Alberta Court of Queen's Bench
Kvaerner Enviropower Inc. v. Tanar Industries Ltd.
Date: 1994-07-13

E. Rice, for applicant.

Ms. Van Der Lee, for Sovereign.

R.N. Curtis, for Tanar.

R. Nielsen, for Noralta.

(Edmonton No. 9403-10106)

July 13, 1994.

[1] DEA J.: — At issue on this lengthy chambers application was the *International Commercial Arbitration Act*, S.A. 1986, c. I-6.6 ("ICAA"), in a situation said by some of the parties to be governed exclusively by the *Builders' Lien Act*, R.S.A. 1980, c. B-12 ("BLA"), of the Province of Alberta.

[2] Kvaerner Enviropower Inc. ("Kvaerner") is the applicant in proceedings instituted by originating Notice of Motion in which Tanar Industries Ltd. ("Tanar"), Sovereign General Insurance Company ("Sovereign") and Noralta Metal Fabricators Inc. ("Noralta") are named as respondents.

[3] When the contract at issue was executed and for some time thereafter the name of the applicant was Outokumpu EcoEnergy Inc. Its name has been changed to Kvaerner and I will refer throughout to the applicant as Kvaerner.

[4] Kvaerner agreed to construct certain works in Whitecourt, Alberta, and entered into a subcontract dated 1 July 1993 with Tanar. It was part of the subcontract that Tanar furnish to Kvaerner a performance bond and a labor and material payment bond. These bonds were obtained and disclosed in each case Tanar as principal, Kvaerner as obligee and Sovereign as surety.

[5] Tanar failed to pay some of its subcontractors and suppliers on the project. Sovereign was called upon to and did pay claims on the labor and material payment bond. Sovereign was given assignments of all of the rights and interests of those subcontractors and suppliers.

[6] Sovereign takes the position – opposed by Kvaerner – that it has not been called upon under the performance bond. It says that its payment under the labor and materials payment bond is as required by that bond.

[7] On April 19, 1994 Tanar registered a statement of lien pursuant to the BLA.

[8] Liens were filed on April 20, 1994 by Sovereign as assignee of subcontractors and suppliers of Tanar on the project. A lien has subsequently been filed by Noralta as a further subcontractor of Tanar.

[9] An action has been commenced by Sovereign to enforce its lien rights. The owner of the lands on which the project is being constructed is a named defendant in those proceedings in accordance with the BLA. The Statement of Claim also claims relief under the labor and material payment bond issued by American Home with Kvaerner as principal. A second action has been commenced by Sovereign in regard to claims made against American Home's bond for which no liens were filed. The American Home bonds were bonds between American Home, Kvaerner and the owner of the property and Kvaerner says those are irrelevant to the issues in the case at bar.

[10] In May of 1994 Kvaerner demanded that Tanar and, later, that Sovereign arbitrate certain matters between them. Both Tanar and Sovereign have resisted the demand for arbitration.

[11] By these proceedings Kvaerner applied for leave to post securities for the liens and an order:

> d) Directing an issue to be tried as to the validity of the liens and the entitlement of the respondents to the money secured by the aforesaid lien bond, and staying the trial of that issue and these proceedings pending a determination in the arbitration proceedings.

[12] By notice of motion in the same action Kvaerner asked for an order:

> a) Referring the actions in this Court reflected by certificates of lis pendens registered as instruments numbered 942165803 and 942165816 to arbitration in accordance with the submission to arbitration contained in the agreement between the applicant and the respondent Tanar Industries Ltd. dated 1 July 1993.

[13] By her order in these proceedings my sister Picard cancelled the liens and the certificates of lis pendens effective upon the posting of the required bond. As at the time of the hearing of these motions the lien bond had not in fact been filed but all counsel agreed that it would be filed within a day or so and that I should deal with this matter on the basis that the appropriate lien bond is filed.

[14] The order of Picard J. also provides:

> 2) That, upon deposit of the lien bond with the clerk of this honourable court, the lien bond shall replace the lands as security for the liens, and the lands and the owner thereof shall be discharged from all further liability in respect of the liens.

3) That the deposit of the lien bond and the cancellation of the registration of the liens shall be without prejudice to the applicants' right to dispute the validity and amount of the liens.

[15] Picard J. then adjourned Kvaerner's application for a stay and referral to arbitration. It is that adjourned application which is the subject of this chambers application.

Tanar

[16] Kvaerner bases its demand to Tanar on the contract between them and on the ICAA.

[17] By para. 11(b) of the subcontract between them it is provided:

> b) Any controversy between EcoEnergy and subcontractor shall be decided by arbitration in accordance with the Construction Industry Arbitration Rules of the American Arbitration Association ("AAA"). Arbitration shall be held in Baltimore, Maryland. The foregoing agreement to arbitrate shall be specifically enforceable in any court of competent jurisdiction. Upon its request, EcoEnergy shall be entitled to consolidation or joinder of any arbitration involving subcontractor with related arbitrations involving other parties. The award rendered by arbitrators shall be final and judgment may be entered upon it in accordance with applicable law in any court of competent jurisdiction.

[18] "EcoEnergy" in para. 11(b) is Kvaerner.

[19] The demand for arbitration describes the nature of the dispute in these terms:

> Kvaerner EnviroPower, Inc. ("Kvaerner") (formerly Outokumpu EcoEnergy, Inc.) and Tanar Industries Limited ("Tanar") entered into a subcontract agreement dated July 1, 1993 pursuant to which Tanar was to provide labor and materials for the mechanical erection and piping for a wood burning facility to be constructed in Whitecourt, Alberta, Canada (the "Whitecourt Project"). Sovereign General Insurance Co. ("Sovereign General") provided Tanar's performance and payment bonds for the Whitecourt Project, which incorporate the Kvaerner/Tanar subcontract agreement.
>
> A. Kvaerner claims damages against Tanar and Sovereign General on the following grounds:
>
> 1. Failure to perform the subcontract work as specified and in a timely fashion; and
>
> 2. Slander of title/wrongful lien and breach of contract by Tanar and Sovereign General in filing liens which lacked any basis in law or fact.
>
> B. Kvaerner denies that it is indebted to Tanar or Sovereign General in the amounts claimed by them and reflected in their respective lien filings.

[20] The provisions of the ICAA relied upon by Kvaerner are:

Section 10:

> 10. Where, pursuant to article 11(3) of the Convention or article 8 of the International Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates.

Article II of the Convention to the ICAA (Sched. 1):

> 1. Each Contracting State shall recognize an agreement in writing under which the parties undertake to submit to arbitration all or any differences which have arisen or which may arise between them in respect of a defined legal relationship, whether contractual or not, concerning a subject matter capable of settlement by arbitration.
>
> 3. The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

Articles 8 and 9 of the International Law (Sched. 2 to the ICAA):

> Article 8 …
>
> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed …
>
> Article 9 …
>
> It is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

[21] The ICAA legislation has been considered by the Court of Appeal of Alberta in several cases and in particular in *Kaverit Steel & Crane Ltd. v. Kone Corp.* (1992), 85 Alta. L.R. (2d) 287 [[1992] 3 W.W.R. 716].

[22] There, Kerans J.A. in speaking generally of the legislation in a case in which the trial judge had refused to refer anything to arbitration because there was a prospect of inconvenient overlapping litigation and the possibility of conflicting decisions says at p. 290:

> With respect, I am of the view that the applicable provisions of the *International Commercial Arbitration Act* under review do not permit that approach. For the reasons I shall give, I am of the view that the statute commands that what may go to arbitration shall go. No convenience test limits references.

[23] Further at pp. 297-98 the court indicates:

> The power to grant or withhold a reference under the *International Commercial Arbitration Act* is very limited, and the statute does not permit a decision on the test invoked by the learned chambers judge, which resembles the forum conveniens test. For the purpose of argument, I accept the possibility (albeit I suspect very slim) of two suits at the same time, and even contradictory findings. Nevertheless, that is the

> method chosen by the parties. The Act directs me to hold them to their bargain. Section 2(1) of the *International Commercial Arbitration Act* makes the Convention part of the law of Alberta. It says that the Convention "applies in the Province."

[24] The Convention art. II(3), is as heretofore set forth.

[25] Prima facie the requirements of the Convention are met in this case Kvaerner and Tanar have agreed by contract to submit "any controversy" between them to arbitration. The issues presented are "controversies". They are differences arising out of commercial, legal relationships and in the context of the contract at bar. The "Nature of the dispute" and the "Claim or Relief Sought" are attached to the Demand for Arbitration. All arise out of commercial, legal relationships created by the contract between Kvaerner and Tanar.

[26] All are capable of being arbitrated, being in essence determinations of sums due the parties to determine the sum owed by one to the other.

[27] The final test is to see if the agreement is null and void or is inoperative or is incapable of being performed. In addressing himself to this issue Mr. Justice Kerans for the Court of Appeal says at p. 299:

> In my view, the proviso about "null and void, inoperative and incapable of being enforced" simply preserves the rule in *Heyman v. Darwins Ltd.* cited earlier. The arbitrator cannot decide whether the submission is valid. Its validity and enforceability must be pronounced upon before the referring court can enforce it by a reference and stay. It is not valid if it, or the contract in which it is found, is, by operation of domestic law in the referring tribunal, either void or unenforceable. The proviso is an echo of the law about void contracts ("null and void"), unenforceable contracts ("inoperative"), and frustrated contracts ("incapable of being enforced"). See *Paczy v. Haendler & Natermann Gmbh*, [1981] 1 Lloyd's Rep 302 (C.A.), at pp. 307-308.

[28] Tanar raises several arguments to resist a referral to arbitration.

[29] Firstly, Tanar refers to s. 30 of the contract:

> 30. Applicable Law
>
> The parties agree that this Subcontract Agreement shall be governed by and interpreted under the law of the State of Maryland, USA provided, however, that to the extent this Subcontract Agreement deals with rights, obligations, issues or disputes arising under the Prime Contract, the law applicable to the Prime Contract shall govern and provided further that nothing contained in this Subcontract Agreement shall abrogate Tanar's rights pursuant to the Alberta Lien Act or any Builder's Lien Legislation in force in the Province of Alberta.

It then argues that s. 30 excludes BLA matters from the operation of the arbitration clause. Secondly, Tanar argues, the decision of Chief Justice McPherson (Saskatchewan) in *BWV Investments Ltd. v. SaskFerco Products Inc.*, [1993] 4 W.W.R. 553 (Sask. Q.B.), is

supportive of the proposition that the BLA conflicts with the ICAA and therefore the agreement referring controversies to arbitration is null and void. As well Tanar argues that s. 3 of the BLA makes the submission to arbitration void as against public policy.

[30] With respect to the first point it is my view that s. 30 of the Contract far from excluding lien matters confirms that the arbitration is not to deprive Tanar of its lien rights.

[31] When one considers what lien rights are to be protected it is seen that the possibility of conflict disappears. The right sought to be protected by s. 30 is the giving of security even though there is no privity of contract between Tanar and the owner (s. 4 of the BLA). It is that right which s. 30 protects. The agreement between Kvaerner and Tanar to have the amount owing between them determined by arbitration does not affect or deprive Tanar of any relief which the section wants or purports to grant.

[32] But the principal argument of Tanar is found in the *SaskFerco* case. While there are differences between the *Saskatchewan Builders' Lien Act* and the BLA (the Saskatchewan legislation uses a trust vehicle) the legislation in Saskatchewan is much like legislation in this province.

[33] The court in *SaskFerco* held that where the effect of the agreement to submit to arbitration and the International Rules was to make many *Builders' Lien Act* provisions inapplicable that such infringements rendered the agreement to arbitrate void.

[34] With respect I do not find this analysis persuasive. Here the lien bond placed pursuant to the order of Picard J. replaces the land as security. Tanar retains its security. The arbitration agreement does not impair Tanar's remedies under the BLA. In *Bird Construction Co. v. Tri-City Interiors Ltd.*, (unreported), Appeals 9303-0250-AC and 9303-0249-AC, Edmonton Sittings, May 2, 1994, Fraser C.J.A. for the court at p. 4 says:

> Finally, we do not agree that Tri-City has waived its rights to arbitration by taking the required steps to preserve its security. There is no legal prohibition against arbitrating a dispute on one hand and preserving security on the other so that the security may be relied upon if a party is successful on arbitration. We do agree, however, that a multiplicity of actions is not desirable. Because of the wording of s. 7 of the *Arbitration Act* which, unlike the B.C. statute, does not allow any party to a proceeding to bring a stay application, we are prepared to exercise our inherent jurisdiction to stay the proceedings commenced by Tri-City under its Builders' Lien action until arbitration has been finalized or until further Order of the Court. In the result, the appeal is dismissed.

[35] Tanar does not have an absolute or indefeasible right to litigate in the Court of Queen's Bench the merits of its claim under the procedure contemplated in the BLA or at all. Once security is posted under s. 35 of the BLA (as is done here) the procedure to

realize upon a lien set out in the BLA no longer applies. *Bruneau v. Bruneau* (1993), 48 R.F.L. (3d) 382 (Alta. C.A.); *Driden Industries Ltd. v. Sieber*, [1974] 3 W.W.R. 368 (Alta. C.A.); *Kenart Investments Ltd. v. Adray Construction Ltd.* (1986), 77 A.R. 330 [47 Alta. L.R. (2d) 280] (Master), and *Heredity Homes* (*Edmonton*) *Ltd. v. Stout*, 16 March 1987, unreported (Q.B. Master).

[36] On the issue of public policy Tanar calls in as authority art. 8 of Sched. 2 of the ICAA and s. 3 of the BLA:

> Creation and Extent of Lien
>
> 3 An agreement by any person that this Act does not apply or that the remedies provided by it are not to be available for his benefit is against public policy and void.

[37] An interpretation of s. 3 of the BLA to protect the rights given by the BLA while allowing the parties to arrange by contract the manner in which the liability between them will be determined is not offensive to the wording of s. 3 of the BLA.

[38] Arbitration of the part of the price of the work or material furnished in respect of an improvement that remains due to a lien holder is not contrary to the letter or to the spirit of the BLA. Public policy supports arbitration of disputes as shown by the *International Convention* and the *Arbitration Act* of Alberta. Many if not most construction contracts call for arbitration of disputes notwithstanding that the BLA applies to work and materials provided under construction contracts.

[39] The amount due to a lien holder measures the monetary value of his lien. The existence of a debt is a condition precedent: No debt no lien. A cause of action on the debt arises by common law not pursuant to the BLA. The BLA gives a right of action only on the security for the debt given by the Act (BLA, s. 4).

[40] For the foregoing reasons and with respect to the opposing views expressed in the *SaskFerco* case it seems to me that an appropriate interpretation of s. 3 of the BLA is one which allows that section to stand with the *International Convention.* This ensures the public policy purpose for which s. 3 was enacted. Not to be applied to mere procedural matters which may adequately be governed by the parties themselves but to apply to agreements which purport to take away or extinguish a lien holder's right to register a lien.

[41] A further point raised by Tanar argued that a reading of s. 11 of the contract as a whole discloses that only non builders' lien issues may be referred to arbitration. I have in fact referred to this point inferentially above. I do not think that an ordinary construction of the words in the contract can support that meaning.

[42] Accordingly, it is my view that Tanar and the applicant are parties to a submission to arbitration. The issues indicated in the demand for arbitration, i.e., the determination of the amounts owing as between the two – all of which arise out of the contract – are arbitrable. Further the agreement itself is valid. Accordingly, the issues in question as set out in the demand for arbitration between the applicant and Tanar are referred to arbitration pursuant to s. 11(b) of the contract.

Sovereign

[43] Kvaerner placed its position on arbitration as against Sovereign squarely on the terms of the performance bond and the labor and materials payment bond. Both bonds recite the contract between Kvaerner and Tanar and speak of the contract documents between them which are submitted to the surety. Each of the bonds says "… which are by reference made part hereof and are here and after referred to as the contract."

[44] At the outset Sovereign refers me to *Marigold Holdings Ltd. v. Norem Construction Ltd.* (1988), 60 Alta. L.R. (2d) 289 at 322 [[1988] 5 W.W.R. 710] (Q.B.), and following where Conrad J. (as she then was) addresses the circumstances under which a performance bond may be in default. Sovereign argues that the facts of the case do not disclose a default on its part.

[45] Whatever the merits of that argument (and I must say it has a strong appeal to reason) it is not Sovereign's strongest argument on this application). That argument forcibly presented is simply this: Sovereign has not agreed to arbitrate its differences with Kvaerner and therefore ought not to be compelled to arbitrate those differences.

[46] Sovereign argues that the reference in the bonds to "incorporating by reference" the contract between Kvaerner and Tanar does not and cannot by any ordinary application of the English language disclose or be interpreted as an agreement between Kvaerner and Sovereign to submit issues between them to arbitration. It may mean, and indeed probably does mean, that an arbitration award on issues between Kvaerner and Tanar will bind Sovereign as to the amounts found by the arbitrators. Little authority was presented on the principal point but the comments in *Scott and Reynolds on Surety Bonds* in para. 7.7 are compelling.

> 7.7 Arbitration Provisions
>
> If the bonded contract contains an arbitration clause applicable between the principal and the obligee, is the surety company bound by that arbitration clause? In the absence of a specific arbitration provision in the bond itself the surety is not bound because while the bonded contract is incorporated by reference into the bond. It does not purport to bind the surety, it simply binds the principal and the obligee. The

> bonding company, though, might well decide to take part in an arbitration procedure if given notice and particularly if the principal's ability to pay an adverse award is in doubt.

[47] In the circumstances I am not satisfied that the bonds issued by Sovereign constitute an agreement between Sovereign and Kvaerner to submit differences to arbitration. Kvaerner's application for an order to refer differences between it and Sovereign to arbitration is accordingly refused.

Stays

[48] In *Driden* (supra) and other cases referred to earlier herein the courts speak of applications being made at the time of an application under s. 35 of the BLA to replace the land as security with money or a lien bond. The application is of course as to directions as to the procedural steps to apply upon the posting of the lien bond.

[49] Here, the applicant has asked for stays of existing actions instituted by Tanar and Sovereign.

[50] The application for a stay against Tanar is granted pending a conclusion of the arbitration, the form of procedure chosen by Tanar and Kvaerner to resolve their controversies.

[51] By virtue of s. 10 of ICAA the proceedings of this Court are stayed with respect to the matters to which the arbitration relates. This would include any proceedings that might arise for directions as a result of the order allowing the posting of a lien bond.

[52] The situation with respect to a stay on the actions instituted by Sovereign are somewhat different in view of the fact that Sovereign has not submitted to arbitration. Nonetheless Kvaerner asks that a stay against Sovereign's actions be granted.

[53] It says that because Sovereign's lien claims are included in Tanar's lien claim and the security for the one is security for the other these proceedings as they pertain to those liens and the actions commenced by Sovereign should be stayed as against Kvaerner (Outokumpu EcoEnergy Inc.) and Whitecourt Power Corporation pending the conclusion of the arbitration proceedings. This is so, it is argued, because the security to satisfy Sovereign's claims cannot be determined until the value of the work done by Tanar and the amount payable therefore is determined in the arbitration proceedings.

[54] It seems to me that there is merit to this argument and a stay will go accordingly.

[55] Several American cases were cited to the court respecting the stays and the procedures to be followed to protect the lien rights of claimants while allowing the arbitration to proceed in accordance with its terms.

[56] In *Frederick Contractors Inc. v. Bel Pre Medical Center Inc*., 274 Md. 307 (1975):

> … we turn to the task of harmonizing the provisions of the Act with the concept of our mechanics' lien law …
>
> As early as 1837, this Court held that an attachment would lie to enforce any award which might be made by arbitrators to whom the controversy was to be submitted for determination after the action had been instituted …

[57] There the court after indicating that it had the task of harmonizing the provisions of the *Arbitration Act* with the concept of the mechanics' lien law went on to say:

> As a consequence, we conclude that Bel Pre's demand for arbitration should have had the effect of staying the foreclosure proceeding until an award is returned from the arbitration, when any award made in Frederick's favour may be enforced by going forward with the proceeding to foreclose the lien…

[58] In *McCormick Construction Co. v. 9690 Deerco Road Ltd. Partnership*, 556 A. (2d) 292 (Md. App., 1989); the court in dealing with the issues of stays says at p. 295:

> McCormick's right to establish a mechanic's lien has not been denied or impaired by the staying of the court case. The court, being advised that the contract required arbitration, stayed the proceedings, retained jurisdiction, and granted the motion to arbitrate. The court order settled nothing; neither did it conclude any rights or deny any party the means of proceeding further. Not being a final order, it was not appealable … McCormick may still return to the circuit court for further relief after the amount owed by Deerco is determined by arbitration.

[59] Because I have concluded that Sovereign is not bound to go to the arbitration but that its actions are stayed I direct that Sovereign be given notice of the arbitration proceedings and be given an opportunity to participate therein should Sovereign so elect. In making these further directions I bear in mind that Sovereign's position in this litigation arises out of and is, I suspect, ultimately dependent upon Tanar's position qua Kvaerner. If that is correct then the arbitration award in the Kvaerner/Tanar arbitration will determine in part Sovereign's position.

[60] Kvaerner seeks no remedy against Noralta at this stage and that matter is dismissed.

Application allowed in part.