CA010002

Vancouver Registry

BETWEEN:	
STANCROFT TRUST LIMITED, NICHOLAS W. BERRY and DR. ISIDOR KLAUSNER PLAINTIFFS (APPELLANTS)	REASONS FOR JUDGMENT OF THE HONOURABLE
AND:	MADAM JUSTICE SOUTHIN
CAN-ASIA CAPITAL COMPANY LIMITED, MANDARIN CAPITAL CORPORATION AND ASIAMERICA CAPITAL LTD. DEFENDANTS (RESPONDENTS)	

Before: The Honourable Mr. Justice Carrothers
The Honourable Madam Justice Southin
The Honourable Mr. Justice Wood

Counsel for the appellants:	J. Edward Gouge, Esq.
Counsel for the respondent Can-Asia	Paul W. Walker, Esq.
for the respondent Mandarin	Murray A. Clemens, Esq.
for the respondent Asiamerica	Stephen R. Schachter, Esq.
Counsel for the Intervenor, Attorney General of British Columbia	E.R.A. Edwards, Esq. Q.C.

Date of Hearing: 31st January, 1990

Vancouver, British Columbia

26th February, 1990

This is an appeal from a judgment of the chambers judge allowing motions by each of the defendants for an order that these proceedings be stayed.

The motion of the defendant Can-Asia sought a stay of the proceedings "pursuant to section 8 of the International Commercial Arbitration Act, 1986 S.B.C., chapter 14, and the inherent jurisdiction of the court."

The motions of the other defendants asked that the proceedings be stayed "pursuant to Rule 14(6)(c) of the Supreme Court Rules."

The action is brought on certain agreements and security instruments entered into between the plaintiffs and the defendants the substance of which need not be stated save to say that the instruments contemplated among other things, a stock issue requiring regulatory approval in British Columbia.

One of the instruments contained these clauses:

3. Consents. The terms of the Purchase Agreement must be approved by the Vancouver Stock Exchange and the Superintendent of Brokers of the Province of British Columbia. Mandarin undertakes in good faith to use its best efforts to obtain such regulatory approval with all possible dispatch. If such consent is not given, or if it is conditioned upon restrictions greater than those described in paragraph 2(c) hereof on the Sellers ability to freely dispose of the Mandarin Shares or the shares issued pursuant to the Mandarin Warrants the Sellers, Mandarin and Can-Asia agree, and Asiamerica agrees to cause Mandarin and Can-Asia, to negotiate in good faith to modify, alter or amend the terms of the Purchase Agreements, the Notes, the Debentures and/or the Mandarin Warrants to provide the Sellers with equivalent consideration in a manner necessary to secure such consents.

4. Law; Arbitration. (a) This Agreement shall be governed by the substantive law of the Province of British Columbia in Canada.

(b) Any dispute arising out of or in connection with this Agreement, either Purchase Agreement or any instrument executed pursuant to, or any transaction contemplated by, either Purchase Agreement shall be referred to Arbitration in London and subject to the Rules of the London Court of International Arbitration. A single Arbitrator, who shall be an individual qualified to practice [sic] law in British Columbia, England or New York with at least ten years experience in a corporate and securities legal practice shall be appointed by the parties or failing agreement between them by the President for the time being of the London Court of International Arbitration. Any such Arbitration shall (insofar as it is not inconsistent with the London Court of International Arbitration Rules aforesaid) be in accordance with and subject to the procedural law of England and the provisions of the Arbitration Acts 1950 to 1979 or any statutory re-enactment or modification thereof for the time being in force. Notwithstanding the foregoing, the parties hereby

agree that any right of appeal which may lie to the High Court on any question of law arising out of an Award made in Reference under or pursuant to the provisions of Section 1 of the Arbitration Act 1979 is hereby expressly excluded.

Of the defendants, Mandarin and Asiamerica are British Columbia corporations. Can-Asia is a Hong Kong corporation. Of the plaintiffs, one is a United Kingdom company, one is an individual resident in London, England, and the third resides in Switzerland.

The plaintiffs allege that Mandarin did not use its best efforts to obtain regulatory approval but, on the contrary, deliberately prevented it and claims relief arising from the asserted breach.

Can-Asia brought its application without having taken any step in the action and without having delivered a statement of defence.

The other two defendants delivered statements of defence and there is, therefore, a substantial difference between the application of Can-Asia and the applications of the other defendants.

The relevant statutory provisions are these:

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.

Supreme Court Rule 14(6)(c)

Idem

(6) Where a person served with an originating process has not entered an appearance and alleges that

(a) the process is invalid or has expired,

(b) the purported service of the process was invalid, or whether or not he has entered an appearance, alleges that

(c) the court has no jurisdiction over him in the proceeding or should decline jurisdiction,

he may apply to the court for a declaration to that effect. (MR 100; ER 12/8.)

The word "idem" refers to sub-rule 5 which says this:

Conditional appearance

(5) Conditional appearances are abolished and an appearance purporting to be conditional shall be deemed to be unconditional. (New.)

Both these sub-rules are part of a Rule intituled "Appearance".

There is no dispute between the parties that the agreements are within the International Commercial Arbitration Act.

There is also no dispute that, on the face of the statute, Can-Asia's application has been brought in time and in accordance with the requirements of s.8.

Two questions arise upon Can-Asia's application.

The first of these questions is whether s.8(1) means that if one of the defendants has a right to an order under s.8 the order to which he is entitled is an order staying the proceedings against all the defendants or is only an order staying those proceedings against him.

In my opinion, the second is the proper construction.

The other issue arises upon the submission of the plaintiff that s.8(2) is unconstitutional. The foundation of that submission is the argument that any statutory provision which prevents a subject from seeking redress in the courts is contrary to the Constitution. Counsel does not assert that it is contrary to any particular provision of any of the Constitution Acts, 1867 to 1982. He refers to the line of cases concerning s.96 of the Constitution Act, 1867 and to statements made by distinguished authorities concerning the constitutional importance of the judiciary and the courts.

As early as 1698, by the statute 9 William III, chapter 15, Parliament enabled the courts to enforce agreements to arbitrate:

. . . .

In fine, Parliament, by such legislation, is not denying access to the courts save to those who by agreement have surrendered their constitutional right of access.

I say also that much of what we think of as "constitutional" or "unconstitutional" is a matter of our history. As legislation similar in effect has been on the books for nearly 300 years without it being attacked as constitutionally outrageous, I think it too late to take the point.

It follows, therefore, that Can-Asia was, by statute, entitled to an order staying proceedings as against it.

The other defendants are in a different position for they delivered pleadings and, therefore, have no right to a stay under s.8.

That section is derived from the Arbitration Act, 1889 and was part of the law of British Columbia concerning all arbitrations from the passing of the first arbitration act here, 1893 S.B.C. c.4, until, in 1986, the long standing Arbitration Act was replaced by the Commercial Arbitration Act, S.B.C. 1986, c. 3. Thus, for domestic, in contradistinction to international, commercial arbitrations, the applicable provision now gives the court a much broader jurisdiction and is in these terms:

15.(1) Where a party to a commercial arbitration agreement commences legal proceedings claiming relief in respect of a matter that was agreed to be resolved by arbitration, any other party to the arbitration agreement may apply to the court for an order stay the proceedings.

(2) Where proceedings referred to in subsection (1) were commenced in a county court, an application under subsection (1) may be made in the county court in which the proceedings were commenced.

(3) In an application under subsection (1), the court shall stay the court proceedings unless the party opposing the stay shows a good reason why the court proceedings should continue in place of the arbitration, and, in determining whether good reason exists, the court may consider:

(a) whether the commercial arbitration agreement was freely made.

(b) whether the matters in dispute are factually or legally complex,

(c) whether the intended arbitrator is qualified to settle the factual and legal matters in dispute,

(d) the comparative expense and delay as between the court proceedings and the arbitration under the agreement,

(e) the wishes of other parties to the commercial arbitration agreement who have been joined in the action,

(f) whether there are other parties to the court proceedings who are not parties to the commercial arbitration agreement,

(g) the stage of the court proceedings,

(h) the extent to which the applicant has participated in the court proceedings by delivering pleadings or taking other steps,

(i) potential bias on the part of the intended arbitrator,

(j) whether fraud has been alleged by a party to the court proceedings,

(k) whether the applicant, at the time the court proceedings were commenced and at the date of the hearing, remains ready and willing to do all things necessary for the proper conduct of the arbitration, and

(l) any other matter the court considers significant.

There is a long line of authority exemplified by such cases as Lane v. Herman, [1939] 3 All E.R. 353 that the statutory words of what is now s.8 mean what they say.

Finding themselves in difficulties with s.8, these two defendants now invoke the Rules of Court and assert that the rule invoked gives a broad power to the court to grant stays even to parties to arbitration agreements who have lost their right under the applicable statutory provision.

In my opinion, that is a misconstruction of the rule.

This sub-rule was intended, as was the immediately antecedent sub-rule, to get rid of the cumbersome procedure which existed before 1976 of the conditional appearance. Without a conditional appearance, a defendant who asserted that the court had no jurisdiction over either his person or the cause had to enter a conditional appearance in order to avoid being held to have attorned to the jurisdiction of the court. This rule permits a defendant who asserts the court has no jurisdiction over his person or over the subject matter of the cause to enter an appearance and bring on an application to that effect. The other purpose of the rule, in my view, is to permit the court to address issues of what is the convenient forum when, for whatever reason, two jurisdictions can properly have cognizance of the cause.

I note that the sub-rule is said to be derived from our former Marginal Rule 100 and the English Rule 12/8.

These rules were respectively:

M.R. 100

A defendant before appearing shall be at liberty, without obtaining an order to enter or entering a conditional appearance, to serve notice of motion to set aside the service upon him of the writ or of notice of the writ, or to discharge the order authorizing such service.

E.R. 12/8

(1) A defendant to an action may at any time before entering an appearance therein, or, if he has entered a conditional appearance, within fourteen days after entering the appearance, apply to the Court for an order setting aside the writ or service of the writ, or notice of the writ, on him, or declaring that the writ or notice has not been duly served on him or discharging any order giving leave to serve the writ or notice on him out of the jurisdiction.

(2) An application under this Rule must be made -

(a) in an action in the Queen's Bench Division, by summons;

(b) in any other action, by summons or motion.

In my opinion, these defendants cannot invoke Rule 14(6) upon the footing of the arbitration agreements into which they entered.

That brings me to the final question of whether British Columbia is the convenient forum for the trial of this action as between the plaintiffs and the defendants Mandarin and Asiamerica.

This is a convenient forum. Two of the defendants reside here and the gravamen of the plaintiffs' complaint against them is a failure to perform here a contract the substantive law of which, by agreement of the parties, is British Columbia.

The only thing which makes the action inconvenient here is that as against the third defendant it is stayed. But that is more a problem for the plaintiff than for the remaining defendants.

I would allow the appeal from the order staying proceedings as against the defendants Mandarin and Asiamerica with costs and dismiss the appeal from the order staying proceedings as against the defendant Can-Asia with costs.

I AGREE:

_____

The Honourable Mr. Justice Carrothers

I AGREE:

_____

The Honourable Mr. Justice Wood