

CANADA / JUDGMENT

Liang v. Barnard

2022 BCSC 924

COURT

Supreme Court of British Columbia

DECIDED

29 March 2022

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2021 BCSC 924 Liang v. Barnard IN THE SUPREME COURT OF BRITISH COLUMBIA Citation: Liang v. Barnard, 2022 BCSC 924 Date: 20220329 Docket: S-2110147 Registry: Vancouver Between: Yue Liang, 1153625 BC Ltd., 2134551 Alberta Ltd., and 2134504 Alberta Ltd. Plaintiffs And Mitchell Barnard, Ryan Mason, Thomas Walker, Metta Beverage Corp., Metta Beverage Inc., Clearwater Farms Ltd., 2134514 Alberta Ltd., and 2243229 Alberta Ltd. Defendants Before: The Honourable Justice Edelmann Oral Reasons for Judgment In Chambers Counsel for the Plaintiffs appearing by videoconference: G. Allen K.M. Meyer A. Chekh Counsel for the Defendants appearing by teleconference: M.E. Fancourt-Smith E.M.G. Stockley Place and Date of Trial/Hearing: Vancouver, B.C. March 28-29, 2022 Place and Date of Judgment: Vancouver, B.C. March 29, 2022 I.

OVERVIEW

- [1] THE COURT (by videoconference): This is an application to stay the claims against certain defendants on two grounds. First, that the claims against Mitchell Barnard, Ryan Mason, Thomas Walker, and Metta Beverage Corp. ("the Arbitration Agreement defendants") are covered by an arbitration clause in a shareholders' agreement to which they and the plaintiff 1153625 B.C. Ltd. ("115") are parties. Second, that the Court does not have territorial competence, or should decline to exercise that competence, against the two numbered companies registered in Alberta ("the Alberta defendants"). The parties agree that the issue of territorial competence should be adjourned generally as the defendants are seeking to amend the Notice of Application in relation to that issue.
- [2] The defendants also seek an order requiring the plaintiffs to post security for costs in relation to the claims for which the Court exercises jurisdiction. II. BACKGROUND
- [3] In 2018 the plaintiff 115 entered into an agreement to invest in the defendant Metta Beverage Inc. (the "Investment Agreement"). The Investment Agreement has a governing law clause and an exclusive jurisdiction clause in favour of B.C. The Investment Agreement also contemplated a shareholders' agreement, which the shareholders entered into the same year (the "Shareholders' Agreement").

- [4] Section 10.11 of the Shareholders' Agreement contained a mandatory arbitration clause (the "Arbitration Agreement") that reads: 10.11 Arbitration. All disputes arising out of or in connection with this Agreement or in respect of any legal relationship associated therewith or derived therefrom shall be resolved by arbitration before a single arbitrator appointed pursuant to the provisions of the Arbitration Act (British Columbia), as amended from time to time, and pursuant to the rules of procedure of the British Columbia International Commercial Arbitration Centre, which shall administer the arbitration. The arbitrated resolution of the dispute shall be final and binding on all parties. The place of arbitration will be Vancouver, British Columbia. III. PROCEDURAL HISTORY
- [5] The plaintiffs' Notice of Civil Claim was filed on November 24, 2021, and served on December 1, 2021.
- [6] The defendants issued a Demand for Particulars on December 21, 2021.
- [7] A Jurisdictional Response was filed on behalf of the Alberta Defendants on December 22, 2021.
- [8] On December 22, 2021, the defendants' counsel advised the plaintiffs' counsel they had instructions to bring an application for security for costs.
- [9] On January 10, 2022, however, the defendants' counsel advised the plaintiffs' counsel that they also had instructions to bring an application disputing jurisdiction and that a two-day hearing was now required.
- [10] On January 14, 2022, the defendants threatened to bring an application against the plaintiffs to compel their response to the Demand for Particulars.
- [11] Response to the Demand for Particulars was provided on February 2, 2022.
- [12] In subsequent correspondence, counsel for the plaintiffs indicated they would seek default judgement if a Response to Civil Claim was not filed.
- [13] The defendants made an application for extension of time to file their Response to Civil Claim which was heard on March 1, 2022.
- [14] On March 2, 2022, Master Keim ordered that the time for the Alberta Defendants to file their Response to Civil Claim was extended to March 30, 2022, and the other defendants were ordered to file their Response to Civil Claim by March 11, 2022. In her reasons, indexed at 2022 BCSC 491, Master Keim noted the following:
- [15] Counsel for the defendants submit that having to prepare a response when there is some question as to the participation of two defendants is not cost effective and could lead to the defendants having to pay for legal work that will be unnecessary. When asked, the defendants' counsel was unable to explain why the other six defendants would need an extension of time to file their response. There is no possibility that they will be excluded from the litigation as a result of the jurisdictional application.

- [15] On March 11, 2022, the Arbitration Agreement defendants filed their Response to Civil Claim. In the Response to Civil Claim, the Arbitration Agreement defendants responded to the substance of the claim, but also pleaded that the Court did not have jurisdiction to hear any claims arising in relation to the Shareholders' Agreement, given the dispute resolution clause.
- [16] On March 16, 2022 the defendants filed the Notice of Application that is now before me. IV. LEGAL FRAMEWORK
- [17] The Arbitration Agreement defendants seek a stay of these proceedings pursuant to s. 7 of the Arbitration Act, S.B.C. 2020, c. 2 [Arbitration Act]: 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 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.
- [18] The current Arbitration Act was enacted in 2020, replacing the former Commercial Arbitration Act, S.B.C. 1986, c. 3 [Commercial Arbitration Act]. The equivalent section of the former Commercial Arbitration Act provided as follows: Stay of Proceedings
15. (1) Where 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, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the legal proceedings.
- [19] There has been substantial judicial consideration and application of the former Commercial Arbitration Act. The Court of Appeal set out the prerequisites for a stay of proceedings in favour of arbitration in *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 1995 CanLII 2487 (BC CA), 9 B.C.L.R. (3d) 368 (C.A.) at para. 26:
- (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. [references omitted]
- [20] In the current Arbitration Act, the legislature has removed the wording "before delivery of any pleadings or taking any other step in the proceedings" that was in the Commercial Arbitration Act. Section 7 of the current Arbitration Act refers instead to an application being made "before submitting the party's first response on the substance of the dispute".

The defendants concede that the Response to Civil Claim filed on March 11, 2022, was a "response to the substance of the dispute", and it is therefore not necessary for me to engage in a more detailed analysis of the amendments and their scope.

- [21] In my view, the procedure set out by the legislature in order for a defendant to seek a stay under s. 7 of the Arbitration Act is unambiguous. A defendant may apply "before submitting the party's first response on the substance of the dispute". There is no disagreement between the parties that there was no such application made until after the filing of a substantive response. I find that the Arbitration Agreement defendants could therefore not avail themselves of s. 7 of the Arbitration Act after March 11, 2022. The application is dismissed.

V. SECURITY FOR COSTS

- [22] The defendants seek an order for security for costs to be posted both by 115 and by Ms. Liang in her personal capacity. It became evident during the hearing of the application that the resolution of the issues of territorial jurisdiction would have an impact on the scale and nature of the matters before the Court and the parties to whom such security, if any, might be payable. In my view, it is more appropriate for the question of security for costs to be addressed when the remainder of the application is heard, should the Defendants still be seeking such an order at that time.

VI. DISPOSITION AND COSTS

- [23] The application for the order sought at paragraph 1 of Part 1 of the Notice of Application is dismissed. The time for the filing of the Response to Civil Claim is extended to April 4, 2022. I am not seizing myself of this matter.
- [24] The application is adjourned generally as it relates to paragraphs 2 to 4.
- [25] Costs will be in the cause. "Edelmann J."

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Prepared on 27 October 2026 · Esheria