

CANADA / JUDGMENT

Trio Apparel Inc. v. Arborlea Developments Ltd.

2024 BCSC 2436

COURT

Supreme Court of British Columbia

DECIDED

13 September 2024

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2024 BCSC 2436 Trio Apparel Inc. v. Arborlea Developments Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Trio Apparel Inc. v. Arborlea Developments Ltd.,

2024 BCSC 2436

Date: 20240913

Docket: S228288

Registry: Vancouver

Between:

Trio Apparel Inc. doing business as Couturist

Plaintiff

And

Arborlea Developments Ltd.

Defendant

And

Arborlea Developments Ltd.

and Jet-Stream Restoration & Deconstruction

Third Parties

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:

S.A. Besanger

Counsel for Arborlea Developments Ltd.:

D. Ellis

S. Mainar, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

September 13, 2024

Place and Date of Judgment:

Vancouver, B.C.

September 13, 2024

- [1] This is the written version of judgment rendered orally on September 13, 2024. It has been edited to correct and improve grammar and composition, but nothing about the analysis or conclusions was changed.
- [2] THE COURT: This is an application brought by the defendant, Arborlea Developments Ltd. (the "Applicant"). It seeks an order that the notice of civil claim filed by the plaintiff be struck or dismissed or, in the alternative, be stayed. In the further alternative, it seeks a declaration that the arbitration of the dispute is statute-barred because of the expiry of a limitation period.
- [3] The parties agree on the essential facts and chronology of events, which is set out in the material, which I will not review at length due to shortness of time.
- [4] Briefly stated, the plaintiff is a retailer, and the Applicant is a general contractor. They entered into an agreement dated July 30, 2019. The plaintiff was leasing premises to open a store in in the Metrotown Mall in Burnaby. The agreement addressed tenant improvements to the premises that the plaintiff was going to occupy. The general contractor, as is normal, hired some subcontractors. Unfortunately, a fire took place on October 18, 2019. That fire caused loss and damage, which has resulted in this litigation. However, this is not the only matter brought before the court relating to that fire.
- [5] The Applicant relies on clause 13 of its agreement with the plaintiff, which is a mandatory arbitration clause. That clause states:

If during the course of construction, there is any dispute, difference or complication or conflict whatsoever between the parties hereto, or if there is any dispute, difference or conflict with respect to the terms of this Agreement, the parties hereto agree to the appointment of one arbitrator or a mediator agreeable to both parties, and he shall then hear the matter in dispute and deliver a decision, which decision shall be final and binding upon the parties herety. All costs with respect to any arbitration shall be borne by the party deemed to have lost the arbitration or costs will be equally shared if the arbitrator deems that responsibility is to be equally shared in the dispute.

- [6] The Applicant also relies on the Arbitration Act, S.B.C. 2020, c. 2, that states limitations or deadlines in relation to arbitration matters are the same as it would be for court proceedings (s. 11(1)).
- [7] Clause 23 in the parties' agreement is an indemnity and "save harmless" clause. It states, among other things, that the Applicant "shall indemnify and save harmless", the owner against all "claims, demands, losses, costs, damages, suits or proceedings by third parties" that arise from the performance of the agreement.
- [8] There were discussions between counsel, and some correspondence is in the material filed. Also, three other lawsuits were started in which both the plaintiff and Applicant are named as defendants. The substance of those actions is not directly relevant to this application, but they all stem from the same fire. The point is that the plaintiff was notionally being held responsible in those lawsuits and was looking for confirmation from the Applicant that it would get indemnification pursuant to clause 23.
- [9] The subcontractor, Jet-Stream Restoration, is named as a defendant in this action, and has also been named in other litigation. There is a "B.C. Ferries agreement" between the plaintiff and Jet-Stream Restoration for about \$15,000, which is relevant. In other words, Jet-Stream Restoration is actually not involved in this particular action.
- [10] I will not go through in detail the correspondence between the parties except to say that they were corresponding at the same time about what I will call two different legal matters. I appreciate from the plaintiff's perspective, it may have approached everything as being one matter: it was dealing with a fire that occurred at its premises, it was being sued by other parties and it also suffering a loss. There is not necessarily anything wrong with that. However, from the Court's perspective, there is a distinction between the legal jeopardy faced by the plaintiff in those two matters as a result of that fire.
- [11] With regard to one of those matters, as mentioned, the plaintiff is being sued by others as allegedly having some responsibility for the fire. In relation to that legal matter, clause 23 of the agreement is relevant.

- [12] However, the plaintiff also asserts as against the Applicant a claim in negligence, seeking compensation for business loss arising from the inability to open its store because of the fire and then the remediation that took place. As noted, it is already settled with the subcontractor alleged to have caused the fire in the first place.
- [13] As I said, the record contains the parties' correspondence, which I will not review in this judgment. I rely on the facts set out in the notice of application, particularly paras. 7-12, and the helpful chronology contained in the response to application (at pages 4-6 of the response). There is no difference between the parties' description of the chronology of events or correspondence that was exchanged, so I will not read out those facts.
- [14] They do have different positions on the implication of those events to this litigation and the arbitration.
- [15] A point pertinent to the issue before me is that the plaintiff's notice of civil claim was served on the Applicant in November 2022. The Applicant takes the position that the limitation period to commence arbitral proceedings had already lapsed by then, although the parties did correspond about arbitration after that. However, the Applicant did immediately raise the issue of the mandatory arbitration clause, saying that it barred the litigation. For that reason and perhaps others, no response to the notice of civil claim was filed for some time.
- [16] I also note that in the meantime, all of the parties involved the various lawsuits relating to the fire attended a mediation in the hope that everything could be resolved. Unfortunately, the mediation was not successful, but it having taken place explains, in part, some of the delay to the other proceedings. Of course, had the parties resolved matters on mediation, that would have been preferable.
- [17] In any event, I review briefly certain milestones. From the Applicant's point of view, it is significant that the plaintiff filed a notice to arbitrate in July 2024. I am told that the arbitrator has received submissions about how to proceed.
- [18] This application was filed on August 30, 2024, and seeks to strike the claim pursuant to Rule 9-5 of the Supreme Court Civil Rules as an abuse of process in the sense of there being a duplication of proceedings. I do not understand the Applicant to be relying on that arm of abuse of process characterized by conduct deserving of rebuke, in the way that the term is sometimes used, but rather just that it is inappropriate for there to be dual proceedings.
- [19] The plaintiff's position is that this is not open to the Applicant to rely on that position because the Applicant has essentially attorned to the jurisdiction of this Court, relying on *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2024 BCSC 1465 [Montaigne].

- [20] There are some similarities between Montaigne and the facts here. It involved a dispute between parties to an agreement, which contained an arbitration clause, albeit that clause was worded quite differently. However, litigation was commenced and the defendant applied to have the plaintiff's action struck under Rule 9-5 as disclosing no reasonable cause of action or being frivolous or vexatious, or an abuse of process.
- [21] However, what is different in that case was the defendant argued that the litigation should be stayed on the basis of s. 7 of the Arbitration Act, S.B.C. 2020, c. 2. Section 7 is what is referred to as a mandatory stay of proceedings clause. I make no comment on the potential applicability of that section here, because the defendant relies on the arbitration clause in the agreement between the parties, the expiration of the limitation, and the notion of abuse of process relating to duplicative proceedings.
- [22] Earlier litigation in Montaigne addressed the placement of certificates of pending litigation (CPLs) on property and related applications. I will not go through the whole history of those facts, which are set out in the decision.
- [23] Ultimately, the court in Montaigne decided that the first issue was whether the technical prerequisites for a mandatory stay of court proceedings had been met, referring to the governing principles set out in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [Peace River]. As set out in Peace River, the first three technical prerequisites are whether: there is an arbitration agreement; court proceedings have been commenced by a party to the arbitration agreement; and, the court proceedings are in respect to a matter that the parties agreed to submit to arbitration. All of those factors exist in the facts before me, as they did in Montaigne.
- [24] The issue in dispute in Montaigne was the fourth requirement from Peace River: the party applying for a stay in favour of the arbitration does so before taking any step in the proceedings. At para. 35, the Court stated it had to consider whether, on the facts, the parties should be held to have impliedly affirmed the correctness and willingness to go along with a determination by a court of law instead of arbitration. The burden is on the Applicant applying for the stay to show an arguable case, and then the burden would shift.
- [25] I am not persuaded that Montaigne applies to the facts before me. I find it distinguishable for several reasons. First, in that case there was a clear distinction between the application for a stay based on an arbitration clause and the application to strike, which was a substantive application to strike based on inadequacy of pleadings and allegation that the claim was frivolous. That is not the situation here.
- [26] The court in Montaigne specifically held that by bringing the motion to strike (importantly, not the motion to stay based only on the arbitration clause), the defendant had impliedly affirmed the correctness of the court proceeding.

- [27] I do not make the same finding here. The court in Montaigne stated that it made that determination on the basis of the content of the motion to strike and the context of the surrounding circumstances (para. 43).
- [28] Before me there is only one application. There is no juridical difference between the grounds supporting a stay or supporting striking the claim because they are both based on the arbitration clause in the parties' agreement.
- [29] The court in Montaigne also held that the motion to strike before it went far beyond what may be described as purely defensive measures taken by a party to parry or smother an action. However, with respect, that is how I characterize the facts before me. Also, I note that in Montaigne the court commented that the defendant chose to delay the setting of the date for its motion to strike and allowed the motion to strike to go after the motion to stay. In other words, it made a strategic decision to delay the stay application because if granted, it would have been precluded from seeking relief under Rule 9-5 to strike. That is yet another indication of a clear juridical difference between that case and the facts before me.
- [30] At para. 47, the Court stated in the following terms the mischief that s. 7 was intended to prevent--that a party cannot be entitled to take the benefit of the litigation process while preserving the ability to reject that process in favour of arbitration. The Applicant says here that is what the plaintiff is trying to do.
- [31] I am not sure that comment applies with equal force to the plaintiff before me, but the plaintiff has been candid in stating it had tried to resolve this matter through other means. In saying that, I took the plaintiff's counsel to mean that it just wanted to resolve the issue and was trying to be cooperative with counsel by doing in the way the parties were discussing. However, the plaintiff has filed a notice to arbitrate. The correspondence indicates that even though they were having discussions about the litigation proceeding, the Applicant has agreed that arbitration is appropriate.
- [32] Therefore, I am not satisfied, based on the surrounding circumstances and the nature of the application that has been filed, that the Applicant has, in fact, attorned to the jurisdiction or taken a step in the proceeding. Nor am I satisfied that it has shown a willingness to litigate instead of arbitrate. In my view, the opposite is true. It has not done anything in a strategic way trying to gain advantage. In fact, it is committing itself to the arbitration process by filing this application.
- [33] For all those reasons, I come to a different conclusion than the court did in Montaigne. I am not satisfied that the Applicant has taken a step in the proceeding.
- [34] If the technical requirements under the Peace River framework apply, I would have been satisfied that the Applicant has, in fact, satisfied more than an arguable case, and therefore this matter should go to arbitration.

- [35] I should say it is not clear to me if that framework applies. However, even if it does, the result would not change.
- [36] The submissions of the Applicant focused simply on the communication and litigation history and arbitration history between the parties in this particular case. I would have been satisfied on that basis alone that it is appropriate to strike the claim, without reference to Peace River.
- [37] I also note that the arbitrator apparently was asked recently to make a ruling and chose to delay that ruling pending the outcome of this hearing. It is clear that both parties were actively engaged in the arbitration. That is a very different factual circumstance from Montaigne.
- [38] I also rely on *Lafarge Canada Inc. v. Edmonton (City)*, 2013 ABCA 376; and *HOOPP Realty Inc. v. A.G. Clark Holding Ltd.*, 2014 ABCA 20 [HOOPP], both of which are factually similar. Although I am told in HOOPP there was no litigation commenced or steps taken in litigation, but there were in Lafarge. Nevertheless, it comes down to the same analysis, which is whether the court thinks a party is attempting to essentially "eat its cake and have it too" by keeping two avenues open.
- [39] I do not find the plaintiff is intentionally doing that, but that is the effect of its conduct in that the Applicant is being forced to spend money responding to litigation while pursuing at the same time an expedited arbitration proceeding. Therefore, the matter needs to go before the arbitrator.
- [40] For all those reasons, the notice of civil claim is stayed. I am declining to make a declaration because I think that may be an issue that the arbitrator can decide.
- [41] The reason I am not striking the claim is simply the shortness of time in which this application was heard. It may be as a result of the arbitration that some aspect of the dispute legitimately survives that process. I am not saying, suggesting or hinting that to be the case, and I do not think that will be the case. However, in my mind, the stay has the same effect in terms of analysis, such that it is stayed because of the arbitration. Presumably, if the arbitration answers all the questions in dispute between the parties, there would be no ability to revive the action. However, this matter was heard in short chambers just over 90 minutes. I am not satisfied that I have enough background to go further than what I have done.
- [42] For that reason, the action is stayed. The parties should proceed to arbitration.
- [43] The application for a declaration is adjourned generally. As I said, I believe that is something that goes to the arbitrator, but it may be the arbitrator has a different view. I do not want to preclude either party from potentially being able to come back on that issue. I am not suggesting that should happen. I am just saying I am deferring to the arbitrator on that issue.

[44] You did not address the issue of costs. I will hear you both on that.

(SUBMISSIONS)

[45] THE COURT: The application for a stay of the proceedings brought up another anomaly, which was brought to my attention earlier. Due to inadvertence, the plaintiff, pursuant to a "B.C. Ferries agreement", amended the notice of civil claim, but also changed the style of cause to remove Jet-Stream, without court order.

[46] That was accepted by the registry and arguably ought not to have been. I am not criticizing the registry, but counsel have kindly agreed that I am going to strike the amended notice of civil claim filed September 10, 2024, purely to address what has been admitted to be an error. I am not purporting to comment at all on substance, and certainly, there is no suggestion that the amendments to the substance of the claim could not or would not have proceeded by consent, but counsel for the Applicant reasonably says it needs to seek instructions, and could not consent immediately, even though the change to the style of cause was not done properly.

[47] Therefore, the amended claim filed September 10, 2024, is struck, for those reasons only. And the stay applies to the original notice of civil claim that was filed on October 13, 2022.

[48] I am sorry, we are out of time, it is Friday and Madam Registrar has been very patient. I am going to ask you give me brief written submissions on costs, and I outline parameters for how to do that.

[49] With regard to costs or special costs, the defendant can provide me written submissions, no more more than five pages, to be sent to me, opposing counsel and the Court no later than 4 p.m., September 27, 2024. The plaintiff can provide a response, no more than five pages, by 4 p.m., October 11, 2024. The defendant can provide a brief reply, if necessary, of no more than two pages, no later than October 18, 2024.

[50] If either party needs an extension for those timelines, please do try to reach agreement and simply update the Court. You will hopefully be cooperative.

"Sharma J."

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/24/24/2024BCSC2436.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/trio-apparel-inc-v-arborlea-developments-ltd-2024>

Prepared on 25 October 2026 · Esheria