IN THE SUPREME COURT OF NOVA SCOTIA
Citation: *Attorney General of Canada* v. *Marineserve.mg Inc.*, 2003 NSSC 026

Date: 20030207
Docket: S.H. 173182
Registry: Halifax

Between:

The Attorney General of Canada, in Right of the Minister of Transport

Plaintiff

v.

Marineserve.mg Inc., a body corporate, and Maritime Harbours Society, an incorporated society

Defendants

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D E C I S I O N

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| Judge: | The Honourable Justice Gerald R.P. Moir |
| Heard: | January 29, 2003 at Halifax |
| Counsel: | Harvey L. Morrison, and Kevin Donald Gibson, for the defendant/applicant, Marineserve.mg Inc.<br>John P. Merrick, Q.C. and Sean Foreman, for the plaintiff/respondent, The Attorney General of Canada<br>John E. MacDonell, for the defendant Maritime Harbours Society (watching brief) |

Moir, J:

[1] *Introduction*. The government of Canada decided to get out of the ownership and operation of various small ports, including Digby. It provided funds to the Maritime Harbours Society so it might retain professionals and do other things towards negotiating with the government to take over the port facilities at Digby. Although those negotiations had not yet concluded, Marineserve and the Society entered into a contract whereby Marineserve would provide virtually all services necessary to the operations of the port. The contract provided that Marineserve would do so as agent of the Society. In return, the Society agreed to make payments totalling $3,700,000 over a period of five years. About a month later, the government agreed to turn the port over to the Society, the very premise of the earlier agreement between Marineserve and the Society. The government and the Society entered into three contracts including a "Contribution Agreement" under which $3,070,000 was to be paid by the government for the Society to use for "Eligible Expenditures". The Society agreed to keep the contribution funds separate from other funds, to apply the contribution funds only to forty-three categories of expenses referred to as "Eligible Expenditures", to keep separate records for the fund and expenditures,

and to submit to audits. Since lump sum payments were made by the Society to Marineserve and since Marineserve paid expenses and because Marineserve will not open its books to the government, it has not been possible for the government to see, for itself, whether contribution funds were devoted exclusively to eligible expenditures. The government sued the Society for breach of contract and it sued Marineserve in conspiracy, inducing breach of contract and interference with economic relations.

[2] About a year ago, the Society succeeded in an application for a stay of the action against it, leaving only the action in tort against Marineserve to be brought to trial. The agreement between the Society and the government calls for mediation and binding arbitration. The Society insisted on those procedures and that forum, and Justice Goodfellow stayed the action in favour of the contracted processes. Those have now passed through the mediation stage and a single arbitrator has been nominated by the government. If a single arbitrator is not accepted, a panel of three will be established in the ususal way. After that, there likely will be preliminary motions respecting discovery and disclosure. It may be quite some time yet before the arbitration is concluded.

[3] The remaining claim has not progressed swiftly. In 2001 Justice MacAdam granted an interlocutory injunction freezing the balance of contribution funds in the hands of the Society, and he refused the government's request for injunctive relief against Marineserve At the time the Society's motion for a stay was before this court, it was made clear on behalf of the government that it intended to pursue the action against Marineserve regardless of the outcome of that application. However, a dispute arose over production of relevant documents. In December 2002, Justice Tidman heard the government's application for an order compelling production by Marineserve of its financial documents. There was no doubt these were relevant but Marineserve appealed to the Court's discretion to postpone disclosure. After discussing the reasons put forward on behalf of Marineserve, Justice Tidman concluded that, in all of the circumstances, his discretion ought not to be exercised and Marineserve was required to produce the financial documents. That decision is now under appeal.

[4] Marineserve applies for a temporary stay of the action against it. The stay would last until the arbitration between the government and the Society was concluded. I will dismiss the application.

[5] I do not propose to state the factual background in greater detail than that which appears in this introduction. It is also discussed at para. 1 to 20 of Justice MacAdam's decision of 10 October 2001, para. 1 to 7 of Justice Goodfellow's decision dated 24 May 2002 and para. 1 to 7 of Justice Tidman's decision of 20 November 2002: *A.G. Canada* v. *Marineserve.mg Inc. and Maritime Harbours Society*, [2001] N.S.J. 127 (S.C.); *A.G. Canada* v. *Marineserve.mg Inc. and Maritime Harbours Society*, [2002] N.S.J. 147 (S.C.), and; *A.G. Canada* v. *Marineserve.mg Inc. and Maritime Harbours Society*, [2002] N.S.J. 261 (S.C.).

[6] *Law Respecting Stays of Proceedings*. As Mr. Morrison, counsel for Marineserve, points out, the jurisdiction to stay proceedings is inherent and it is confirmed by s. 41(e) of the *Judicature Act*. Based upon *Global Petroleum Corp.* v. *CBI Industries Inc.* (1997), 158 N.S.R. (2d) 203 (CA), Mr. Morrison allows that the discretion is exceptional, that is, it "should only be exercised in the clearest of cases" (p. 207), and he suggests that the criterion for exercising the discretion is "the action would be an abuse of process in which the applicant would somehow be prejudiced and not merely inconvenienced": *Fruit of the Loom Inc.* v. *Chateau Lingerie Mfg. Co. Ltd.* (1984), 70 C.R.P. (2d) 274, at p.

278 quoted with approval in *Global Petroleum, supra* at p. 206, and in *Horn Abbott Ltd.* v *Reeves* (1999), 182 N.S.R. (2d) 278 (NSSC). Mr. Merrick, counsel for the government of Canada, readily accepts these characterizations. On assessment of the affidavit evidence before me, I cannot find an abuse of process. I do not find that it is abusive to continue the action against Marineserve while the related claim against the Society is determined by arbitration. However, with respect, I take a slightly different view of the law on this subject. I find it helpful to think of the stay as a remedy and to allow that there are diverse circumstances in which the discretion might be exercised. It is the expected response to an abuse of process. However, a stay of proceedings may respond to circumstances that do not amount to an abuse. Indeed, Mr. Merrick and Mr. Foreman, in their brief on behalf of the government, referred me to *Canadian Imperial Bank of Commerce* v. *Ria-Mar Fisheries Limited* (1985), 71 N.S.R. (2d) 446 (SCTD), where Justice Kelly makes it clear at para. 5 and 6 that a stay of proceedings for *forum non conveniens* no longer involves finding an abuse of process. That requirement has been replaced by a requirement that the applicant show a substantial balance of convenience in favour of proceeding in the other jurisdiction. Note

also the qualifying words in this passage from para. 16 of *Global Petroleum Corp.*:

> Although the situations including the durations of the stays may differ, in this case we adopt the principle that the power to order a stay of proceedings is an exceptional power which should only be exercised in the clearest of cases.... [emphasis added]

The power to stay proceedings is ancient and it is closely connected to the inherent jurisdiction of the Court to control its own processes. I do not read the authorities to which counsel referred me as having restricted the exercise of the power to cases of abuse of process. The power is to be approached with great caution. Its use is exceptional. A case for its use must be clearly established. These cautions are indicated by the gravity of shutting a plaintiff from access to the court or delaying the plaintiff's progress toward trial. The cautions stated in so many authorities do not indicate categorical restrictions upon the discretion.

[7] *Boart Sweden AB* v. *NYA Stromner AB* (1988), 41 B.L.R. 295 (OSC) involved a suit in which some parties had contracted for arbitration in respect of some causes, some causes were outside the agreement providing for arbitration and some parties were not bound by the agreement. Much the same as the situation we have here. Justice Campbell of the Ontario Supreme Court stayed those aspects of the suit which were subject to arbitration. However, he also granted

a four month stay respecting the balance of the action. The stay was expressed to be "under s. 119 of the *Courts of Justice Act*, 1984", which does not refer so clearly to the inherent jurisdiction as does s. 41(e) of our *Judicature Act*. Nevertheless, the Ontario provision must be a continuation or confirmation of the same power to stay proceedings as any superior court possesses without statute. Thus, the case involved the same discretion as now concerns us. Justice Campbell expressed his reasons on the merits of a temporary stay in detail and I shall discuss some of his reasons later. However, what is important for the moment is that he did not rest the stay upon a finding of abuse. Indeed, the stated facts are against it. Rather, this is an example of a case where a temporary stay was granted to achieve procedural fairness and efficiency. This approach was embraced by the Saskatchewan Court of Appeal in *UHDE GmbH* v. *BWV Investments Ltd.* (1994), 119 D.L.R. (4th) 577 (SCA) at p. 595-596. The Court ordered a stay pending arbitration under a building contract and it ordered a stay in the meantime of actions brought by sub-contractors even though the sub-contractors were not parties to the building contract or the arbitration.

[8] Counsel for the plaintiff provided the Quicklaw printout of *Bank of British Columbia* v. *Sitko*, [1986] A.J. No. 155 (AQB Master). The court was faced with a number of motions including motions for stay and for trial together. Master Funduk concluded "a stay of proceedings against Sitko is not appropriate because it is preferable that both claims be tried together" (p. 9). However, he did provide a lengthy discussion of stays of proceedings where separate actions raise the same issues. At p. 6 it is said "if it would be appropriate to consolidate the actions but, for whatever reasons, the actions are not consolidated, it might be appropriate to stay one of the actions". This draws upon an analogy to the situation where a number of suits raise a new legal issue and one is brought forward to get the issue determined while the actions rest are stayed. Unless the power to grant a stay is categorically restricted, I see no reason to accept that "the principles governing the grant of a stay are much the same as those to be considered in applications for consolidation of actions." (p. 6), such as, the issues must be identical (p. 7) or substantially the same (p. 8). Further, borrowing from the former law of *forum non conveniens*, Alberta appears to require that the proponent of the stay establish an abuse of process and that a stay will not cause an injustice to the plaintiff, the burden being on the defendant in both instances (p. 8). Respectfully, this approach is both

artificial and confused. It is artificial because a discretion is being reduced to a set of rules insensitive to various circumstances for which the discretion exists. It is confused because it selects these rules from judicial commentary, some of which is no longer good law, arising from the desperate circumstances of concurrent suits in different jurisdictions and numerous suits for which a test case needs selecting. I much favour the practical approach of the Ontario Supreme Court in *Boart Sweden*.

[9] To conclude this discussion of the law governing stays of proceedings. The stay is an ancient remedy which is inherent to the jurisdiction of this Court and which is closely connected to the inherent power to control the process of the Court. The remedy is routine where the applicant clearly establishes abuse of process or *forum non conveniens*, and it is sometimes employed to bring forward a test case in advance of others or to secure procedural fairness and efficiency where two cases must be tried separately although joint trial might normally have been more just and efficient. The power is invoked with great caution because of the plaintiff's interests in having access to the Court and in having that access as swiftly as procedural fairness allows. However, in my opinion the discretion is not restricted to categories of case or by rigid rules.

In cases like the present, the flexible approach evident in *Boart Sweden AB* is warranted. That is, the Court should start by recognizing the caution and the importance of the plaintiff's access to the Court and weigh those in the balance with other factors relevant to the question of whether a stay is just.

[10] *Conclusion*. Although the situation of the parties in this case is much the same as in *Boart Sweden*, the circumstances do not justify delaying the plaintiff in its progress towards trial. In their pre-trial brief, Mr. Merrick and Mr. Foreman summarize factors that lead to a stay in *Boart Sweden*. It is helpful in explaining my conclusion to set out those factors and contrast them with the case at hand. Mr. Merrick and Mr. Foreman wrote:

- the issues in the two proceedings were very interwoven in that the arbitration proceedings dealt with whether the disputed actions constituted a breach of contract and the court proceedings dealt with whether the ***same*** actions constituted a tort;
- the two proceedings would take place in two different countries;
- the witnesses in the one proceeding were going to be essentially the same witnesses in the second;
- there was a possibility that the same witnesses might have to testify in two countries at or about the same time;
- the parties to the arbitration were the identical parties to the legal proceeding. Therefore the applicant was being exposed to two separate proceedings and had to litigate the matter twice;

- it was anticipate that it would only take six months for the arbitration proceedings to be completed and thus the stay would be of a limited duration.

[11] Following the same order, my comments are:

- While the issues between the government and the Maritime Harbours Society are simpler than those between the government and Marineserve, they arise out of the same circumstances and the question of the Society's breach is material to all causes against Marineserve and it is essential to at least one of them. This factor may not be as strong as in *Boart Sweden*. However, it weighs significantly for a stay.

- The different jurisdictions was an important factor in *Boart Sweden* and this is not a consideration here.

- During argument it appeared that officials or employees of Marineserve may be called at the arbitration. Officials of the Society would have relevant evidence to give at a trial of the claims against Marineserve

- I do not read *Boart Sweden* as having placed much emphasis upon the chance that witnesses would be required in two parts of the world at the same time.

- It is not exactly correct to say that the parties were "identical". The tort defendants in *Boart Sweden* were not to be parties to the arbitration. However, those defendants were shareholders of the contracting party and were represented by common counsel. That factor is absent in this case.

- Unlike the relief requested here, *Boart Sweden* involved a short stay of a specific duration. We can take no assurance that the arbitration between the government and the Society will be completed in such a short time and we cannot provide a definite termination of the stay.

In addition to those considerations, other factors weigh against a stay in this case. Mr. Morrison pointed out that the advantages of a stay are that it would reduce the risk of conflicting findings and it would make it possible for parties to avoid the non-compensable expenses of litigation, such as having employees tied up in making production. These are only possibilities. If the government succeeds in the arbitration, Marineserve would not be bound by the findings. If the government fails in the arbitration, that would not necessarily put an end to the claims against Marineserve either. For one thing, it is doubtful that issue estoppel would apply. Even if it did, all tort claims would not be disposed of because wrongful interference with economic relations does not depend on a contract having been breached. Mr. Morrison suggests that, in the absence of a breach of contract there could not be any tortious damages. Not willing to speculate about how this tort may be made out, I can only say now that it is not clear to me that the measure of damages would be so restricted.

[12] Further, this action has been outstanding for a year and a half and disclosure of documents is still in controversy. When the Society applied for a stay almost a year ago, counsel for the government made it clear that the claims against Marineserve would be pursued no matter that those against the Society should

be stayed. Rather than applying for its own stay, Marineserve continued to defend and it eventually responded to demands for production by delivering a list that excluded all its financial documents. It was only after Marineserve was ordered to make production of those documents, many months after the stay had been granted respecting the Society, that Marineserve sought its stay. The delay and the timing are factors against granting a stay.

[13] I will dismiss the application of the defendant, Marineserve.mg Inc., for a stay of the proceedings against it. Counsel may address costs.

J.