

CANADA / JUDGMENT

Beck v. Vanbex Group Inc.

2021 BCSC 1619

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1619 Beck v. Vanbex Group Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Beck v. Vanbex Group Inc.,

2021 BCSC 1619

Date: 20210818

Docket: S199464

Registry: Vancouver

Between:

Andrew Beck and Craig Petersen

Plaintiffs

And

Vanbex Group Inc., Kevin Hobbs, Lisa Cheng, Jeffery Walsh, Brian Onn and Toronto Dominion Bank dba TD Canada Trust

Defendants

Before: The Honourable Madam Justice Fleming

Reasons for Judgment

Counsel for the Plaintiffs

appearing via videoconference:

P. Bennett

Counsel for the Defendants,

Vanbex Group Inc. and Kevin Hobbs

appearing via videoconference:

O. Ahmed

A. Tang

Counsel for the Defendant Lisa Cheng

appearing via videoconference:

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Place and Date of Hearing:

Vancouver, B.C.

July 8, 2021

Place and Date of Judgment:

Vancouver, B.C.

August 18, 2021

Introduction

- [1] The defendants Vanbex Group Inc. ("Vanbex Group") and Kevin Hobbs apply for an order staying this proposed class action proceeding, except for the relief sought under s. 172 of the Business Practices and Consumer Protection Act, S.B.C. 2004, c. 2 [BPCPA], relying on s. 7 of the Arbitration Act, S.B.C. 2020, c. 2, ss. 8 and 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253, and the court's inherent jurisdiction.
- [2] The action concerns the sale of digital "FUEL" tokens by Vanbex Labs Inc. ("Vanbex Labs") say the defendants, and also by Vanbex Group, Mr. Hobbs and the other defendants Lisa Cheng, Jeffery Walsh and Brian Onn, say the plaintiffs, through an initial coin offering in 2017 ("ICO"). In summary, the plaintiffs allege the defendants breached various provisions of the Securities Act, R.S.B.C. 1996, c. 418, and the BPCPA, in addition to being unjustly enriched and engaging in an unlawful conspiracy in relation to the sale of the FUEL tokens.
- [3] The only evidence in the application record is an affidavit made by Mr. Hobbs.
- [4] He deposes that Vanbex Group and Vanbex Labs are distinct corporate entities with completely separate and distinct businesses. He and the defendant, Lisa Cheng are the sole directors, officers and shareholders of Vanbex Group, which was incorporated in 2014. They are also the sole directors and officers of Vanbex Labs but majority not sole shareholders, which was incorporated approximately three weeks prior to the ICO. According to Mr. Hobbs, Vanbex Group operated mainly as a cryptocurrency consulting, marketing, and strategic development business. Vanbex Labs was created after he and Ms. Cheng decided to

work on the product development side of "blockchain" and cryptocurrency technology.

[5] Purchasers of the FUEL tokens were required to agree to terms of service. The agreement contained an arbitration clause that reads:

17. Dispute Resolution; Arbitration

a. Arbitration. Except for any disputes, claims, suits, actions, causes of action, demands of proceedings (collectively, "Disputes") in which either you or the Company seeks to bring an individual action in small claims court or seeks injunctive or equitable relief for the alleged unlawful use of intellectual property, including, without limitation, copyrights, trademarks, trade names, logos, trade secrets, or patents, all Disputes arising out of or in connection with these Terms, or in respect of any legal relationship associated therewith or derived therefrom, will be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre ("BCICAC") pursuant to BCICAC Rules.

[6] The dispute resolution clause also contained a class action waiver:

b. No Class Arbitrations, Class Actions or Representative Actions. Any Dispute arising out of or related to these Terms is personal to you and the Company and will be resolved solely through individual arbitration and will not be brought as a class arbitration, class action or any other type of representative proceeding. There will be no class arbitration or arbitration in which an individual attempts to resolve a Dispute as representative of another individual or group of individuals. Further, a Dispute cannot be brought as a class .

[7] Although the amended notice of civil claim ("ANOC") removed Vanbex Labs as a defendant, it alleges Vanbex Labs was a wholly owned subsidiary of Vanbex Group or otherwise under its control. Defining Vanbex Labs as part of Vanbex Group, it also alleges that the businesses of "Vanbex, Vanbex Labs, and Vanbex Ventures Inc. (Vanbex Group)" are inextricably interwoven, and each is the agent of the other for the purposes of the operation of the Vanbex Group business, the FUEL tokens, and the FUEL ICO. Further, the ANOC pleads in the alternative that "[j]ustice demands that the corporate veil be pierced to allow the Plaintiffs and the Class Members to recover against all wrongdoers for their illegal misconduct".

Legal Principles

[8] Section 7 of the Arbitration Act provides for a mandatory stay in particular circumstances:

Stay of court proceedings

7 (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court for a stay of 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.
- [9] There are three prerequisites under s. 7:
- (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 timely, i.e. before the applicant takes a step in the proceeding.

See *Prince George v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (C.A.) at para. 22.

- [10] If an applicant establishes an arguable case regarding each prerequisite, the court must grant a stay unless it determines that the arbitration agreement is void, inoperative or incapable of being performed, which is not asserted here. The low threshold reflects the principle of competence-competence that affirms arbitrators are competent to determine their own jurisdiction in the first instance: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 at para. 122. Jurisdictional challenges involving a pure question of law, or one of mixed fact and law that require "only superficial consideration of documentary evidence in the record" are an exception: *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 at paras. 29 and 114; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at paras. 84-85. *Uber* described this superficial consideration at para. 36:
- [36] Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties.

[Citations omitted.]

- [11] The only issue here is whether the applicants have established an arguable case that a defendant is a party to the agreement containing the arbitration clause, part of the first prerequisite.
- [12] There is no dispute that the signatories to the agreement and therefore the arbitration clause include the plaintiffs and Vanbex Labs only. The proper parties to an arbitration agreement, however, may include non-signatories where there is an agency relationship between a party and a non-signatory; or the corporate relationship between a parent and its subsidiary is sufficiently close to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other, along with other circumstances: *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014 at para. 77.

[13] Further, in DNM Systems Ltd. the court accepted a stay is appropriate when it is unclear whether a party to the action is a party to the arbitration agreement:

[76] This point is made by the authors of Commercial Arbitration in Canada at 2-48:

It is within the scope of the jurisdiction of the arbitral tribunal to determine whether a particular person is a party to the arbitration agreement. It is only when it is clear that a person is not a party to the arbitration agreement that the court should make a final determination in this regard. Where it is not clear who is a party to an arbitration agreement, it is appropriate that a stay of proceedings be granted and the matter decided by the arbitral tribunal

Discussion

[14] The applicants assert that they have established an arguable case that Vanbex Group is a party to the arbitration agreement, because if the plaintiffs' theory is accepted, and Vanbex Group is found responsible for the conduct of Vanbex Labs on the basis the two are "inextricably interwoven", each acted as an agent for the other, or the corporate veil should be pierced, then by necessary implication, Vanbex Group is at least arguably a (non-signatory) party to the arbitration agreement.

[15] The applicants rely most significantly on Lambsmead Limited v. Pharmawest Pharmacy Ltd., 2014 BCSC 218 (and similarly, Northwestpharmacy.com Inc. v. Yates, 2017 BCSC 1572) in support of their position.

[16] In Lambsmead, the plaintiff sued the defendants for breach of contract, although not signatories, arguing the party to the contract was the defendants' nominee and the true contractual parties were the defendants. The contract in issue contained an arbitral clause. The defendants applied for a permanent stay based on the clause and took much the same position as the applicants. Submitting that although they would argue at arbitration or trial that they are not parties to the contract, they argued they were entitled to rely on the arbitral clause, because if the plaintiffs were correct the action should be stayed, but if the defendants were not parties, the plaintiff had no claim against them and the action would be dismissed. Justice Melnick concluded the "threshold issue" of whether the defendants were the true parties to the contract and therefore the arbitral clause, was not one the court should determine, and granted a permanent stay.

[17] Conversely the plaintiffs argue the application for a stay must be dismissed, based on Mr. Hobbs's evidence that Vanbex Group and Vanbex Labs are distinct corporate entities that pursued separate businesses. Insisting the arguable case standard involves an evidentiary burden, the plaintiffs suggest it cannot be met based on their pleadings or what they say is a purely hypothetical argument to the effect that the arbitrator might have jurisdiction, relying on AtriCure, Inc. v. Meng, 2020 BCSC 341 at para. 62.

- [18] In AtriCure one of the defendants applied to dismiss a BC action, on the basis the court lacked jurisdiction to decide the claims made against her. AtriCure had distribution agreements with a number of Chinese companies. One of the distribution agreements contained a dispute resolution clause requiring arbitration in China. AtriCure had started an action against another defendant Dr. Jian Meng - the applicant's husband, and others in the state of Ohio, alleging they acted in concert with one of the Chinese companies, ZenoMed, in order to develop and sell counterfeit medical devices. AtriCure had also started an arbitration in China against ZenoMed claiming damages for breach of its distribution agreement. Although the applicant was the sole shareholder of ZenoMed, she was not a director or an officer, nor had she ever been significantly involved in the business. In the BC action, AtriCure alleged Dr. Meng and the applicant had conspired with the Chinese companies to defraud AtriCure and steal its confidential information.
- [19] Based on the absence of evidence to establish an arguable case that either the applicant or Dr. Meng was even a non-signatory party to the distribution agreement with ZenoMed, Justice Hori concluded the arbitration clause did not apply to the BC action (at paras. 65 and 66). Before reaching this conclusion, he commented that the applicant must present some evidence that she or Dr. Meng were parties to the arbitration clause, citing Northwestpharmacy.com at para. 54, which adopted paras. 98-99 of the defendants' submissions. Those paragraphs, however, do not discuss an evidentiary burden. Nor do I interpret, Hori J.'s reasons as intending to articulate such a principle.
- [20] Further, in contrast to the alignment between the ANOCC in this case and the grounds upon which a non-signatory may be a proper party to an arbitration agreement, AtriCure had alleged only that Dr. Meng controlled and directed each of the Chinese companies. In other words the plaintiff's allegations/pleadings were also insufficient to ground a potential finding that Dr. Meng or Ms. Ren were non-signatory parties.
- [21] The plaintiffs also argue that Lambsmead and Northwestpharmacy.com are distinguishable on a number of grounds:
- the plaintiffs in both cases explicitly alleged the non-signatory parties were the true parties to the contracts;
 - the claims in both cases were contract based, and the question of whether the non-signatories were parties to the contracts was a contested threshold issue for the claims themselves;
 - as a result, it was arguable the plaintiffs could not advance their claims, as pleaded, without establishing that the defendants were parties to the contract and by extension the arbitration clause; and
 - it was the plaintiffs in those cases who insisted on the arbitration clauses, making it plainly unjust for them to avoid the application of those clauses.

- [22] I disagree. First, the plaintiffs appear to have conflated the first and second prerequisites for a mandatory stay. Yet they have not disputed there is an arguable case that this action is "in respect of a matter agreed to be submitted to arbitration". Second, I am firmly of the view the plaintiffs cannot properly take a position that is not only inconsistent with but contrary to the necessary implication of their pleadings that Vanbex Group is a non-signatory party to the arbitration clause.
- [23] I conclude that in the circumstances of this case, the allegations contained in the ANOCC that the businesses of Vanbex Group and Vanbex Labs were inextricably interwoven, each was the agent of the other, and Vanbex Labs is a wholly owned subsidiary of Vanbex Group, are sufficient to establish an arguable case that Vanbex Group is a (non-signatory) party to the arbitration clause. Without deciding whether the dispute that arises from the pleadings and Mr. Hobbs' evidence involves a mixed question of fact and law, as opposed to a purely factual question, this approach, in my view, accords with the superficial review prescribed in *Uber* and the case law's recognition that arbitrators have the jurisdiction to decide first who the proper or necessary parties to an arbitration agreement are. Here, any necessary legal conclusions cannot be drawn from facts that are either evident on the face of the record or undisputed by the parties. It is not clear that Vanbex Group is not a party.
- [24] In the event of this outcome, the plaintiffs assert that only those parts of the claim that are linked to the allegations Vanbex Group and Vanbex Labs' businesses were "inextricably interwoven" and each was an agent of the other should be stayed. They suggest the conspiracy claim and Securities Act claims against Mr. Hobbs and Ms. Cheng as individual directors under s. 131(1)(b)(iii) and (iv) (liability as directors of the issuer or persons who signed the prospectus for misrepresentations contained in the prospectus), and s. 136 and s. 136.1 (personal liability for damages and an accounting of benefits for personally selling their own FUEL tokens during and after the FUEL ICO on the basis of undisclosed information, while in a special relationship with "Vanbex"), are "fully independent" of those allegations and should therefore not be captured.
- [25] The applicants argue the conspiracy claim is not wholly independent and actually depends on the plaintiffs establishing the Vanbex Group (or Mr. Hobbs and Ms. Chen) was the agent of or should be treated as the same entity as Vanbex Labs. I tend to agree.
- [26] Silent on the Securities Act claims against Mr. Hobbs and Ms. Cheng as individual directors, the applicants also argue however that even if there are any claims that can be said to be "wholly independent" of the interwoven business, agency, or piercing the corporate veil claims, they nonetheless involve issues that are sufficiently intertwined that they too should be stayed pursuant to s. 10 of the Law and Equity Act and the principle of judicial economy.
- [27] But in this case only a partial stay is sought because the plaintiffs' claims for relief under s. 172 of the BPCPA cannot be stayed, based on *Seidel*.

- [28] Further the plaintiffs ask that any partial stay provide them with leave to apply to set it aside based on further proposed amendments to the ANOCC withdrawing or abandoning those parts of the claim that are linked to the interwoven business, agency or piercing the corporate veil claims. They assert and I agree there is nothing inappropriate in allowing them this opportunity so the class proceeding may proceed: *Douez v. Facebook, Inc.*, 2018 BCCA 186 at para. 76.
- [29] Accordingly, I grant an order partially staying this action with respect to all claims in the ANOCC, except for those related to s. 172 of the BCPA, and claims against Mr. Hobbs and Ms. Cheng in their capacity as individual directors under the Securities Act. I also grant the plaintiffs leave to apply to set aside the partial stay based on further proposed amendments to the ANOCC that withdraw or abandon allegations that relate to or could ground a finding or an inference that Vanbex Group was a non-signatory party to the arbitration agreement.

"Fleming J."

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