

CANADA / JUDGMENT

Milner v. Clean Harbors Industrial Services Canada, Inc.

2020 BCSC 68

COURT

Supreme Court of British Columbia

DECIDED

20 January 2020

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2020 BCSC 68 Milner v. Clean Harbors Industrial Services Canada, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Milner v. Clean Harbors Industrial Services Canada, Inc.,

2020 BCSC 68

Date: 20200120

Docket: S54925

Registry: Vernon

In the Matter of the Arbitration Act, R.S.B.C. 1996, c. 55

and

In the Matter of an Arbitration Award of Arbitrator Richard Deane, dated February 9 and April 20, 2018

Between:

Douglas J. Milner

Petitioner

And

Clean Harbors Industrial Services Canada, Inc.

Respondent

- and -

Docket: S55081

Registry: Vernon

In the Matter of the Arbitration Act, R.S.B.C. 1996, c. 55

and

In the Matter of Arbitral Awards Issued on or about February 9 and April 20, 2018

Between:

Clean Harbors Industrial Services Canada, Inc.

Petitioner

And

Douglas J. Milner

Respondent

Before: The Honourable Mr. Justice A. Saunders

Reasons for Judgment

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Place and Date of Hearing:

Vernon, B.C.

June 19, 2019

Place and Date of Judgment:

Vernon, B.C.

January 20, 2020

Introduction

- [1] Under a share purchase agreement dated as of November 14, 2014 (the "SPA"), Douglas J. Milner ("Milner") as vendor agreed to sell to Clean Harbors Industrial Services Canada, Inc. ("CH") as purchaser, all shares in a company, Grizzco Cap Services, Inc. ("Grizzco"). As per the terms of the SPA, the parties submitted to arbitration certain disputes concerning final determination of the purchase price. The arbitration resulted in rulings in favour of CH. There are two Petitions before me, one from each party: Milner seeks leave to appeal and, if

granted, appeals from the arbitrator's awards, under s. 31 of the Arbitration Act, R.S.B.C. 1996, c. 55 [Act]; CH seeks enforcement of the arbitrator's awards.

- [2] I note at the outset as a minor procedural matter that the style of cause in Milner's Petition referred to the Act by its former name, the Commercial Arbitration Act. The name of the statute was changed by way of amendment that came into force February 3, 2015. I have corrected the style of cause in these reasons to reflect the Act's current name, and I order that the style of cause in Milner's Petition be amended accordingly.
- [3] The arbitrator issued an award on June 30, 2016, as to jurisdiction and as to an application by Milner to add parties. The word "award" in this context has the meaning provided in the Definitions section of the Act:
1. In this Act:

"award" means the decision of an arbitrator on the dispute that was submitted to the arbitrator and includes

- (a) an interim award,
- (b) the reasons for the decision, and
- (c) any amendments made to the award under this Act.

That award is not appealed from.

- [4] The arbitrator issued a further award on February 9, 2018 in respect of adjustments to the purchase price. This is the subject of the proposed appeal. As was the case with the previous rulings, the February 9 award was styled as a "Partial Award", and I refer to it as such herein.
- [5] In the Partial Award the arbitrator made certain findings of fact and law regarding, inter alia, liabilities of Grizzco and determination of its Working Capital, in accordance with the SPA's terms. In particular, in respect of the Working Capital, the arbitrator held:
- a) that the Preliminary Net Working Capital Statement delivered by CH to Milner within 90 days of the closing, as contemplated by the SPA, had become final and binding due to Milner's failure to deliver an Objections Statement within 45 days thereafter;
 - b) that the Net Working Capital as of the SPA's closing date was determined to be \$588,553;
 - c) that Milner was liable for the difference between that Net Working Capital and the SPA's Net Working Capital Target of \$1.5 Million, being the amount of \$911,467; and
 - d) that in respect of that amount, CH was entitled to retain the \$200,000 Post-Working Capital Portion of the holdback, and Milner was required to repay CH the additional sum of \$711,467.
- [6] In respect of the SPA's indemnity provisions, the arbitrator determined:

- a) that a payment of \$175,000 made by CH to settle litigation between Grizzco and K.N.A.B. Industries Ltd. (the "KNAB Litigation") fell within the scope of the SPA's indemnity provision; and
 - b) that Milner's liability to CH in respect of that indemnity payment was to be satisfied by means of CH retaining the whole of the \$400,000 Post-Indemnification portion of the holdback, and Milner receiving credit for the difference of \$225,000.
- [7] In the result, the arbitrator ruled in the Partial Award that CH was entitled to retain the whole of the Post-Working Capital Portions and Post-Indemnification Portions of the holdback, and Milner was liable to CH for the balance of \$484,467.
- [8] I note, for the record, one minor issue with respect to the Partial Award that is more a matter of formality than substance. In allowing CH to retain the holdbacks, the arbitrator reversed the dollar figures, attributing \$400,000 to the Post-Working Capital Portion, and \$200,000 to the Post-Indemnification Portion. The error, which counsel both agree requires rectification, has no bearing on the substance of the appeal.
- [9] Under a further award issued April 20, 2018, styled by the arbitrator as the "Final Award", CH was awarded its reasonable fees and expenses, to be assessed by the Registrar of this Court, under s. 11(3) of the Act; and, interest on the sum of \$486,487 under the Court Order Interest Act, R.S.B.C. 1996, c. 79 calculated from February 9, 2018.

Summary of the Parties' Positions

- [10] Milner contends there were several errors of law made by the arbitrator in the Partial Award that justify the court exercising its jurisdiction to grant leave to appeal under s. 31 of the Act. The purported errors are summarized below. The need for Milner to characterize these purported errors as being errors of law arises from the wording of subsections 31(1) and (2), which limits appeals from arbitrations to questions of law:

31(1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if

- (a) all of the parties to the arbitration consent, or
 - (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
 - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or

(c) the point of law is of general or public importance.

[Emphasis added.]

[11] If leave is granted, Milner asks to have the Partial Award set aside, and to receive credit for the Post-Working Capital Portion and Post-Indemnification Portion holdback amounts; and, as a consequence, also to have the Final Award set aside, and to be awarded legal fees and interest.

[12] CH opposes leave to appeal being granted, primarily on two grounds. First, CH submits that the appeal is time-barred, by reason of Milner's Petition not having been filed within 60 days of the Partial Award being issued, as required under s. 42 of the Act. Second, CH submits that the purported errors of law are properly characterized as being only matters of mixed fact and law, and as such are not grounds for appeal. On the merits of the appeal, CH submits that no errors were made by the arbitrator.

Limitation Issue - Discussion

[13] The time limit governing appeals to this court from awards made under the Act is governed by ss. 42 and 43, which read as follows:

42(1) Applications to the court under this Act must be made by a petition proceeding or, if Rule 17-1 of the Supreme Court Civil Rules applies, a requisition proceeding.

(2) An application under section 30 or 31 must be made within 60 days after the parties have been notified of the award and its terms.

43 The court may extend any time limit provided for in this Act even if the application for the extension or the order granting the extension is made after time has expired.

[14] For the reasons set out herein, I determine that Milner's right of appeal is barred by the effluxion of time, and I decline to exercise my discretion to extend the time limit.

Was the Appeal Brought In Time?

[15] The first issue is whether the application for leave to appeal was made within 60 days after the award. It is not contested by Milner that he did not take any steps in respect of his rights of appeal within 60 days of receiving notice of the February 9, 2018 Partial Award. The Petition was filed May 17, 2018, within 60 days of the Final Award of April 20, but 97 days after the Partial Award had been issued.

[16] Milner submits that the 60-day filing period ought not to be treated as running from the date of the Partial Award, because of the inherent uncertainty created by the award having been styled as such. It is submitted that to require Milner to have filed separate appeals in respect of the Partial Award and the Final Award would have led to the undesirable result of there being a multiplicity of proceedings. With it being certain that a "final" award would be issued at a later date, Milner submits that time should begin to run only once the Final Award was issued.

[17] At para. 6 of his decision, the arbitrator explained his decision to style the award as a Partial Award as being because of the need to reserve jurisdiction in order to determine costs and interest. Further, in summarizing the Award granted he set out, at paragraph 176, a schedule for the parties to deliver written submissions respecting interest and costs, and he stated that he would then, following receipt, proceed to determine those issues. The arbitrator concluded:

177. I reserve my jurisdiction to decide all matters in dispute that have not been determined by this Partial Award, including all matters relating to interest and costs.

The Partial Award therefore clearly reached a final determination of the issues that it addressed.

[18] From an objective standpoint, there was nothing ambiguous about the decision being styled as a Partial Award. Subjectively, there is no evidence that Milner himself was somehow confused or uncertain as to his rights due to the decision being styled in that manner.

[19] The Partial Award fell within the definition of "award" under s. 1 of the Act, and was subject to appeal, with leave of this Court, upon being issued.

[20] This Petition, therefore, was clearly filed beyond the 60-day period prescribed by s. 42(2).

Ought the Time for Bringing the Appeal to be Extended?

[21] The principles governing the Court's exercise of its discretion to extend the time limit for the filing of an appeal were summarized by Madam Justice Ker in *Patenaude v. Patenaude*, 2018 BCSC 286 [Patenaude]:

[20] Essentially, in order to succeed on an application for an extension of time to appeal an applicant must establish "special circumstances" to overcome the principle of finality in litigation. Although the courts have traditionally adopted a generous approach in granting extensions of time, a number of factors guide it in the exercise of its discretion. The jurisprudence recognizes that the following framework governs the exercise of discretion in determining whether an extension of time will be granted:

- i. Was there a bona fide intention to appeal within the appeal period?
- ii. Was the respondent informed of the appellant's intention to appeal within the appeal period time frame?
- iii. Would the respondent be unduly prejudiced by an extension?
- iv. Is there merit in the appeal?
- v. Is it in the interests of justice that an extension be granted?

- [21] These principles are outlined in numerous appellate authorities including *Davies v. Canadian Imperial Bank of Commerce* (1987), 15 B.C.L.R. (2d) 256 at para. 20 (C.A.); *R. v. Smith*, [1990] B.C.J. No. 2933 (B.C.C.A.); *Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 8; *Wilson v. Newcomb*, [1998] B.C.J. No. 2042 at para. 24 (C.A.); *Topgro Greenhouses et al v. Houweling*, 2003 BCCA 355 at para. 5.
- [22] The power to extend time is a discretionary one. The ultimate question is always whether, in all the circumstances and considering the factors developed in the jurisprudence, the justice of the case requires that an extension of time be granted. To that end, the interests of justice subsumes all other factors and is, therefore, the most important. It requires a balancing of the interests of justice as they affect both parties: *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 per Lambert J.A. at para. 9; *Topgro Greenhouses* at para. 5.
- [22] No one of the first four of these factors is determinative. In *Rowan v. Dunwoody & Company*, 1999 BCCA 755 [Rowan] Chief Justice McEachern discussed those factors in relation to an application to reinstate an appeal that had been placed on the inactive list and then administratively dismissed as abandoned. He remarked:
- [20] In considering the merits of the case, I decline to decide whether the appellant must show a substantial chance of significant success or any other particular degree or level of probability of success. The purpose of s. 25 is prevent dormant appeals from sleeping too long, not to foreclose reasonable access to the appeal process. Appeals without merit should certainly be weeded out, and appeals with little or no chance of success should often be left undisturbed. There must be at least an arguable case, but whether any particular case is sufficiently deserving of being allowed to continue may depend in part upon other factors such as the cause of the delay or the nature, if any, of the prejudice likely to be caused by reinstating the appeal

Intention to Appeal, and Notice

- [23] In the present case, the first two factors weigh in favour of CH. There is no evidence that Milner formed a bona fide intention to appeal within the appeal period. No such intention was conveyed to CH within the appeal period. There is no explanation given by Milner for the delay in filing the Petition.

Undue Prejudice

- [24] As to the third factor, there is no identified prejudice to CH. The only potential for prejudice lies in that which is inherent in any appeal, and in any that might potentially arise out of the relatively brief delay beyond the appeal period expiry date. No "undue" prejudice is made out; see: *Bankruptcy of Gaffney*, 2007 BCCA 182, at para. 22.
- [25] The absence of undue prejudice, however, does not weigh in the applicant's favour; it simply means that this factor is neutral.

Merits of the Appeal

[26] Consideration of the merits of a proposed appeal, in respect of an application for the extension of the appeal period, does not involve a searching examination of the applicant's position, but the applicant must establish at least that it has an arguable case: Rowan, at para. 20. Milner says that the arbitrator erred in his interpretation of the SPA, and in finding that CH had complied with the SPA's terms. Milner submits these errors are issues of law. Describing generally the nature of the proposed appeal, Milner's written submissions cast the issue in these terms (Submissions to the Court on Behalf of the Petitioner - Argument, para. 8):

8. This Petition raises questions of law which arise out of the Arbitration Award. The Petitioner pleads that the Arbitrator erred in law on the points which are the subject matter of the Petition. In particular, the Petitioner pleads that the Arbitrator erred in determining that the Respondent had complied with the contract of purchase and sale. This is a question of the construction of the agreement and, therefore, a question of law.

[Emphasis added.]

[27] The written submissions then go on to elaborate on Milner's position as to the merits of the proposed appeal with respect to the Net Working Capital calculations:

14. The Arbitration involved the production of affidavit evidence from a number of witnesses addressing the process of the sale and the calculation of the Net Working Capital.
15. The interpretation of the agreement and the evidence presented involved numerous documents and a factual matrix.
16. In the circumstances, the Petitioner pleads that the Arbitrator failed to properly interpret the agreement considering the factual matrix in light of the accepted canons of contractual interpretation and applicable principles and, in doing so erred in law by allowing the Respondents' initial calculation of net working capital to become final and binding.
18. A party to a contract has a duty not to act in a manner that deprives another party to the contract of the bargained objective or benefit. The duty has been described as the obligation to adhere to the reasonable expectations created by the bargain entered into and not to act in a manner which undermines that bargain .
19. In addition, there can be implied a duty to act in good faith depending upon the circumstances and the conduct of the parties .

[Emphasis added.]

[28] Milner also takes issue with the arbitrator's finding that CH's post-contract settlement of the KNAB Litigation fell within the scope of the SPA's indemnification clause, which included "settlements". Before me, as he did in the arbitration, Milner cites case law on the question of whether indemnification clauses can encompass voluntary payments, and on the need to interpret the SPA in a manner that reflects the parties' intent.

[29] These submissions misstate the nature of contractual interpretation determinations. The Supreme Court of Canada, in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva], held that contractual interpretation is a matter of mixed fact and law, and therefore not properly the subject of appeal from the decision of an arbitrator. Delivering the decision of the Court, Mr. Justice Rothstein wrote, at para. 50:

Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.

[30] Mr. Justice Rothstein went on to state that an appealable extricable question of law might be identified within the controverted decision's reasoning as to a matter of mixed fact and law. He referenced the majority judgement of Iacobucci and Major JJ. in *Housen v. Nikolaisen*, 2002 SCC 33, in which the lower court decision in *Rhône (The) v. Peter A.B. Widener (The)*, (1988), 18 F.T.R. 81; aff'd in part, (1990), 67 D.L.R. (4th) 646; appeal allowed, [1993] 1 S.C.R. 497, was cited as an example of such an extricable question of law:

[34] In [*Rhône (The) v. Peter A.B. Widener (The)*] the issue was the identification of certain individuals within a corporate structure as directing minds. This is a mixed question of law and fact. However, the erroneous finding of the courts below was easily traceable to an error of law which could be extricated from the mixed question of law and fact. The extricable question of law was the issue of the functions which are required in order to be properly identified as a "directing mind" within a corporate structure (pp. 515-16). In the opinion of Iacobucci J. for the majority of the Court (at p. 526):

With respect, I think that the courts below overemphasized the significance of sub-delegation in this case. The key factor which distinguishes directing minds from normal employees is the capacity to exercise decision-making authority on matters of corporate policy, rather than merely to give effect to such policy on an operational basis, whether at head office or across the sea.

[35] Stated differently, the lower courts committed an error in law by finding that sub-delegation was a factor identifying a person who is part of the "directing mind" of a company, when the correct legal factor characterizing a "directing mind" is in fact "the capacity to exercise decision-making authority on matters of corporate policy". This mischaracterization of the proper legal test (the legal requirements to be a "directing mind") infected or tainted the lower courts' factual conclusion that Captain Kelch was part of the directing mind. As this erroneous finding can be traced to an error in law, less deference was required and the applicable standard was one of correctness.

[31] In the present case, however, Milner fails to identify any such extricable question of law. From the numerous references in Milner's submissions to the factual matrix of the parties' negotiations and post-contract conduct, the parties' intentions, and their reasonable expectations, the alleged errors in the arbitrator's decision are manifestly matters of mixed fact and law. The arbitrator's written decision clearly explains what evidence he finds relevant to his interpretation of the SPA, and what evidence he disregards, and why. These matters are all within the arbitrator's jurisdiction and his core competence. I do not find Milner has demonstrated an arguable case that an extricable error of law was made. This fourth factor therefore clearly lies in CH's favour.

The Interests of Justice

[32] As stated in Patenaude, this fifth factor subsumes the previous four factors, requires a balancing of interests, and is the most important. However, in the present case none of the previous four factors lie in Milner's favour. Even if I had found some merit in Milner's position, under the fourth factor, the arguments in favour of characterizing the arbitrator's purported errors as questions of law would be so weak, given the Supreme Court of Canada's clear directive in Sattva, that any merit in the appeal would be outweighed by his failure to demonstrate an intent to appeal before the time for appeal expired.

Limitation Issue - Conclusion

[33] For these reasons, I find the appeal was not commenced in time, and I decline to extend the time period.

[34] The application for leave to appeal is denied on this ground.

Alternative Finding - Leave to Appeal

[35] Even if I were to extend the appeal period and allow the leave application to proceed, I would deny leave under s. 31(2) of the Act in any event. The three grounds on which leave may be granted under that section - prevention of a miscarriage of justice; importance to a class or body of persons of which the applicant is a member; and, general or public importance - all have as their precondition the identification of a discrete question or questions of law. For the reasons set out above, I would find that no such question has been identified.

CH's Claim for Enforcement

[36] Section 14 of the Act provides that an arbitrator's award is binding on the parties. Section 29(1) provides for an award being enforced in the same manner as a judgment or order of the court, and judgment being entered in the terms of the award, with leave.

[37] The Dispute Resolution provision of the SPA provided:

Section 8.1(d) the decision of the arbitrator shall be reasoned, final, conclusive and binding upon the Parties hereto, and may be enforced in any court having jurisdiction .

No objection is taken by Milner to the jurisdiction of this Court.

[38] I find no impediment to the enforcement of the arbitrator's awards.

Conclusion

[39] Milner's application for leave to appeal is dismissed.

[40] The arbitrator's Partial Award and Final Award are affirmed.

[41] CH will have judgment against Milner in the amount of \$486,497, and interest under the Court Order Interest Act calculated from February 9, 2018

[42] CH is awarded its reasonable fees and expenses, to be assessed by the Registrar of this Court in accordance with s. 11(3) of the Act, in accordance with the arbitrator's reasons;

[43] CH is further awarded its costs of this Petition, at Scale B.

"A. Saunders J."

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