provisions of art. 8 prevents this Court from giving effect to the clear policy of deference set out in the article.
>
> To conclude otherwise would drive a hole through the article by encouraging litigants to bring actions on matters related to but not embraced by the arbitration and then say that everything had to be consolidated in Court, thus defeating the policy of deference to the arbitrators.

[7] The Notice to Arbitrate however must be advanced in a timely fashion. A party to an agreement containing an arbitration clause must not equivocate by taking court action to determine the contract dispute prior to exercising the provision requiring arbitration or the courts will likely refuse a stay and allow the court action to proceed. From *Larc Developments Ltd. v. Levelton Engineering Ltd.*, 2010 BCCA 18, at paras. 31 and 32: "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 intension at the outset and not allow the action to proceed with its participation … The law generally recognizes the right of litigants to their choice of forum. While usually the right of an opposing party to challenge that right is preserved, at common law any step taken which invokes the

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jurisdiction of the court will result in attornment even if the party has reserved or is pursuing a challenge to jurisdiction."

[8] On the other hand, however, steps taken by a party to defend an action brought by the other side while advancing the claim for arbitration or participation in applications for interim relief will not prejudice that party's right to press for an arbitration. From *No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.*, [1993] B.C.J. No.1622, at paras. 22 and 23:

> [22] The respondent now asserts before us that the demand for discovery of documents, even if it can be said to be a step in the proceedings within s.15(1), was, on all the facts, clearly for the sole purpose of obtaining documents to be used on the motion to set aside the ex parte order that froze the joint venture funds. The respondent goes on to say that, this being so, s.15(4) of the Act applies and the action should be stayed and this appeal dismissed.
>
> [23] In my opinion, if s. 15(4) is applicable on the facts before us then the respondent must succeed on this appeal. I say this whether or not the demand for discovery of documents can be said to be a step in the proceedings within s. 15(1). It is, in my opinion, arguable whether what could otherwise be taken as a step in the proceedings within s.15(1) is, as a matter of interpretation, within that subsection where the facts bring the case within s.15(4). 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. In my opinion, it is the pursuit of the defence itself that brings an activity within s.15(1). I say this because s.15(1) cannot be read in isolation but must be read together with the other subsections, and particularly subsection (4) of s.15. However, I need not decide this point because, in my opinion, if the activity, here the demand for discovery of documents, is for a purpose which falls within s.15(4) then, be it a step or not, it remains open to the respondent to assert the arbitration clause in the agreement.

[9] Further, the participation in an application for interim relief will not prejudice that party's right to press for arbitration. In respect of this last proposition, s. 15(3) of the *Arbitration Act* is apposite:

> (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.

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[10] In this case, the applicant Cool-It and Mr. Zaeri contend that the Vancouver action brought to collect the invoice amounts was not an action to determine rights under the contract and the only reference to the Agreement was to a 30-day payment provision, which is generally consistent with business practice. They argue that the contract dispute only arises through the response to this action and the separate claim in the Chilliwack action brought by Tiger.

[11] After these matters were pleaded, participation in the court actions was purely defensive to hold off default, while at the same time advancing their stay application, or by way of participation in the interim interlocutory injunction application, proceedings which are available independent of the contractual right to arbitrate.

[12] Secondly, the applicant, Mr. Zaeri, is a separate party to the Distribution Agreement and has an independent right to call for arbitration. He is not named and has taken no part in the Vancouver action, has advanced the claim for arbitration in a timely manner, and has only responded to the Chilliwack action by filing a Response after a demand to do so.

[13] I find these points to be well-founded. The Vancouver action is a debt collection proceeding concerning goods ordered, supplied, and invoiced, to collect the invoiced amount. The reference to the payment within 30 days provision in the contract is incidental, has nothing to do with the substance of the contractual dispute brought by Tiger, and the claim could stand independently, likely without contest, with reference to general business practices.

[14] Beyond this, Cool-It has invoked the arbitration clause in a timely manner, has maintained its position that the contract dispute be arbitrated and has only participated in the proceedings brought by Tiger defensively to preserve its position or as allowed generally under s. 15(3) in respect of the interim application for an injunction.

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[15] In these circumstances, I reject the contention Cool-It has acted to delay the arbitration or has attorned to the court process or is estopped from its present position.

[16] Further, I find Mr. Zaeri's right to an arbitration stands separate from that of Cool-It. He is personally subject to restrictive provisions under the Distribution Agreement which Tiger alleges he has breached. He was made a separate party to the Agreement and signed the contract in his own right as well as by way of his role as director of Cool-It. The Vancouver action makes no claims on his behalf and he enters the litigation solely as a defendant to Tiger's Chilliwack action. His right to arbitration has not been compromised and can stand alone from any equities that might affect Cool-It's position. As stated in *Bab Systems, Inc. v. McLurg*, [1994] O.J. No. 3029 (Ont. C.J.) at para. 6: "Although one party to a contract may waive a provision in the contract for its own benefit, generally speaking, all parties to the contract must agree to waive compliance with a provision which applies to all parties and which, ... imposes the same obligation on all parties."

[17] Accordingly, the stay will be ordered.

[18] I am wondering, gentlemen, if there is any requirement for terms or further provisions in respect of this stay.

[19] **MR. LOEWEN:** I don't think there is, My Lord. My friend and I with respect to Mr. Justice Brown's order attended a hearing yesterday and we were able to resolve that issue. As I understand it and perhaps my friend can make his views known, but I'm not sure we need any further terms.

[20] **THE COURT:** Mr. Ayliffe?

[21] **MR. AYLIFFE:** Well, I think the only thing that I notice that of course there are monies that are held in trust pursuant to the injunction order. Now those monies I believe correspond directly to the monies claimed in the Vancouver action. Are you – I mean I'm not sure, My Lord, what my friend's intentions are with respect to the Vancouver action having heard Your Lordship's reasons, but I would suggest it

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would flow that we would quantify to avoid a multiplicity of proceedings here if we arbitrate. Perhaps Your Lordship could canvass that with my friend as to whether or not we can stay the other action, arbitrate everything and then the funds can stay in trust.

[22] **THE COURT:** Well, if I remember correctly, and I could easily be wrong, this application was specific to the Chilliwack action.

[23] **MR. AYLIFFE:** It was. It was, My Lord.

[24] **THE COURT:** So the stay would be specific to the Chilliwack action. The other action of course is in your friend's hands and, you know, whether it is going to proceed or stay in abeyance, well, you know that is a matter that I think is not directly affected by this particular order. If you want to take it further or somehow have some other application in the Vancouver action, well I will hear from you, but it seems to me that this is a reasonably confined directive to the Chilliwack action as it presently stands – presently determined. What do you say, Mr. Loewen?

[25] **MR. LOEWEN:** I anticipate that any concerns that my friend may have with respect to multiplicity of proceedings will be allayed. I certainly do not want a multiplicity of proceedings and at first blush would likely consider abeying that action until there is a final resolution with respect to the arbitration or perhaps – and I haven't put much thought to this – perhaps having both of them arbitrated, but that's something where I certainly am going to take all efforts and steps to ensure that there is not a multiplicity of proceedings.

[26] **THE COURT:** All right. Well then I will take no further step in this except to make the order staying the Chilliwack action subject to the arbitration proceedings and we will leave it at that for today.

[27] **MR. LOEWEN:** My Lord, are you willing to entertain any submissions with respect to costs?

[28] **THE COURT:** Well, I'll hear you on costs -- brief submissions, I hope.

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[29] **MR. LOEWEN:** These will take no more than three minutes. My submission is this: it relates to the disbursement for filing the Response to Civil Claim. In my view, requesting the Response to Civil Claim near the end of or very close to the application hearing date and insisting that it be filed was not necessary. With respect to those filing costs, I'd ask Your Lordship to make an order that the plaintiff reimburse the defendants for that. As well, we would request that given the insistence on this Response to Civil Claim when it was not necessary we were of the view that it was an attempt to entrap us into turning to the jurisdiction was not a proper purpose for requesting it and an increased order of costs should follow. When I say increased order of costs I am simply requesting that costs would be – an order for costs be made in any event of the cause and payable within 60 days. So it's not necessarily an increased scale, it's just a matter that may be paid in any event of the cause to the defendants and within 60 days.

[30] **THE COURT:** Mr. Ayliffe?

[31] **MR. AYLIFFE:** My Lord, I have a couple of points in response. Under the general law of injunctions, the plaintiff is required to proceed with certain dispatch and this is a situation where the defendants have – they started out with Mr. Anderson as counsel, Charles Anderson, then they switched over to Jack Anderson as counsel, and Mr. Loewen was third counsel and he came in on the September 3.

[32] Throughout this period of time, the – and including at the hearing for an injunction, Mr. Anderson was unclear as to whether or not the arbitration would be something that would be pursued. Then when Jack Anderson came on, I suppose the application was made, but there were various requests throughout this time to move the matter forward and for a response and to set discoveries, then to do all of these things. So you know I think that the plaintiff was subject to competing and conflicting imperatives here in this regard and had to pursue the matter, push it forward pursuant to the law of injunctions, and that is an implied term of the injunction that it do so.

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[33] In any event as I have submitted, and perhaps Your Lordship considers this to be wrong, but Tiger Tool's position and expectation was that there would be a Response filed with some jurisdictional element to it. Now perhaps that is not something that Your Lordship finds to be reasonable, but that was the intention and the expectation and Tiger Tool had a right to have the pleadings closed.

[34] An application for a stay is not a stay. The action had been ongoing for many months and our request for a Response to Civil Claim had been unanswered for many, many months and so I don't think closing pleadings without prejudice of course to the outcome of this application which is what my friend did was an unreasonable step for Tiger Tool to request. Tiger Tool did have a good faith basis for opposing this application. It took the position that the Vancouver action was an indication that this action was to be litigated, and in fact at the injunction application my friend indicated that he wasn't sure whether or not they would be proceeding with the arbitration. So there has been equivocation on the part of Cool-It and Tiger Tool has just been trying to stay the course since the – well, since the Notice of Civil Claim was filed in the Vancouver action, My Lord.

[35] **THE COURT:** All right. Gentlemen, I am attracted to the argument that the filing fee on the Response should be reimbursed. That Response was in counsel's hands – opposite counsel's hands before the requirement that it be filed on September 25. It was made in circumstances where the stay application was ready to proceed within two weeks and I do not see any matter of pressing significance that required the Response to actually be filed. It was as I say in hand and was filed just in the same form as already delivered. So a filing fee seems to me to be an appropriate claim to award by way of costs, as costs thrown away in effect and as it now turns out with the success of the stay application.

[36] As to going to some special remedy based upon the – said to be unseemly act of baiting you, Mr. Loewen, into something that might look like an attornment. No. There are strategies and logistical steps taken during the course of litigation which may not be thought to be entirely fair game, but it seems to me that this is

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something that does not cross the line and I am not going to make any special provision on costs in that regard.

[37] The last thing though that I consider here is that we are going to arbitration now and that likely is going to determine the contract or at least there is every prospect of doing so. This Chilliwack action may never be resurrected. It is difficult in those circumstances sometimes to determine when costs might be taxable because costs ordinarily are expressed in some fashion as being subject to the cause. If this were an ongoing action, for example, and Mr. Loewen was successful on some application , then I would likely express the view that he is entitled to his costs in the cause.

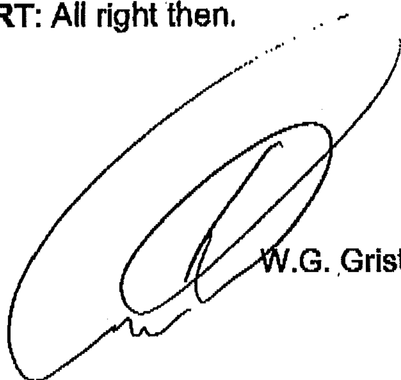
[38] Here, I think the appropriate order is costs of this application will be to the respondents, payable forthwith based upon Scale B of the tariff. So the costs will become payable without a cause actually having to be determined in the action.

[39] **MR. LOEWEN:** My Lord, I apologize for interrupting you, but if I heard you correctly, the order was with respect to costs to the respondents which would be Mr. Ayliffe's client. Were you intending to say costs to my client?

[40] **THE COURT:** Yes, defendants is what I wanted to say. I'm afraid that my instincts go back to the time when we had writs and defences and plaintiffs and defendants and so it's easy for me to get confused, gentlemen.

[41] **MR. LOEWEN:** Well, we've sorted that out. Okay. Thank you, My Lord.

[42] **THE COURT:** All right then.



W.G. Grist J.

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