
CANADA / JUDGMENT

Williams v. Amazon.com, Inc.

2019 BCSC 1807

COURT

Supreme Court of British Columbia

DECIDED

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2019 BCSC 1807 Williams v. Amazon.com, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Williams v. Amazon.com, Inc.,

2019 BCSC 1807

Date: 20190826

Docket: S1810560

Registry: Vancouver

Between:

John Williams

Plaintiff

And

Amazon.com, Inc., Amazon Services International, Inc. and

Amazon.com.ca, Inc.

Defendants

Corrected Judgment: The judgment was corrected on the front page on

October 25, 2019.

Before: The Honourable Madam Justice Horsman

Oral Ruling Re Various Applications Including a Direction for a Stay of Proceedings

In Chambers

Counsel for the Plaintiff:

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Counsel for the Defendants:

M. Sampson

A. Basmadjian

Place and Date of Hearing:

Vancouver, B.C.

August 21, 2019

Place and Date of Ruling:

Vancouver, B.C.

August 26, 2019

- [1] THE COURT: I am going to give my ruling on the application for a case management direction that was heard last week.

INTRODUCTION

- [2] This action is brought pursuant to the Class Proceedings Act, RSBC 1996, c. 50. The plaintiff alleges that the defendants, who I will collectively refer to as "Amazon," have agreed with third party sellers not to compete for sales of new books, music, movies and DVDs sold by the selection of a featured offer that is referred to in the notice of civil claim as the "Buy Box." The plaintiff says that by foreclosing competition in this market, Amazon overcharges consumers for its own benefit.
- [3] In its notice of civil claim part 3, "legal basis," the plaintiff pleads claims against Amazon for breach of the Competition Act, RSC 1985, c.-C34, unjust enrichment, civil conspiracy and breach of British Columbia's Business Practices and Consumer Protection Act, SBC 2004, c.2. For ease of reference, I will refer to this latter statute as the "Consumer Act" in these reasons. In relation to the Consumer Act claim, the plaintiff seeks a declaration, injunction and restoration order against Amazon pursuant to s. 172 of the Act.
- [4] Amazon applies for a case management direction that the defendants may bring an application for a stay of proceedings pursuant to s. 15 of the Arbitration Act, RSBC 1996, c. 55, as a first step in this action and before the hearing of any application for certification.
- [5] Amazon says that the arbitration clause in the plaintiff's contract with Amazon mandates that customer disputes be resolved by arbitration, with the exception of the claim under the Consumer Act. Amazon says that the wording of s. 15 of the Arbitration Act creates a

substantive right on the part of Amazon to apply for a stay at the earliest stage of a proceeding. As such, Amazon says that the usual balancing that occurs on what is familiarly known as a "sequencing application" in a class action, that is an application to have an interlocutory application heard in advance of certification, is inapplicable in this case.

- [6] The plaintiff opposes the direction sought by Amazon and argues that the stay application should be heard at the same time as the certification motion. The plaintiff acknowledges that Amazon has a substantive right under s. 15 of the Arbitration Act to apply for a stay of proceedings but says there is no right to have that application heard prior to certification. The plaintiff says that the court has a discretion to determine the timing of the stay application, and this discretion is guided by the usual considerations that apply on a sequencing application. The plaintiff says that these principles include that a certification motion is usually the first procedural motion heard in a class action proceeding and that any departure from the usual rule must be justified on the basis of judicial efficiency and timely resolution of legal disputes. He says that Amazon's application to have the stay application heard prior to the certification hearing amounts to litigation in slices that will only lead to excessive delay.

PROCEDURAL HISTORY

- [7] I will briefly review the procedural history of this action before turning to the substantive issue that I must decide on this application.
- [8] The action was filed on September 27, 2018. I was appointed as case management judge on January 7, 2019. The first judicial management conference (JMC) in this matter was scheduled for March 25, 2019. On March 22, 2019, the plaintiff delivered his notice of application for certification and supporting affidavits. The March 25th, 2019 JMC was adjourned by consent to May 1, 2019, to permit Amazon an opportunity to review the certification material.
- [9] At the JMC on May 1, 2019, counsel for Amazon advised that they were considering bringing an application for a stay of proceedings and were not ready to commit to a certification schedule. I directed the parties to reappear before me at a JMC on May 10, 2019, to set a certification schedule.
- [10] At the JMC on May 10, 2019, the parties presented irreconcilable schedules. Amazon proposed a schedule that included Amazon's application for a stay of proceedings as a first litigation step to be heard in advance of certification. The plaintiff proposed a schedule in which Amazon's application for a stay would be heard at the same time as the certification motion. The competing schedules raised a sequencing issue that I directed ought to be resolved by Amazon bringing an application for a case management direction that its stay application could proceed first. I further directed Amazon to file and serve the stay application by June 17, 2019.

- [11] Amazon served its sequencing application along with its application for a stay of proceedings under the Arbitration Act in accordance with my direction. The fact that the sequencing application could only be heard on August 21, 2019, is a function of the court's availability and not the fault of any party.
- [12] A date of September 18, 2019, has been provisionally scheduled for the hearing of Amazon's application for a stay in the event I determine that it may proceed in advance of the certification hearing.
- [13] Amazon's application for a stay of proceedings includes the affidavit of Richard Logan, a general manager employed by Amazon. Mr. Logan's evidence is that all Canadian customer purchases from the Amazon Canada store from the time that it opened on June 21, 2002, are subject to the customer agreeing to Amazon's Conditions of Use. The Conditions of Use have always contained an arbitration clause. Between June 21, 2002, and October 23, 2014, the arbitration clause provided that any dispute would be submitted to confidential arbitration in Seattle, Washington. The Conditions of Use were amended on October 24, 2014, to remove the requirement to arbitrate in Seattle.
- [14] It appears from the material filed on this application that the plaintiff became a customer of Amazon in March 2015. The relevant arbitration clause in relation to his claim is therefore the one in force as of October 24, 2014. This clause provides in relevant terms that:

Any dispute or claim relating in any way to your use of any Amazon.ca Service, or to any products or services sold or distributed by Amazon.ca or through Amazon.ca Services will be resolved in binding arbitration rather than in court, except that you may assert claims in small claims court if your claims qualify. The U.S. Federal Arbitration Act and US federal arbitration law apply to this agreement.

- [15] Both the Arbitration Act and the International Commercial Arbitration Act, RSBC 1996, c. 233, provide for the staying of an action where there is a valid arbitration clause. It is not immediately apparent to me which statute applies in these circumstances. Given that there is an identically awarded stay provision in both statutes, this is not an issue I need to resolve for the purpose of the present application. In these reasons for judgment I will refer the Arbitration Act as this is the statute that the parties' submissions focused on.

ANALYSIS

- [16] The arguments before me on the sequencing application reflect an inherent tension between the policy underlying the Class Proceedings Act and the Arbitration Act. Each party invoked principles of access to justice in support of their positions, although those principles point in different directions depending on whether one is emphasizing the efficiencies of arbitration as a voluntary method of private dispute resolution or the efficiencies of class proceedings as a method of resolving mass claims. Each party has pointed to indications in the statutes for their respective positions that a certification application should proceed first under the Class Proceedings Act or a stay application should

go first under the Arbitration Act.

Principles on a sequencing application

[17] The plaintiff relies on s. 12 of the Class Proceedings Act, which provides:

Court may determine conduct of proceeding

12 The Court may, at any time, make an order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and for that purpose may impose on one or more of the parties the terms it considers appropriate.

[18] The court's discretion to determine the conduct of a class proceeding includes the discretion to determine the timing of procedural steps, and in particular whether an interlocutory application should precede the certification motion. The general rule under the Class Proceedings Act is that the certification motion is the first procedural step in a class action. This rule is premised in part of the basis that the 90-day period for bringing a certification application under s. 2(3) of the Class Proceedings Act is indicative of the legislative intent that certification precede other preliminary motions. See *Gill v. Yahoo! Canada Co.*, 2018 BCSC 290 [Gill], at paras. 13-14.

[19] The court's discretion on a sequencing application is generally determined on a case-by-case basis, having regard to factors that include the potential delay in costs and implications of an interlocutory application and the overall interests of economy and judicial efficiency. See Gill at para. 18.

Section 15 of the Arbitration Act and Seidel

[20] Amazon emphasizes that none of the sequencing cases cited by the plaintiff involve an application for a stay of proceedings under s. 15 of the Arbitration Act. Amazon says that the general sequencing principles cited by the plaintiff do not apply where the parties' dispute is potentially governed by an arbitration clause and the defendant wishes to exercise its substantive right to apply for a stay of proceedings pending arbitration. That substantive right is contained in s. 15 of the Arbitration Act, which provides in relevant terms:

Stay of proceedings

15 (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 apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

- [21] In *Seidel v. TELUS Communications Inc.*, 2011 SCC 15 ["Seidel"], the Supreme Court of Canada held that absent legislative intervention, the courts will generally give effect to an arbitration clause included in a commercial contract freely entered into, even if it is a contract of adhesion: *Seidel* at para. 2. The extent to which arbitration clauses have been curtailed by legislation is determined by the law of the forum where the plaintiff has commenced their court case. The issue in *Seidel* was whether British Columbia's Consumer Act constituted such a curtailment. A majority of the court held that the remedies in s. 172 of the Consumer Act constituted a legislative override of the arbitration clause in a contract between Telus and its customers.
- [22] As in the present case, the plaintiff in *Seidel* brought her claim under the Class Proceedings Act. The British Columbia Court of Appeal had stayed all of her claims pending arbitration. The Supreme Court of Canada disposed of the appeal by lifting the stay in relation to the plaintiff's claims under s. 172 of the Consumer Act while upholding the stay in relation to her other claims. The Court acknowledged that this could, if arbitration was pursued, result in bifurcated proceedings. However, the Court found that such an outcome is "consistent with the legislative choice made by British Columbia." See *Seidel* at para. 60.

The timing of an application for a stay of proceedings

- [23] *Seidel* does not specifically address the timing of an application for a stay of proceeding under s. 15 of the Arbitration Act, although I note that the stay application in *Seidel* was brought in advance of a certification motion. However, the development of the law in British Columbia leading up to the Supreme Court of Canada's decision in *Seidel* is instructive on the question of timing. I will brief review the relevant chronology.
- [24] In 2004 our Court of Appeal held in *MacKinnon v. National Money Mart Company*, 2004 BCCA 473 [*MacKinnon* (2004)] that an arbitration clause is inoperative if a court finds that the criteria for certification under s. 4 of the Class Proceedings Act, including preferability, are met. The Court reasoned that the mandatory language in s. 4 of the Class Proceedings Act (the court "must" certify if the certification requirements are met) overrides the parties' agreement to arbitration as the method of dispute resolution. Given the Court's conclusion that the question of whether an arbitration clause is operative depends on a finding that the certification criteria are met, the Court also held that an application for a stay under the Arbitration Act must be heard at the same time as a certification application.
- [25] In 2007, the Supreme Court of Canada issued two judgments that cast doubt on the correctness of *MacKinnon* (2004): *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 [*Dell*]; and *Rogers Wireless Inc. v. Muroff*, [2007] 2 SCR 921 [*Rogers*]. These cases address the interplay between arbitration clauses and class proceedings in Quebec. In both cases the court held that a binding arbitration clause removes the dispute from the jurisdiction of the superior court, and further that class actions are procedural vehicles that cannot override a party's substantive right to refer dispute to arbitration where there is a contractual agreement to do so.

- [26] In 2009 our Court of Appeal sat as a five-member panel to hear two appeals that addressed the same question of whether the court's decision in *MacKinnon* (2004) had been implicitly overruled by *Dell and Rogers*. The court released concurrent decisions in these appeals: *MacKinnon v. National Money Mart Co.*, 2009 BCCA 103 [*MacKinnon* (2009)]; and *Seidel v. TELUS Communications Inc.*, 2009 BCCA 104 [*Seidel BCCA*].
- [27] In *MacKinnon* (2009), the Court of Appeal held that *Dell and Rogers* had changed the law such that *MacKinnon* (2004) should be regarded as overruled in British Columbia. The Court concluded that, as had been found in *Dell and Rogers*, the various unique features of class proceeding legislation are essentially procedural (para. 68). Further, the Court held that a defendant's substantive right to apply to stay court proceedings under the Arbitration Act could not be defeated by a plaintiff's procedural choice to pursue a claim as a class action (paras. 69-72).
- [28] In the companion decision of *Seidel BCCA*, the judgment that was ultimately appealed to the Supreme Court of Canada, the Court applied this analysis in staying the plaintiff's action in its entirety under the Arbitration Act. The defendant *Telus* had brought the application for a stay of proceeding prior to filing a defence and prior to a certification hearing. The Court of Appeal held that s. 15 of the Arbitration Act "specifically deals with the timing of stay applications", and that *Telus*' application had been brought in a timely way as *Telus* had not yet "taken a step" in the proceeding (para. 26).
- [29] As I have already reviewed, the Supreme Court of Canada allowed the plaintiff's appeal in part in *Seidel* in holding that the plaintiff's Consumer Act claims could proceed. However, the remainder of the plaintiff's claims remain stayed.

Is Amazon entitled to bring an application for a stay in advance of certification?

- [30] With this background in mind, I return to the question facing me on the present application: is Amazon entitled to bring an application for a stay in advance of taking any other step in this action, including responding to a certification motion?
- [31] In my view, and in light of the case law I have reviewed leading to the Supreme Court of Canada's judgment in *Seidel*, Amazon has a substantive right to apply for a stay of proceedings under the Arbitration Act in respect of the non-Consumer Act claims prior to the certification motion. That right cannot be defeated simply on the basis of the plaintiff's procedural choice, exercised unilaterally, to pursue his claims as a class action.
- [32] It is a term of the plaintiff's contractual relationship with Amazon that "any dispute or claim" relating to Amazon's products or services will be resolved by binding arbitration. Without prejudging the outcome of Amazon's stay application, it is at least arguable that the arbitration clause applies here and precludes the plaintiff's access to the courts to resolve the non-Consumer Act claims. Pursuant to s. 15 of the Arbitration Act, Amazon is entitled to apply for a stay of proceedings before filing a response or "taking any other step in the proceeding" to enforce what Amazon says is its contractual entitlement.

- [33] I agree with Amazon that the usual discretion exercised by the court on a sequencing application is inapplicable where the interlocutory application in issue is brought under s. 15 of the Arbitration Act. While I would not go so far as accepting that a court has no discretion over the timing of a stay application in these circumstances, as Amazon has argued, I do agree that any discretion must be exercised in a manner that does not undermine the policy of the Arbitration Act. The policy includes giving effect to contractual arrangements the parties have freely entered which limit the jurisdiction of the superior court.
- [34] In my view requiring Amazon to wait until a certification hearing to argue its stay application would undermine the Arbitration Act and Amazon's substantive right under that statute to bring an application for a stay before taking a step in the proceeding. Through the mechanism of a sequencing motion, the plaintiff seeks a direction that would require Amazon to file a response to civil claim, prepare for and argue a four-day certification motion and respond to any interlocutory applications that may arise in connection with the certification application. These are not small steps in the proceeding. They would require a significant amount of time and effort by Amazon to litigate matters in this court that Amazon says the parties have agreed not to litigate in this court.
- [35] In short, the plaintiff relies on his presumptive procedural entitlement to have a certification motion heard first in a class proceeding to override Amazon's substantive right to attempt to enforce a contractual arbitration clause before taking any steps in a proceeding.
- [36] As I noted at the outset of these reasons, both parties cite access to justice considerations in support of their arguments. Access to justice is a well established policy objective of class action legislation. However, it must be recognized that the Supreme Court of Canada has also found that arbitration clauses promote access to justice by allowing parties to voluntarily choose private, less expensive, and potentially less time consuming methods of final dispute resolution outside of the traditional court system. While the plaintiff claims that a stay application may delay his pursuit of certification of his claims, delay is a two-sided coin in this context. A rule that would require parties to argue a stay application at the same time as certification could delay the timely and final resolution of disputes by way of arbitration, despite the parties' agreement to arbitrate disputes.
- [37] I acknowledge that the plaintiff intends to argue against a stay of the non-Consumer Act claims on grounds that include that the arbitration clause is an issue or unconscionable, relying on *Heller v. Uber Technologies Inc.*, 2019 ONCA 1. I make no finding on this application about the merits of Amazon's stay application, beyond finding that it is arguable. My comments are intended only to reflect that an application for a stay under the Arbitration Act raises unique considerations that, for compelling policy reasons, are not easily subject to the usual balancing of interests that occurs on a sequencing motion.

- [38] In any event, and more importantly, to the extent there is conflict or tension between the Class Proceedings Act and the Arbitration Act, our Court of Appeal and the Supreme Court of Canada have already resolved that tension in favour of giving effect to the substantive rights that are created by a contractual arbitration clause. To the extent that this may lead to bifurcation where some claims are exempted, *Seidel*, already holds that this is the result of legislative choices that the courts must respect.
- [39] I accept that there may be circumstances that dictate a different outcome to the timing of a stay application under the Arbitration Act within the context of an action brought under the Class Proceedings Act. As counsel for Amazon acknowledged, delay by a defendant amounting to a waiver or the taking of a step in a proceeding may disentitle a defendant from bringing a stay application at all, or at least prior to certification. In *MacKinnon* (2009) the Court of Appeal held that the defendant was precluded by the doctrine of issue estoppel in having a stay application heard in accordance with the change in law since *MacKinnon* 2004. There may be other circumstances that affect entitlement or timing.
- [40] In the present case, to the extent that I have discretion to direct Amazon to delay its stay application so that it is heard at the same time as the certification application, I see no principled basis on which such a discretion could be exercised. While the plaintiff complains of delay since the filing of his notice of civil claim in September 2018, I do not find that Amazon has been dilatory in pursuing its rights. As counsel for Amazon points out, Amazon required the plaintiff's proposed class definition in order to locate the applicable versions of the arbitration clause, and that proposed class definition only came with the service of the certification application material in March of 2019. Amazon's stay application was served three months after that, and in accordance with the timeline directed by the court. Amazon has secured a date in September 2019 for the hearing of the application for a stay if it is permitted to proceed.
- [41] Amazon is not guilty of any lack of diligence that would disentitle it to the relief sought in this application, which is an opportunity to bring a stay application as the first step in this proceeding.
- [42] Accordingly, I direct that Amazon may bring its application to stay the non-Consumer Act claims pursuant to s. 15 of the Arbitration Act before taking any step in this proceeding. The application may proceed on September 18, 2019, as currently scheduled or on the next date availability to the parties and the court in the event that the plaintiff requires additional time to prepare his response to the application.

"Horsman, J."

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