I. ODC Exhibit Systems Ltd. v. Lee, 1988 CanLII 3297 (BC SC)

Date:	1988-11-28
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II. Decisions cited

- Moran v. Pyle National (Canada) Ltd., 1973 CanLII 192 (SCC)
- Petersen v. Ab Bahco Ventilation, 1979 CanLII 734 (BC SC)
- Rhodes v. Shorter, 1981 CanLII 423 (BC CA)
- Tezcan v. Tezcan, 1987 CanLII 157 (BC CA)

Supreme Court of British Columbia
ODC Exhibit Systems Ltd. v. Lee
Date: 1988-11-28

R.B. Webster, for plaintiff.

E.C. Chiasson, Q.C., for defendant, Expand International AB.

(Doc. No. Vancouver C880681)

[1] November 28, 1988. MACKOFF J. [In Chambers]: – The defendant company, Expand International AB (“Expand International”) was served in Sweden with a writ and statement of claim. The company did not enter an appearance and seeks,

pursuant to r. 14(6)(c), a declaration that this Court has no jurisdiction, or, in the alternative, that the Court should decline jurisdiction.

[2] Alternatively, counsel for the defendant company submits that the Court must grant a stay of proceedings with respect to the claims advanced against Expand International, pursuant to s. 8 of the *International Commercial Arbitration Act,* S.B.C. 1986, c. 14 ("the Act").

[3] The defendant Expand International is a company registered under the laws of Sweden where it manufactures and sells products for the display industry. Its products are also sold in British Columbia.

[4] The defendant Ulf Karl Spennare resides in Sweden and is an officer and principal of Expand International. The company is the alter ego of Spennare.

[5] The plaintiff ("ODC") is a body corporate duly incorporated under the laws of British Columbia and has its head office in Richmond, B.C. It carries on the business of selling display equipment across Canada, but primarily in British Columbia.

[6] From 1984 the defendant Allan Wayne Lee was employed by the plaintiff ODC as its comptroller and chief financial officer. He was promoted to the position of general manager in July 1987. He continued in that capacity until he resigned on November 27,1987.

[7] On January 18, 1985, ODC and Expand International entered into a sales agency agreement (exclusive contract). By that agreement, ODC was granted inter alia, the exclusive rights to market in Canada a product called "Expand" which was designed and manufactured by the defendant company.

[8] In July 1987 the exclusive contract was unilaterally terminated by Expand International. As a result of negotiations between Mr. Raymond Weind, the president of ODC, and the defendant Mr. Ulf Karl Spennare, the principal of Expand International, a conciliation agreement was entered into on November 24, 1987. By the terms of the conciliation agreement, the exclusive contract was terminated. ODC surrendered its exclusive rights to market "Expand" in Canada. It also gave up its registered trademark "Expand" in Canada and in the United States. ODC received an inventory of the "Expand" product. However, at the time ODC did not have, and has only recently acquired from another manufacturer, a different product to replace the "Expand" product.

[9] Both agreements contain arbitration clauses, which are set out later in these reasons. Each clause provides that in the event of a matter proceeding to arbitration, the hearing is to be held in Sweden and shall be governed by Swedish law.

[10] I will first deal with the applications under r. 14(6)(c). Counsel for the defendant Expand International argues that this is an action for breach of contract and, since the alleged breach took place in Sweden, the Court has no jurisdiction: *Rhodes* v.*Shorter* 1981 CanLII 423 (BC CA), (1981), 27 B.C.L.R. 60, 20 C.P.C 25 (C.A.).

[11] For the purpose of testing jurisdiction, I must accept the truth of the plaintiff's claim against Expand International as set out in the amended statement of claim and particularized in the numerous affidavits filed on behalf of the plaintiff: *Moran* v.*Pyle National (Canada) Ltd.,* 1973 CanLII 192 (SCC), [1975] 1 S.C.R. 393 at p. 395, 1 N.R. 122; *Petersen* v. *Ab Bahco Ventilation; Richmond* v. *Ab Bahco Ventilation* 1979

CanLII 734 (BC SC), (1979), 17 B.C.L.R. 335 at pp. 341-342, [1980] 3 W.W.R, 245, 14 C.P.C. 129,107 D.L.R. (3d) 49 (S.C.).

[12] Briefly stated, the plaintiff claims that Spennare and Expand International, together with Allan Wayne Lee (while he was yet the general manager of the plaintiff company), committed the torts of conspiracy, deceit and fraud and that these torts were committed in British Columbia.

[13] The plaintiff claims, prima facie supported strongly by affidavits and exhibits attached thereto, that these defendants conspired to terminate the exclusive contract and, once having done so, to give a contract to Mr. Lee. In support of this claim is a transcript of a tape recording that Mr. Lee had made of one of his telephone conversations with Mr. Spennare. The tape was found in the trunk of Mr. Lee's automobile when searched by the authority of an Anton Pillar order made on February 5, 1988. Furthermore, when Mr. Lee's premises were searched there was found a quantity of “Expand” product together with an unexecuted agreement between Expand International and Mr. Lee.

[14] The plaintiff also claims, again prima facie strongly supported by affidavits and exhibits attached thereto, that these defendants conspired and by deceit and fraud induced the plaintiff to execute and then to perform the conciliation agreement.

[15] Although the plaintiffs pleadings could have been better drawn, and although they cannot divorce themselves from the contracts, they are primarily concerned with tort. They allege that it was the torts of conspiracy, fraud and deceit which were the wrongs which caused the claimed damage to the plaintiff and for which damages are sought. This is set out with sufficient clarity in paras. 19(e) and (f), 20(a), (b) and (c), and para. 23 in the amended statement of claim.

[16] In my view this is an action founded on a tort committed in British Columbia and falls within r. 13(1)(h). The Court has jurisdiction where, as here, there is a real and substantial connection between the tort and British Columbia: *Petersen,* supra. The alleged torts of conspiracy, deceit and fraud which were allegedly perpetrated by Mr. Lee and Mr. Spennare and Expand International, took place, in part at least, in British Columbia. The alleged acts of Spennare, Expand International and Lee, together with the alleged acts of the other British Columbia defendants, which were all carried out in British Columbia, have caused the plaintiff damage in this province. Furthermore, the alleged motive behind the alleged fraud and conspiracy was to take away from the plaintiff its exclusive rights to “Expand” in British Columbia and to give it to Mr. Lee. I hold that the Court has jurisdiction.

[17] Should the Court decline jurisdiction? In general, a stay will be granted only if the following two conditions are met:

(a) The defendant must satisfy the Court that there is another forum to whose jurisdiction he is amenable in which justice can be done between the parties at substantially less inconvenience or expense.

(b) The declining of jurisdiction must not deprive the plaintiff of a legitimate personal or judicial advantage which would be available to him if he invoked the jurisdiction of the British Columbia Court: *Tezcan* v. *Tezcan,* 1987 CanLII 157 (BC CA), [1988] 2 W.W.R. 264 at pp. 267-268, 20 B.C.L.R. (2d) 253, 11 R.RL. (3d) 113, 24 CP.C. (2d) 13, 46 D.L.R. (4th) 176 (C.A.).

[18] The defendant company has filed no evidence to support a claim that if the hearing were to be held in Sweden justice can be done between the parties at substantially less inconvenience or expense.

[19] The plaintiff intends to call approximately 20 witnesses who are located in British Columbia, elsewhere in Canada, and in the United States. Most of those witnesses are from British Columbia and will require subpoenas to attend. The plaintiff would not be able to compel their attendance if the matter were to be heard in Sweden.

[20] There is no suggestion from the defendant company that it would have any difficulty in obtaining the attendance of any of its witnesses if the trial were held in British Columbia.

[21] In this action there are nine defendants duly served in British Columbia. The actions of all the named defendants are so intermeshed that to sever Expand International from the action, for hearing in Sweden, would result in a substantial injustice to the plaintiff. In effect, the plaintiff would be obliged to conduct two parallel actions which would result in very great inconvenience and very great additional cost to the plaintiff.

[22] If the Court were to decline jurisdiction, the plaintiff would be deprived of a legitimate, personal advantage which would be available to it if it invoked the jurisdiction of the British Columbia Court.

[23] On balance, the appropriate forum for this action is in British Columbia. The applications under r. 14(6)(c) are dismissed.

[24] I turn now to a consideration of the submission by counsel for Expand International that the Court must grant a stay of proceedings pursuant to s. 8 of the Act.

[25] The exclusive contract contains the following clauses:

> “18. Entire agreement
>
> …
>
> Furtermore [sic] this agreement is based on a loyal and trustful collaboration between the parties. In case of a dispute related to the agreement, the parties agree in good faith to enter into negotiations for the purpose of finding an amicable settlement of the dispute.
>
> 19. Law applicable, arbitration
>
> If the parties should fail to settle the dispute as provided in the foregoing paragraph, such dispute should be finally settled by arbitration in accordance with the rules of the Arbitration Institute of Stockholm Chamber of Commerce. The arbitral tribunal shall be composed of three members. The law of Sweden shall cover the matter regulated by the agreement and the arbitration proceeding shall be conducted in the English language.”

[26] Section 8 of the *International Commercial Arbitration Act,* S.B.C 1986, c. 14 provides:

> “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." (my emphasis)

[27] It will be seen that by clause 19 of the exclusive contract provision is made for arbitration if the parties should fail to settle the dispute by negotiation. The dispute was settled and the conciliation agreement was the result. By the terms of that agreement the exclusive contract was terminated.

[28] Therefore, as matters stand at present, the exclusive contract in its entirety is at an end; it no longer exists and is no longer binding on the parties. It has been replaced by the conciliation agreement.

[29] By s. 8(1) of the Act there must be an arbitration agreement between the parties before one of them may apply for a stay of proceedings. Here there is no longer such an agreement. That being so, the defendant cannot apply for a stay of proceedings under s. 8(1) of the Act.

[30] The conciliation agreement contains an arbitration clause. Counsel for the defendant submits that on an application for a stay of proceedings brought under s. 8(1) of the Act, the Court has no discretion as to whether a stay should or should not be granted. He bases his submission on the following grounds: s. 8(2) of the Act states that "… the court shall make an order staying the legal proceedings unless … ". By using the word "shall" the legislation thereby makes it mandatory for the Court to make an order staying the proceedings and therefore the Court has no discretion in the matter.

[31] For reasons which follow, it is unnecessary for me, in the circumstances of this case, to express an opinion as to whether or not counsel is correct in that submission.

[32] The arbitration clause in the conciliation agreement reads:

"8. This Conciliation Agreement shall be governed by the laws of the Kingdom of Sweden and *any dispute arising out of this Agreement* shall be settled by arbitration in accordance with the rules of the Arbitration Institute of the Stockholm Chamber of Commerce. The arbitral tribunal shall consist of three members and the proceedings shall be conducted in English." (my emphasis)

[33] For purposes of this application the key words in clause 8 are: "… any dispute arising out of this agreement shall be settled by arbitration … ". That provision unquestionably relates to such matters as interpretation of the agreement when disputes arise out of the carrying out of its terms: for example, whether one party is or is not obliged to do something demanded of it by the other; whether a party did or did not carry out its obligations under the agreement; whether it did or did not properly fulfil an obligation, etc.

[34] The action here does not arise out of "this agreement". It arises out of something allegedly done by the defendants Expand International, Spennare and Lee before the conciliation agreement came into being. The plaintiff alleges that it was induced by their conspiracy, deceit and fraud to execute the conciliation agreement. It cannot be reasonably said that these allegations which induced the plaintiff to enter into the conciliation agreement, were matters which the parties had

agreed (or had even contemplated) as being among those to be settled by arbitration pursuant to clause 8: *Petersen,* at p. 343.

[35] Section 8(1) of the Act applies only to proceedings in a Court "in respect of a matter agreed to be submitted to arbitration". It is therefore a condition precedent for the bringing of an application for a stay of proceedings under s. 8(1), that the Court action must be one in respect of a matter agreed to be arbitrated. Since, as above noted, this action is not in respect of such a matter, the condition precedent has not been met and, therefore, the defendant cannot invoke s. 8 for a stay of proceedings.

[36] Because of the conclusion reached concerning the arbitration clauses, I return to the earlier part of these reasons in which was considered the application, made pursuant to r. 46(6)(c), for the Court to decline jurisdiction. In refusing that application I held that having regard to certain considerations, on balance the appropriate forum for hearing this action is in British Columbia. To that I now add the following, even more compelling, reason to refuse that application: For reasons above stated, arbitration is not available to the defendant. As a result, British Columbia becomes the sole forum in which the claims in this action can be heard.

[37] The applications are dismissed. Costs to the plaintiff.

Application dismissed.