CANADA / JUDGMENT

Vancouver Pile Driving Ltd. v. JGC Constructors BC Ltd.

2024 BCSC 344

COURT
Supreme Court of British Columbia

DECIDED
28 February 2024

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2024 BCSC 344 Vancouver Pile Driving Ltd., v. JGC Constructors BC Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Vancouver Pile Driving Ltd., v. JGC Constructors BC Ltd.,

2024 BCSC 344

Date: 20240228

Docket: S235807

Registry: Vancouver

Between:

Vancouver Pile Driving Ltd. and Travaux Civils & Marins Besix Canada Inc., Operating as a Joint Venture under the name and style of Besix-Vanpile Joint Venture

Plaintiffs

And

JGC Constructors BC Ltd., Fluor Canada Ltd., Operating as a Joint Venture under the name and style of JGC Fluor BC LNG Joint Venture, LNG Canada Development Inc. and Rio Tinto Alcan Inc.

Defendants

Before: The Honourable Justice Iyer

Reasons for Judgment

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Place and Date of Hearing:

Vancouver, B.C.

November 1, 2023

December 4, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 28, 2024

OVERVIEW

[1] The two applications before me arise out of a large project for the construction of a marine terminal berth at a natural gas liquefaction and export facility in Kitimat, BC. The defendant, LNG Canada Development Inc. ("LNGC"), is constructing the terminal berth on a site it has leased from the defendant, Rio Tinto Alcon Inc. ("Rio Tinto"). The prime contractor is a joint venture between the other defendants, to whom I refer as, "JGC-Fluor". I refer to LNGC, Rio Tinto and JGC-Fluor collectively as the "defendants". The plaintiffs are also a joint venture, to whom I refer as "Besix-Vanpile".

[2] In July 2019, Besix-Vanpile successfully bid on and entered into a subcontract with JGC-Fluor[1] to construct certain aspects of the terminal berth ("Subcontract"). The Subcontract contained a mandatory arbitration clause ("Arbitration Agreement").

[3] Besix-Vanpile's work included dredging and construction of a quay wall. Problems arose during construction. They included discovery of hazardous waste and other debris in the water, sinkholes, dredging incidents and the COVID-19 pandemic. As a result, Besix-Vanpile's costs increased significantly.

[4] In March 2023, Besix-Vanpile filed a notice of civil claim against the defendants to recover these costs ("NOCC").

[5] In April 2023, JGC-Fluor commenced arbitration proceedings against Besix-Vanpile under the Arbitration Agreement.

[6] In May 2023, JGC-Fluor and LNGC filed jurisdictional responses to the NOCC.

[7] JGC-Fluor now applies to stay the claim against it on the basis that the Arbitration Agreement requires the claims between Besix-Vanpile and JGC-Fluor to be determined by arbitration. Although LNGC takes no position on the main application, in the event that a stay is granted, LNGC applies to stay Besix-Vanpile's claim against it pending the outcome of the arbitration. Rio Tinto takes no position on either application and did not participate in the hearing. Besix-Vanpile argues that the Arbitration Agreement does not apply to the present dispute and this Court should refuse the stay applications.

THE ARBITRATION AGREEMENT

[8] The Arbitration Agreement provides:

In the event that [JGC-Fluor] is required to arbitrate a dispute with a third party, which dispute arises out of or is directly related to [the Subcontract], [Besix-Vanpile] agrees to join in such arbitration proceeding, as [JGC-Fluor] may direct, and shall submit to such jurisdiction and be finally bound by the award rendered in accordance with the arbitration rules, as may be established therein. All disputes, controversies or differences which may arise between the parties, out of or in connection to the [Subcontract] that do not involve [LNGC] or Participants, or any breach, validity or cancellation thereof, shall finally be settled by arbitration in London, United Kingdom in accordance with the latest Rules of Arbitration of the International Chamber of Commerce. The award rendered by such arbitration shall be final and binding upon the parties thereto, without any right of appeal therefrom.

[Emphasis added].

[9] The Subcontract defines the term "Participants" as other participants in the project. Besix-Vanpile and JGC-Fluor agree that the underlined sentence is the only applicable part of the Arbitration Agreement, judicial interpretation of which will determine whether JGC-Fluor is entitled to a stay.

[10] Specifically, the central question in the main application is whether the claims in the NOCC "involve" LNGC as that term is used in the Arbitration Agreement.

APPLICABLE LAW

[11] Section 8 of the International Commercial Arbitration Act, R.S.B.C 1996, c. 233 ["ICAA"] applies to the Arbitration Agreement. Section 8(1) of the ICAA sets out the circumstances in which a party to litigation may obtain a stay:

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 submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.

[12] In other words:

(a) the stay applicant must be a party to the litigation;

(b) the plaintiff and at least one defendant must be parties to an arbitration agreement;

(c) the claim must be in respect of a matter that was agreed to be submitted to arbitration; and

(d) the application must be brought before the applicant took a step in the action.

[13] The parties agree that (a), (b) and (d) are satisfied, so the only dispute is over (c). That means I must decide whether the NOCC is in respect of a matter that was agreed to be submitted to arbitration, which is a question of contractual interpretation.

[14] As established in Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53, contractual interpretation requires a decision-maker to read the contested words in light of the contractual provision in which they are found and the agreement as a whole, in light of the ordinary and grammatical meaning of the words used, consistent with the surrounding circumstances known to the parties at the time of contract formation: at para 47. Those surrounding circumstances include the purpose of the agreement and the nature of the relationship it creates between the contracting parties: Sattva at para. 48. Evidence of surrounding circumstances is used as an interpretive aid for determining the meaning of the written words: Sattva at para. 60. That said, the surrounding circumstances must not "overwhelm" or fundamentally change the words of the agreement: Sattva at para. 58.

[15] If there is an "arguable case" that the dispute consists of matters the parties agreed would be submitted to arbitration based on the Arbitration Agreement in the Subcontract, the stay should be granted. The Supreme Court of Canada has called for deference to arbitrators to resolve challenges to their jurisdiction: Dell Computer Corp. v. Union des consommateurs, 2007 SCC 34 at para. 84; Gulak v. Breckenridge, 2015 BCSC 153 at para. 25; Clayworth v. Octaform Systems Inc., 2020 BCCA 117 at paras. 24-27. In Isagenix International LLC v. Harris, 2023 BCCA 96, the Court of Appeal explained how deference operates:

[22] Generally speaking, the "competence-competence" principle applies, meaning that courts favour allowing the arbitrator the first opportunity to determine the arbitrator's own jurisdiction. The standard that has developed is the "arguable case" test: if the party seeking a stay can establish an "arguable case" that the legal proceedings are "in respect of a matter agreed to be submitted to arbitration", the stay should be granted in favour of allowing the arbitrator the first opportunity to determine the arbitrator's jurisdiction: Peace River at paras. 39, 85.

[16] The competence-competence principle reflects that "arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement": Peace River Hydro Partners v. Petrowest Corp., 2022 SCC 41 at para. 41.

[17] There are two limited exceptions to the general rule that challenges to an arbitrator's jurisdiction must be resolved by an arbitrator. The court retains jurisdiction to resolve a challenge to an arbitrator's jurisdiction only if the challenge is confined to (1) pure questions of law or (2) questions of mixed fact and law "requiring only superficial consideration of the evidentiary record": Peace River at para. 42. In Uber Technologies Inc. v. Heller, 2020 SCC 16 at para. 36, the Supreme Court of Canada explained that a "superficial" review is one in which the facts necessary to support the conclusion are either evident on the face of the record or are not disputed. Interpreting the scope of an arbitration agreement is a question of mixed fact and law: Clayworth at para. 44.

[18] In summary, only if it is clear from a superficial review of the evidence that an arbitration agreement does not apply to a dispute, should the court decline to grant the stay: Jean Estate v. Wires Jolley LLP, 2009 ONCA 339 at para. 50.

[19] Importantly, in cases such as this, involving multiple parties and multiple interrelated issues, where only some of the parties are subject to an arbitration clause, the inefficiencies entailed by some claims going to arbitration while others remain in court is not a basis for denying a stay: Ontario v. Imperial Tobacco Canada Limited, 2011 ONCA 525 at paras. 69, 78; see also Brian Casey, Arbitration Law of Canada: Practice and Procedure, 4th ed (Huntington, New York: Juris Publishing, 2022) at 338. AS Cumming J.A. stated in Prince George (City) v. McElhanney Engineering Services Ltd. (1995), 9 B.C.L.R. (3d) 368, which also concerned a construction project:

[37] as a general principle, the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause.

MUST THE ACTION BE STAYED AGAINST JGC-FLUOR?

[20] As I read the governing law, I must grant the stay if JGC-Fluor has established an arguable case that the claims the NOCC makes against JGC-Fluor "do not involve" LNGC, interpreting those words using established principles of contract interpretation. However, I should decline the stay application if it obvious from a superficial review of the record that LNGC is involved in the civil claims against JGC-Fluor. This narrow question focuses only on whether there is an arguable case, not which interpretation should be preferred on merits.

[21] JGC-Fluor submits that "do not involve" means that LNGC (or other project participants) are not directly involved in Besix-Vanpile's claims against JGC-Fluor. It says that I should assess each of the claims in the NOCC separately and must stay all claims against JGC-Fluor that can be resolved without LNGC's participation as a party.

[22] Besix-Vanpile submits the meaning of "do not involve" is much broader than that. Besix-Vanpile approaches the NOCC as a whole, submitting that the numerous references to LNGC throughout the pleading make it so obvious that LNGC is "involved" that I should decline to grant the stay. It says that the ordinary meaning of "involve" encompasses direct and indirect involvement. Besix-Vanpile says that the fact that LNGC is seeking a stay if I grant JGC-Fluor a stay proves that LNGC is "involved" within the meaning of the Arbitration Agreement. Besix-Vanpile also points to the inefficiencies of multiple forums.

[23] In ordinary usage, being "involved" connotes participating in or being part of an activity or situation, whether directly or indirectly. This is a broad definition of a word that is used in many different contexts. But the fact that "involved" is capable of a very broad meaning does not establish that it has a broad meaning in the context of the Arbitration Agreement, or that a narrower interpretation is incorrect. The range of the word's possible meanings in common usage suggests that it takes much of its meaning from contexts in which it is used. Defining "involved" in the abstract is of little assistance in understanding what it means in the Arbitration Agreement.

[24] The parties' reliance on University of Regina v. Canadian Union of Public Employees, Local 1975 and Thurlow (1980), 111 D.L.R. (3d) 128, 1980 CanLII 2119 (S.K.C.A.), illustrates this point. There, the Saskatchewan Court of Appeal interpreted the phrase "not involving the University" in the context of a termination grievance. A provision of the collective agreement gave the employer discretion to provide a leave of absence to employees found guilty of an offence, "not involving the University." The Court of Appeal interpreted the phrase as meaning the University was not involved in the circumstances of the offence (e.g. theft of its property) rather than meaning that the University was not affected by the offence: at para.18. This shows that the context in which "involve" is used can determine its meaning.

[25] In this case, the context in which "do not involve" must be construed starts with the Arbitration Agreement and the Subcontract. The Subcontract is a standard form document on JGC-Fluor letterhead that can be adapted for the various agreements JGC-Fluor, as prime contractor, enters into with various subcontractors. In particular, it includes a section entitled "Special Terms" that consists of clauses modifying those terms in the section entitled "General Terms" that would otherwise apply. The fact that the Arbitration Agreement is a Special Term means that Besix-Vanpile and JGC-Fluor turned their minds to it and negotiated it as part of the Subcontract.

[26] Interpreting the Arbitration Agreement against this factual matrix demonstrates that it is arguable that "involved" means directly involved. At the time the parties entered into the Subcontract, they knew that they were going to be working on a complex multi-participant

construction project, with contractual chains linking LNGC as project "owner" to JGC-Fluor and down through various sub-contractors, sub-sub-contractors and perhaps others. They knew that LNGC was actively involved in the project, including its siting and design of the terminal berths. It was in that context that the parties agreed to modify the General Term regarding arbitration. The General Term provided:

In the event that [JGC-Fluor] is required to arbitrate a dispute with a third party, which dispute arises out of or is directly related to [the Subcontract], [Besix-Vanpile] agrees to join in such arbitration proceeding, as [JGC-Fluor] may direct, and shall submit to such jurisdiction and be finally bound by the award rendered in accordance with the arbitration rules, as may be established therein.

[27] The Special Term (that is, the Arbitration Agreement) modified the General Term by adding the following provision to it.

All disputes, controversies or differences which may arise between the parties, out of or in connection to the [Subcontract] that do not involve [LNGC] or Participants, or any breach, validity or cancellation thereof, shall finally be settled by arbitration in London, United Kingdom in accordance with the latest Rules of Arbitration of the International Chamber of Commerce. The award rendered by such arbitration shall be final and binding upon the parties thereto, without any right of appeal therefrom.

[28] The parties contemplated - and negotiated - that there could be disputes between them that did not "involve" LNGC in the context of this multi-party complex construction project. The parties were aware that LNGC was part of the contractual chain for the purposes of any flow-through claims and was providing information and establishing requirements that JGC-Fluor was providing to Besix-Vanpile, which it was contractually required to meet.

[29] I am satisfied that this context establishes that that it is arguable that "do not involve" has the narrow meaning for which JGC-Fluor contends. An examination of the NOCC supports this conclusion.

[30] The NOCC also reflects the reality of multi-party construction litigation. The NOCC sets out a number of circumstances that Besix-Vanpile says caused it damage. These include site conditions, hazardous waste, dredging damage, changes to work, delays in obtaining necessary approvals, and pandemic regulations, among other things. The NOCC specifies which claims are made against JGC-Fluor and which claims are made against LNGC.

[31] The ten contractual claims against JGC-Fluor are set out at paragraphs 93-141 of the NOCC. There is no question that they arise out of the Subcontract and they are advanced only against JGC-Fluor. Any references to LNGC relate only to its involvement in the creation of information, standards or requirements that JGC-Fluor provided to Besix-Vanpile pursuant to the Subcontract. I am satisfied that JGC-Fluor has established an arguable case that LNGC is not involved in these claims within the meaning of the Arbitration Agreement.

[32] Besix-Vanpile's claims against LNGC and JGC-Fluor in negligent misrepresentation are more intertwined. However, there is also an arguable case that the claims against JGC-Fluor should be stayed in favour of arbitration. Besix-Vanpile claims that each of LNGC and JGC-Fluor made misrepresentations regarding the sufficiency of site investigations, the suitability of Besix-Vanpile's plans based on designs made by LNGC, and the full disclosure of all material information about the site.

[33] JGC-Fluor submits that LNGC's involvement in Besix-Vanpile's misrepresentation claims against JGC-Fluor is limited to its participation in the underlying facts because of its role on the project. It argues:

At their core, the Misrepresentation Claims involve alleged duties of care owed by JFJV, breaches allegedly committed by JFJV, and reliance interests that only directly involve JFJV. None of those elements of BVJV's claims against JFJV involve LNG Canada. The claims BVJV has made against LNG Canada in this action involve representations that were made at a different time, to a different audience, for a difference purpose, in breach of a different duty, and with a vastly different element of reliance. It follows that there is at least an arguable case that the Misrepresentation Claims are subject to the Arbitration Agreement and, pursuant to Section 8 of the ICAA, they also must be stayed.

[34] Assessment of the accuracy of these statements would require careful consideration of the evidentiary record, well beyond a superficial review. It follows that the exception does not apply and issues should be left for an arbitrator to determine, on a full evidentiary record: Dancap Productions Inc., v. Key Brand Entertainment, Inc., 2009 ONCA 135 at para. 40.

[35] I conclude that there is an arguable case that the misrepresentation claims against JGC-Fluor fall within the terms of the Arbitration Agreement.

SHOULD THE ACTION AGINST LNGC BE STAYED?

[36] Section 8(1) of the ICAA permits a party to a legal proceeding to seek a stay even if it is not a party to the arbitration agreement: Darby v. Lasko, 2003 BCCA 584 at paras. 9-11.

[37] LNGC also seeks a stay under ss. 8 and 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253. Together, those provisions permit a court to grant a stay where it sees fit to do so and, in particular, to avoid a multiplicity of proceedings.

[38] JGC-Fluor takes no position on this application.

[39] Besix-Vanpile opposes the application. It reiterates its argument on the main application: that LNGC is "involved" so the Arbitration Agreement is not engaged. Besix-Vanpile submits that the "arguable case" standard in s. 8(1) of the ICAA does not apply because LNGC is not a party to the Arbitration Agreement; instead, LNGC must establish that the matter is "clearly subject to arbitration", which it cannot do because the basis for its stay application is the intertwined nature of the plaintiff's claims against it and JGC-Fluor. Besix-Vanpile submits that the court has a residual discretion to refuse a stay to a litigation party who is not party

to an arbitration agreement. It submits that a stay is an exceptional remedy under the Law and Equity Act and LNGC has not met the requirements for that exceptional remedy.

[40] With respect to the applicable standard under s. 8(1) of the ICAA, the cases relied on by Besix-Vanpile do not stand for the proposition that a party to the litigation who is not a party to the arbitration agreement must meet a higher standard than an "arguable case".

[41] Besix-Vanpile incorrectly relies on a passage from Gulf Canada Resources Ltd. v. Arochem International Ltd. (1992), 66 B.C.L.R. (2d) 113, 1992 CanLII 4033 (C.A.) at 12. The paragraph, beginning at the bottom of 12, affirms the competence-competence principle and the limited scope for the court to refuse to grant a stay. Read in context, the reference to a party who "is not a party to the arbitration agreement" is not about a stay applicant who is a party to the litigation but not to the arbitration agreement; it is about the requirement that the plaintiff be a party to an arbitration agreement. Prince George at paras. 52-54 clarifies the meaning of this passage from Gulf Canada.

[42] Besix-Vanpile has not pointed to any authority that, where a stay applicant under s. 8 of the ICAA is not a party to the arbitration agreement, it should have to demonstrate more than an arguable case that the matter was agreed to be submitted to arbitration. I can see no principled reason for applying a different standard, since s. 8 only applies where a plaintiff and a defendant are parties to an arbitration agreement.

[43] I do not find it necessary to decide the question of residual discretion because I am satisfied that the circumstances of this case justify granting a stay under ss. 8 and 10 of the Law and Equity Act. The arbitrator will determine the applicability of the Arbitration Agreement based on a full consideration of the evidence. Following that, it will be clearer whether some or all of the litigation will continue in this Court. While the principle of deference to the parties' choice of dispute resolution forum creates the possibility of multiple proceedings, s. 10 of the Law and Equity Act permits the court to prevent them. On that basis, I stay the action against LNGC pending completion of the arbitration.

CONCLUSION

[44] In conclusion, I grant JGC-Fluor's application and stay the action against it. I also grant LNGC's application to stay the action against it. Costs of each application are payable by Besix-Vanpile against the respective applicants on Scale B.

"Iyer J."

[1] A predecessor to Besix-Vanpile entered into the subcontract, but Besix-Vanpile assumed the predecessor's obligations under a novation agreement. As there is no dispute that Besix-Vanpile is bound by the subcontract, I will not refer to the novation agreement.

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