

CANADA / JUDGMENT

Wilson v. Infracon Construction Inc.

2020 BCSC 2074

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 2074 Wilson v. Infracon Construction Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Wilson v. Infracon Construction Inc.,

2020 BCSC 2074

Date: 20201224

Docket: S209350

Registry: Vancouver

Between:

Dennis Wilson

Plaintiff

And

Infracon Construction Inc. and Infracon Capital Corp.

Defendants

Before: The Honourable Justice Lindsay M. Lyster

Reasons for Judgment

Counsel for the Plaintiff (via teleconference):

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G. Plottel

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 14, 2020

Written Submissions of the Plaintiff Submitted:

October 23, 2020

Written Submissions of the Defendants Submitted:

October 27, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 24, 2020

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Introduction

- [1] The defendants, Infracon Construction Inc. and Infracon Capital Corp. (the "Defendants"), apply for a stay of the action filed by the plaintiff, Dennis Wilson (the "Plaintiff"). Infracon Capital employed Mr. Wilson as its Chief Executive Officer pursuant to the terms of a written contract of employment. Mr. Wilson's contract of employment ended on or about January 18, 2020.
- [2] On September 18, 2020, Mr. Wilson filed a notice of civil claim alleging he was wrongfully dismissed. On September 22, 2020, he obtained a prejudgment garnishing order, pursuant to which \$420,265 has been garnished.
- [3] The Defendants apply to have the action stayed on the basis that the British Columbia courts lack jurisdiction over this dispute pursuant to the arbitration clause contained in the employment agreement. They submit that the stay will have the effect of setting aside the garnishing order.

- [4] The Plaintiff submits in response that the arbitration clause is void because it attempts to contract out of the Employment Standards Act, R.S.B.C. 1996, c. 113 [ESA]. As a result, the Plaintiff says that the British Columbia courts have jurisdiction, and the action should be allowed to proceed. He submits that even if the action is stayed, the garnishing order should not be set aside, as he is entitled to "an interim measure" under the Arbitration Act, S.B.C. 2020, c. 2.
- [5] While other issues were raised in the notice of application, the parties agreed to limit the issues before the Court to only those just listed, which could be adjudicated on the basis of undisputed facts.

Further Submissions on the Application of Hansard Spruce Mills

- [6] The Defendants rely on the decision of Madam Justice Humphries in *A-Teck Appraisals Ltd. v. Constandinou*, 2020 BCSC 135 [A-Teck]. In that case, the defendant argued that the arbitration clause in the parties' employment agreement was void because it attempted to contract out of the ESA. Justice Humphries, for reasons I will explore in greater detail below, held that the employment agreement was not void.
- [7] In oral submissions before me, the Plaintiff argued that A-Teck was wrongly decided. I asked whether I was bound by it, and the Defendants argued in reply that I was bound to apply A-Teck by virtue of the principles expressed in *Hansard Spruce Mills Limited (Re)*, [1954] 4 D.L.R. 590 (B.C.S.C.). Subsequently, the Plaintiff requested an opportunity to make written submissions with respect to the application of *Hansard Spruce Mills* to this case, which I permitted him to do. The Plaintiff provided complete written submissions on October 23, 2020, to which the Defendants replied on October 27, 2020.
- [8] In their written submissions, the Defendants argued that the Plaintiff should not be permitted to make sur-reply submissions on this issue. I do not agree. The Defendants did not refer to *Hansard Spruce Mills* in their initial arguments, and the question of whether I am bound by virtue of the principles expressed therein to follow A-Teck only arose in the hearing in response to a question from me. This was an appropriate case for further submissions, and I am grateful to both counsel for their thorough and helpful submissions on this point.

Analysis

Should the action be stayed?

- [9] Section 7(1) of the Arbitration Act provides that a party to legal proceedings may apply for a stay of proceedings. Section 7(2) states:
- (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.

[10] In *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 at 375(C.A.) [Prince George], the Court of Appeal set out a three part test for granting a stay under s. 15 of the former Arbitration Act, R.S.B.C. 1996, c. 55:

There are three prerequisites to the application of s.15. They are:

- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- (c) the application must be brought in a timely manner, i.e. before the applicant takes a step in the proceedings.

[11] That test continues to be applicable under s. 7 of the current Arbitration Act. There is no question that the parties are party to the employment agreement. That agreement contains an arbitration clause. That clause is mandatory on its face, providing that "any dispute between the parties hereto in respect of the interpretation of this Agreement or otherwise arising under this Agreement which cannot be resolved . . . will be determined by arbitration". The Plaintiff's claim of wrongful dismissal is a dispute in respect of the interpretation of the employment agreement. The Defendants have brought this application in a timely manner, before taking any other steps in these proceedings.

[12] As the Defendants submit, a stay under s. 7 of the Arbitration Act is not discretionary, and must be granted, unless the arbitration agreement is void, inoperative or incapable of being performed. Here, the Plaintiff submits that the arbitration agreement is void because it seeks to contract out of the ESA.

[13] The Plaintiff relies on s. 4 of the ESA, which provides:

Requirements of this Act cannot be waived

4 The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of the requirements, not being an agreement referred to in section 3(2), has no effect.

[14] The Plaintiff submits that the arbitration clause in the agreement provides that any dispute between the parties will be decided by way of arbitration, with no exceptions being made for complaints to the Director of Employment Standards (the "Director"). He submits that this clause effectively eliminates the right of the Plaintiff to make a complaint to the Director in the event the Defendants have violated any of their obligations under the ESA. As a result, the Plaintiff submits the arbitration clause is void ab initio, of force or effect, and cannot be relied upon in support of a stay of the action.

- [15] In making these submissions, the Plaintiff relies upon the decision of the Supreme Court of Canada in *Machtinger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986 at 1002-04 [Machtinger]. In that well-known case, the Court held that the ESA is remedial legislation and that courts should favour an interpretation of it that "encourages employers to comply with the minimum requirements of the Act", and "extends its protection to as many employees as possible": *Machtinger* at 1003. He also refers to the decision of the Court of Appeal in *Shore v. Ladner Downs* (1998), 52 B.C.L.R. (3d) 336 (C.A.) [Shore], for the proposition that if a clause in an employment contract carries even the possibility that it will violate a requirement under the ESA, it is void *ab initio*, regardless of whether the impugned provisions of the ESA were triggered or not.
- [16] Most of the cases, such as *Shore and Waddell v. Cintas Corp.* (2001), 96 B.C.L.R. (3d) 366 (C.A.), considering whether provisions in employment contracts are void due to contracting out the ESA address termination provisions. Here, the Plaintiff points instead the inability to access the complaint and investigation processes under the ESA. The Plaintiff submits that the fact he has not sought to file a complaint with the Director to access those processes does not matter, as the analysis is to be done *ab initio*.
- [17] Very similar arguments were made in *A-Teck*. Justice Humphries cited *Machtinger* for the proposition that if a term in an employment contract does not comply with the minimum requirements of the ESA, that term is void for all purposes: *A-Teck* at para. 33. She stated that she did not see it as support for the proposition that the entire contract becomes a nullity: *A-Teck* at para. 33. She noted that that the British Columbia cases referred to her did not deal directly with the issue before her, which was the interaction between the arbitration clause, the ESA and the common law, and "whether a dispute mechanism provided for in the statute precludes resolution of disputes under an arbitration clause": *A-Teck* at para. 34.
- [18] Justice Humphries considered the decision of the Ontario Court of Appeal in *Heller v. Uber Technologies Inc. et al*, 2019 ONCA 1 [Heller], which is also relied upon by the Plaintiff in support of his position before me. The issue in *Heller* was whether Uber drivers were employees: if they were, they would be covered by the Ontario Employment Standards Act, 2000, S.O. 2000, c. 41, and entitled to benefits thereunder. If so, they would not be bound by contractual terms that purported to oust those benefits.
- [19] The arbitration clause in *Heller* required arbitration in the Netherlands. The Ontario Court of Appeal held that clause was inoperable, because it would be unconscionable to require Uber drivers to travel to the Netherlands to have their disputes resolved. As described by Humphries J. at para. 23:

- [23] . . . the court went on to consider the issue in a wider context. The court noted that, if any employee makes a complaint, then the Employment Standards Officer must investigate it under the ESA. The court stated that this complaint and investigative process itself constitutes an employment standard. The arbitration clause, which eliminated the right of an Uber driver to make a complaint to the Ministry of Labour regarding a possible violation of the Act, constituted a contracting out of benefits provided for under the Act.
- [20] In her analysis, Humphries J. stated that Heller had "some superficial application to the present situation": A-Teck at para. 37. She noted that the Ontario and British Columbia statutes had slightly different wording, and observed that:
- [39] While, for this court, the Ontario Court of Appeal is persuasive authority and its judgments should be viewed with respect, it is not obvious that a statutory complaint/investigative mechanism becomes an employment standard itself rather than a procedure for enforcing employment standards. More importantly, the reasoning in that case was informed by the unfairness of requiring the parties in Canada to resolve disputes in the Netherlands.
- [21] Justice Humphries went on to hold that the language in the British Columbia ESA, unlike the Ontario statute, does not refer to an "employment standard", but rather to "minimum requirements", and "cannot easily be read to include a complaint/investigative procedure used to enforce those minimum requirements as itself a 'minimum requirement'": A-Teck at para. 40.
- [22] At the time Humphries J. issued her decision in A-Teck, Heller was on appeal to the Supreme Court of Canada. Justice Humphries stated that "[i]f such a reading were to be imported into the British Columbia context based on Heller, thus rendering most arbitration clauses nullities, it will have to await the interpretation of the issues by the Supreme Court of Canada": A-Teck at para. 41.
- [23] Having found that the arbitration clause in the case before her was not void, Humphries J. held that she was bound by Prince George to stay the action and allow the arbitration to proceed: A-Teck at para. 43.
- [24] Since A-Teck was decided, the Supreme Court has released its decision in Uber Technologies Inc. v. Heller, 2020 SCC 16 [Heller, SCC]. The Court upheld the Ontario Court of Appeal's decision that the arbitration agreement was unenforceable because it was unconscionable for a variety of reasons, including the requirement that the arbitration occur in the Netherlands: Heller, SCC at para. 95. The majority went on to state that "[g]iven the conclusion that the arbitration agreement is invalid because it is unconscionable, there is no need to decide if it is also invalid because it has the effect of contracting out of mandatory protections in the ESA": Heller, SCC at para. 99.
- [25] The Plaintiff made no attempt to distinguish the decision in A-Teck from the application before me. This was sensible, as A-Teck is on all fours with the present matter. Rather, he submitted that I was not bound to follow it for four reasons. First, the court failed to

consider binding authorities and statutes, specifically Shore and the relevant provisions of the ESA. Further, in respect of Machtinger, the court only considered it on a narrow point but did not apply the special interpretive principles it lays down. Second, he submits that A-Teck is isolated and relatively recent, with the result that there is no "course of judicial decision" to be departed from: *Chief Mountain v. British Columbia (Attorney General)*, 2011 BCSC 1394 at paras. 79, 94 [Chief Mountain]. Third, following A-Teck would not promote consistency as similar legislation should be interpreted similarly in different jurisdictions. Fourth, the Plaintiff submits that A-Teck contained a number of fatal errors.

- [26] For the reasons that follow, I do not believe that I should depart from the reasoning in A-Teck. First, I do not accept that Humphries J. failed to consider relevant authorities and statutes. A judge is not required to refer to each and every authority and statutory provision the parties may have cited. In any event, Humphries J. explicitly considered Machtinger and the ESA. So far as other British Columbia authorities are concerned such as Shore, her reasons clearly reflect that she was aware of them and the principles they stand for, but she considered them distinguishable: A-Teck at para. 34. As the Defendants submit, the per incuriam exception set out in *Hansard Spruce Mills* does not ask how the court considered a binding authority, but only whether it was brought to the court's attention: *Hansard Spruce Mills* at 592. The relevant authorities and statutes were clearly before the court in A-Teck.
- [27] The Plaintiff is correct in his submission that A-Teck is a recent decision, and that it has not yet been considered by this Court or the Court of Appeal. The court in *Chief Mountain* discussed this factor. Despite the fact that the relevant previous decision in that case was isolated, the court still declined to depart from it, in the absence of clear and cogent reasons to do so: *Chief Mountain* at para. 98.
- [28] The Plaintiff has not provided clear and cogent reasons for me to depart from the reasoning in A-Teck. Employment agreements are entered into by employers and employees for a variety of reasons. One of them is to achieve certainty about the terms and conditions that will govern the employment relationship. Certainty for employers and employees in British Columbia would not be furthered by there being two divergent decisions from this Court on precisely the same legal issue.
- [29] Third, I am not persuaded that there is a requirement for consistency across jurisdictions that means I should follow the Ontario Court of Appeal's decision in *Heller* and not A-Teck. I find Humphries J.'s reasoning with respect to the significance of the difference between the legislation in the two jurisdictions persuasive. Section 4 of the British Columbia ESA provides that "[t]he requirements of this Act . . . are minimum requirements and an agreement to waive any of those requirements . . . has no effect." By contrast, section 5 the Ontario statute provides that no one "shall contract out of or waive an employment standard and any such contracting out or waiver is void." I agree with Humphries J. that the British Columbia language "cannot easily be read to include a complaint/investigative procedure used to enforce those minimum requirements as itself a 'minimum requirement'": A-Teck at para. 40. While the interpretive principles laid down in cases like *Machtinger* have universal

application, each provincial statute must be interpreted according to its individual terms.

- [30] Fourth, I reject the Plaintiff's argument that A-Teck is palpably wrong. The palpably wrong standard is an exceptionally high one, which would require that there was a fundamental flaw in the reasoning, "clear to the mind or plain to see": Chief Mountain at para. 103. I do not accept that Humphries J. failed to conduct the necessary analysis or that she fundamentally misread Heller. Nor was she palpably wrong in observing that were Heller to be imported into British Columbia it would render most arbitration clauses nullities. There is no evidence before this Court as to "most arbitration clauses". Nor does there appear to have been before the court in A-Teck. I agree with the Defendants that it was merely an observation made in a broader context, and not essential to the court's reasoning in A-Teck.
- [31] For all these reasons, I am not persuaded that I should depart from the reasoning in A-Teck.
- [32] I therefore conclude that the arbitration clause in the employment contract between the Plaintiff and the Defendants is not void. As a result, the Plaintiff's action must be stayed in order to allow the arbitration to proceed in Alberta as agreed to between the parties in the employment agreement.

Should the Garnishing Order be set aside?

- [33] The Defendants submit that the effect of a stay is to release the funds paid into court as a result of the garnishing order. In the alternative, they say that the garnishing order should be set aside.
- [34] The Plaintiff submits in response that the existence of an arbitration clause does not preclude the Plaintiff from asking the court for a garnishing order. He relies upon s. 45(1) of the Arbitration Act, which provides that "[a] court has the same powers to issue an interim measure in relation to arbitral proceedings as that court has in relation to court proceedings", and s. 45(3), which states "[i]t 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". He says that if this proceeding is transferred to Alberta, it would not affect an order already made in this proceeding, and the Defendants would need to make an application in Alberta.
- [35] The parties' employment agreement provides that it "shall be governed by and construed in accordance with the laws of the Province of Alberta and the laws of Canada applicable therein." Any arbitration is to happen in Edmonton, and the parties have the right, should they be unable to agree on an arbitrator, to apply to the Alberta Court of Queen's Bench to appoint an arbitrator.
- [36] The Alberta Arbitration Act does not grant an Alberta court the power to make prejudgment garnishing orders. The Defendants argue that given that Alberta law governs this employment agreement, this Court must apply Alberta law in considering the status of the prejudgment garnishing order.

- [37] There is case law that supports that a prejudgment garnishing order can be made under s. 45 of the Arbitration Act, even where the action is stayed. The Plaintiff referred to R.(S.M.) v. B(R.S.), 2003 BCCA 412 (Chambers). In that case, the Court of Appeal stayed proceedings in a family law action and ordered that security be posted in the form of an irrevocable letter of credit. Madam Justice Rowles referred to case law, in particular the judgment of Mr. Justice Bouck in *Trade Fortune Inc. v. Amalgamated Mills Supplies Ltd.* (1994), 89 B.C.L.R. (2d) 132, on the meaning of "interim measure of protection":
- [26] In *Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd.*, the defendant applied to set aside a garnishing order issued before judgment, and sought a stay of the action pending the outcome of an arbitration in England. The plaintiffs conceded that the action should be stayed, but on special terms. The plaintiffs argues that they might have the right to garnishee and secure protection for their claim even though it was in the process of arbitration, otherwise they could end up with a hollow award. . . . In that case Bouck J. held that the words "interim measure of protection" in s. 9 of the International Commercial Arbitration Act included the issuance of a garnishing order. Mr. Justice Bouck referred to two text authorities, and quoted the following passage from one of them:

Article 9 is not limited to any particular kind of interim measures. Thus it applies to measures to conserve the subject matter of the dispute; measures to protect trade secrets and proprietary information; measures to preserve evidence; pre-award attachments to secure an eventual award and similar seizures of assets. . . .

Mr. Justice Bouck inferred from the authorities to which he had referred that it was reasonable to conclude that the concept of protection in s. 9 includes the right of an arbitrating party to obtain a garnishing order before judgment in order to secure funds for payment of the eventual arbitration award.

[Citations omitted; emphasis added.]

- [38] It is clear from the passage just quoted that the British Columbia Supreme Court has jurisdiction to make a prejudgment garnishing order as an interim protective measure, and that a stay of proceedings in this Court in favour of arbitration proceedings in another jurisdiction does not automatically vacate or set aside such an order.
- [39] Section 2(1) of the Arbitration Act states that, subject to ss. 2(4) and (5), it applies to an arbitration if it takes place in British Columbia. Section 2(4) sets out a number of sections that apply regardless of where an arbitration takes place. Those include s. 45 interim protective measures.
- [40] From this, I conclude that this Court had the power to make the prejudgment garnishing order. The stay I have ordered does not have the automatic effect of vacating or setting aside the garnishing order. Section 45 of the Arbitration Act applies, regardless of where the arbitration occurs.

[41] There may be grounds upon which a court could, on application, grant an order setting aside the garnishing order. Any determination of that question would require a consideration of relevant evidence, and the parties agreed to restrict their arguments before me to those that did not require the consideration of any disputed facts. I therefore decline to order that the garnishing order be set aside. This order does not affect the Defendants' right to pursue their application to set aside the garnishing order on the basis of a full evidentiary record and arguments.

Conclusion

[42] I have concluded that this action must be stayed in favour of arbitral proceedings in Alberta. I have declined to set aside the prejudgment garnishing order.

[43] If the parties are unable to agree on costs, they may appear before me to make submissions on that point.

"Lyster J."

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