

CANADA / JUDGMENT

DJ Hildebrandt Homes Inc. v. HMTQ

2014 BCSC 2358

COURT

Supreme Court of British Columbia

DECIDED

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2014 BCSC 2358 DJ Hildebrandt Homes Inc. v. HMTQ

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

DJ Hildebrandt Homes Inc. v. HMTQ,

2014 BCSC 2358

Date: 20141212

Docket: S132430

Registry: Vancouver

Between:

DJ Hildebrandt Homes Inc. et al

Plaintiffs

And

Her Majesty the Queen in right of the Province of British Columbia, The Trustees of the
Healthcare Benefit Trust and Community Living British Columbia

Defendants

Before: The Honourable Justice Fisher

Reasons for Judgment

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S. McEachern

Place and Date of Hearing:

Vancouver, B.C.

November 6, 2014

Place and Date of Judgment:

Vancouver, B.C.

December 12, 2014

- [1] The defendant, Community Living British Columbia (CLBC) applies under s. 15 of the Arbitration Act, RSBC 1996, c.55 for a stay of this action against it on the basis that the dispute between it and the plaintiffs is one that is subject to an arbitration agreement.

The parties

- [2] The plaintiffs are community social service agencies that provide various kinds of services to individuals with developmental disabilities under contracts with the Province, and after 2005, with CLBC. CLBC is an agent of the province under the Community Living Authority Act, SBC 2004, c. 60 with a mandate to provide for the delivery of community living support services. It receives its funding from the Province.
- [3] The defendant Healthcare Benefit Trust (HBT) formerly provided long term disability (LTD) benefits for the employees of the plaintiffs and others. In 1999, as part of the settlement of a strike in the social services sector (known as the Munroe Settlement), the plaintiffs were required to obtain LTD benefits from HBT. In the years that followed, HBT incurred unfunded liabilities as a result, it is alleged, of setting rates artificially low. In 2002, the requirement to obtain these benefits from HBT was removed, and social services employers began to withdraw and obtain these benefits elsewhere. To address the unfunded liabilities of HBT, employers were required to pay surcharges and, on withdrawal, exit levies. The plaintiffs withdrew at various times from 2009 forward.
- [4] Funding for the cost of LTD benefits was provided for by the Province, and after 2005 by CLBC, and reflected in the service contracts with the plaintiffs.

- [5] The current service contracts between the plaintiffs and CLBC are Client Services Agreements (CSAs), which incorporate standard "Services Terms and Conditions", in an agreement referred to as the STA. The STA contains a dispute resolution protocol that governs disputes between the parties under the CSAs and STA.
- [6] The plaintiffs are members of the CEO Network, a group that represents private agencies and non-profits in the community social services sector. The CEO Network negotiates with CLBC about funding commitments, such as the manner in which funding is to be apportioned and calculated.

The action

- [7] This action involves an issue of liability for the payment of the exit levies imposed on the plaintiffs when they withdrew from HBT. The plaintiffs seek as their primary relief a declaration that they are not liable to HBT for these exit levies.
- [8] It is only their alternative claim that involves the Province and CLBC. In this alternative claim, they seek a declaration that in the event they are liable to pay the exit levies, either the Province or CLBC must reimburse them for the amounts they are required to pay. This is based on commitments made to fund the actual cost of LTD benefits. The Amended Notice of Civil Claim states:
 - 14. As of 2010, the Province, through CLBC, agreed in writing to fund the actual cost of LTD benefits, in addition to wages and other benefits, incurred by the Plaintiffs associated with the delivery of community social services. Prior to 2010, the province funded the actual cost of wages and benefits incurred by the Plaintiffs, although funding arrangements varied and the funding commitments were not always reduced to writing.
 - 15. In particular, the Province confirmed in the Funding Commitment in 1999 to fund the obligations of the Social Services employers arising out of the Munroe Settlement, including the HBT requirement.
 - 16. In accordance with this agreement or funding arrangement, the Province or CLBC funded the contributions paid by Social Services Employers to the HBT Trustees. In accordance with this agreement or funding arrangement, the Province or CLBC also funded the surcharges in relation to the unfunded liability of the HBT which were paid by Social Services Employers who remained in HBT.
 - 17. The Exit Levies, like the Contributions or Surcharges, are costs of providing benefits to employees of the Social Services Employers associated with the delivery of community social services that the Province or CLBC is obligated to pay.
 - 18. Any amount that the Plaintiffs are liable to pay to the HBT Trustees is a deferred payment for which the Province or CLBC is liable under the agreements or funding arrangements between the Plaintiffs and CLBC on behalf of the Province.

- [9] There are alternative claims for damages against the Province or CLBC for "breach of fiduciary obligation or breach of a duty of care to the Social Services Employers".
- [10] In the original Notice of Civil Claim, the plaintiffs made their alternative claim only against the Province. It added CLBC as a result of the Province's reliance on common law Crown immunity and its pleading that "[a]ll of the Plaintiff's claims, as advanced against the Province, are or would be enforceable against CLBC".

Position of CLBC

- [11] CLBC's position is that its relationship with the plaintiffs is governed entirely by the CSA (which incorporates the STA), including any funding commitments made by CLBC. It says that the essential character of the dispute falls within the terms of this agreement and therefore, the parties are bound by the dispute resolution protocol that includes an arbitration clause. If there is any doubt about this, it is for the arbitrator to determine if the dispute is governed by the CSA.
- [12] CLBC says that the references to agreements in paragraphs 14 and 18 of the Amended Notice of Civil Claim must refer to the CSAs, as there are no other agreements between CLBC and the plaintiffs.

Position of the plaintiffs

- [13] The plaintiffs' position is that the dispute about the exit levies is not governed by the CSAs and they do not allege that CLBC is in breach of its obligations under those agreements. They go further and concede that CLBC has complied with the terms and conditions in the CSAs.
- [14] The plaintiffs say that their claim against CLBC is based on funding commitments originally made by the Province in 1999, and later confirmed by CLBC, that the actual cost of LTD benefits would be funded. Their alternative claim is based generally on the notion that exit levies are equivalent to the surcharges that were paid by the Province or CLBC as part of the actual cost for LTD benefits.

The authority to grant a stay

- [15] CLBC's application for a stay is governed by s. 15 of the Arbitration Act:
- (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 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.

- [16] To exercise my jurisdiction to grant a stay, I must first be satisfied that CLBC has met the requirement in s. 15(1) that the alleged dispute is in respect of a matter agreed to be submitted to arbitration. If it is, then I am required to grant a stay unless I determine, under s. 15(2), that the arbitration agreement is void, inoperative or incapable of being performed: *Gulf Canada Resources Ltd v Arochem International Ltd* (1992), 66 BCLR (2d) 113 (CA); *St. Pierre v Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 25. There is no residual discretion to refuse to grant a stay if the conditions in s. 15 are met: *Prince George (City) v McElhanney Engineering Services Ltd* (1995), 9 BCLR (3d) 368 (CA); *Ferrari v University of British Columbia*, 2014 BCCA 18 at para. 46.
- [17] Courts take a deferential approach where challenges are made to an arbitrator's jurisdiction and give precedence to arbitration agreements. Generally, the wishes of parties who have agreed to commit themselves to arbitration should be respected absent proper reason: *St. Pierre* at para. 24; *Maher v Chertkow*, 2003 BCSC 48 at para. 14. Under s. 15(1), a stay should be granted unless it is clear that the dispute is outside the terms of the arbitration agreement. Otherwise, it will be for the arbitrator to decide whether the dispute falls within the terms of the arbitration agreement: *Gulf Canada* at p. 20.
- [18] The term "inoperative" in s. 15(2) has been narrowly interpreted. The fact that there are multiple parties and multiple issues that are inter-related and only some of the parties are bound by an arbitration agreement does not generally render an arbitration agreement inoperative: *McElhanney* at para. 37.

The issue

- [19] This application is to be determined under s. 15(1) of the Arbitration Act, as the issue is whether the dispute set out in the pleadings is in respect of a matter agreed to be submitted to arbitration. CLBC says that the Amended Notice of Civil Claim is based on a dispute arising out of the individual CSAs. The plaintiffs maintain that the dispute between them and CLBC arises from broader funding commitments, not the CSAs, and is therefore not in respect of a matter agreed to be submitted to arbitration.

Analysis

- [20] As set out in *Gulf Canada* at p. 119, arbitration agreements should be broadly and liberally construed, and a court should avoid making a final determination in respect of matters between parties to an arbitration agreement unless it is clear that the dispute is outside the terms of the arbitration agreement. However, not all disputes between parties to an arbitration agreement are bound to proceed by arbitration. In *Cut & Run Holdings Ltd. v Booze Bros. Holdings Inc.*, 2005 BCSC 167, Davies J. stated this at para. 40:

it is settled law that parties to an agreement containing an arbitration clause cannot be presumed to have agreed to submit all matters which may arise between them to arbitration. The agreement to arbitrate must be interpreted to determine whether the parties have agreed that a particular dispute will be submitted to arbitration.

- [21] The question of whether a dispute falls within the terms of an arbitration agreement requires an analysis of the nature of the dispute, the words of the arbitration clause and the terms of the contract as a whole in their factual context: see *St. Pierre* at paras. 21-22.
- [22] On this issue, CLBC relies primarily on two decisions of our Court of Appeal: *St. Pierre* and *ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290.
- [23] In *St. Pierre*, the plaintiff property owners alleged breach of fiduciary duties in relation to a construction management contract. The contract included an arbitration clause stating that any disagreement between the parties about the interpretation of the contract or the services provided by the project manager would be referred to arbitration. The plaintiffs argued that their claims for breach of fiduciary duty were not a dispute over the interpretation of the contract, and thus should not be referred to arbitration. Both the chambers judge and the Court of Appeal disagreed, concluding that the parties' dispute centred on the interpretation of the contractual provisions concerning the duties owed by the project manager, and thus held that the matter was bound to go to arbitration. Levine J.A. explained at para. 28:

The appellants' statement of claim makes it clear that their allegations that the respondents breached fiduciary duties and took secret profits turn on a finding that a fiduciary relationship existed between them. The source of their relationship is the contract. It is only by interpreting the contract, in its factual context, that the legal nature of their relationship and whether the appellants' allegations have any merit may be determined.

- [24] *ABOP* concerned a dispute related to a transfer of share ownership under the terms of a shareholders agreement, which contained an arbitration clause. While the matter was framed as an oppression claim, the chambers judge concluded that the substantive dispute was about the interpretation of the shareholders agreement. This was affirmed by the Court of Appeal, which held that the oppression claim was not something apart from the agreement. Thus, the matter was one that the parties had agreed to submit to arbitration.
- [25] *Cut & Run* also concerned an oppression claim but the court came to a different conclusion as to whether the dispute related to or arose out of the contract between the parties. The contract was an operating agreement that addressed responsibilities, determination of profits and losses, and other matters related to the business, and it contained an arbitration clause. There was also another agreement, not containing an arbitration clause, which governed some of the relationships between the parties. Davies J. concluded that the oppression claim concerned matters separate from and outside of the terms of the arbitration clause. At para. 41:

While arbitration clauses will generally be liberally and broadly construed, care must still be taken to ensure that disputes which are outside the scope of the parties' agreement are not made the subject of arbitration. In my view, that is particularly so in a case such as this where the parties have entered into only one agreement that contains an arbitration clause, but there is also another agreement that also governs some of the relationships between the parties.

- [26] In both *St. Pierre* and *ABOP*, it was found that the agreement governed the relationship between the parties and the dispute turned on the interpretation of the agreement; thus the parties were bound by the arbitration clause. In *Cut & Run*, it was found that the agreement did not govern the entire relationship between the parties and the dispute arose out of a matter not contemplated by or related to the agreement. Therefore, the parties were not bound by the arbitration clause.
- [27] In this case, the STA defines "contract" as "a document that is signed by both parties and establishes the scope and term of Services and the funding amount to be paid" by CLBC to the Service Provider for providing the services, and includes the STA. It also contains an "Entire Agreement" clause, which provides that a contract (as defined) between CLBC and a Service Provider (SP) and the terms and conditions in the STA, "together form the entire agreement between the parties". It is on this basis that CLBC submits that the CSAs and the STA govern the entire relationship between it and the plaintiffs.
- [28] I cannot see how the CSAs and the STA can be said to govern the entire relationship between the plaintiffs and CLBC. Each CSA provides for specified services to be provided by the agency at a fixed level of funding. The funding provides payment for wages and benefits and program, administration and other costs at "negotiated rates" in accordance with funding guidelines. These "negotiated rates" and funding guidelines arise from different processes and are separate from the CSAs. The "Entire Agreement" clause in the STA simply defines the contractual relationship between CLBC and an individual Service Provider under a CSA and the STA. It does not limit the relationship between the plaintiffs and CLBC on matters not covered by these agreements.
- [29] There is no question that disputes arising under a CSA were intended to be addressed in accordance with the dispute resolution protocol set out in the STA. Clause 20.2 provides:
- Disputes between the SP and CLBC under this Agreement will follow the process outlined in the Dispute Resolution Protocol - Schedule F
- [30] The Dispute Resolution Protocol sets out a process of notification, negotiation, mediation and/or arbitration. When both parties agree that mediation will not resolve the dispute or where mediation has failed, either party may refer the matter to arbitration.
- [31] In my view, the dispute resolution process was not intended to address matters related to broader funding commitments, agreements or guidelines. In a document entitled "Summary of Agreements with the BC CEO Network and CLAN" dated October 2011, it is stated that the dispute resolution process "is for business matters related to the contract." This appears in a

section called "Terms and Conditions - Contracts" which addresses the timeliness of the dispute resolution process and who parties may bring with them in the process. Given this context, the reference to "contract" must mean a CSA.

[32] There is no question that there is a strong preference evident in the Arbitration Act and the case law that matters agreed to be submitted to arbitration be arbitrated. However, in this case, the pleadings and supporting affidavits clearly set out a dispute between the plaintiffs and CLBC that arises from a matter not contemplated by the CSA and STA agreements but rather from alleged funding commitments that exist independently from these agreements. I find that the dispute between the parties does not arise from their rights and obligations under the CSA, and the dispute resolution protocol in the STA does not apply to the issues raised in the Amended Notice of Civil Claim. The claims here arise from a relationship between the plaintiffs and CLBC that is separate from and broader than the terms of the individual CSAs. Accordingly, their claims against CLBC do not relate to the CSAs and thus the parties have not agreed to submit disputes arising from these alleged funding commitments to arbitration.

[33] In my view, it is clear that the dispute arises outside the terms of the arbitration agreement and therefore, according to Gulf Canada, a stay should not be granted under s. 15(1).

[34] The application of CLBC is dismissed.

"Fisher, J."

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