Date of Release: November 21, 1994 No. C943260
Vancouver Registry

IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:	)	
	)	
GLOBE UNION INDUSTRIAL CORP.	)	REASONS FOR JUDGMENT
	)	
PLAINTIFF	)	OF THE HONOURABLE
	)	
AND:	)	MR. JUSTICE LYSYK
	)	
G.A.P. MARKETING CORPORATION	)	
	)	
DEFENDANT	)	(IN CHAMBERS)

Counsel for the Plaintiff	H. Shapray
Counsel for the Defendant	S.K. Gudmendseth and S. Padmanabhan
Dates and Place of Hearing	September 27-28, 1994 Vancouver, British Columbia

The applications

Two applications were brought on for hearing together, one by the plaintiff ("Globe") and the other by the defendant ("GAP"). The broad issue raised by the applications is whether certain matters in dispute between the parties ought to be resolved by litigation or by arbitration.

Globe is a Taiwan corporation which manufactures plumbing products, primarily faucets of various design. It entered into an agreement with GAP dated December 1, 1989 (the "Distribution Agreement") granting the latter a licence to distribute Globe's product lines in Canada and Mexico on an exclusive basis. Differences arose between them.

GAP initiated arbitration proceedings by service upon Globe of a Notice of Request to Arbitrate ("the Notice") dated May 4, 1994. The Notice states that there is a dispute between the parties which relates to the Distribution Agreement and refers to an arbitration clause in the Distribution Agreement which reads as follows:

> 5.09 **Arbitration**. The parties wish to settle all disagreements or disputes which may arise via bilateral negotiations. If any impasse may result throughout the negotiation process, both parties will choose a third neutral person whose verdict shall be respected by the parties. If the parties fail to agree on the neutral third person, they shall each select one person and these two persons will select a third independent arbitrator to form an arbitration panel of three people.

In the Notice, GAP claims damages for breach of specified provisions of the Distribution Agreement and seeks a declaration that Globe is bound by the terms of the Distribution Agreement relating to the appointment of GAP as Globe's exclusive distributor of the latter's product lines in Canada and Mexico.

On June 9, 1994, Globe commenced the present action in which it seeks a declaration that the Distribution Agreement was terminated for all purposes by a further agreement arrived at in discussions between representatives of the parties on August 31, 1993. Those discussions culminated in a handwritten document which is captioned an "understanding or agreement" and which I will refer to as "the August 31 document". Its text is set out later in these reasons. In addition to declaratory relief, Globe seeks to enjoin

GAP from proceeding with the arbitration and from holding out to others that GAP is entitled to distribute Globe's product lines. GAP has entered an appearance in this action.

GAP's position is that no binding agreement was entered into on August 31, 1993 or at any other time which had the effect of terminating the Distribution Agreement.

On June 24, 1994, Globe filed the first of the two applications now under consideration ("the Globe application"). By this application, Globe seeks to enjoin GAP from proceeding with the arbitration until further order or, alternatively, against proceeding with an arbitration which involves determination of the issue of whether the understanding/agreement evidenced by the August 31 document effectively terminated the Distribution Agreement. Also, Globe seeks an order restraining GAP from holding itself out as entitled to distribute Globe's product lines.

On August 15, 1994, GAP filed the other application now under consideration ("the GAP application"). By its terms, GAP seeks an order staying this action. In the alternative, it seeks an order requiring Globe to pay into court security for costs in the amount of $13,219.46. Counsel for Globe stated that Globe would not oppose an order for payment of security for costs in the stated amount in the event that GAP's application for a stay of proceedings is dismissed.

Termination of the Distribution Agreement

As previously noted, Globe's position is that the Distribution Agreement was terminated by a subsequent agreement evidenced by the August 31 document. The latter is a handwritten document, the text of which reads as follows:

> G.A.P. MARKETING CORP. and GLOBE UNION IND. CORP. HAS ARRIVED (SIC) THE FOLLOWING UNDERSTANDING OR AGREEMENT:
>
> 1. WE BOTH AGREE THE DISTRIBUTION AGREEMENT MADE ON THE 1ST DAY OF DECEMBER 1989 IS NOT EFFECTIVE OR VALID ANY LONGER. BOTH PARTIES HAVE AGREED TO END THE AGREEMENT.
>
> 2. WE BOTH AGREE TO ARRANGE A NEW RELATIONSHIP BASED ON THE FOLLOWING:
>
> a. WESTERN PRIDE LINE WOULD BE MARKETED IN CANADA THROUGH GAP.
>
> b. "A" SERIES SPOUT WITH #16 HANDLE WILL BE MARKETED IN CANADA THROUGH GAP.
>
> c. GLOBE WILL CONSIDER TO HAVE GAP HAVING #91 HANDLE ON THE KITCHEN FAUCET.
>
> d. GLOBE WILL NOT SELL DIRECTLY TO WESTERN POTTERY'S/GAP FOLLOWING PRESENT OR EX AGENT. THE NAME LIST WILL BE SUBMITTED BY GAP FOR GLOBE'S APPROVAL.
>
> [Signature] August 31, 1993 [Signature] August 31, 1993

It is common ground that the signatures are those of Mr. Khan Agha for GAP and Mr. Scott Ouyoung for Globe, that Mr. Agha signed at the conclusion of these discussions on August 31, that Mr. Agha

then gave the document to Mr. Ouyoung to take away, and that the latter added his signature at some later date.

Whether or not the August 31 document constitutes or evidences a legally binding agreement is a hotly contested issue in the dispute between the parties. GAP says that it does not for several reasons, including lack of authority on the part of Mr. Agha to bind GAP and the character of his discussions with Mr. Ouyoung, which GAP contends culminated in nothing more than an "agreement to agree" on a new arrangement to replace the Distribution Agreement.

For the purposes of these applications, I am not called upon to determine whether the August 31 document represents or evidences a binding contractual termination of the Distribution Agreement. Counsel for the parties agree that it is unnecessary for me to make a finding on that issue and, indeed, that it would be inappropriate to attempt to do so on the affidavit material before me. Accordingly, I do not propose to examine in further detail the merits of the dispute between the parties.

The legislation

The governing enactment for purposes of these applications is the **International Commercial Arbitration Act**, S.B.C. 1986, c. 14 ("the Act"). Section 1 of the Act reads as follows (in part):

> **Scope of application**
>
> **1.** (1) This Act applies to international commercial arbitration, subject to any agreement which is in force between Canada and any other state or states and which applies in the Province.
>
> (2) This Act, except sections 8, 9, 35 and 36, applies only if the place of arbitration is in the Province.
>
> (3) An arbitration is international if
>
> (a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different states, ...
>
> (6) An arbitration is commercial if it arises out of a relationship of a commercial nature including, but not limited to, the following: ...
>
> (b) a distribution agreement; ...

It is common ground that arbitration between Globe and GAP under article 5.09 of the Distribution Agreement is an international commercial arbitration within the above definitions.

The provisions of key importance to GAP's application for a stay of proceedings are found in s. 8:

> **Stay of legal proceedings**
>
> **8.** (1) Where 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 or after entering an

> appearance and before delivery 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 shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
>
> (3) Notwithstanding that an application has been brought under subsection (1) and that the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

Two other sections of the Act, ss. 9 and 16, are pertinent and may conveniently be set out at this point:

> **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.
>
> **Competence of arbitral tribunal to rule on its jurisdiction**
>
> **16.** (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
>
> (a) an arbitration clause which forms part of a contract shall be treated as an agreement independent of the other terms of the contract, and
>
> (b) a decision by the arbitral tribunal that the contract is null and void shall not entail ipso jure the

> invalidity of the arbitration clause.
>
> (2) A plea that the arbitral tribunal does not have jurisdiction shall be raised not later than the submission of the statement of defence; however, a party is not precluded from raising such a plea by the fact that he has appointed, or participated in the appointment of, an arbitrator.
>
> (3) A plea that the arbitral tribunal is exceeding the scope of its authority shall be raised as soon as the matter alleged to be beyond the scope of its authority is raised during the arbitral proceedings.
>
> (4) The arbitral tribunal may, in either of the cases referred to in subsection (2) or (3), admit a later plea if it considers the delay justified.
>
> (5) The arbitral tribunal may rule on a plea referred to in subsections (2) and (3) either as a preliminary question or in an award on the merits.
>
> (6) If the arbitral tribunal rules as a preliminary question that it has jurisdiction, any party may request the Supreme Court, within 30 days after having received notice of that ruling, to decide the matter.
>
> (7) The decision of the Supreme Court under subsection (6) is final and is not subject to appeal.
>
> (8) While a request under subsection (6) is pending, the arbitral tribunal may continue the arbitral proceedings and make an arbitral award.

Analysis

The requirements that must be met by an application for a stay of proceedings are set out in sub-ss. (1) and (2) of s. 8 of the Act.

Under s. 8(1), the legal proceedings must be "in respect of a matter agreed to be submitted to arbitration". The arbitration clause (article 5.09 of the Distribution Agreement, set out above) refers to "all disagreements or disputes which may arise" between the parties. The language could hardly be broader in scope. On its face, the clause provides no basis for excluding the matter now in dispute. As established by authority discussed later in these reasons, this requirement of s. 8(1) is satisfied if it is arguable that the dispute falls within the terms of the arbitration agreement.

A more contentious issue is presented by the requirement in s. 8(1) that the application for a stay be made "before delivery of any pleadings or taking any other step in the proceedings". As previously noted, GAP entered an appearance; however, it has not delivered any pleadings. The issue, therefore, is whether GAP has taken "any other step in the proceedings".

Globe's position is that GAP took a step in the legal proceedings by responding to the Globe application. Counsel for Globe points firstly to the initial adjournment of the Globe application, apparently by agreement, and secondly to GAP's filing of affidavit material responding to the Globe application.

Counsel for GAP takes the position that defensive procedural steps or the filing of responsive material in interlocutory

proceedings do not constitute a step in the legal proceedings within the meaning of s. 8(1). The latter submits that the authorities relied upon by Globe are not ones in which the application was truly interlocutory but ones in which the applicant sought summary judgment or the equivalent: see, **Pitcher's Ltd. v. Plaza (Queensbury) Ltd.**, [1940] 1 All E.R. 151 (C.A.); **Hardy v. Judson**, [1955] V.L.R. 274 (Sup. Ct.); and **Turner & Goudy v. McConnell**, [1985] 2 All E.R. 34 (C.A.).

GAP's position finds support in **Roussel-Uclaf v. G.D. Searle & Co. Ltd.**, [1978] Fleet Street Rep. 95 (High Ct., Ch. D.), which involved the counterpart to s. 8(1) of the Act in the **Arbitration Act** 1975 (U.K.), requiring an application for a stay to be made "before delivery of any pleadings or taking any other step in the proceedings". There, as here, the plaintiff had applied for injunctive relief. It was held that defending against the interlocutory application did not disqualify the defendant from applying for a stay. Graham, J. stated at 105:

> On the whole, I think that the statute is contemplating some positive act by way of offence on the part of the defendant rather than merely parrying a blow by the plaintiff, particularly where the attack consists in asking for an interlocutory injunction.

GAP relies as well on the decision of the British Columbia Court of Appeal in **No. 363 Dynamic Endeavours Inc. v. 34718 B.C. Ltd.** (1993), 81 B.C.L.R. (2d) 359 (C.A.). There the issue arose

under the **Commercial Arbitration Act**, S.B.C. 1986, c. 3., s. 15(1) of which is identical to s. 8(1) of the Act and s. 15(4) of which is the counterpart to s. 9 of the Act. The plaintiff had applied for an order freezing certain funds and the defendant served a demand for discovery of documents. It was held that the defendant's application for a stay was not barred. Delivering the judgment of the court, Hollinrake, J.A. stated at 363:

> The respondent [defendant] now asserts before us that the demand for discovery of documents, even if it can be said to be a step in the proceedings within s. 15(1), was, on all the facts, clearly for the sole purpose of obtaining documents to be used on the motion to set aside the *ex parte* order that froze the joint venture funds. The respondent goes on to say that, this being so, s. 15(4) of the Act applies and the action should be stayed and this appeal dismissed.
>
> In my opinion, if s. 15(4) is applicable on the facts before us then the respondent must succeed on this appeal. I say this whether or not the demand for discovery of documents can be said to be a step in the proceedings within s. 15(1). It is, in my opinion, arguable whether what could otherwise be taken as a step in the proceedings within s. 15(1) is, as a matter of interpretation, within that subsection where the facts bring the case within s. 15(4). The argument, as I see it, is that the demand for discovery of documents here was not served with a view to pursuing the defence of the action, but rather for the purpose of protecting the rights of the respondent in the face of the *ex parte* order obtained by the appellant freezing the funds in the bank. In my opinion, it is the pursuit of the defence itself that brings an activity within s. 15(1). I say this because s. 15(1) cannot be read in isolation but must be read together with the other subsections, and particularly subs. (4) of s. 15. However, I need not decide this point because, in my opinion, if the activity, here the demand for discovery of documents, is for a purpose which falls within s. 15(4) then, be it a step or not, it remains open to the respondent to assert the arbitration clause in the agreement.

> I think the activity of the appellant in seeking this order freezing the funds clearly falls within s. 15(4). If that is so, I think it necessarily follows that anything done to oppose an activity that falls within s. 15(4) must itself fall within the subsection.
>
> I think that on the facts before the Court in this case, viewed objectively, the service of the demand for discovery of documents falls within s. 15(4) and thus cannot be said to be incompatible with the arbitration clause. If it is not incompatible with the arbitration clause then, in my opinion, the condition to seeking a stay in s. 15(1) — before taking any other step in the proceedings — does not apply.

As I read these authorities, GAP's position on this point must prevail. On the analysis in **Roussel-Uclaf**, GAP's defensive response to Globe's application for an interlocutory injunction does not constitute a step in the proceedings within the meaning of s.8 of the Act. Alternatively, on the analysis in **Dynamic Endeavours**, if Globe's application is viewed objectively as based on s. 9 of the Act, the s.8(1) requirement that no step in the proceedings be taken prior to seeking a stay is inapplicable.

Turning now to s. 8(2) of the Act, it will be noted at once that the provision is mandatory. The court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is: (1) null and void; (2) inoperative; or (3) incapable of being performed. I do not understand Globe to suggest that the arbitration agreement is incapable of being performed. Does it fall within (1) or (2)?

Counsel for GAP submits with respect to (1) that "null and void" in this context means void *ab initio*, as opposed to merely voidable, citing in support **The Tradesman**, [1962] 1 W.L.R. 61, esp. at 67-68, and authority there cited. It is not contended here that either the Distribution Agreement or its arbitration clause was void, for example by reason of illegality, from the outset. In my view, the terms "null and void" and "inoperative" are not apt to describe the type of attack that is made on the arbitration agreement here, namely, that the contract containing it has been terminated by a new contract.

Moreover, s. 16(1) of the Act, set out above, provides that an arbitration clause is to be treated as an agreement independent of the other terms of the contract and it does not necessarily follow from a finding that the contract is null and void that the arbitration clause is invalid. Thus, in **Krutov v. Vancouver Hockey Club Ltd.**, (November 22, 1991), Vancouver Registry No. C916447 (B.C.S.C.), where a stay was granted under s. 8 of the Act, Harvey, J. stated at p. 6:

> I accept the submission of counsel for the defendant that an arbitration agreement will survive even if the underlying contract within which it is contained comes to an end whether by frustration or by repudiation by one party and acceptance of that repudiation by the other party. The right to have disputes settled by the method chosen by the parties at the time the contract was entered into remains. (See **Haymen & Another v. Darwins Ltd.**, [1942] 1 All E.R. 337 (H.L.) at pp. 343, 347 & 350; and **Roy v. Boyce**, (1991) 57 B.C.L.R. (2d) 187).

As to severability of an arbitration clause from the remainder of the agreement which contains it, see also **Hebdo Mag. Inc. v. 125646 Canada Inc.,** (August 14, 1992), Vancouver Registry No. C924230 (B.C.S.C.). In that case, Blair, J. had this to say about the burden of proof at page 5:

> The defendant has proven the existence of the purported arbitration agreement and the burden, therefore, shifts to the plaintiff to show that the proposed agreement is in fact null and void, inoperative or incapable of being performed and that direction I take from, in part, the law and practice of *Commercial Arbitration in England*, (2d), Mustle & Boyd at p. 464.

In the present matter, I conclude that Globe has failed to demonstrate the applicability of any of the grounds specified in s. 8(2) of the Act for denying a stay of proceedings.

There remains one further point to be dealt with in connection with the GAP application. Is there a residual discretion to deny a stay on grounds not set out in s. 8(2)? The leading authority in this jurisdiction is the decision of the Court of Appeal in **Gulf Canada Resources Ltd. v. Arochem International Ltd.** (1992), 66 B.C.L.R. (2d) 113, (C.A.) esp. at 120-121, where Hinkson, J.A., delivering the principal judgment, held that a court has some residual discretion to refuse a stay, such as where one of the parties named in the legal proceedings is not a party to the arbitration agreement. (It may be noted parenthetically that a stay of proceedings was denied on that ground by Hamilton, J. of

this court in **Afton Operating Corporation v. Canadian National Railway Company**, (January 13, 1994), Vancouver Registry No. C921353 (B.C.S.C.). Leave to appeal was granted by Legg J.A.,: (February 21, 1994), Vancouver Registry No. CA018322 (B.C.C.A.) who stated at p. 5 of his reasons: "Only in British Columbia, I am informed by counsel, has a residual discretion been permitted to a trial judge to refuse to grant a stay where the provisions of s. 8(2) [of the Act] or s. 15(2) [of the **Commercial Arbitration Act**] apply." The appeal has since been abandoned.)

Given a residual discretion to deny a stay in certain circumstances, the question remains whether that discretion ought to be exercised. It is important to remember that s. 16 of the Act provides that the arbitration tribunal may rule on its own jurisdiction (a provision which has no counterpart in the **Commercial Arbitration Act**). In **Gulf Canada**, Hinkson, J.A. considered the combined effect of ss. 8 and 16 of the Act in the following passage at 120-121:

> Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, 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 because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is 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 reach any final determination in respect of such matters on an application for stay of proceedings.
>
> Where 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, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

In the present matter, of course, there is no issue concerning a party to the legal proceedings not being a party to the arbitration agreement. And my task, on this application, is not to reach a final determination as to the scope of the arbitration agreement. I have noted the breadth of the arbitration clause in the Distribution Agreement. The issue for me to decide is whether it is arguable that the dispute between the parties falls within the terms of the arbitration clause. I have no difficulty in finding that this threshold test has been met.

I conclude that GAP is entitled to a stay of proceedings.

With respect to Globe's application for an order restraining GAP from holding itself out as entitled to distribute Globe's product lines, counsel for GAP stated that the latter would undertake to have no contact with third parties in this connection pending resolution of the dispute. On this basis, Globe's application for such an order is adjourned, with leave to reapply should the circumstances warrant.

Result

GAP's application is granted and there will be a stay of the legal proceedings.

Globe's application to enjoin GAP from proceeding with the arbitration is dismissed and its application for an order restraining GAP from holding itself out as entitled to distribute Globe's product lines is adjourned.

"Lysyk, J."

Lysyk, J.

Vancouver, British Columbia
November 18, 1994