SUPREME COURT OF NOVA SCOTIA

Citation: *Colbourne Chrysler Dodge Ram Ltd., v. MacDonald et al., v. Colbourne, MacDougall, and Denny*, 2024 NSSC 204

Date: 20240704
Docket: Sydney No. 509902
Registry: Halifax

Between:

Colbourne Chrysler Dodge Ram Limited

Plaintiff

v.

Jim MacDonald, Chris MacDonald, Mark MacDonald, Ron MacDonald, (The Estate of) Winifred MacDonald, Jim MacDonald Family Trust, Chris MacDonald Family Trust, Mark MacDonald Family Trust, Ron MacDonald Family Trust, and MacDonald Auto Holdings Limited

Defendant

v.

Rodney Colbourne, Steve MacDougall, and Matt Denny

Third Party Defendant

DECISION

Judge:	The Honourable Justice John A. Keith
Heard:	December 21, 2023, in Halifax, Nova Scotia
Final Written Submissions:	January 29, 2024
Counsel:	Tony W. Mozvik, K.C., for the Plaintiff Christopher Conohan, for the Defendant Self-Represented, for the Third-Party Defendant

By the Court:

INTRODUCTION AND BRIEF CONCLUSION

[1] The Defendants bring this motion under s. 9 of Nova Scotia's *Commercial Arbitration Act*, S.N.S. 1999, c. 5, as amended, for an Order staying the within proceeding and permitting the underlying dispute to be resolved by way of arbitration.

[2] For the reasons which follow:

1. This action will be stayed subject to the parties moving forward in an efficient and expeditious manner with the arbitration commenced in the Notice of Arbitration previously served;

2. The arbitrator shall, in the first instance, determine any jurisdiction issues and/or defences which may be raised in connection with the claims made against certain personal guarantors in the third party action.

ISSUES

[3] I would distill the issues in this motion as follows:

1. Did the Defendants, by their actions, and including the filing of pleadings in this action, attorn to the jurisdiction of this Court and otherwise surrender their right to arbitration?

2. Do the claims made in this action extend beyond the scope and purpose of the arbitration agreement?

3. If a dispute around the payment of a debt is to be arbitrated under the Commercial Arbitration Act, should certain individuals who personally guaranteed that debt should be parties to the arbitration even though they did not sign the contract containing the arbitration agreement?

BRIEF BACKGROUND INFORMATION

[4] Certain basic background information is needed to better understand the legal issues which have arisen.

[5] The Defendants collectively owned all the issued and outstanding shares of the following three (3) companies: Scotia Chrysler (2010) Limited, Lloyd MacDonald Ford Sales Limited, and 3248916 Nova Scotia Limited (collectively, the "**Companies**").[1] In turn, these Companies owned and operated several car dealerships in Cape Breton, Nova Scotia, including: a Chrysler dealership located on Welton Street in Sydney, N.S.; a Ford dealership on Grand Lake Road in Sydney, N.S.; and a Nissan dealership also in Cape Breton. It is unclear precisely how the assets and business interests of the various car dealerships were divided among these Companies.[2]

[6] By purchase agreement dated December 14, 2018 (the "**Share Purchase Agreement**"), 3314852 Nova Scotia Limited ("**852 NS Ltd.**") agreed to purchase all the Defendants' shares in the Companies and assume ownership of the car dealerships.

[7] The Share Purchase Agreement closed on May 14, 2019.

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[1]The Defendants originally included Ron MacDonald, Ron MacDonald Family Trust, and Winnifred MacDonald, all of whom were shareholders in the Companies and also signed the Share Purchase Agreement. I note that:

1. Any and all issues between Ron MacDonald and the Ron MacDonald Family Trust were eventually resolved. On August 24, 2022, the parties confirmed that the within action would be dismissed against these persons; and
2. It is agreed that Winnifred MacDonald passed away after the transaction closed.

I am proceeding on the basis that the decision not to include these three remaining shareholders as parties in the Notice of Arbitration (i.e. Ron MacDonald, Ron MacDonald Family Trust and the Estate of the deceased Winnifred MacDonald) has no bearing on the Court's determination of the specific issues raised in this motion for a stay. No party has raised this issue or argued otherwise.

[2] Breaking the three Companies down, the materials filed with the Court suggest that:

1. Scotia Chrysler (2010) Limited owned all the assets and business interests associated with the Chrysler dealership. Scotia Chrysler (2010) Limited subsequently amalgamated with the purchaser in the Share Purchase Agreement (852 NS Ltd.) to form the Plaintiff in this action, Colbourne Chrysler Dodge Jeep Ram Limited;
2. Lloyd MacDonald Ford Sales Limited owned all of the assets and business interests associated with a Ford dealership; and
3. 3248916 Nova Scotia Limited owned all of the assets and business interests associated with the Nissan dealership.

However, again, the evidence is unclear, and these inferences are largely based on connecting business names with a particular car brand.

[8] The purchase price due on closing was $14,800,000, plus the value of all "Working Capital", as that term is defined in the agreement. Under s. 2.05 of the Share Purchase Agreement, the purchase price was paid as follows:

1. $740,000 held in an escrow account and released at closing;

2. $1,000,000.00 paid over the next three (3) years after closing, in accordance with the terms of a vendor take-back promissory note (the **"VTB Note"**); and

3. The balance to be paid at closing, subject to certain agreed adjustments.

[9] This dispute raises issues around the VTB Note. As such, it is necessary to review it basic components.

[10] The "Lenders" who were owed money under the VTB Note were Jim MacDonald, Chris MacDonald, Mark MacDonald, James MacDonald Family Trust, Chris MacDonald Family Trust, Mark MacDonald Family Trust, and MacDonald Auto Holdings Limited.[3]

[11] The "Borrower" who originally promised to pay the monies owing under the VTB Note was the purchaser under the Share Purchase Agreement (852 NS Ltd.). However, on closing, the VTB Note was amended to include the following two other "Borrowers": 3324689 Nova Scotia Limited ("**689 NS Ltd.**") and 3323936 Nova Scotia Limited ("**936 NS Ltd.**"). All three of these "Borrowers" who jointly and severally agreed to pay all monies owing "in accordance with the Share Purchase Agreement dated December 14, 2018".[4]

[12] In a separate agreement, Rodney Colbourne, Steve MacDougall, and Matt Denny personally guaranteed all obligations owing under VTB Note (the "**Personal**

[3] The original draft (unsigned) VTB Note included Ron MacDonald, Ron MacDonald Family Trust and Winifred MacDonald who, as mentioned in footnote 1, were all shareholders in the Companies and signatories under the Share Purchase Agreement. It appears to have been agreed on closing that these persons would not be entitled to further payment under the VTB Note.

[4] While 852 NS Ltd. is the sole named purchaser in the Share Purchase Agreement, it appears that this company ultimately divided the shares, assets, or business interests in the various car dealerships among itself, 689 NS Ltd., and 936 NS Ltd. The details as to how this division occurred (or what rights may have been transferred/retained through this division) are unclear.

Guarantors"). These individuals are directing minds of 852 NS Ltd., 689 NS Ltd., and 936 NS Ltd.

[13] The first payment under the VTB Note was not due until May 14, 2020 – the first-year anniversary of the transaction closing. From that point forward, all monies owing under the VTB Note (including accrued interest) were to be paid in equal monthly installments over the next 24 months (i.e. in the second and third years after closing the transaction).

[14] The "Borrowers" under the VTB Note and the Personal Guarantors failed and/or refused to make any payments due under the VTB Note. The reason for non-payment came from one of the three "Borrowers": the original purchaser (852 NS Ltd.) through its corporate successor Colbourne Chrysler Dodge Jeep Ram Limited ("**Colbourne Chrysler**").

[15] Colbourne Chrysler took the position that any monies owing under the VTB Note were more than offset by certain counterbalancing claims uncovered after the transaction closed. In particular, Colbourne Chrysler alleged serious financial and operational misconduct within the "Service Department" at the Chrysler dealership on Welton Street, Sydney, N.S.[5] Further details are provided below.

[16] Unable to resolve the dispute, the Defendants turned to s. 9.01 of the Share Purchase Agreement to compel payment under the VTB Note. Section 9.01 states, *inter alia*:

> "If the parties are unable to agree on any matter intended to be governed by this Agreement then, upon written notice to the other, either party may demand that the matter be submitted to arbitration..... The arbitration shall be carried out in

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[5]Colbourne Chrysler did not provide the details or clarify which rights, interests, assets, claims, and obligations originally acquired by 852 NS Ltd. as sole purchaser under the Share Purchase Agreement. It is not clear which rights, interests, assets, claims, and obligations:

1. Were retained by 852 NS Ltd. and then accrued to Colbourne Chrysler as its corporate successor; and
2. Were transferred by 852 NS Ltd. to certain other corporate entities – or divided among other corporate entities. For example, as indicated in footnote 4 above, it appears that, at some point after closing, the ownership and operation of the other car dealerships acquired through the Share Purchase Agreement (i.e. the Ford dealership and the Nissan dealership) may have been divided between 689 NS Ltd. and 936 NS Ltd..

In any event, for the purposes of the claims made by Colbourne Chrysler in this Action, it is accepted that:

1. Colbourne Chrysler now owns and operate the Chrysler dealership on Welton Street, Sydney, N.S. where the claims in this Action originate – even though the claims in the arbitration (and the obligations related to the VTB Note) involve more parties including 689 NS Ltd. and 936 NS Ltd.. and the Personal Guarantors; and
2. Is entitled to advance or enforce whatever rights, interests, and causes of action accrued to 852 NS Ltd. under the Share Purchase Agreement with respect to this Chrysler dealership.

> accordance with the terms and conditions contained in the *Commercial Arbitration Act* as amended from time to time."

(the "Arbitration Agreement")

[17] By letter dated January 22, 2021, the Lenders served a Notice of Arbitration under s. 9.01. The Notice of Arbitration:

1. Identified the "Lenders" who signed the VTB Note as Claimants in the arbitration (see para. 10 above); and

2. Identified as Respondents:

   a. All three companies who signed the VTB Note as "Borrowers". I note that the Notice of Arbitration describes the Borrowers 936 NS Ltd. and 689 NS Ltd. as "parties" to the Share Purchase Agreement. Respectfully, these entities were not parties to the Share Purchase Agreement. However, they became parties to the VTB Note which confirmed a joint and several obligation to pay all monies owing under that note "in accordance with the Share Purchase Agreement dated December 14, 2018". I return to this issue below; and
   b. the Personal Guarantors. 6

[18] The Respondents did not formally respond to the Notice of Arbitration; and the arbitration did not move forward. Instead, about 9 months later, on October 21, 2021, Colbourne Chrysler filed the within action against all the entities identified as "Vendors" in the Share Purchase Agreement (the "**Action**").[7]

[19] As mentioned, Colbourne Chrysler's allegations in this Action originate in one of the three car dealerships acquired through that transaction: the Chrysler dealership on Welton Street, Sydney, N.S.

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[6] For reasons that are unclear, the Notice of Arbitration also named 3248916 Nova Scotia Limited as a Respondent. This company was one of the three original companies whose shares were being purchased (see para. 5 above). However, it was neither the purchaser under the agreement nor a party to the VTB Note nor a guarantor of the obligations under the VTB Note. I mention this concern in passing. No party has alleged that it has any bearing on the substantive issues raised in connection with the Defendants' request for a stay.

[7] As mentioned, Winnifred MacDonald passed away after the Share Purchase Agreement closed. The Action was commenced against her Estate. Also, and as indicated in footnote 1 above, the Action was subsequently dismissed against two of the Vendors who were originally named as Defendants in this Action: Ron MacDonald and the Ron MacDonald Family Trust.

[20] In its Statement of Claim, Colbourne Chrysler alleges that the Defendants in this proceeding (i.e. the shareholders who sold their shares to 852 NS Ltd.):

1. Fraudulently or negligently caused or directed unnecessary warranty work to be performed on automobiles for the purpose of unlawfully inflating the financial performance statistics, earnings, and profitability of the "Service Department" at the Chrysler dealership;

2. Provided the purchaser 852 NS Ltd. with this same financial information during the course of the share purchase transaction – even though the Defendants knew it was contaminated by fraud, deceit, and/or negligence. This was done, Colbourne Chrysler alleges, to improperly drive an increased purchase price;

3. Breached their contractual obligation to act honestly and in good faith in the context of the share purchase transaction by presenting the purchaser with this contaminated financial information which hid (or exaggerated) the true value of the shares; and

4. Ultimately caused the Plaintiff to suffer related damages when the misconduct was eventually uncovered, after the share purchase transaction closed. The amount of those damages, the Plaintiff says, includes paying excessive amounts for the shares acquired under the Share Purchase Agreement.

[21] On February 4, 2022, the Defendants filed their Statement of Defence together with a Counterclaim. In the Counterclaim, the Defendants claim payment of all monies owing under the VTB Note. This is essentially the same claim which was advanced in their Notice of Arbitration filed many months earlier – although the Notice of Arbitration claimed against a number of additional Respondents, including 936 NS Ltd. and 689 NS Ltd. who signed the VTB Note as "Borrowers".

[22] Despite commencing this Counterclaim for monies owing under the VTB Note, the Statement of Defence also contained the following references to arbitration proceedings:

1. Paragraph 9: the Defendants state that they previously commenced an arbitration and quote s. 9.01 of the Share Purchase Agreement which contains the arbitration agreement;

2. Paragraph 22: the Defendants state "the appropriate jurisdiction and forum of such a dispute is under the Share Purchase Agreement and in particular under paragraph 9 that deals with disputes"; and

3. Paragraph 24: the Defendants request "an immediate stay of the action".

[23] The Plaintiff did not file a defence to the Counterclaim.

[24] On April 28, 2022, the Defendants filed a Notice of Claim against the Personal Guarantors as Third Parties to the Action (Rodney Colbourne, Steve MacDougall, and Matt Denny). For present purposes, paragraph 8 of the Third Party Claim is relevant. It states:

> "The Defendants confirm that a Notice of Arbitration to address this matter has been filed and served on the parties. In the event that the court assumes jurisdiction or determines that jurisdiction of this dispute rests with the Supreme Court, the Defendants claim against the Third Parties the amounts owing under the Vendor Take Back Security".

[25] The Third Party Defendants and Personal Guarantors under the VTB Note (Rodney Colbourne, Steve MacDougall, and Matt Denny) did not file a defence to the Third Party claim.

[26] On May 11, 2022, the Defendant-Vendors filed a motion[8] to stay the Action and, instead, pursue their competing claims under the pre-existing Notice of Arbitration. As indicated above, Colbourne Chrysler agreed to dismiss its claims against the Defendant-Vendors Ron MacDonald and Ron MacDonald Family Trust on August 22, 2022. The claims against the remaining Defendants/Vendors continue.

Issue 1 – Attornment, the *Commercial Arbitration Act* and "Undue Delay"

[27] The word "attornment" originates with the French verb "tourner" meaning "to turn". Its legal connotation has roots in the medieval notion of alienation under the feudal system of landholding. The feudal bond between a tenant and the lord who owned the land upon which the tenant worked was grounded in a form of mutual consent. As a result, a feudal lord could not transfer (or "turn over") his land to a new lord without the tenant's consent or, more accurately, without the tenant formally submitting to the new lord's authority (Sir John Baker, *An Introduction to English Legal History* (5th ed.), p. 281). The notion of submitting (or attorning) to a

[8]The motion was originally, and incorrectly, filed as an Application in Court. It was converted on consent to an interlocutory motion. See paras. 15 – 16 of my earlier decision in this matter (2023 NSSC 309)

new feudal lord obviously ended centuries ago. However, the word "attornment" endured in legal circles to signify the process through which a person submits to the jurisdiction of a legal authority.

[28] Whether a party has "attorned" to a particular jurisdiction or legal decision-maker depends on the circumstances and the assessment may be guided by legislation. For example, in the field of labour relations, Nova Scotia's *Trade Union Act*, R.S.N.S. 1989, c. 475 as amended, expresses a strong statutory preference for arbitrating disputes arising out of a collective agreement. The Courts will only retain jurisdiction where the dispute does not arise from the collective agreement or when a remedy is required that an arbitrator is not empowered to grant (*Ashley v. Nova Scotia (Attorney General)*, 2024 NSSC 104, at para. 12, summarizing the basic conclusions of the Supreme Court of Canada in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929).

[29] In this case, s. 9.02 of the Share Purchase Agreement expressly invokes Nova Scotia's *Commercial Arbitration Act*. As will be discussed below, this statute shapes the manner in which the concept of attornment operates in circumstances involving an arbitration agreement.

[30] Section 2 of the *Commercial Arbitration Act* confirms that its purpose is: "to revise and update the law respecting commercial arbitration and thereby encourage and promote the use of arbitration as an alternative to court proceedings in resolving disputes between parties to a contract."

[31] Sections 9(1) and (2) advance that legislative intent by establishing conditions through which a court proceeding may be stayed in favour of an arbitration agreement. They state:

> 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, on the motion of another party 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.

Only s. 9(2)(d) of the *Commercial Arbitration Act* is potentially applicable in this case. The circumstances described in s. (2)(a), (b), (c) and (e) are not present here.

[32] The *Commercial Arbitration Act* arose out of wholesale amendments made in 1999 to its predecessor statute: the *Arbitration Act*, R.S.N.S. 1989, c. 19. Sections 2 and 9 of the *Commercial Arbitration Act*, described above, reveal the extent to which these amendments signaled important, legislative shifts in recognizing and enforcing arbitration agreements.

[33] As indicated, s. 2 of the *Commercial Arbitration Act* clearly confirms the statutory intent of promoting and encouraging arbitration. Its statutory predecessor (the *Arbitration Act* from 1989) did not contain a similar provision and did not expressly communicate this new legislative purpose.

[34] Section 9 of the *Commercial Arbitration Act* (quoted above) provides guidance around how this legislative intent may be realized by identifying the circumstances in which a Court proceeding may be stayed in favour of an agreement to arbitrate. Section 9 is to be contrasted against the corresponding stay provisions in the 1989 *Arbitration Act*. Section 7 stated:

> "If any party to a submission, or any person claiming through or under him, commences any legal proceedings in any court against any other party to the submission, or any person claiming through or under him, in respect to any matter agreed to be referred, any party to such legal proceedings may, at anytime after appearance, and before delivering any pleadings, or taking any other steps in the proceedings, apply to that court to stay the proceedings, and that court, or a judge thereof, if satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission, and that the applicant was, at the time when the proceedings were commenced, and still remains, ready and willing to do all things necessary to the proper conduct of the arbitration, may make an order staying the proceedings."

[35] Section 9 did more than simply clarify the convoluted wording of the original s. 7. Importantly, for the purposes of this motion, s. 7 of the original *Arbitration Act* expressly stated that a party seeking to stay a judicial proceeding must do so "before delivering any pleadings, or taking any other steps in the proceedings". Section 9 in the current *Commercial Arbitration Act* removed that wording. In its place, s. 9(2) lists the "**only**" circumstances in which a Court "may refuse to stay the proceeding" (emphasis added). Put differently, a Court will typically stay a proceeding which is

otherwise subject to an arbitration agreement unless one of the circumstances enumerated in s. 9(2) is satisfied.

[36] Filing (or not filing) a pleading is clearly **not** one of the circumstances listed in s. 9(2) as a basis for refusing a stay of proceedings. The legislature could have adopted wording similarly to that of s. 7 in the predecessor *Arbitration Act* and said, for example, that a stay may be refused if the party requesting a stay has filed a pleading. It did not do so. On the contrary, s. 9 does not even mention pleadings.

[37] Furthermore, s. 9(2)(d) only allows the Court to refuse a stay request where there has been "undue delay". Here again, there is no mention of filing pleadings as being fatal unless, of course, they become part of an argument for "undue delay". As mentioned, the only circumstance listed in s. 9(2) which is relevant to this motion is s. 9(2)(d).

[38] Perhaps more revealing, s. 9(2)(e) allows the Court to refuse a motion for a stay where "…the matter in dispute is a proper one for default or summary judgment." Consider the following:

> 4. Civil Procedure Rule 13.03 allows summary judgment on pleadings to strike either a statement of claim or a statement of defence; and
>
> 5. Civil Procedure Rule 13.05(1) states that "[a] motion for summary judgment on evidence may be made any time after pleadings close and before a date assignment conference is requested, unless a judge directs otherwise." (emphasis added)

In short, Rule 13 contemplates the possibility of summary judgment after any party (plaintiff or defendant) has filed a pleading. However, Rule 9(2)(e) does not state that the Court may refuse a stay solely because a pleading has been filed. On the contrary, s. 9(2)(e) states that a stay may be refused only if the pleadings or the evidence are sufficient to warrant summary judgment. I pause here to note that, in this case, no party has argued summary judgment as a basis for denying a stay under s. 9(2)(e). Still, s. 9(2)(e) re-affirms the greatly diminished influence of merely filing a pleading as a reason to avoid an arbitration agreement.

[39] In summary and for the purposes of this motion for a stay:

> 1. The amendments contained in s. 9 of the *Commercial Arbitration Act* represent a shift away from imposing overly technical procedural constraints upon a party's ability to enforce an arbitration agreement – where the mere act of filing a pleading might entirely undermine the enforceability of an arbitration agreement; and

2. The amendments contained in s. 9 similarly reveal a growing acceptance of, and deference to, agreements which recognize arbitration as the contracting parties' preferred method of dispute resolution. Indeed, the Court may only refuse to stay a Court proceeding if a party to an arbitration agreement falls within one of the discrete, specific cases listed in s. 9(2). Similar conclusions are expressed in *Black & McDonald Ltd. v. Dégremont Ltée*, 2009 NSSC 85, at para. 13; and *Self v. Abridean Inc.*, 2001 NSSC 191, at para. 9).

[40] At this point, it is necessary to address Colbourne Chrysler's primary argument: that the Defendants' motion for a stay should be denied because they filed pleadings (including a counterclaim and third party claim) confronting the allegations made in this Action. And they did so voluntarily, without being compelled under the threat of default judgment. In these circumstances, Colbourne Chrysler concludes, the Defendants attorned to the jurisdiction of the Courts and lost any residual entitlement to a stay of proceedings.

[41] Curiously, in making this argument, Colbourne Chrysler's written arguments suggest that the concept of attornment can operate under Civil Procedure Rule 4 and the common law - independent of either the Arbitration Agreement or the provisions of the *Commercial Arbitration Act*. Colbourne Chrysler only debates the wording of the Arbitration Agreement and the related statutory provisions as alternative or secondary submissions.

[42] Respectfully, in my view:

1. No party has disputed the fact that s. 9.01 of the Share Purchase Agreement contains an arbitration agreement which very clearly invokes the *Commercial Arbitration Act*. The provisions of that Act apply in this case. They cannot be ignored. They speak clearly to the circumstances under which a stay may be refused. And they must be afforded meaning as intended by the legislature;

2. As indicated, the importance of filing pleadings as a singular or determinative factor in refusing a stay has been greatly diminished in the *Commercial Arbitration Act*. Filing pleadings may support an argument around "undue delay", but this act, by itself, does not justify refusing a stay under s. 9(2);

3. Rule 4 speaks to dismissing (not staying) an action for lack of jurisdiction. More importantly, it does not supersede or overwrite the more specific, clear provisions of the Commercial Arbitration Act or any other legislation that might more strongly enforce the right to arbitration (e.g. the *Trade Union Act*). To the extent there is any disconnect in this motion, the provisions of the *Commercial Arbitration Act* govern;

4. The cases relied upon by Colbourne Chrysler in support of this argument are clearly distinguishable. Colbourne Chrysler refers to *Waterbury Newton v. Lantz*, 2010 NSSC 359; aff'd 2011 NSCA 34 (***"Waterbury Newton"***); *Wamboldt Estate v. Wamboldt*, 2017 NSSC 288 (***"Wamboldt"***); and *Ross v. Elliott*, 2011 NSSC 298 (***"Ross"***). None of these cases refer or relate to matters which engage the *Commercial Arbitration Act*:

    a. *Waterbury Newton* was decided under (and relied upon) the old *Arbitration Act* – not the current *Commercial Arbitration Act*. For that reason, the motions judge and appeal court decisions in *Waterbury Newton* both place strong reliance on the requirement in s. 7 of the old *Arbitration Act* to seek a stay before filing pleadings in an action (see para. 21 of LeBlanc, J.'s decision at 2010 NSSC 359, and para. 12 of Bryson, J.A.'s decision at 2011 NSCA 34). In *Waterbury Newton*, the defendant (Walter Newton) did nothing to enforce the arbitration agreement for two years. Moreover, during that same period of time, he took many substantive steps in the action itself. He produced some documents in fulfillment of his disclosure obligations but refused to produce others. And he attended discovery examinations, although he refused to answer any questions going to the merits of the claim. Mr. Newton did much more than simply file a pleading. The Court of Appeal focused on these steps and their prejudicial effect on Mr. Newton's arguments for a stay. Bryson, J.A. commented on Mr. Newton's delay. He wrote: "For more than two years, Mr. Newton did nothing to seek the stay that s. 7 of the Arbitration Act permits. And then he only did so when faced by a motion to produce documents and attend discoveries" (at para. 12). By contrast, in this case, the Defendants commenced their arbitration

proceeding months **before** the Plaintiffs filed their claim in this action. Moreover, the Defendants neither waited for two years to seek a stay nor participated in any steps in the litigation beyond filing a Defence, Counterclaim and Third Party Claim. Those pleadings clearly reference arbitration as the agreed form of dispute resolution; and they directly challenge the Court's jurisdiction to determine the issues raised in this action.

b. *Wamboldt* involved issues of territorial competence (or jurisdiction simpliciter) and related questions regarding the appropriate forum in which the claims should be brought. There was no arbitration agreement with an express commitment by the parties to submit disputes to arbitration. The provisions of the *Commercial Arbitration Act* were neither considered nor relevant to the Court's determination. Instead, the controlling (and different) legislative provisions were contained in Nova Scotia's *Court Jurisdiction and Proceedings Transfer Act*, S.N.S. 2003, c. 2, as amended. It is not necessary to comment further on Lynch, J.'s finding in that decision regarding the connections between filing a defence and attornment to the jurisdiction of the Nova Scotia Supreme Court other than to repeat that these conclusions do not relate to (and do not overwrite) the provisions of the *Commercial Arbitration Act* and jurisprudence under that statute.

c. *Ross* was an appeal from the decision of the Small Claims Court in which certain tenants were ordered to pay $1,135.05 to their landlords. Again, there was no arbitration agreement in this case and the provisions of the *Commercial Arbitration Act* were neither considered nor applicable.

[43] In my view, the influence of filing pleadings is folded into the larger question of whether the Defendants have acted with "undue delay" and thereby surrendered their entitlement to a stay under s. 9(2)(e) of the *Commercial Arbitration Act*. On that issue, I am of the firm view that the Defendants did not act with "undue delay" in the circumstances.

[44] First, the Defendants triggered the Arbitration Agreement in s. 9.01 of the Share Purchase Agreement about 8 months before Colbourne Chrysler decided to

commence this action. This fact concentrates the Defendants' legitimate request for arbitration and dilutes Colbourne Chrysler's complaints around delay.

[45] Second, the Defendants' pleadings and the materials for this stay motion were all filed over a period of about 3 months. Admittedly, they did not comply strictly with the deadlines in the Rules of Civil Procedure, but I do not find the delay was unreasonable or undue, in the circumstances – taking into account the Notice of Arbitration served many months earlier and also having regard to the fact of uncertainties surrounding how the purchaser (852 NS Ltd.) restructured its affairs after the transaction closed.

[46] Third, the pleadings consistently raised and claimed the right to proceed by arbitration in accordance with the provisions of the Share Purchase Agreement.

[47] In conclusion, the Defendants did not attorn to the jurisdiction of the Court in a manner which would override the provisions of the *Commercial Arbitration Act* and justify refusing the requested stay under s. 9 of that Act. The Defendants also did not act with "undue delay" sufficient to justify refusing a stay under s. 9(2)(d) of the *Commercial Arbitration Act*.

Issue 2 – The Scope of the Arbitration Agreement

[48] Colbourne Chrysler advances an alternative argument that the actions raise issues of fraud and misrepresentation which go beyond the scope and purpose of the Arbitration Agreement. They offered brief written submissions on this issue, without supporting case law.

[49] In s. 9.01 of the Share Purchase Agreement, the parties agreed that if they were "unable to agree on any matter intended to be governed by this Agreement then, upon written notice to the other, either party may demand that the matter be submitted to arbitration...."

[50] Colbourne Chrysler bears the burden of proving that the issues raised in this action do not fall within the ambit of s. 9.01. Yet, Colbourne Chrysler has not provided any evidence from those persons who signed the Share Purchase Agreement as to the underlying intent – or that the claims made in this action go beyond the contracting parties' intent.

[51] Regardless, it is clear that the essential nature of the issues raised in this action relate to matters intended to be governed by the Arbitration Agreement and the *Commercial Arbitration Act* (*MacKay v Applied Microelectronics Inc.*, 2001 NSSC

122, at para. 26). The Statement of Claim contains numerous allegations which directly ground the causes of action in the Share Purchase Agreement. For example:

1. Paras. 3 and 4 introduce the claim by reference to the Share Purchase Agreement which closed in May of 2019;

2. Para. 10 states that Colbourne Chrysler "relied upon 2017 earnings as given to it by the Defendants to determine the Purchase price it paid for Scotia Chrysler 2010 Limited." Obviously, the price is a critical condition of the Share Purchase Agreement. To the extent the 2017 earnings were relevant to determining the purchase price and based on Colbourne Chrysler's own claim, this information necessarily was required as part of the actual contract.

3. Paras. 10 and 14 similarly connect allegations of fraud, deceit and negligent misrepresentation to this information exchanged as part of the transaction and, it is alleged, directly related to the purchase price paid;

4. Para. 11 refers to the "Doctrine of Detrimental Reliance" which, again, relates to the impact of the impugned financial information "particularly with the purchase price of Scotia Chrysler 2010 Limited"; and

5. Para. 12 specifically states that it was a "condition" of the Share Purchase Agreement that the Defendants "would act in good-faith and honesty to assist in negotiating and justifying a purchase price for Scotia Chrysler 2010 Limited."

[52] In sum, Colbourne Chrysler's claims in the action are very clearly grounded in its rights as purchaser under the Share Purchase Agreement and its allegations relate to issues governed by that agreement.

[53] On this, I also note that no party has made any argument that the claims made under the VTB Note are somehow outside the scope of the Share Purchase Agreement. Moreover, as mentioned, the parties to the VTB Note expressly agreed that they were "jointly and severally" liable to pay all monies owing "in accordance with the Share Purchase Agreement dated December 14, 2018." There may be separate issues regarding the Personal Guarantors, but nobody has challenged that the VTB Note itself is the proper subject matter for arbitration under the Share Purchase Agreement. The most Colbourne Chrysler states is that the Defendants were at liberty to take steps to enforce their Notice of Arbitration but failed to do so. The fact that all current disputes (including any offsetting claims to monies owing under the VTB Note) may be heard through arbitration serves to fortify my determination that the issues in this action were intended to be governed by the Share Purchase Agreement.

[54] Finally, it bears repeating that Chrysler Colbourne has refused payment under the VTB Note because it says that counterbalancing monies are owed. In doing so, and consistent with the allegations in its Statement of Claim, Chrysler Colbourne clearly connects the amounts owing under the VTB Note with its opposing rights and causes of actions as purchaser under the Share Purchase Agreement.

[55] Overall and in my view, the issues raised in the Statement of Claim fall squarely within the realm of matters intended to be governed by the Share Purchase Agreement.

Issue 3 – Claims Against the Personal Guarantor

[56] The following residual issue arose: are the Personal Guarantors subject to the Arbitration Agreement (or can they be made parties to the Arbitration Agreement) when they did not personally sign and were not parties to the Share Purchase Agreement?

[57] The issue is somewhat unusual in the sense that the Plaintiff's Statement of Claim does not raise issues which involve the Personal Guarantor. Rather, to the extent the Personal Guarantors are involved with this action, it is because the Defendants started a Third Party action against them – and yet it is also the Defendants who seek to stay the entire action.

[58] The parties filed post-hearing written submissions on this issue.

[59] Several additional background facts are required to place this issue in its proper context.

[60] Rodney Colbourne signed the Share Purchase Agreement on behalf of the purchaser, 852 NS Ltd..

[61] Section 1.05 of the Share Purchase Agreement lists the VTB Note and supporting Personal Guarantees (among other documents) as being:

1. attached as Schedules "F" and "G", respectively; and
2. "an integral part of the Agreement";

[62] Section 2.11 of the Share Purchase Agreement states:

> The Vendors agrees [sic.] to take back $1,000,000.00 of the Purchase Price by way of a 3-year Vendor Take Back Promissory Note ("VTB Note")

> containing the terms and conditions set out in Schedule "F". As collateral for the VTB Note, the Purchaser shall provide a joint and several personal guarantee from the following persons in the amount of $1,000,000.00 (the "**Guarantee**"):
>
> a) Rodney Colbourne
>
> b) Steve MacDougall
>
> c) Matt Denny

[63] Rodney Colbourne:

1. Signed the Share Purchase Agreement on behalf of the purchaser, 852 NS Ltd.;

2. Signed the VTB Note on behalf of the identified "borrowers": 852 NS Ltd., 689 NS Ltd., and 936 Nova Scotia Ltd; and

3. Signed the personal guarantee in his personal capacity.

[64] The two additional Personal Guarantors (Steve MacDougall and Matt Denny) signed the personal guarantee in their personal capacities. However, they did not sign the Share Purchase Agreement in any capacity.

[65] As indicated, the Personal Guarantors only became parties to this litigation because the Defendant named them in the Third Party claim. The Personal Guarantors have not defended this claim and so it remains unknown what defences or issues they might raise.

[66] In my view, it would be premature to decide this issue. This matter is more properly submitted for consideration by the arbitrator in the first instance. The arbitrator will be in a better position to assess jurisdiction and whether (or the extent to which) the Personal Guarantors are liable under the VTB Note. And, as such, these issues are more properly included among the other matters that will be arbitrated (i.e. liability of the Borrowers under the VTB Note and the claims made by Colbourne Chrysler in the Statement of Claim).

[67] As a preliminary comment, I note that primary liability under the VTB Note rests with the "Borrowers" under that agreement (852 NS Ltd., 689 NS Ltd., and 936 Nova Scotia Ltd.). The Personal Guarantors recognize the debt and the obligation to repay. And they signed the guarantee "to facilitate an expedited payment of the Principal [owing under the VTB Note]". However, liability under the personal guarantee is secondary or collateral to the primary obligations of the Borrowers.

[68] Again, the arbitrator will be in a better position to consider the various factual matters that may bear upon the issues including, for example, jurisdiction and the nature of any defences or issues raised by the Personal Guarantors and their connection to the issues to be arbitrated, having regard to such things as:

1. The nature of a personal guarantors as having secondary liability behind the primary debtor;

2. The fact that Colbourne Chrysler has not yet defended the Third Party claim;

3. The possibility of multiplicity of proceedings; and

4. The terms of the personal guarantee including the fact that the signed version is different from the form that was attached to the Share Purchase Agreement.

[69] Other potential factors may include, without limitation, the relationship between the Personal Guarantors and the companies that are bound by the Arbitration Agreement; and any potential estoppel arguments (*Aradia Fitness Canada Inc. v. Dawn M Hinze Consulting Ltd.*, 2008 BCSC 839, at para. 29)

[70] For clarity, in staying this action, I am neither determining that the liability of the Personal Guarantors under the VTB Note be arbitrated nor am I precluding the Lenders from pursuing the Personal Guarantors in a Court proceeding if the arbitrator declines jurisdiction. These reasons should not be interpreted as saying otherwise. Thus, this action is stayed (including the Third Party claim against the Personal Guarantors), but the Lenders' rights to pursue an action against the Personal Guarantors is not extinguished if the arbitrator declines jurisdiction over that particular issue. Moreover, for greater clarity, the running of any limitation period related to the liability of the Personal Guarantors' does not run while these preliminary issues are being determined – including, potentially, the amount owing by the Borrowers under the VTB Note. At the risk of repetition and absent the Personal Guarantors' consenting to arbitration, I simply determine that the arbitrator appointed in this matter under the provisions of the *Commercial Arbitration Act* shall determine whether the issues regarding the Personal Guarantors' liability for any monies owing under the VTB Note is properly included within the arbitration.

Keith, J.