

CANADA / JUDGMENT

Pixhug Media Inc. v. Steeves

2017 BCSC 2171

COURT

Supreme Court of British Columbia

DECIDED

28 November 2017

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2017 BCSC 2171 Pixhug Media Inc. v. Steeves

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Pixhug Media Inc. v. Steeves,

2017 BCSC 2171

Date: 20171128

Docket: S164955

Registry: Vancouver

Between:

Pixhug Media Inc.

Plaintiff

And

Adam Steeves also known as Adam Joshua Noel Steeves also known as

Adam Joshua Brenden Noel Steeves also known as Adam Joshua

Noel Alexander Steeves also known as Adam-Joshua Noel-Steeves

also known as Adam-Joshua Brenden Noel-Steeves also known as

Adam-Joshua Brenden Alexander Noel-Steeves, Janice Birtha King,

Steeves Investments Corporation, Scrumsoft Inc., Bit Creative Inc.,

Darshan Khatri, John Doe as the Trustee of the Steeves Family Trust,

and Jane Doe

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment on

Defendants' Application for Stay of Proceedings

Counsel for Plaintiff:

R. Bennett

Counsel for Defendants:

R. Robertson

Place and Date of Hearing:

Vancouver, B.C.

June 23, 2017

Place and Date of Judgment:

Vancouver, B.C.

November 28, 2017

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INTRODUCTION

- [1] In this action, the plaintiff, Pixhug Media Inc. ("Pixhug"), claims against the defendants for fraud, conversion, breach of trust, breach of fiduciary duty, breach of contract and unjust enrichment related to a failed project for the development of certain computer software.
- [2] By this application, the defendants, Adam Steeves, Steeves Investment Corporation ("SIC"), Janice Birtha King, Scrumsoft Inc., Bit Creative Inc. and Darshan Khatri seek an order staying this action in favour of arbitration pursuant to s. 8 of the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 (the "ICAA").
- [3] The relevant provisions of ss. 8 and 9 of the ICAA are as follows:

Stay of legal proceedings

8 (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, before service of any pleadings or taking any other step in the proceedings, apply to that court to stay the 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 null and void, inoperative or incapable of being performed.

...

Interim measures by court

9 It is not incompatible with an arbitration agreement for a party to request from a court, before or during arbitral proceedings, an interim measure of protection and for a court to grant that measure.

- [4] The defendants say they have met their burden of establishing an arguable case that they have satisfied all of the requirements under s. 8(1) of the ICAA for a stay of proceedings. They submit they have limited their participation in this proceeding to matters related to the defence of the plaintiff's application for a Mareva injunction, an "interim measure of protection" within the meaning of s. 9. Accordingly, the defendants contend they have not done anything in this proceeding incompatible with their reliance on the arbitration clauses in the contracts for the software development project made between SIC and Pixhug. The defendants submit that in the absence of fraud that would render the arbitration clauses null and void, this Court should grant the stay of proceedings.
- [5] For its part, Pixhug submits the defendants' application should be dismissed. Pixhug contends there is no arguable case that any of the defendants, other than SIC, are parties to the arbitration agreements. Further, the plaintiff says the stay application is out of time. Pixhug maintains it is clear the stay application was brought after the defendants filed their

responses to civil claim and took other steps in the proceeding. Pixhug also argues that its claim that the defendants' entire business is a sham is not a dispute in respect of the matters the parties agreed to submit to arbitration. In addition, the plaintiff contends the arbitration agreements are null and void because Pixhug was induced to enter into them by fraud.

issues

- [6] After reviewing the background to this action and its procedural history, I will address the following questions:
- a) Have the defendants satisfied the requirements for a stay under s. 8(1) of the ICAA?
 - b) If the defendants have satisfied the requirements of s. 8(1), are the arbitration agreements null and void for fraud under s. 8(2)?
- [7] If the defendants have not met the requirements of s. 8(1), it will not be necessary to answer the second question.

BACKGROUND

- [8] Pixhug is a British Columbia technology company formed to create a software platform linking donor corporations to charitable organizations through social media.
- [9] The defendant, Adam Steeves, is the former chief technology officer of the plaintiff and the principal of SIC, a New Brunswick corporation that provided software development services to the plaintiff. The defendant, Janice Birtha King, is also a director of SIC.
- [10] The defendants Bit Creative Inc. and Scrumsoft Inc. are, respectively, graphic design and software development companies that performed work for the plaintiffs' project as subcontractors to SIC. Darshan Khatri was the chief software developer at Scrumsoft.
- [11] By its notice of civil claim filed on June 1, 2016, Pixhug claims it is a victim of a brazen fraud carried out by the defendants. The plaintiff alleges that the defendants fraudulently induced Pixhug to engage Mr. Steeves as its chief technology officer and to enter into an agreement with SIC to develop the software platform. Pixhug maintains the defendants fraudulently represented they were developing a fully functioning software program for Pixhug when in fact they produced no computer code and did little more than produce graphic mock-ups and demonstration animations. The plaintiff contends that in reliance upon the defendants' misrepresentations, it paid for work the defendants never performed.
- [12] On September 25, 2015, SIC entered into an agreement with Pixhug to provide planning, design, software development and other services to the plaintiff regarding the development of Pixhug's software platform (the "Independent Contractor Agreement"). The Independent Contractor Agreement contained the following arbitration clause:

19. Disputes:

The Company and the Contractor are committed to settling disputes in the most efficient way possible. Accordingly:

Amicable Negotiation

We agree that, both during and after the performance of their responsibilities under this agreement, each of them shall make bona fide efforts to resolve any disputes arising between them by amicable negotiations and provide frank, candid and timely disclosure of all relevant facts, information and documents to facilitate those negotiations.

Efficient Process

We further agree to use their best efforts to conduct any dispute resolutions or procedures herein as efficiently and cost effectively as possible.

Mediation

We agree to attempt to resolve all disputes arising out of or in connection with this contract, or in respect of any legal relationship associated with it or from it, by mediated negotiation with the assistance of a neutral person appointed by the British Columbia International Commercial Arbitration Centre administered its Commercial Mediation Rules.

Arbitration

If the dispute cannot be settled within 30 days after the mediator has been appointed, or such other period agreed to in writing by the parties, the dispute shall be referred to and finally resolved by arbitration administered by the British Columbia International Commercial Arbitration Centre, pursuant to its Rules. In the absence of any written agreement otherwise, the place of arbitration shall be Vancouver, British Columbia.

- [13] On or about October 16, 2015, SIC and Pixhug entered into a Master Services Agreement which, at para. 18(j), contained an arbitration clause identical to para. 19 of the Independent Contractor Agreement.
- [14] A dispute arose when Pixhug failed to pay invoices rendered by SIC under the Master Services Agreement and complained that SIC was not performing the software development work for which the plaintiff had contracted.
- [15] On January 20, 2016, one month after SIC issued a notice of termination of the Master Services Agreement unless and until it was fully paid for its services, Pixhug made a partial payment, which fell short by approximately \$150,000 of the amount sought by SIC.

- [16] Relations between the parties continued to deteriorate. On February 3, 2016, the plaintiff disabled SIC's access to Pixhug's computer and email systems. SIC responded on February 9, 2016 by demanding payments of \$32,250 (CAD) and \$534,498.89 (USD) for the outstanding balances allegedly due under the Independent Contractor Agreement and the Master Services Agreement.
- [17] On February 10, 2016, SIC commenced mediation proceedings with Pixhug at the British Columbia International Arbitration Centre. A mediation between those parties on April 12, 2016 was unsuccessful.
- [18] On June 2, 2016, Pixhug applied, ex parte, for a Mareva injunction, which this court granted against the defendants Steeves, SIC, Scrumsoft Inc. and Bit Creative Inc. on June 3, 2016.
- [19] On July 7, 2016, previous counsel for the defendants, Mr. Forrester, notified counsel for the plaintiff that he was in the process of being retained. In the course of an email exchange with Mr. Forrester on July 13 and 14, 2016, plaintiff's counsel advised that his client "may proceed in default against any party who has not retained counsel within the time limit to respond to the notice of civil claim."
- [20] On July 22, 2016 defendants' counsel filed a jurisdictional response on behalf of all the defendants disputing the court's jurisdiction over each defendant.
- [21] On July 25, 2016, the defendants filed a notice of application by which they sought:
- a) an order requiring the plaintiff to post security for costs in the amount of \$81,166.40 or such other amount as the court determined;
 - b) an order requiring the plaintiff to post security for its undertaking to pay damages of the Mareva injunction in the amount of \$200,000; and
 - c) orders for the cross-examination of Mr. Jack Ong, the plaintiff's expert witness, on his expert report filed in support of the application for the Mareva injunction, and for disclosure of Mr. Ong's file.
- [22] The plaintiff produced Mr. Ong for cross-examination on his report without the necessity of an order of the court.
- [23] On August 2, 2016, defendants' counsel filed the response to civil claim of the defendants Steeves, King, SIC and Scrumsoft Inc.
- [24] By their response to civil claim, those defendants admitted certain uncontroversial facts relating to the identities of the parties, denied most of the facts alleged in the notice of civil claim, pleaded the arbitration clause and sought a stay of the action in favour of arbitration.

- [25] On August 17, 2016, the defendants Steeves, SIC, King and Scrumsoft Inc. filed their notice of application for an order setting aside the Mareva injunction. The defendants also sought orders requiring Pixhug to pay damages to be assessed for losses suffered as a result of the Mareva injunction, or alternatively, to post \$200,000 as security for damages. The defendants also applied for a declaration that the plaintiff had improperly disclosed confidential and privileged mediation documents on the Mareva injunction application.
- [26] On August 18, 2016, Bit Creative Inc. and Darshan Khatri filed a response to civil claim identical to the response filed on behalf of the other defendants. Earlier on the same day, the plaintiff had applied for and obtained a default judgment against Bit Creative Inc. However, the parties later entered a consent order setting aside that default judgment.
- [27] The defendants' application to set aside the Mareva injunction, and for the balance of the relief sought in their notices of application of July 25 and August 17, 2016, came on for hearing before this Court on August 22 through 25, 2016. Adopting the parties' nomenclature, I will refer to this hearing as the "set aside hearing".
- [28] By oral reasons delivered on September 2, 2016, this Court set aside the Mareva injunction, with written reasons to follow. The defendants' application for the assessment of any damages suffered as a result of the Mareva injunction was adjourned to the trial of the fraud action. The Court dismissed the defendants' application regarding the disclosure of privileged and confidential mediation documents.
- [29] On September 14, 2016, the defendants filed a notice of change of solicitor, recording the appointment of Mr. Robertson as their lawyer, in place of Mr. Forrester.
- [30] On September 19, 2016, by reasons for judgment indexed as Pixhug Media Inc. v. Steeves, 2016 BCSC 1714, I found the plaintiff had failed to make full and frank disclosure to the court, or to its expert, of materials relevant to the assessment of the software development work performed by the defendants. I also found the plaintiff had failed to disclose facts concerning its own financial circumstances material and relevant to the court's exercise of its discretion on the Mareva injunction application.
- [31] At paras. 50 and 85 I concluded:
- [50] While there remains a live dispute between the parties concerning the scope of the work performed and the value of the services provided by the defendants, Mr. Ong's report was so diminished on cross-examination that it no longer provides the underpinnings for a strong prima facie case of fraud.
- ...
- [85] I find that the plaintiff failed to disclose facts relating to its lack of exigible assets, the security held by the Royal Bank of Canada and its indebtedness to creditors. Those facts were relevant and material to the Court's exercise of its discretion on the Mareva injunction application. They have a direct bearing on the adequacy of the plaintiff's undertaking as to

damages, the Court's assessment of the balance of convenience, and the extent to which damages would provide a remedy to the defendants in the event that the injunction was granted and the plaintiff's claim ultimately failed. Had the plaintiff fully disclosed its financial position, I would have been left in serious doubt concerning the adequacy of the plaintiff's undertaking as to damages. The plaintiff's failure to fully disclose its financial circumstances, combined with the undermining of Mr. Ong's report lead me to conclude that the Mareva injunction should be set aside.

- [32] On the set aside hearing, the defendants restricted their application for security for costs to \$10,000 for the costs of their application to set aside the Mareva injunction and an anticipated application that the court decline jurisdiction in favour of arbitration. By my reasons for judgment of September 19, 2016, I ordered the plaintiff to post security for costs in the amount of \$10,000. I dismissed the defendants' application for security for damages on the basis the defendants had not shown a likelihood of substantial loss arising from the Mareva injunction.
- [33] On September 23, 2016 on the hearing of the plaintiff's application for an interim stay of the set aside order, this Court, on the request of defendants' counsel, ordered Pixhug to post \$10,000 as security for any damages resulting from the interim stay.
- [34] On October 14, 2016, the plaintiff paid \$10,000 into court as security for costs pursuant to the order of September 19, and a further \$10,000 as security for damages pursuant to the order of September 23, 2016.
- [35] On March 8, 2017, defendants' counsel wrote to plaintiff's counsel commenting on deficiencies in the plaintiff's document production. The plaintiff contends this correspondence constituted a demand by the defendants pursuant to Rule 7-1(10) that the plaintiff deliver an amended list of documents, and therefore constituted another step in the action.
- [36] On March 14, 2017, the defendants applied for special costs of the set aside hearing payable forthwith and in any event of cause.
- [37] On March 16, 2017, the defendants filed notice of their application for a stay of proceedings pursuant to s. 8 of the ICAA.

ANALYSIS

Legal Framework

- [38] Under s. 7(1) of the ICAA, an arbitration agreement is defined as:

An agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not.

[39] The arbitration clauses in s. 19 of the Independent Contractor Agreement and s. 18(j) of the Master Service Agreement are "arbitration agreements" within the meaning of the ICAA.

[40] Section 2 of the ICAA defines a "party" as:

Definitions and interpretation

2 (1) For the purposes of this Act:

...

"party" means a party to an arbitration agreement and includes a person claiming through or under a party;

...

[41] For ease of reference, I repeat here the relevant provisions of s. 8 of the ICAA:

Stay of legal proceedings

8 (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, before service of any pleadings or taking any other step in the proceedings, apply to that court to stay the 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 null and void, inoperative or incapable of being performed.

...

[42] As ss. 8(1) and 8(2) of the ICAA are essentially identical to the stay provisions contained in s. 15(1) and 15(2) of the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 ("CAA"), the test for a stay of proceedings under both statutes is the same: *Nanaimo (City) v. Millennium Nanaimo Properties Ltd.*, 2010 BCSC 1703 at para. 12.

[43] Under s. 8(1) of the ICAA, in order to obtain a stay of proceedings in favour of arbitration, three criteria must be met:

- a) the applicant must show that a party to the arbitration agreement has commenced legal proceedings against another party to the arbitration agreement;
- b) the legal proceedings must be in respect of a matter that the parties have agreed to submit to arbitration; and
- c) the application must be brought before the applicant takes a step in the proceeding.

Gulf Canada Resources Ltd. v. Arochem International Ltd. (1992), 66 B.C.L.R. (2d) 113 (C.A.) at 119-120; *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368, [1995] B.C.J. No. 1474 (C.A.) at para. 22.

- [44] If the applicant establishes an arguable case that the conditions of s. 8(1) are met, then, under s. 8(2), the court must grant the stay unless it determines the arbitration agreement is null and void, inoperative or incapable of being performed: *Gulf Canada* at 119-120. In order for fraud to render an arbitration agreement null and void, the allegations of fraud must relate "directly and specifically" to the arbitration agreement, rather than to the contract as a whole: *James v. Thou*, 2005 BCSC 809 at para. 92.
- [45] As the Court explained in *Gulf Canada*, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement. Those are matters within the jurisdiction of the arbitral tribunal. Only if it is clear that the dispute falls 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 make the final determination regarding those matters. Conversely, "[w]here it is arguable that the dispute falls within the terms of the arbitration agreement, or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then . . . the stay should be granted and those matters left to be determined by the arbitral tribunal": *Gulf Canada* at 120.
- [46] The low threshold of an arguable case reflects the strong public policy in giving effect to arbitration agreements: *Prince George (City)* at para. 36.
- [47] A step taken by a defendant for the purpose of protecting its rights in the face of a plaintiff's interim protective measure is not incompatible with the arbitration clause and does not disqualify the defendant from seeking a stay: *No. 363 Dynamic Endeavors Inc. v. 34718 B.C. Ltd.* (1993), 81 B.C.L.R. (2d) 359, [1993] B.C.J. No. 1622 (C.A.) at paras. 23-25.
- [48] The defendants also rely on Rule 21-8 of the Supreme Court Civil Rules in arguing their responses to civil claim, by simply denying the court's jurisdiction rather than defending the plaintiff's claims on the merits, do not constitute an attornment to the jurisdiction of the court, and are not "pleadings" under s. 8 of the ICAA.
- [49] Rule 21-8(1)(b) permits a party who has been served with an originating pleading, after filing a jurisdictional response, to apply to dismiss or stay the proceeding on the ground that the court does not have jurisdiction over that party in respect of the claim made against that party in the proceeding.
- [50] Rule 21-8(5) provides:

Party does not submit to jurisdiction

- (5) If, within 30 days after filing a jurisdictional response in a proceeding, the filing party serves a notice of application under subrule (1) (a) or (b) or (3) on the parties of record or files a pleading or a response to petition referred to in subrule (1) (c),

- (a) the party does not submit to the jurisdiction of the court in relation to the proceeding merely by filing or serving any or all of the following:
 - (i) the jurisdictional response;
 - (ii) a pleading or a response to petition under subrule (1) (c);
 - (iii) a notice of application and supporting affidavits under subrule (1) (a) or (b), and
- (b) until the court has decided the application or the issue raised by the pleading, petition or response to petition, the party may, without submitting to the jurisdiction of the court,
 - (i) apply for, enforce or obey an order of the court, and
 - (ii) defend the proceeding on its merits.

[51] In *Stancroft Trust Ltd. v. Can-Asia Capital Co.* (1990), 43 B.C.L.R. (2d) 341, [1990] B.C.J. No. 401 (C.A.), Southin J.A., for the Court, observed that Rule 14(6) of the former Rules of Court [now replaced by Rule 21-8] permitted a defendant who asserted the court had no jurisdiction over their person or the subject matter of the action to enter an appearance and bring an application to that effect. Her Ladyship explained the other purpose of the Rule was to permit the court to address issues of the convenient forum. In *Stancroft*, the Court held the defendant could not invoke Rule 14(6) "upon the footing of the arbitration agreements into which they entered" (at p. 7).

[52] In *Bodnar v. Payroll Loans Ltd.*, 2009 BCSC 1205, where the steps taken by the defendants in pursuing their discovery rights in the litigation went beyond interim measures of protection, Justice Griffin held that a party who did not meet the requirements of s. 15 of the CAA could not get around those requirements by applying pursuant to Rule 14(6) to have the court stay the proceeding in favour of arbitration. As the Court explained in *Bodnar* at paras. 70, 71 and 74:

70 In *Boutsakis and Kakavelakis v. Boutsakis (c.o.b. Crown Travel)*, 2008 BCCA 13, 77 B.C.L.R. (4th) 113, the Court of Appeal noted a long line of authority for the proposition that "where a defendant neglects to apply for a stay until after the pleadings have been delivered or other steps have been taken in the proceedings, the stay will generally not be granted" in favour of arbitration (at para. 14). The Court stated that this is because "[f]ailure on the part of the defendant to seek a stay under s. 15, leaves the Court with sole and exclusive jurisdiction to adjudicate the claim", citing with approval the words of Madam Justice Boyd in *Bott v. Sorley*, [1998] B.C.J. No. 2023 at paras. 19-20 (S.C.).

71 It is clear from the passages emphasized by the Court of Appeal in *Boutsakis* that where a party fails to make a timely application for a stay of proceedings in favour of arbitration, as required by the CAA, the court becomes seized with the dispute and only the court has jurisdiction thereafter to determine it. . . .

74 In my view it would be an error to invoke a general discretionary power to grant a stay in these circumstances. The specific jurisdiction conferred by s. 15 of the CAA is intended to provide certainty concerning the proper forum for dispute resolution. The effect of the party's failure to comply with the requirements under s. 15(1) of the CAA to invoke the jurisdiction conferred by that section is to leave the Court with "sole and exclusive jurisdiction" to resolve the dispute.

[53] The same principles apply here, where the application for a stay of proceedings in favour of arbitration is brought pursuant to s. 8 of the ICAA. If the defendants are unable to comply with the requirements of s. 8 of the ICAA, the court has "sole and exclusive jurisdiction" to resolve the dispute.

[54] Finally, although the defendants included a further or alternative pleading of forum non conveniens in their responses to civil claim, they did not pursue that submission on the hearing of this application. Accordingly, I need only decide whether the defendants have met the requirements for a stay of proceedings under s. 8 of the ICAA.

Have the defendants satisfied the requirements for a stay under s. 8(1) of the ICAA?

Party to Arbitration Agreement has commenced Legal Proceedings

[55] Here, where the defendant SIC and Pixhug are parties to the arbitration agreements, SIC is undoubtedly entitled to apply for a stay under s. 8(1). The fact that the remaining defendants are not parties to the arbitration agreement does not preclude SIC from invoking the arbitration clause: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.*, 2008 BCCA 283 at paras. 64-66.

[56] In *Stancroft*, the plaintiffs and the three defendants were all parties to an arbitration agreement. Two of the defendants had delivered pleadings and therefore had no right to a stay under s. 8 of the ICAA. The third defendant, Can-Asia, brought its application for a stay without having taken any step in the action and without having delivered a statement of defence. The Court of Appeal concluded that Can-Asia was entitled under s. 8 to an order staying the proceedings as against it.

[57] In this context, the Court considered whether s. 8(1) meant that if one of the defendants had a right to an order under s. 8, the order to which it was entitled was an order staying the proceedings against all the defendants or was only an order staying those proceedings against him. Southin J.A. concluded that the latter was the proper construction. The Court in *Stancroft* did not address the question of whether a party to the legal proceedings, other than a party to the arbitration agreement, may apply for a stay of proceedings.

- [58] In *Darby v. Lasko*, 2003 BCCA 584, the Court of Appeal answered that question. In *Darby*, the defendant/appellant Lasko was the sole director and shareholder of the defendant Bartel Communications Ltd. ("Bartel"). The plaintiffs brought an action against both defendants. They sought rescission and damages for breach of their contract with Bartel and alleged that Lasko had made fraudulent or negligent misrepresentations concerning the Bartel agreement. That agreement provided for the arbitration of disputes in the State of Georgia.
- [59] The chambers judge stayed the action against Bartel but refused Lasko's application for a stay because he was not a party to the Bartel agreement.
- [60] The Court of Appeal held that as "a party to the legal proceedings", Lasko was entitled to apply for a stay under s. 15 of the CAA. By its plain wording, s. 15 extended the right to apply for a stay to parties to the litigation and not only parties to the agreement. At para. 9, the Court reasoned:
- [9] In my respectful view, the plain wording of s. 15 can admit of no other interpretation. The section clearly distinguishes between parties to the agreement and parties to the litigation and allows the parties to the litigation to apply whereas here parties to the agreement have commenced legal proceedings against another party to the agreement.
- [61] Similarly, in *Thow*, at para. 59, Justice Wedge, applying *Darby*, held that parties to the legal proceedings, although "remote parties" to the dispute under the arbitration agreement, were entitled to invoke s. 15(1) of the CAA.
- [62] While SIC is the only defendant that is a party to the arbitration agreement, each of the other defendants on this application is "a party to the legal proceedings" within the meaning of s. 8(1) of the ICAA.
- [63] The defendants have established an arguable case that they meet the first criterion under s. 8(1), and that as parties to the litigation, they are entitled to apply for the stay of proceedings.

Dispute within Scope of Arbitration Agreement

- [64] I turn next to the question of whether this action is in respect of a matter the parties have agreed to submit to arbitration.
- [65] The arbitration clause provides for the resolution of "all disputes arising out of or in connection with this contract, or in respect of any legal relationship associated with it or from it". As the Court of Appeal held in *Gulf Canada* at 120, only where it is clear that the dispute falls outside the terms of the arbitration agreement should a stay be refused.
- [66] Here, the plaintiff's claims for rescission of the Independent Contractor Agreement and the Master Services Agreement, and its alternative claim for breach of contract arise "out of or in connection with" those agreements and fall within the scope of the arbitration clauses.

- [67] The plaintiff's claims of fraud in the performance of those agreements and of breach of trust, breach of fiduciary duty and unjust enrichment are also arguably claims concerning disputes arising out of or in connection with the Independent Contractor Agreement and the Master Services Agreement, or in respect of legal relationships associated with those agreements. The plaintiff's claim of breach of fiduciary duty against Steeves and SIC is based upon those defendants' alleged fiduciary duties and duties of confidentiality arising from Mr. Steeves' engagement as Pixhug's chief technology officer. Mr. Steeves held that position under the Independent Contractor Agreement. The plaintiff's claims of breach of trust and unjust enrichment are based on allegations that payments under the Independent Contractor Agreement and the Master Services Agreement were impressed with a trust in favour of Pixhug. The plaintiff alleges that each member of the Steeves' Group, (all of the defendants on this application), participated in and was unjustly enriched by the breach of that trust. Again, these are arguably disputes arising out of or in connection with the contracts made between SIC and Pixhug or in respect of legal relationships associated with those contracts.
- [68] The alleged failure of Mr. Steeves and SIC to perform their obligations under the Independent Contractor Agreement and the Master Services Agreement lies at the core of the dispute giving rise to this litigation.
- [69] The plaintiff also claims it was induced by fraudulent misrepresentations of Mr. Steeves and SIC regarding Mr. Steeves' experience and qualifications as a software development manager to enter into the Independent Contractor Agreement, and later, the Master Services Agreement. By its notice of civil claim, the plaintiff pleads that Mr. Steeves and SIC made false representations during their engagement under the Independent Contractor Agreement which induced Pixhug to enter into the Master Services Agreement. The plaintiffs also allege that Mr. Steeves, Ms. King and SIC all made false representations of SIC's performance of the Master Services Agreement in order to induce Pixhug to pay money to SIC to which it was not entitled. In my view, the defendants have an arguable case that all of the plaintiff's claims including the fraud claims, are disputes arising in connection with the contracts or in respect of legal relationships associated with those contracts. Accordingly, the defendants have met their burden of establishing an arguable case that this matter falls within the scope of the arbitration agreements.

Service of Pleadings and Steps in the Proceedings

- [70] It remains to consider whether the defendants have an arguable case that they applied for the stay before serving any pleadings or taking any other step in the action. As we have seen, over the nine months between commencement of this action and the filing of the stay application on March 16, 2017, the defendants served their responses to civil claim and filed various applications in this proceeding.

- [71] Anything done to oppose an interim protection measure falling within s. 9 of the ICAA also falls within that section, is not incompatible with the arbitration clause, and does not constitute taking a step in the proceedings under s. 8(1): No.363 Dynamic Endeavours Inc. at paras. 24-25. There, the Court held that a demand for discovery of documents made to protect the rights of the respondent in the face of an ex parte injunction, rather than to defend the action, was a demand made concerning an interim measure of protection. As such, it was not a step in the proceedings contemplated by s. 15(1) the CAA.
- [72] The defendants' applications to cross-examine Mr. Ong on his report, to set aside the Mareva injunction and for the costs of the set-aside hearing were all responsive to an interim protection measure, and therefore did not constitute disqualifying steps in the proceeding for the purposes of s. 8 (1) of the ICAA.
- [73] By its plain wording, section 8 (1) provides that a defendant may apply for a stay of proceedings before service of any pleading or taking any other step in the proceedings. A response to civil claim is a "pleading" as defined in Rule 1-1 of the Supreme Court Civil Rules.
- [74] Two decisions of this Court suggest that a court, in determining whether a defendant has lost its right to have the dispute arbitrated, may consider whether a defendant has served pleadings which are incompatible with reliance on the arbitration process.
- [75] In *Freisen v. Lam*, 2007 BCSC 1124, Justice Dorgan considered whether a defendant had lost his right to arbitration by filing a statement of defence. By his statement of defence, the defendant pleaded the court had no jurisdiction to decide the dispute because of the arbitration clause. However, rather than requesting a stay of proceedings, he asked the court to dismiss the plaintiff's claim. Justice Dorgan held that by filing his statement of defence and seeking the court's intervention to dismiss the plaintiff's claim, the defendant had lost his right to have the dispute arbitrated (at para. 19).
- [76] In *African Mixing Technologies (PTY) Ltd. v. Canamix Processing Systems Ltd.*, 2014 BCSC 2130, the defendants contested the plaintiffs' application for an interlocutory injunction and applied for a stay of proceedings in favour of arbitration pursuant to s. 8 of the ICAA. Justice Bruce rejected the plaintiffs' argument that the defendants had attorned to the jurisdiction of the court by filing a response to civil claim or by filing a response to their application for interlocutory relief. At para. 54, the Court stated:
- 54 . . . I find that the ratio of No. 363 Dynamic Endeavours is a complete answer to the plaintiffs' argument. The purpose of the response was to protect the defendants' rights in the face of the injunctive relief sought by the plaintiffs and is not incompatible with reliance on the arbitration process in the Agreement.

- [77] It does not appear that counsel in African Mixing Technologies brought to the court's attention *Commonwealth Insurance Co. v. Larc Developments Ltd.*, 2010 BCCA 18. There, the Court of Appeal approved, obiter, the proposition that where a defence has been filed and served, the application for a stay should be dismissed, even if the filing party has previously indicated a desire to arbitrate the dispute.
- [78] In *Commonwealth Insurance Co.* the defendants appealed from a stay of proceedings against the third party, Levelton. The chambers judge ordered the stay after the defendants had failed to answer Levelton's demand for particulars. Levelton had applied for a stay of proceedings in favour of arbitration under s. 15 of the CAA.
- [79] The Court of Appeal held that Levelton, by making a demand for particulars required for the preparation of a statement of defence, had taken a step in the proceeding.
- [80] The Court stated at paras. 18 and 19:

18 The authors of *Commercial Arbitration in Canada* commented on s. 15(1) of the *Commercial Arbitration Act* as follows:

Under s. 15(1) of British Columbia's *Commercial Arbitration Act* and s. 8(1) of its *International Commercial Arbitration Act*, the application for a stay of proceedings may be made before or after entering an appearance and before the delivery of any pleadings or the taking of any other step in the proceedings. Accordingly, where a defence has been filed and delivered, the application for a stay of proceedings should be dismissed, even where the filing party indicated at an early stage that it wished the matter to be arbitrated-there is no ambiguity in the wording of the section, and, in any event, taking a purposive approach to interpretation (the section was intended to prevent the mischief of a party to an arbitration agreement having both the benefit of the court process and, if that did not achieve its purpose, the benefit of arbitration) would lead to the same result. (pp. 3-34-.1 - 3-35)

19 I agree with these observations. A party should not be entitled to take the benefit of the litigation process - obtaining particulars - while preserving the ability to reject that process in favour of arbitration.

- [81] At para. 40, the Court emphasized that a party seeking to deprive the other side of its right of access to the court must not be equivocal, must make clear its intention at the outset and not allow the action to proceed with its participation.

- [82] At paras. 33 and 34 the Court held:

33 In my view, the judge erred by being concerned with whether Levelton objectively affirmed its willingness to participate in the litigation process. This led him to conclude Levelton had not taken a step in the litigation because it appeared its next action would be to seek a stay and not to obtain an order for particulars. That inquiry was not relevant in the circumstances of this case.

34 Once it is determined that a demand for particulars has been made under the Rules of Court, a step in the proceedings has been taken and a stay under s. 15 of the Commercial Arbitration Act no longer is available. A party cannot render the step nugatory by suggesting it may seek to refer the matter to arbitration. It cannot undo what has been done. The orderly administration of justice requires certainty in these matters.

- [83] In short, a party that takes a step in the proceedings forfeits its right to apply for a stay under s. 8(1), regardless of whether it has expressed an intention to refer the dispute to arbitration.
- [84] Here, if the defendants, before applying for the stay of proceedings, had confined themselves to filing and delivering responses to civil claim that requested a stay of proceedings in favour of arbitration, it might have remained open to them to argue they were not seeking to have the benefit of both the court process and the arbitration agreement. However, the defendants, in addition to delivering their responses to civil claim, also brought applications for security for costs and for damages flowing from the grant of the Mareva injunction.
- [85] The defendants filed their application for security for costs in the amount of \$81,166.40, on July 25, 2016. By that application, the defendants sought security for the costs of the trial. In support of their application, the defendants filed the second affidavit of Joy Chiang which attached a draft bill of costs of the trial, in the amount of \$81,166.40.
- [86] There is venerable authority for the proposition that a motion for security for costs is a "step in the proceeding" which precludes a defendant from applying under statutes equivalent to s. 8 of the ICAA for a stay in favour of arbitration: see *Heistein & Sons v. Polson Iron Works Ltd.* (1919), 46 O.L.R. 285, [1919] O.J. No. 44 (Ont. S.C. - H.C. Div.), citing *Bartlett v. Ford's Hotel Co.*, [1895] 1 Q.B. 850; *Ford's Hotel Co. v. Bartlett*, [1896] A.C. 1; *151429 Canada Inc. v. Scaletta*, [1991] M.J. No. 235 (Man. Q.B. Master). In *Heistein*, the Court characterized the request for security for costs in the action as an intimation that upon security being given, the action might proceed (at para. 6).
- [87] When the defendants' application for security for costs came on for hearing, the defendants restricted their application to security for the costs of their application to set aside the Mareva injunction and their intended stay application. However, at that stage the defendants could not undo a step already taken in the action.
- [88] The defendants, by their notice of application of August 17, 2016, also sought an order requiring Pixhug to pay damages to be assessed for losses suffered as a result of the Mareva injunction, or to post \$200,000 as security for damages. By seeking an order for damages to be assessed, the defendants sought the assistance of the court, and indicated their willingness to pursue a remedy in court, rather than by arbitration. In my view, the application for damages to be assessed, or alternatively, for security for damages, constituted a further step in the proceedings.

- [89] The defendants' counsel's correspondence of March 8, 2017 to plaintiff's counsel identified deficiencies in the plaintiff's list of documents and commented that the list would certainly have to be amended. However, it did not request or require the plaintiff to amend its list or serve an amended list of documents. In my view, Mr. Robertson's letter does not constitute a demand pursuant to R. 7-1(10) or (11) and accordingly, was not a step in the proceeding.
- [90] I conclude that it is clear that the defendants, before bringing their stay application, in addition to serving pleadings, took steps in the proceeding by applying for security for costs and for an order for damages to be assessed, or alternatively, for security for damages. Accordingly, the defendants are precluded from invoking s. 8 of the ICAA.
- [91] In these circumstances, it is unnecessary to determine whether the arbitration clause is rendered null and void but by the alleged fraud of the defendants.

Conclusion

- [92] The application of the defendants for a stay of proceedings in favour of arbitration is dismissed.
- [93] The plaintiff is entitled to the costs of this application, at Scale B.

"PEARLMAN J."

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Prepared on 26 October 2026 · Esheria