IN THE SMALL CLAIMS COURT OF NOVA SCOTIA
Citation: *Darim Masonary Limited v. The Roy Building Limited*, 2021 NSSM 23

2021 Claim No. 500097

BETWEEN:

DARIM MASONARY LIMITED

Claimant

- and -

THE ROY BUILDING LIMITED

Defendant

Date of Motion Hearing:
March 5, 2021

Appearances:
Claimant – Melanie Gillis, Barrister and Solicitor
Defendant – Lisa Delaney, Barrister and Solicitor

DECISION

[1] This is a preliminary decision dealing with, effectively, the jurisdiction of this Court to proceed to hear a matter which arguably is subject to an exclusive arbitration agreement.

[2] The Claim is for $25,000 and relates to allegedly unpaid monies under a construction contract between the Claimant and the Defendant.

[3] In its written Defence, the Defendant states that the contract between the parties provides that any all and all disputes shall be submitted to mediation and then to arbitration, and that only if those contractual dispute resolution steps are met that a party may bring the matter before a court. It is stated that the Claimant did not follow the dispute resolution provisions and therefore is estopped from bringing the within claim.

[4] While it is not typical for this Court to deal with preliminary issues in a separate hearing, in this case, I took the view that the matter was a very discrete issue and largely a legal issue that could and should appropriately be dealt with in a separate hearing. As well, a decision in favour of the Defendant on this issue would be dispositive of the overall matter.

[5] As it is a matter of some legal significance, I suggested and both counsel agreed to file written briefs prior to making oral submissions which took place by video conference on March 5, 2021. I take this opportunity to thank both counsel for the excellent written submissions that were provided.

[6] After careful review of the written and oral submissions and the supporting materials, I have concluded that the motion should be dismissed and, in the result, this matter should proceed to a full hearing on the merits. My reasons for this conclusion follow.

[7] The position advanced by the Defendant is that the Claimant should be estopped from bringing this claim because it has not complied with the dispute resolution provisions in the written contract between the parties. Those provisions include mediation and arbitration of disputes and because of that, it is argued that the Nova Scotia *Commercial Arbitration Act*, SNS 1999, c. 5, applies and it prohibits the Court from acting in this matter.

[8] In evidence for this motion were excerpts from the document titled, "CCDC-17 - Stipulated Price Contract Between Owner and Trade Contractor for Construction Management Projects". This is a comprehensive contractual document issued by the Canadian Construction Documents Committee of the Canadian Construction Association. These forms of contract are apparently used by members of the Association and/or those who purchase the right to use the documents.

[9] There are some 12 Parts to the contract including Part 8 – Dispute Resolution and, in particular, GC 8.2 which is headed "Negotiation, Mediation and Arbitration." Of most relevance here are the arbitration provisions as follows:

> 8.2.6 By giving a *Notice in Writing* to the other party and the *Construction Manager*, not later than 10 *Working Days* after the date of termination of the mediated negotiations under paragraph 8.2.5, either party may refer the dispute to be finally resolved by arbitration under the latest edition of the Rules for Mediation and Arbitration of Construction Disputes as provided in CCDC 40 in effect at the time of bid closing. The arbitration shall be conducted in the jurisdiction of the *Place of Project*.
>
> 8.2.7 On expiration of the 10 *Working Days*, the arbitration agreement under paragraph 8.2.6 is not binding on the parties and, if a *Notice in Writing* is not given under paragraph 8.2.6 within the required time, the parties may refer the unresolved dispute to the courts or to any other form of dispute resolution, including arbitration, which they have agreed to use.

[10] In this present case, the parties did not follow the mediation provisions and, most significantly, no "Notice in Writing" as per Article 8.2.6 was given. Therefore, by the clear wording of Article 8.2.7 the arbitration agreement was not binding on the parties and, to use the wording of 8.2.7 the "…parties may refer the unresolved dispute to the courts…."

[11] This conclusion is supported by case law; see the cases of *Millennial Construction Ltd. v. 1021120 Alberta Limited*, 2005 ABQB 533 and *Campbell Construction Ltd. v. Abstract Construction Inc.*, 2019 BCSC 113.

[12] I note the argument of the Defendant that the preceding articles under Part 8 are necessary preconditions to litigation. This is contrary to case authority. I take the liberty of quoting in full paragraph 23 of the Claimant's March 1 brief:

> 23. The Roy suggests in their submissions that the preceding articles under Part 8 are preconditions to litigation, and that until they are exhausted, they are entitled to a stay. This is incorrect. They are preconditions to arbitration only, not litigation. The fact that the provisions under Part 8 were not followed is detrimental only to the parties' right to arbitrate, not to their right to refer the dispute to the courts which is expressly preserved under Article 8.2.7. This much was explained in the case of *A.G. Clark Holdings Ltd. v. HOOPP Realty Inc.*, 2012 ABQB 567 (Tab 4) as follows:
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> > 33. The language in the Design-Build Agreement does not make arbitration mandatory. Arbitration is not an automatic right, or obligation, under the Design-Build Agreement. It is only available, or required, for those disputes which are still outstanding after the parties follow the other steps in Part 8. These steps are preconditions to Arbitration. This interpretation of the Dispute Resolution process is consistent with the overall structure and wording of Part 8 of the Design-Build Agreement.
> >
> > 34. In this case, the parties chose not to use Part 8 of the Design-Build Agreement. They did not appoint a Consultant or a Project Mediator. It is now too late to start the process and the preconditions to Arbitration cannot be fulfilled. Arbitration no longer remains alive as a contractual right.
> >
> > …
> >
> > 38. In summary, I find that the Design-Build Agreement did not make arbitration mandatory for this dispute. Further, Section 7(1) of the Arbitration Act does not apply as only mandatory arbitration clauses are subject to Section 7 of the Arbitration Act.

[13] I consider this a full answer to the Defendant's motion.

[14] Before concluding, I will mention, without deciding, the other issue raised in this motion. That is, the issue of whether Section 14 of the *Small Claims Court Act* trumps Section 8 and 9 of the *Commercial Arbitration Act*. Section 14 of the *Small Claims Court Act* reads:

> Void Provision in agreement
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> 14(1) Except as otherwise provided in an enactment, any provision or acknowledgement in an agreement is void if
>
> > (a) in any way purports to exclude, limit or vary the jurisdiction of the Court;
> > (b) provides for the place of hearing of a claim, matter or proceeding under this Act to be at a place other than as permitted by this Act; or
> > (c) states that the provisions of this Act or the regulations do not apply.
>
> (2) Where a provision or acknowledgement contrary to this Act is a term of an agreement, it shall be severable therefrom.

[15] Sections 8 and 9 of the *Commercial Arbitration Act* read as follows:

> 8 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:

(a) to assist in the arbitration process;
(b) to ensure that an arbitration is carried out in accordance with the arbitration agreement;
(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
(d) to enforce awards.

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.

(3) An arbitration of the matter in dispute may be commenced or continued while the motion pursuant to subsection (1) is before the court.

(4) Where the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued and anything done in connection with the arbitration, before the refusal of the court, is without effect.

(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if the court finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

(6) There is no appeal from the decision of the court pursuant to this Section.

[16] In its submission, the Defendant notes the beginning words of Section 14 – “except as otherwise provided in an enactment…” and submits that the *Commercial Arbitration Act* is an enactment and therefore its provisions supersede Section 14 of the *Small Claims Court Act*. It goes on to refer to policy arguments and certain interpretative aids to support its interpretation.

[17] For its part, the Claimant refers to the definition of "court" in the *Commercial Arbitration Act* which reads:

> "court" means,
>
> (i) in Sections 8 and 9, the Supreme Court of Nova Scotia and the Provincial Court of Nova Scotia, and
> (ii) in all other Sections, the Supreme Court of Nova Scotia.

[18] The Claimant argues that the drafters of the *Commercial Arbitration Act* could have left the word "court" term undefined in which case it would likely be applicable to all courts of the Province, including the Small Claims Court. But, they did not. Rather there is a specific definition and a definition which, by use of the word "means" is all inclusive. It is argued that the presumption against redundant provisions in the legislation and against implied terms should both apply with a result that the *Commercial Arbitration Act* would be seen to not apply to the *Small Claims Court Act*, since the definition of court does not include the Small Claims Court.

[19] I would note as well that under the *Provincial Court Act*, RSNS 1989, c. 238, Section 2A states:

> 2A There is hereby established a court of record to be known as the Provincial Court of Nova Scotia.

[20] Based on this, if there was any doubt, it is clear to me that the Provincial Court of Nova Scotia is distinct and wholly different Court than the Small Claims Court.

[21] In the Claimant's brief, a reference is made to previous Small Claims Court decisions said to support its position including *VanAmburg v. Halifax County Condominium Corporation*, No. 267, 2007, NSSM 23; *Tulloch v. Amerispec Home Inspection Services*, 2006, NSSM 48; and *Custom Clean Atlantic Ltd. v. GSF Canada Inc.*, 2016, NSSM 17.

[22] As I read these cases, none of them dealt with the exact issue raised herein which is the apparent inconsistency between Section 14 of the *Small Claims Court Act* and Sections 8 and 9 of the *Commercial Arbitration Act*.

[23] In all events, the issue of the apparent inconsistency between these two statutes is best left to a case where the facts necessitate a decision on that sole issue and given my conclusion above, I find it unnecessary to make that decision in this present case.

[24] In summary therefore, I dismiss the motion and direct that the proceed proceeding to a hearing on the merits which should be organized shortly.

DATED at Halifax, Nova Scotia, this 28th day of April, 2021.

MICHAEL J. O'HARA
ADJUDICATOR