
CANADA / JUDGMENT

A-Teck Appraisals Ltd. v. Constandinou

2020 BCSC 135

COURT

Supreme Court of British Columbia

DECIDED

5 February 2020

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2020 BCSC 135 A-Teck Appraisals Ltd. v. Constandinou

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

A-Teck Appraisals Ltd. v. Constandinou,

2020 BCSC 135

Date: 20200205

Docket: S1956934

Registry: Prince George

Between:

A-Teck Appraisals Ltd.

Plaintiff

And

Alex Constandinou also known as Alexandros Constandinou

Defendant

Before: The Honourable Madam Justice Humphries

(Appearance via video conference)

Reasons for Judgment

Counsel for Plaintiff:

Andrew Kemp

Counsel for Defendant:

David M. Brown

Place and Date of Hearing:

Prince George, B.C.

January 16, 2020

Place and Date of Judgment:

Prince George, B.C.

February 5, 2020

- [1] The defendant worked as a real estate appraiser for the plaintiff. He signed an employment contract in 2016. By letter dated July 15, 2019, he resigned his employment effective August 15, 2019. On August 14, 2019, the principals of the plaintiff, who were planning to start a holiday, met with the defendant and told him not to come in the next day. He was paid for August 15, 2019.
- [2] The plaintiff alleges that the defendant was found to be doing appraisals in October of 2019 in breach of the employment contract's non-solicitation and non-competition provisions.
- [3] The plaintiff filed an action at some point (I have not been able to locate the pleadings in the chambers record or online) and on November 12, 2019, it filed an application to enjoin the activities that it alleges are in breach of the employment contract. The defendant filed a counterclaim for wrongful dismissal.
- [4] On December 23, 2019, the plaintiff filed an application to stay the counterclaim on the basis of the arbitration clause in the employment contract, and the defendant filed an application for summary judgment. The matter came on before me in Vancouver by video from Prince George on January 16, 2020.
- [5] The defendant takes the position that the arbitration clause is void and cannot be enforced; thus their application for summary judgment on the counterclaim should proceed.
- [6] After hearing argument on the plaintiff's application to stay the counterclaim I reserved decision, and counsel agreed that the rest of the applications should be adjourned generally and I need not be seized. The plaintiff has not responded to the application for summary judgment because to do so would negate their argument that the arbitration clause must prevail. Counsel for the defendant agreed to take no steps in default, pending my decision on the stay application.
- [7] In practical terms, the real bone of contention is the non-solicitation and non-competition clause, which runs for 12 months from termination, that is, until August 15, 2020, seven months from now. If the defendant is found to have been wrongly dismissed, the clause does not apply.

- [8] No statements in the above narrative are to be taken as findings of fact or conclusions of law, binding on a future chambers or trial judge.

Statutory Interpretation Issue

- [9] The relevant clause in the employment contract, which is not a model of clear English, provides:
50. All matters in difference between the parties in relation to this agreement, excepting matters related to Confidential information, Non-Competition, Non-Solicitation, and Injunctive Relief, shall be resolved as follows:
- (a) [mediation provision]
- (b) If the parties cannot resolve their differences by way of mediation within a reasonable time, they shall refer the dispute to the arbitration of a single arbitrator. If the parties agree upon one, otherwise, to three arbitrators, one to be appointed by each party and third to be chosen by the first two named before they enter upon the business of arbitration. The award and determination of the arbitrator or arbitrators or any two of the three arbitrators shall be binding upon the parties and their respective heirs, legal representatives, successors, and assigns. The arbitration shall be conducted pursuant to the provisions of the Arbitration Act (British Columbia).
- [10] Subsections 15(1) and (2) of the Arbitration Act RSBC 1996, c. 55, are relevant to the current argument:
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 a civil claim or a response to a family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

The Plaintiff's Position

- [11] The plaintiff refers to *Prince George (City) v McElhanney Engineering Services Ltd.* [1995] B.C.J. No. 1474, a decision of the Court of Appeal, in which the court had to consider both the construction of ss. 15(1) and (2) of the Arbitration Act, and the issue of whether a judge has residual discretion to stay a proceeding under that Act. The chambers judge had refused the defendant's application to stay an action in order to allow an arbitration to proceed, on the basis that the arbitration clause was inoperable because the actions raised broader inter-related issues with other parties, and alternatively, on the basis that he had a residual discretion to refuse a stay where there was a risk of multiple proceedings and inconsistent

results.

[12] The court, at para. 22, referred to three prerequisites to the application of s. 15(1) of the Arbitration Act, at para 22:

- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- (c) the application must be brought in a timely manner, i.e. before the applicant takes a step in the proceeding.

[13] The court then examined s. 15(2), and concluded that it is to be interpreted according to the law of contract:

In my view, the proviso about "null and void, inoperative, and incapable of being enforced" simply preserves the rule in *Heyman v. Darwins Ltd.* cited earlier [1942] A.C. 356 (H.L.)). The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced").

[14] The court next dealt with the meaning of these terms in contract law, and concluded that the arbitration clause in question was not inoperable merely because there were issues involving other parties that were inter-related and would not be resolved by the arbitration.

[15] The court then turned to the issue of whether the chambers judge had a residual discretion to stay these matters because of the risk of multiple proceedings and inconsistent results. The court concluded at para. 52 that no such general residual discretion exists: the court should be concerned on a stay application only with whether the statutory prerequisites have been met. If those prerequisites have not been met, then the court should refuse a stay. If that issue is arguable, the stay will be granted and the matter will be left to be determined by the arbitrator:

Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration.

- [16] The plaintiff refers to two recent cases in this court that have followed McElhanney, and in which the proceedings were stayed to allow arbitrations to proceed under arbitration clauses: Pietrasz v. Eminata Group et al 2014 BCSC 479, and Rashid v. Wipro Limited 2015 BCSC 2199.
- [17] The plaintiff says the arbitration clause clearly applies; the issue of wrongful dismissal arising from the termination should go to arbitration. The requirements of s. 15 of the Arbitration Act are clearly met and the counterclaim for wrongful dismissal and the summary judgment application must be stayed.

The Defendant's Position

- [18] The defendant argues that Clause 50 of the employment contract attempts to contract out of certain key requirements of the Employment Standards Act, RSBC 1996 c. 113, ("the Act") and thus the clause is void. He refers to some particular sections which he says conflict with specific sections of the Act, and which he says render the entire agreement void ab initio. He referred to Lefebvre v. HOJ Industries Ltd. [1992] 1 S.C.R. 986, at pp. 1000-1001, for the proposition that if one termin a contract is null and void, then it all is.
- [19] Most importantly, he says the Act provides for a complaint, investigation, and hearing process; he submits that these are rights afforded by the Act but which are forfeited by Clause 50.
- [20] He refers to section 4 of the Act, which provides:
4. The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements, not being an agreement referred to in section 3(2) [collective agreements], has no effect.
- [21] The defendant relies on a recent case decided by the Ontario Court of Appeal, Heller v. Uber Technologies Inc. et al 2019 ONCA 1, to support his position that his action should go ahead and cannot be thwarted by the arbitration clause.
- [22] In Heller, the issue in a proposed class action was whether Uber drivers were employees. If they were employees, they were covered by the Employment Standards Act 2000, S.O. c. 41, (the "ESA") and entitled to the benefits under that Act. Thus they would not be bound by contractual terms that purported to oust those benefits.
- [23] The arbitration clause at issue in Heller required arbitration in the Netherlands. The Court of Appeal held that that section was inoperable because it was unconscionable to require a person bound by the contract to travel to the Netherlands to have a dispute resolved. However, the court went on to consider the issue in a wider context. The court noted that, if any employee makes a complaint, then the Employment Standards Officer must investigate it under the ESA. The court stated that this complaint and investigative process itself constitutes an employment standard. The arbitration clause, which eliminated the right of an Uber driver to make a complaint to the Ministry of Labour regarding a possible violation

of the Act, constituted a contracting out of benefits provided for under the Act.

- [24] Even though the appellant had not chosen to make a complaint under the ESA, but instead commenced the proposed class action, the court held that the arbitration clause was invalid because it purports to contract out of the complaint and investigative process. The stay of proceedings granted by the chambers judge was set aside. The defendant in this case submits that I should apply the same reasoning, find the arbitration clause to be invalid, and refuse to stay the proceedings.
- [25] The defendant also argues, relying on *Macaraeg v. E Care Contact Centers Ltd.* 2008 BCCA 182, that there is no civil cause of action to enforce statutory rights if an enforcement mechanism is conferred by statute. If such a mechanism exists, the parties must use it. They cannot sue or go to arbitration. The defendant submits that a properly construed arbitration clause can be enforceable but it has to be limited to rights that are not statutory. The parties cannot contract out of statutory enforcement rights.
- [26] The defendant argues as well that there are public policy concerns: he says this clause, which requires an expensive arbitration, is there to frustrate a lay person who does not understand the significance of such clauses in a standard contract of adhesion.

Reply

- [27] In reply, the plaintiff says the Ontario Court of Appeal was wrong in *Heller*, which is under appeal. The plaintiff says the court erred in considering the bare wording of the contract and the legislation in isolation. In the present context, the defendant has not applied for an investigation under the Act in respect of his statutory three weeks' notice; his action is based only on the common law. If a claim were made under the Act, his wrongful dismissal claim could only be dealt with statutorily on the basis of the three weeks provided for in the Act. The rest would have to be determined separately in any event, either by action or by arbitration, so it makes no sense to ignore the larger context, as the court in Ontario did.
- [28] The plaintiff says the law in British Columbia is as set out in *McElhanney*, and which has been followed by this court: arbitration clauses are enforceable in British Columbia.
- [29] The plaintiff notes as well that the defendant's rights under the Act are all retrospective as he is no longer employed. If he were still an employee and alleged that a particular contractual provision conflicted with the statutory minimum, then I understood the plaintiff to acknowledge that it could not use the arbitration provision to thwart the defendant's ability to file a complaint under the Act. However, that is not the present situation.

Practical Considerations

- [30] The defendant added some arguments based on practicalities: there is a potential for conflicting findings if there are parallel proceedings on the issue of whether the plaintiff resigned or whether he was terminated; the injunction will be decided by a court before the arbitration, thus giving rise to the risk of compromising the arbitrator by findings made by the court.
- [31] In response to the latter point, the plaintiff says the lawsuit will not make it to trial because the non-competition/solicitation provision only applies for a year and is up in August of 2020. That period will have expired before a court can deal with a trial and thus there will be no findings from a court to influence the arbitrator. The court would not be required, on an application for an injunction, to make findings that would impinge on the arbitration process, but in any event, the parties can agree not advise to the arbitrator of that application.
- [32] The plaintiff says the wrongful dismissal issue is as easily decided by an arbitrator as by a court, and can be done more expeditiously.

Analysis

- [33] The specific sections in the employment contract which were referred to by the defendant as contrary to the Act are not concerned with the issue of termination or reasonable notice. That is, they do not deal with wrongful dismissal. In my view, even if those sections are in conflict with the Act, which the plaintiff disputes, they are irrelevant to the issue before me. Lefebvre stands for the proposition that if a term in an employment contract does not comply with the minimum requirements of the Act, then that term is void for all purposes and cannot be used as evidence of the parties' intention. I do not see that case as support for the proposition that the entire contract becomes a nullity.
- [34] The cases from British Columbia to which I was referred do not deal directly with the issue before me, which is the interaction between the arbitration clause, the Employment Standards Act, and the common law, and whether a dispute mechanism provided for in the statute precludes resolution of disputes under an arbitration clause.
- [35] The two cases referred to by the plaintiff, Pietrasz and Rashid, following McElhanney, do not deal with the Act. Pietrasz dealt with alleged conflicts within the agreement itself and whether an allegation of bad faith placed the matter outside the jurisdiction of an arbitrator; Rashid was concerned with an allegation that the claim was outside the scope of the arbitration clause. McElhanney itself dealt with the meaning of "inoperative" in the Arbitration Act, and whether a residual discretion exists in the court to refuse to stay proceedings.

[36] Macaraeg, referred to by the defendant, stands for the proposition that there is no civil cause of action if there is a complete code in the Act for the granting and enforcement of benefits that are only conferred by the statute. It does not purport to deal with causes of action, such as wrongful dismissal, that exist otherwise at common law (see paras. 96 and 97).

[37] This leaves Heller, which does have some superficial application to the present situation.

[38] The Ontario ESA, similar to the British Columbia Act, prohibited contracting out of its provisions, although the wording in that statute is somewhat different:

Section 5 (1) Subject to subsection (2), no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void.

(2) If one or more provisions in an employment contract or in another Act that directly relate to the same subject matter as an employment standard provide a greater benefit to an employee than the employment standard, the provision or provisions in the contract or Act apply and the employment standard does not apply.

[39] While, for this court, the Ontario Court of Appeal is persuasive authority and its judgments should be viewed with respect, it is not obvious that a statutory complaint/investigative mechanism becomes an employment standard itself rather than a procedure for enforcing employment standards. More importantly, the reasoning in that case was informed by the unfairness of requiring the parties in Canada to resolve disputes in the Netherlands.

[40] The British Columbia legislation states that the requirements of the Act and regulations are "minimum requirements" which cannot be waived. This wording, which, unlike the Ontario legislation, does not refer to an employment standard, cannot easily be read to include a complaint/investigative procedure used to enforce those minimum requirements as itself a "minimum requirement".

[41] If such a reading were to be imported into the British Columbia context based on Heller, thus rendering most arbitration clauses nullities, it will have to await the interpretation of the issues by the Supreme Court of Canada. The statutory provisions in Ontario and British Columbia are different; the important and, in my view, overriding concern of the Ontario court as to the "inoperative" aspect of the clause requiring resolution of disputes in the Netherlands is not applicable to the case before me; and the logic of the reasoning in Heller on the issue of the dispute mechanism as an employment standard is not of such persuasive effect that it should prevail in the context of the British Columbia legislation.

- [42] The defendant has not chosen to invoke the Employment Standards Act, and his cause of action exists otherwise at common law. Thus he is not relying upon a solely statutory cause of action. Wrongful dismissal exists as a common law cause of action and the defendant has filed a counterclaim for that cause of action; this is a dispute that falls within the arbitration clause on its face; the plaintiff company has taken no steps in that action. The arbitration clause is not void, inoperable, or incapable of being performed.
- [43] I am bound by the law as stated in McElhanney and previous decisions of this court: if the requirements of s. 15(1) of the Arbitration Act are met, and the clause is not void, inoperable, or incapable of being performed, then the action must be stayed in order to allow the arbitration to proceed.
- [44] I am satisfied that the requirements of the Arbitration Act are met and that the stay of the counterclaim and the summary judgment application should be granted in order to allow the arbitration to proceed.
- [45] I am of the view that the practical considerations raised by the defendant can be dealt with as suggested by the applicant A-Teck, but in any event, I am precluded by McElhanney from exercising a residual discretion to refuse a stay based on those types of considerations if the statutory requirements are met.
- [46] The counterclaim is stayed; the arbitration may proceed. The remaining issues are adjourned generally, on the agreement of counsel.

"Humphries J."

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