SUPREME COURT OF NOVA SCOTIA

Citation: Rusk Renovations Inc. v. Dunsworth, 2013 NSSC 179

Date: 20130614
Docket: Hfx No. 389841
Registry: Halifax

Between:

Rusk Renovations Inc.

Applicant

v.

Robert Dunsworth, Ingrid Dunsworth, and Europa Stairways Inc.

Respondents

Decision

Judge: The Honourable Justice Gerald R. P. Moir

Heard: April 30, 2013

Counsel: David St. Clair Bond, for applicant
Kevin P. Downie, for respondents

Moir J.:

Introduction

[1] Rusk Renovations Inc. had a contract to renovate an apartment in New York, and it subcontracted Europa Stairways Inc. to supply materials for, and install, new stairways. Rusk paid half the subcontract price as a down payment. Two months later, when the subcontract was still in the design phase, Europa went out of business.

[2] The subcontract provided for arbitration. Rusk initiated arbitration in New York. Apparently, Rusk and the arbitrator viewed the proceeding as including a claim in fraud made personally against the CEO of Europa, Ms. Ingrid Dunsworth, and her husband. They were not parties to the arbitration agreement, and they did not consent to be joined in the proceeding.

[3] The Dunsworths did not participate in the arbitration. Neither did Europa. The arbitrator made an award against all three for the down payment and an additional $12,000 described as "liquidated damages".

[4] Rusk seeks enforcement in Nova Scotia under the *International Commercial Arbitration Act*. Europa did not oppose. The Dunsworths do.

Issues

[5] The enforcement process begins with the filing of the award and the arbitration agreement. Then, the party against whom enforcement is sought has the opportunity to establish certain grounds for refusing enforcement, such as absence of notice, excess of the submission to arbitration, or breach of public policy.

[6] The Dunsworths say that they have established grounds for refusal, and the fact that they are not parties to the agreement figures in their submission. However, during submissions I raised what may be a more fundamental issue. How can a person who is not a party to the arbitration agreement become a party to the arbitration proceeding?

[7] I propose, first, to deal with the issue of whether a personal award against the Dunsworths is within the *International Commercial Arbitration Act* and, then,

to determine the issue of whether the Dunsworths have established a ground for refusal.

Does the Statute Apply to the Award Against the Dunsworths?

[8] Arbitrators have authority either by contract or by statute. They are either consensual or statutory. The *International Commercial Arbitration Act* is focussed on the consensual kind. The Dunsworths never bound themselves to the arbitration initiated by Rusk Renovations, and it was not a statutory arbitration. As I read the *International Commercial Arbitration Act*, it does not apply to an award made in those circumstances.

[9] Subsection 3(1) and clause 2(1)(a) of the *Act* give force of provincial statute law to the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, and the statute helpfully attaches a copy of the convention as a schedule.

[10] Article 2.1 requires recognition of an arbitration agreement:

> 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.

Article 3 requires the treaty states to "recognize arbitral awards and enforce them".

[11] The Convention closely associates arbitration agreements and arbitral awards. So, the obligation of the treaty states to "recognize arbitral awards as binding and enforce them" (Article 3) is engaged not by filing just the award but also the agreement, which shows the authority for the award. Article 4.1 reads:

> To obtain the recognition and enforcement mentioned in the preceding article, the party applying for recognition and enforcement shall, at the time of the application, supply:
>
> (a) The duly authenticated original award or a duly certified copy thereof;
>
> (b) The original agreement referred to in article II or a duly certified copy thereof.

The parties to the agreement and the parties to the award are indistinguishable in Articles 5.1(a), 5.1(d), and 5.1(e).

[12] The statute also gives force of provincial statute law to the Model Law on International Commercial Arbitration and helpfully includes it in schedule B: s.

5(1) and s. 2(1)(b). Here to, parties to the arbitration proceeding are indistinguishable from the parties to the arbitration agreement.

[13] Article 7(1) of the Model Law defines "arbitration agreement" as an "agreement by the parties". After that, the Model Law frequently refers to "the parties", but at no point does it suggest any distinction between the parties to the agreement and the parties to the arbitration.

[14] Neither the main part of the statute, the Convention, nor the Model Law provide any mechanism by which a person who is not a party to the arbitration agreement can become a party to the arbitration. Counsel have referred me to no authority for the proposition that a person who does not contract or consent may still be bound by an arbitration award. Mr. Downie did refer me to an American text that suggests it is possible for a court to join a non-contracting party to a consensual arbitration.

[15] The arbitration agreement between Rusk Renovations and Europa Stairways recognizes that it is impossible to join someone against their will. A party to the

agreement may join a person under certain conditions "provided that the party sought to be joined consents in writing to such joinder": Section 6.3.4.

[16] Subsection 13(1) of the statute incorporates Dreidger's principle for statutory construction:

> This Act shall be interpreted ... in accordance with the ordinary meaning to be given to the terms of the Act in their context and in light of its objects and purposes.

[17] The purpose of the *Act* is to give effect to foreign arbitration agreements and arbitral awards. In the context I have described, the phrase "arbitral awards" in "recognize arbitral awards as binding and enforce them" cannot mean an award that calls itself arbitral but that is not. That is why the Convention requires filing of both the award and the agreement. That way the court can be satisfied of what the award provided and that it really is arbitral.

[18] The award against the Dunsworths is not an arbitral award under the *International Commercial Arbitration Act* because the Dunsworths are not parties to an arbitration agreement and did not consent to be joined. This is a sufficient

reason to dismiss the application without calling on the Dunsworths to prove anything under Article 5 of the Convention.

Article 5 and Lack of Notice

[19] Article 5 gives me a discretion to refuse enforcement. I may do so only if the party against whom enforcement is sought proves one of several circumstances. The Dunsworths rely on three of these. It is sufficient to consider only one. Article 5.1(b) reads:

> The party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case... .

[20] Both the Model Law incorporated into the *International Commercial Arbitration Act* and the arbitration agreement between Rusk Renovations and Europa Stairways inform us about what constitutes "proper notice".

[21] Article 23(1) of the Model Law required Rusk to "state the facts supporting [its] claim, the points at issue and the relief or remedy sought", and Article 25(a) required the arbitrator to terminate the arbitration proceedings if "the claimant

fails to communicate his statement of claim". Communication of the statement of claim allows the other parties to state a defence under Article 23(1). There never was a statement of claim.

[22] Additionally, Rusk Renovations needed to serve a demand for arbitration on the other parties. Section 6.3.1 of the arbitration agreement includes:

> A demand for arbitration shall be made in writing, delivered to the other party to the subcontract, and filed with the person or entity administering the arbitration. The party filing a notice of demand for arbitration must assert in the demand all claims then known to that party on which arbitration is permitted to be demanded.

A demand for arbitration was never delivered to the Dunsworths.

[23] Mr. Rusk filled out an "Online Filing Demand for Arbitration/Mediation Form" with the American Arbitration Association. The form says, "To institute proceedings, please send a copy of this form and the Arbitration Agreement to the opposing party." Mr. Rusk did not do that.

[24] Had Mr. Rusk sent the demand for arbitration to the Dunsworths, they might or might not have seen that a claim was being made against them personally. Such a claim is not clear from the document.

[25] The claim asserts:

> Subcontractor and their individual principals fraudulently induced Rusk Renovations Inc. to provide payments when Respondent had no intention of providing services.

Note the singular "Respondent".

[26] The online form describes "Claimant 1" as

> Name: John James Rusk
>
> Company Name: Rusk Renovations Inc.

and "Respondent 1" as

> Name: Robert and Ingrid Dunsworth
>
> Company Name: Europa Stairways Inc.

Apparently, one is to discern that there is only one "Claimant 1", Rusk Renovations, but there are three "Respondent 1" because the form says "Include in caption: Company" for "Claimant 1" but "Include in caption: Both" for "Respondent 1".

[27] Nothing was sent by Rusk Renovations or the American Arbitration Association to the Dunsworths or Europa Stairways to tell them of the allegation of fraud, the claim for personal liability, or the process by which the Dunsworths were taken to be parties to an arbitration without their consent. Indeed, even now I am left in the dark about how the arbitrator, who gave no reasons, found fraud, overcame *Salomon v. Salomon*, and made an award against individuals who were not parties to the arbitration agreement and did not otherwise consent.

[28] Ms. Dunsworth gave evidence that is preclusive of a finding of fraud if accepted. A once successful business became insolvent. It was in operation without any intention of closing when it contracted with Rusk Renovations. When it failed, offers to assist Rusk with efficient completion were ignored. Ms. Dunsworth never got to tell the arbitrator about her side of the story because nothing told her that she and her husband were being claimed against.

[29] There was correspondence from the American Arbitration Association to

John J. Rusk

Rusk Renovations Inc.

and

Robert and Ingrid Dunsworth

Europa Stairways Inc.

These letters frequently refer to "Respondent". They never say "Respondents". Sometimes they speak of representatives such that Mr. Rusk would be the representative of Rusk Renovations and the Dunsworths could be taken as the representatives of the other party. I find that Ms. Dunsworth thought that those of the American Arbitration Association letters that found their way to her concerned only a claim against her defunct company.

[30] The award was made on November 4, 2010. For the first time a document uses the plural "Respondents". It seems clear that the award is against the company and the two individuals. Apparently, it was not clear enough for Mr.

Rusk, who secured a correction on January 11, 2011. It amplifies personal liability: "Respondents, Robert and Ingrid Dunsworth, in their personal capacities...".

[31] Again, the Model Law was not applied. Article 33(1)(a) permits a correction "with notice to the other party".

[32] Neither Ms. Dunsworth nor Mr. Dunsworth were given proper notice of the arbitration proceeding against them in their personal capacities. In light of the undisclosed allegation of fraud, the unexplained lifting of the corporate veil, and the absence of a legal basis for including non-contracting individuals in an arbitration, I would exercise my discretion to refuse recognition of, or enforcement of, the award in favour of Rusk Renovations.

Conclusion

[33] The application to recognize and enforce the arbitration award by Mr. Thomas D. Czik at New York on November 4, 2010 is allowed as against Europa Stairways Inc. but, as against Ingrid Dunsworth and Robert Dunsworth, the

application is dismissed because the Dunsworths never agreed to arbitration, and the *International Commercial Arbitration Act* cannot apply to them. Further, if the *Act* did apply I would refuse recognition and enforcement because Rusk Renovations failed to give the Dunsworths proper notice of the personal claim.

[34] Rusk Renovations Inc. will have costs against Europa Stairways Inc. of $500 plus disbursements for the unopposed application. Ingrid Dunsworth and Robert Dunsworth will have costs against Rusk Renovations Inc. of $2,000 plus disbursements.

J.