NOVA SCOTIA COURT OF APPEAL

Citation: *Clyde Bergemann Canada Ltd. v. Lorneville Mechanical Contractors Ltd.*, 2018 NSCA 14

Date: 20180216
Docket: CA 464102
Registry: Halifax

Between:

Clyde Bergemann Canada Ltd.

Appellant

v.

Lorneville Mechanical Contractors Ltd. and
Northern Pulp Nova Scotia Corporation

Respondents

Judges:	Farrar, Van den Eynden and Derrick, JJ.A.
Appeal Heard:	November 21, 2017, in Halifax, Nova Scotia
Held:	Appeal dismissed with costs payable by Bergemann to Lorneville and Northern Pulp in the amount of $1,000 each, inclusive of disbursements per reasons for judgment of Farrar, J.A.; Van den Eynden and Derrick, JJ.A. concurring.
Counsel:	Ranjan K. Agarwal and Jeffrey Leon, for the appellant Colin Piercey and John Shanks, for the respondent, Lorneville Mechanical Contractors Ltd. Darlene Jamieson, Q.C. and Tammy Manning, for the respondent, Northern Pulp Nova Scotia Corporation

Reasons for judgment:

Background

[1] Bergemann supplies products and services to the energy generation and base materials industries. Lorneville is a construction company which provides heavy industrial construction services. Northern Pulp owns and operates a pulp and paper mill in Pictou County.

[2] In March 2014, Bergemann contracted with Northern Pulp for the supply and installation of an electrostatic precipitator at the mill (the "Installation Contract").

[3] Further to the Installation Contract, in October 2014, Bergemann entered into a stipulated price contract with Lorneville for the mechanical erection, piping installation, and insulation work at the mill (the "Subcontract"). The Subcontract contained an arbitration clause to resolve disputes between the parties.

[4] Lorneville performed services for Bergemann under the Subcontract from October 2014 to February 2015.

[5] On February 26, 2015, Lorneville received notice from Bergemann that Bergemann was terminating the Installation Contract with Northern Pulp and its Subcontract with Lorneville.

[6] Subsequently, Northern Pulp contracted with Lorneville to install the electrostatic precipitator.

[7] On March 20, 2015, Lorneville submitted an invoice to Bergemann in the amount of $3,677,735.17. For approximately a year, Bergemann and Lorneville attempted to negotiate a resolution of the dispute as to what Bergemann owed Lorneville. They were unsuccessful.

[8] Meanwhile, on April 23, 2015, in order to preserve its rights under the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended, Lorneville filed a claim for lien against Bergemann as contractor and Northern Pulp as property owner in the amount of $3,436,943.62.

[9] On June 4, 2015, Lorneville commenced a lien action against Bergemann and Northern Pulp and filed a *lis pendens*.

[10] Lorneville granted both Northern Pulp and Bergemann an extension to file defences to allow the parties to continue to negotiate. The parties were unable to resolve all the issues in dispute. There was, however, a partial settlement of matters relating to the payment of certain of Lorneville's subcontractors who had also filed lien claims against the mill site for services and materials which had been provided to Lorneville for the project. The partial settlement between Lorneville, Bergemann and Northern Pulp provided for the direct payment of these subcontractors by Bergemann.

[11] On December 21, 2015, Northern Pulp commenced action against Bergemann claiming that it had breached the Installation Contract by "purporting to terminate the contract and walking away from the Project".

[12] Bergemann defended and counterclaimed denying that it breached the contract with Northern Pulp and saying it was entitled to terminate the Installation Contract as a result of *force majeure*.

[13] To summarize the actions and counterclaim: Lorneville accepted Bergemann could terminate its Subcontract but alleges that Bergemann owes it money for the services it provided; Northern Pulp alleges that Bergemann improperly terminated the Installation Contract and, as such, Northern Pulp has suffered damages; and Bergemann alleges it has not been paid by Northern Pulp for all of its services supplied to the mill.

[14] With respect to the lien action, following a direct payment to Lorneville from Northern Pulp in the amount of $620,137.50 and the payment by Northern Pulp into court in the amount of $1,047,485.98, the claim for lien and *lis pendens* were vacated by Consent Order issued on February 1, 2016.

[15] On March 29, 2016, Lorneville provided a Notice of Arbitration to Bergemann.

[16] On September 1, 2016, Lorneville made a motion to stay the lien action and for an order appointing Michael S. Ryan, Q.C. as arbitrator. In response to the stay motion, among other things, Bergemann took the position that Lorneville failed to comply with the Arbitration Agreement and delayed in seeking a stay of the lien

action. On this appeal, it conceded there had been compliance and abandoned its argument about delay.

[17] Bergemann filed a motion of its own seeking an order consolidating the lien action with the Northern Pulp action and counterclaim.

[18] All of the motions were heard before Justice Ann E. Smith on March 29, 2017, and in a written decision dated May 18, 2017 (reported 2017 NSSC 119) she allowed the motion to stay the lien action; dismissed the motion to appoint an arbitrator; and dismissed Bergemann's motion to consolidate the lien action with the Northern Pulp action and counterclaim.

[19] Bergemann seeks leave to appeal and, if granted, appeals alleging the judge failed to properly apply the test for a stay of proceedings and, further, erred in failing to grant the consolidation.

[20] Northern Pulp participated in the appeal but only with respect to the dismissal of the consolidation motion.

[21] For the reasons that follow, I would grant leave to appeal and dismiss the stay appeal without costs to Lorneville. I would award costs of $1,000 each, payable by Bergemann, to Northern Pulp and Lorneville on the consolidation motion appeal.

Issues

1. Should leave to appeal be granted?
2. If leave to appeal is granted, the four issues to be addressed are as follows:

(a) Did the judge err in identifying the correct legal test for a stay of proceedings under section 41(e) of the *Judicature Act*?

(b) Did the judge err in concluding that Lorneville would suffer irreparable harm if the lien action were not stayed?

(c) Did the judge err in finding that the balance of convenience favoured a stay of the lien action?

(d) Did the judge err in dismissing Bergemann's consolidation motion?

Issue #1: Should leave to appeal should be granted

[22] The requirement for leave to appeal an interlocutory order is found in the *Judicature Act*, R.S.N.S. 1989, c. 240, as amended:

> 40 There is no appeal to the Court of Appeal from any interlocutory order whether made in court or chambers, save by leave as provided in the Rules or by leave of the Court of Appeal.

[23] The test for leave on an appeal of an interlocutory motion is whether the appellant has raised an arguable issue (*Hatch Ltd. v. Factory Mutual Insurance Company*, 2015 NSCA 60, ¶4). An arguable issue is one which could result in the appeal being allowed (*Sydney Steel Corporation v. MacQueen*, 2013 NSCA 5, ¶18).

[24] I am satisfied Bergemann's grounds of appeal raise arguable issues involving the interaction between the *Judicature Act* and the *Commercial Arbitration Act*, S.N.S. 1999, c. 5.

[25] As a result, I would grant leave to appeal.

Standard of Review

[26] The standard of review for the remaining issues on this appeal is not in dispute – this Court will not interfere with a discretionary order unless "wrong principles of law have been applied or a patent injustice would result" (*Innocente v. Canada (Attorney General)*, 2012 NSCA 36, ¶26).

Issue #2(a) Did the chambers judge err in identifying the correct legal test for a stay of proceedings under section 41(e) of the *Judicature Act*?

[27] Before setting out the judge's decision on the stay motion some further context is required.

[28] Before the judge, Bergemann took the position that s. 9 of the Nova Scotia *Commercial Arbitration Act* precluded the court from even considering Lorneville's stay motion as it was seeking to stay its own lien. It argued s. 9 only allows other parties to the Arbitration Agreement to seek a stay of the action and not the party that commenced it. On that basis alone, it said the stay should be refused.

[29] Section 9 provides:

> 9(1) Where a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, <u>on the motion of another party</u>, to the arbitration agreement, stay the proceeding.
>
> (2) The court may refuse to stay the proceeding pursuant to subsection (1) only in the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject‑matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province;
>
> (d) the motion to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.

[Emphasis added]

[30] The judge agreed with Bergemann that Lorneville could not avail itself of s. 9 of the *Act* to obtain a stay of its own action because s. 9 was only available to other parties to the Arbitration Agreement and not Lorneville itself (¶24).

[31] However, that did not end the matter. The judge then went on to consider whether a stay could be granted pursuant to s. 41 of the *Judicature Act*. She found that it could.

[32] Section 41 of the *Judicature Act* grants a broad discretion to order a stay of proceedings:

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> …
>
> (e) no proceeding at any time pending in the Court shall be restrained by prohibition or injunction but every matter of equity on which an injunction against the prosecution of any such proceeding might have been obtained prior to the first day of October, 1884, either unconditionally or on any terms or conditions, may be relied on by way of defence thereto <u>provided always that nothing in this Act contained shall disable the Court from directing a stay of proceedings in any</u>

> proceeding pending before the Court if it or he thinks fit, and any person, whether a party or not to any such proceeding who could have been entitled, prior to the first day of October, 1884, to apply to the Court to restrain the prosecution thereof, or who is entitled to enforce by attachment or otherwise any judgment, contrary to which all or any part of the proceedings have been taken, may apply to the Court thereof by motion in a summary way for a stay of proceedings in such proceeding either generally, or so far as is necessary for the purposes of justice and the Court shall thereupon make such order as shall be just;

[Emphasis added]

[33] The judge's reasons for granting the stay of the lien action are quite short and I will repeat them here:

> [67] I note that Section 9(2) provides that the Court may refuse to stay the proceeding only in the following cases:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid;
>
> (c) the subject‑matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province;
>
> (d) the motion to stay the proceeding was brought with undue delay;
>
> (e) the matter in dispute is a proper one for default or summary judgment.
>
> [68] Bergemann says that the Court should not import Section 9(2) considerations in exercising its inherent jurisdiction to stay the Lien Action. It argues that the legal test the Court must apply in considering a stay pursuant to s. 41(e) of the *Judicature Act* is the "*RHR (sic) MacDonald*" test applicable to interlocutory injunctions (*RHR (sic) MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para. 46). The principles developed in *RHR (sic) MacDonald* require the party seeking relief to demonstrate both irreparable harm and that the balance of convenience favours granting the requested order.
>
> [69] I note that neither Court in *Advanced* or *Saskatchewan Power* conducted an analysis of the *RHR (sic) MacDonald* factors.
>
> [70] Bergemann says that there is no evidence that Lorneville will suffer any prejudice, much less irreparable harm if the Lien Action proceeds.
>
> [71] I find that it is appropriate for this Court to consider the Section 9(2) factors for refusing a stay. These factors are not mandatory for this Court to consider, but they are helpful. The only relevant factors on the facts before the

> Court are (c) "the subject matter of the dispute is not capable of being the subject of arbitration pursuant to the law of the Province" and (d) "the motion to stay the proceeding was brought with undue delay." I have determined that the issues raised in the Lien Action may be arbitrated.The law of Nova Scotia does not preclude these issues from being arbitrated. I have also determined that Lorneville did not unduly delay bringing the Lien Action.

[Emphasis added]

[34] In this part of her decision, the judge did not make reference to *Purdy v. Fulton Insurance Agencies Ltd.*, [1990] N.S.J. No. 361 (C.A.), the seminal case on stay motions in Nova Scotia. In *Purdy*, this Court adopted the *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396 (H.L.) test for a stay under s. 41(e) of the *Judicature Act*:

> [27] A review of the cases indicates there is a trend towards applying what is in effect the *American Cyanamid* test for an interlocutory injunction in considering applications for stays of execution pending appeal. In my opinion, it is a proper test as it puts a fairly heavy burden on the appellant which is warranted on a stay application considering the nature of the remedy which prevents a litigant from realizing the fruits of his litigation pending the hearing of the appeal.
>
> [28] In my opinion, stays of execution of judgment pending disposition of the appeal should only be granted if the appellant can either
>
> > (1) satisfy the Court on each of the following: (i) that there is an arguable issue raised on the appeal; (ii) that if the stay is not granted and the appeal is successful, the appellant will have suffered irreparable harm that it is difficult to, or cannot be compensated for by a damage award. This involves not only the theoretical consideration whether the harm is susceptible of being compensated in damages but also whether if the successful party at trial has executed on the appellant's property, whether or not the appellant if successful on appeal will be able to collect, and (iii) that the appellant will suffer greater harm if the stay is not granted than the respondent would suffer if the stay is granted; the so-called balance of convenience.
> >
> > OR
> >
> > (2) failing to meet the primary test, satisfy the Court that there are exceptional circumstances that would make it fit and just that the stay be granted in the case.

[35] In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the Supreme Court similarly adopted *American Cyanamid*, finding that a "stay of

proceedings and an interlocutory injunction are remedies of the same nature", and "[I]n the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules." (Robert J. Sharpe, *Injunctions and Specific Performance*, loose-leaf, (Toronto: Thomson Reuters, 2016) at 2.120).

[36] Both *Purdy* and *RJR-MacDonald* dealt with stays of execution of lower court decisions, however, Nova Scotia courts have recognized that *Purdy* and *RJR-MacDonald* apply to all manner of stay motions. (See e.g., *Reid v. Halifax Regional School Board*, 2006 NSCA 35, ¶18; *Delorey v. Strait Regional School Board*, 2012 NSSC 227, ¶4; and *Brookfield Lumber Co. v. Nova Scotia (Minister of Environment)*, [1995] NSJ No 175, ¶10 (S.C.)).

[37] Bergemann argues the judge did not apply the *Purdy/RJR-MacDonald* test and, in failing to do so, she erred. It says had she done the proper analysis the stay motion would have been unsuccessful on the irreparable harm aspect of the test.

[38] Although the judge, at this point in her decision, did not reference *Purdy* or *RJR-MacDonald*, her analysis, in substance, applied the exceptional circumstances part of the *Purdy* test.

[39] In my view, the judge, in referencing the provisions of s. 9(2) the *Commercial Arbitration Act*, was using the provisions of that section as a guideline in determining whether to exercise her discretion in favour of granting the stay. In other words, in the face of an arbitration agreement and the spirit and intent of the *Commercial Arbitration Act*, would it be fit and just to grant a stay of the lien action?

[40] A similar situation arose in *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd.*, 2016 SKCA 46. In that case, the Saskatchewan Court of Appeal affirmed that although a party who starts a lien action cannot seek to stay its own action directly under Saskatchewan's *Arbitration Act* (that similarly requires a stay motion to be brought by "another party"), the Chambers judge was correct in allowing both "the spirit and the particulars" of the provincial *Arbitration Act* to guide his discretion in ordering a stay of proceedings under Saskatchewan's *Queen's Bench Act*, stating as follows:

> 34 Third, and most importantly, the Chambers judge was entirely correct to let himself be guided largely by the terms of the *Arbitration Act* in the situation here.

> The matter before him was not just any application for a stay. It was an application for a stay brought against the close background of the *Arbitration Act* and brought by a party to an arbitration agreement desirous of moving forward with that proceeding. In these circumstances, it was incumbent on the Chambers judge to ensure his decision fit coherently with both the spirit and the particulars of the *Arbitration Act*. It would have been a mistake for him to have done otherwise.

[41] I agree with these comments. It was entirely appropriate for the judge to be guided by the factors in the *Commercial Arbitration Act* where the motion was brought in the context of an arbitration agreement.

[42] It is also important to recognize that the type of action for which a stay was sought was an action commenced pursuant to the provisions of the *Builders' Lien Act*, R.S.N.S. 1989, c. 277, as amended.

[43] The *Builders' Lien Act* allows a subcontractor such as Lorneville to obtain security for its unpaid invoices by filing a lien which attaches to the property of Northern Pulp (*Builders' Lien Act*, s. 6). In order to perfect their security, the lien claimant, in this case, Lorneville, must file an action and a *lis pendens* (*Builders' Lien Act*, s. 26).

[44] The scheme of the *Builders' Lien Act* is to allow subcontractors to have security for unpaid work against the owner of the property, something that would not otherwise be available to them.

[45] As was the case here, an owner can then make application to the court to discharge the lien by paying into court (*Builders' Lien Act*, s. 29).

[46] Finally, the *Builders' Lien Act* specifically contemplates that a lien action can be commenced even where the parties have entered into an arbitration agreement. It provides:

> **33B** Notwithstanding the *Arbitration Act*, the *Commercial Arbitration Act* or the *International Commercial Arbitration Act* or equivalent legislation of any other jurisdiction, where the contract or subcontract of a lien claimant contains a provision respecting arbitration, the taking of any step described in Section 33A does not constitute a waiver of the lien claimant's rights to arbitrate a dispute pursuant to the contract or subcontract.

[Emphasis added]

[47] This clearly allows a subcontractor, even where it is bound by an arbitration clause, to file a lien and commence the lien action without prejudice to their right to arbitrate. In this case, it allowed Lorneville to take advantage of the *Builders' Lien Act* in order to obtain security for its unpaid invoices and at the same time proceed with the arbitration.

[48] Taking these factors into consideration and exercising her broad discretion, the judge determined, in essence, that this was one of those exceptional cases referred to in *Purdy* where it would be "fit and just" that a stay be granted. In exercising her discretion she did not apply wrong principles of law nor would a patent injustice result.

[49] I would dismiss this ground of appeal.

Issue 2(b) Did the judge err in concluding Lorneville would suffer irreparable harm if the lien action was not stayed?

[50] After determining that a stay should be granted, taking into consideration the factors in s. 9(2) of the *Commercial Arbitration Act*, the judge went further to make the alternative finding that in applying the *RJR-MacDonald/Purdy* test Lorneville would suffer irreparable harm if it was forced to resort to the courts to have the issue determined. She concluded:

> [73] Counsel for Lorneville contends that if the issues in dispute are not arbitrated, his client will suffer irreparable harm because it will lose the efficiencies of having the disputes arbitrated. He notes that the *Civil Procedure Rules* require more substantial documentary disclosure than would be required in arbitration and that his client would be forced into a lengthy process of civil litigation. While Bergemann argues that referring its disputes with Lorneville to arbitration will result in a multiplicity of proceedings and raises the spectre of possible inconsistent findings of facts, I do not agree. I note that if the factors in Section 9(2) <u>are</u> relevant to the exercise of the Court's inherent jurisdiction to stay an action, those factors do not list the risk of multiple proceedings as exceptions to deny a stay.
>
> [74] I accept that Lorneville will suffer irreparable harm if it loses the right to have its issues with Bergemann able to be arbitrated in the manner the parties contracted would occur. Arbitration, freely chosen, should take primacy over litigation.

[51] With respect, there was no basis upon which the judge could make a finding of irreparable harm on the evidence before her. First, the finding of irreparable harm was based on the assertions of counsel as to the efficiency of the dispute resolution process, the substantial documentary disclosure that would be required in litigation, and that litigation would be a lengthy process. They were simply that – assertions without evidence.

[52] Second, the judge's decision suggests that civil litigants in the Supreme Court are subject to irreparable harm because of the Court's rules regarding document disclosure and time limits. With respect, no one gave evidence on how the arbitration would be faster or the discovery less intrusive than a court proceeding. It cannot be assumed that a civil litigant will suffer irreparable harm if it is required to litigate in the courts rather than arbitrate.

[53] Having no evidence of irreparable harm, it was in error for the judge to found a stay on the first part of the *Purdy* test. However, this error has no impact on the ultimate outcome of this appeal.

Issue 2(c): Did the judge err in finding that the balance of convenience favoured a stay of the lien action?

[54] Having found that there was no basis upon which the judge could have found irreparable harm, it is not necessary to consider whether the balance of convenience favoured Lorneville.

Issue 2(d): Did the judge err in dismissing Bergemann's consolidation motion?

[55] The appeal from the refusal to consolidate becomes moot as a result of our upholding the stay of the lien proceeding.

Costs on the Stay Appeal

[56] The focus before the judge was on the provisions of the *Commercial Arbitration Act*. It was not argued that the motion should have been granted under the second part of the *Purdy* test. As I have determined that a stay is appropriate under that part of the test, this is an appropriate case for not awarding costs as between Bergemann and Lorneville on the stay appeal.

Costs on the Consolidation Motion Appeal

[57] Northern Pulp and Lorneville were successful on the appeal of the consolidation motion. The consolidation motion occupied very little of the Court's time below or on the appeal. As a result, I would award costs to Northern Pulp and Lorneville, payable by Bergemann, in the amount of $1,000 each, inclusive of disbursements.

Farrar, J.A.

Concurred in:

Van den Eynden, J.A.

Derrick, J.A.