Federal Court of Appeal | Cour d'appel fédérale

Date: 20230626

Docket: A-76-22

Citation: 2023 FCA 148

CORAM: **WEBB J.A.**
RENNIE J.A.
LOCKE J.A.

BETWEEN:

GENERAL ENTERTAINMENT AND MUSIC INC.

Appellant

and

GOLD LINE TELEMANAGEMENT INC., GLWIZ INC., AVA TELECOM LIMITED, ATA MOEINI, SHAWN REYHANI, ARASH BAFEKR and VIDA SHARIFIPOUR D.B.A. GLOBAL FILM AND MEDIA

Respondents

Heard at Toronto, Ontario, on March 16, 2023.

Judgment delivered at Ottawa, Ontario, on June 26, 2023.

REASONS FOR JUDGMENT BY: WEBB J.A.

CONCURRED IN BY: RENNIE J.A.
LOCKE J.A.

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REASONS FOR JUDGMENT

WEBB J.A.

[1] The proceedings commenced in the Federal Court by General Entertainment and Music Inc. (GEM) against the defendants were stayed in favour of arbitration in Bermuda by a Judgment of the Federal Court (2022 FC 418, *per* Fothergill J.). GEM is appealing this decision of the Federal Court.

[2] For the reasons that follow, I would dismiss this appeal.

I. Background

[3] The underlying proceeding is a claim filed in the Federal Court by GEM for copyright and trademark infringement. There are related claims for violations of certain sections of the *Copyright Act*, R.S.C. 1985, c. C-42 and the *Radiocommunication Act*, R.S.C. 1985, c. R-2.

[4] GEM broadcasts 28 television channels in the Farsi language to customers through subscription satellite services. GEM asserts that it owns a copyright in various television series, movies and other cinematographic works that it produced or that it acquired from other producers.

[5] Prior to relocating to Canada, the GEM group of companies was based in Istanbul, Turkey and Dubai, United Arab Emirates. The operations were carried out primarily through General Entertainment and Media Advertising Agency LLC (GEMCO). GEMCO is identified in the Statement of Claim as the predecessor-in-title to the copyright and trademarks alleged to be infringed.

[6] Gold Line Telemanagement Inc. (Gold Line) is the parent company of the other two corporate respondents: GLWiZ Inc. and Ava Telecom Inc. (Ava). The three corporate respondents collectively provide streaming services for television channels and video on demand through smart TV apps, mobile device apps, websites and set-top boxes.

[7] A Content Acquisition and Licensing Agreement (the Licensing Agreement) was executed in 2013 between Ava and "General Entertainment and Media", who was identified as the "Licensor". Under this Licensing Agreement, Ava acquired the right to offer to its customers audio and video content (including television programs) produced or licensed by General Entertainment Media.

[8] Gold Line alleges that it assisted GEMCO with various corporate endeavours which resulted in "General Entertainment and Media" owing a significant amount to Gold Line. It is Gold Line's position that the Licensing Agreement was entered into, in part, to compensate Gold Line for services rendered to GEMCO.

[9] The Licensing Agreement included an arbitration clause stipulating that the governing law was the law of Bermuda and that any dispute was to be settled by arbitration in Bermuda. The Licensing Agreement also included a clause allowing either party to terminate the agreement on six months' notice.

[10] The Federal Court noted, at paragraph 20 of his reasons, that on October 17, 2015, the General Manager of "Gem Group TV" sent an e-mail to Ava purporting to terminate the Licensing Agreement effective immediately. In the record there is a letter addressed to "General Entertainment and Media" dated October 22, 2015, in which Ava's VP Operations indicates that Ava does not accept the notice to terminate the Licencing Agreement. The letter noted that the Licensing Agreement contemplated six months' notice of any termination. Ava added that there was still an amount payable by "General Entertainment and Media" to Ava. Ava stated that it

would continue to broadcast the content until the account was cleared. Gold Line continued to treat the Licensing Agreement as being in place until March 2019.

[11] GEM filed a Statement of Claim in the Federal Court on March 5, 2021. Following requests for particulars and the responses provided by GEM, Gold Line, on April 23, 2021, sent a request to GEM to stay the proceedings in Federal Court in favour of arbitration in Bermuda as contemplated by the Licensing Agreement. On May 6, 2021, GEM refused this request. On June 9, 2021, Gold Line delivered its defence and counterclaim.

[12] In its defence, Gold Line submits that the proper forum for resolving the dispute is not the Federal Court, but rather arbitration in Bermuda as provided in the arbitration clause set out in the Licensing Agreement. On June 25, 2021, Gold Line commenced arbitration in Bermuda.

II. Decisions of the Case Management Judge (the Associate Judge) (Federal Court Docket: T-410-21)

[13] Gold Line, GLWiZ Inc., Ava and three individuals, Ata Moeini, Shawn Reyhani, and Arash Bafekr brought a motion for a stay of the proceedings in the Federal Court pending arbitration in Bermuda. The three individuals also sought an order striking them from the Statement of Claim. There is no indication that Vida Sharifipour, doing business as Global Firm and Media (who is also one of the defendants to the claim in the Federal Court), joined in this motion.

[14] The Associate Judge dismissed the motion to stay the proceedings. Ata Moeini, Shawn Reyhani, and Arash Bafekr were also struck from the Statement of Claim without prejudice and with leave to amend. There was no indication that there was an appeal from the Order striking these three individuals from the Statement of Claim. It is not clear why the style of cause in the appeal to the Federal Court and in the appeal to this Court includes these three individuals.

[15] In dismissing the motion to stay the proceedings, the Associate Judge noted that she was not satisfied that GEM was bound by the Licencing Agreement and that the defendants had taken steps to advance the litigation. She also found that the Licencing Agreement had been terminated and that the rights involved included copyright in works created after January 1, 2018 which could not have been owned by GEMCO or subject to the Licencing Agreement.

III. Appeal to the Federal Court (2022 FC 418)

[16] Gold Line, GLWiZ Inc. and Ava appealed the Order of the Associate Judge to the Federal Court. The Federal Court Judge found that, in arguing the motion before the Associate Judge, the parties had agreed that the decision of the Supreme Court of Canada in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27 (*Pompey*) governed the exercise of discretion in relation to granting the stay. In *Pompey* the Supreme Court identified the appropriate test to be applied to determine if a stay of proceedings should be granted to enforce a forum selection clause in a bill of lading. In paragraph 3 of his reasons, the Federal Court Judge set out the test in *Pompey*:

> According to that authority, once a court is satisfied that a validly executed forum selection clause binds the parties, it must grant the stay unless the plaintiff can show sufficiently "strong cause" to support the conclusion that it would not be reasonable or just in the circumstances to require the plaintiff to adhere to the terms of the clause.

[17] The Federal Court Judge found that the test in *Pompey* was not the appropriate test. Rather, he found that the appropriate principles to be applied to determine if a stay should be granted in favour of arbitration are those set out by the Supreme Court in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 (*Dell*) and *Uber Technologies Inc. v. Heller*, 2020 SCC 16 (*Uber*).

[18] In the matter under appeal, GEM is challenging the application and the validity of the Licencing Agreement. The Federal Court Judge found that there are complex issues of mixed fact and law raised by the parties which must first be considered by the arbitrator. The validity of the arbitration clause could not be determined based on a superficial review of the record.

[19] The Federal Court Judge also found that the Associate Judge did not make a specific finding that Gold Line had attorned to the jurisdiction of the Federal Court.

[20] As a result, the appeal was allowed by the Federal Court Judge and the stay was granted.

IV. Issues and Standards of Review

[21] GEM raises two issues in its memorandum of fact and law:

(a) whether the Federal Court Judge erred in failing to consider and apply the finding of the Associate Judge that GEM was not bound by the Licencing Agreement; and

(b) whether the Federal Court Judge erred in finding that Gold Line's conduct in litigating the Federal Court action was irrelevant to whether or not Gold Line was entitled to a stay of the proceedings.

[22] As this Court found in *Hospira Healthcare Corp. v. Kennedy Institute of Rheumatology*, 2016 FCA 215, the applicable standards of review are those as set out in *Housen v. Nikolaisen*, 2002 SCC 33. The standard of review for any question of fact or mixed fact and law is palpable and overriding error and for any question of law is correctness.

V. Analysis

A. *Factual Findings of the Associate Judge*

[23] GEM emphasized in its memorandum and in the hearing of this appeal that it was incorporated after the Licencing Agreement was signed and, therefore, argued that it is not bound by this Agreement. GEM also submits that, in any event, the Licencing Agreement was terminated. The findings of the Associate Judge related to the Licencing Agreement are set out in the following paragraphs of her Order:

> The relationship between the parties and the various contractual arrangements are certainly complicated. It is made more difficult to understand or unravel given the urgency with which the Karimian family [who managed the GEM group] needed to resettle (submissions were made regarding lost documents and records), the blurring of what is a family run business and separate corporate entities and the various arrangements between the Plaintiff or GEMCO and one or more of the

> Defendants. In any event, it has not been established that GEM Inc. is a successor in title in all respects/aspects to GEMCO or that GEM Inc. is bound by the terms of the Content Acquisition and Licensing Agreement.
>
> …
>
> In addition, I note that the motion for the stay is based entirely on the Content Acquisition and Licensing Agreement. The application of the Content Acquisition and Licensing Agreement, however, requires a finding that the Agreement has not been terminated. I am satisfied that valid notice was given and that the Agreement terminated on April 17, 2016. Its application also requires a determination that GEMCO and GEM Inc. are essentially the same party for the purposes of the Agreement, which again I am satisfied that they are not, nor has it been established that GEM Inc. is otherwise bound by the Content and Acquisition and Licensing Agreement.

[24] The issue in this appeal is, however, whether it was appropriate for the Associate Judge to make these findings of fact or mixed fact and law. The Associate Judge did not refer to any decisions of any court in her Order, not even the decision of the Supreme Court in *Pompey* which the Federal Court Judge found that the parties had submitted to the Associate Judge as the relevant authority.

[25] Since this is a request for a stay in favour of arbitration, the decisions of the Supreme Court that address this issue are relevant. In particular, in *Uber*, the majority of the Supreme Court stated:

> [34] The doctrine established in *Dell* is neatly summarized in its companion case, *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 (CanLII), [2007] 2 S.C.R. 921, at para. 11:
>
> > The majority of the Court held that, when an arbitration clause exists, any challenges to the jurisdiction of the arbitrator must first

> be referred to the arbitrator. Courts should derogate from this general rule and decide the question first only where the challenge to the arbitrator's jurisdiction concerns a question of law alone. Where a question concerning jurisdiction of an arbitrator requires the admission and examination of factual proof, normally courts must refer such questions to arbitration. For questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration.

[26] Questions of fact or mixed fact and law related to the jurisdiction of the arbitrator to decide the relevant issues must first be referred to the arbitrator. This would include, in this matter, whether the Licencing Agreement was terminated and whether GEM is bound by this agreement. As noted by the Associate Judge, "[t]he relationship between the parties and the various contractual arrangements are certainly complicated".

[27] Sorting through the evidence to determine whether GEM is bound by the Licencing Agreement, and hence by the arbitration clause, is not a matter that should have been addressed by the Associate Judge. The questions of fact and mixed fact and law that must be addressed in order to determine if the Licencing Agreement was terminated and if GEM is bound by the Licencing Agreement cannot be resolved by a superficial examination of the documentary proof given the complexity of the arrangements among the various entities and the use of multiple names used by the GEM group:

- GEM is claiming copyright infringement for works that were created before it was incorporated but yet maintaining that it is not bound by the Licencing Agreement;

- "General Entertainment and Media" was the party to the Licencing Agreement;
- GEMCO is identified as the predecessor in title to some of the copyright in issue;
- The email purporting to terminate the Licencing Agreement was sent by the General Manager of "Gem Group TV".

[28] The Federal Court Judge did not apply the findings made by the Associate Judge that GEM was not bound by the Licencing Agreement and that the Licencing Agreement was terminated. Since these issues should not have been addressed by the Associate Judge, the Federal Court Judge did not err in rendering his decision without applying these findings made by the Associate Judge.

B. *Conduct in Defending the Claim*

[29] GEM submits that Gold Line should not be entitled to a stay as a result of the various steps it has taken in the Federal Court proceedings. GEM also submits that the Federal Court Judge erred by not addressing whether Gold Line had waived its right to arbitration as a result of the steps taken by Gold Line in this matter before it brought a motion for a stay in favour of arbitration.

[30] In the recent decision of the Supreme Court in *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41, (*Peace River*) the majority of the Supreme Court set out the framework for stays in favour of arbitration:

[76] There are two general components to the stay provisions in provincial arbitration legislation across the country. As the framework is similar across jurisdictions, it will be useful to provide a general overview before turning to the interpretation of s. 15 of the *Arbitration Act* itself. The two components are as follows:

(a) the technical prerequisites for a mandatory stay of court proceedings; and

(b) the statutory exceptions to a mandatory stay of court proceedings.

[77] Though interrelated, these two components ought to remain analytically distinct. This distinction is necessary because the burden of proof shifts between the first component and the second.

[78] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof (McEwan and Herbst, at § 3:43; *Hosting Metro Inc. v. Poornam Info Vision Pvt, Ltd.*, 2016 BCSC 2371, at paras. 29-30 (CanLII)).

[79] If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused (McEwan and Herbst, at § 3:43; Casey, at ch. 3.4). Otherwise, the court must grant a stay and cede jurisdiction to the arbitral tribunal.

[80] I will briefly elaborate on each component and its respective standard of proof.

(1) Technical Prerequisites

[81] The first component is concerned with whether the applicant for a stay has established that the arbitration agreement at issue engages the mandatory stay provision in the applicable provincial arbitration statute.

[82] Considerations at this stage may differ depending on the jurisdiction and the nature of the arbitration (i.e., whether it relates to domestic or international arbitration). Broadly speaking, however, this threshold inquiry requires the court to determine whether the party seeking to rely on the arbitration agreement has established the technical prerequisites for a stay in favour of arbitration.

> [83] There are typically four technical prerequisites relevant at this stage:
>
> (a) an arbitration agreement exists;
>
> (b) court proceedings have been commenced by a "party" to the arbitration agreement;
>
> (c) the court proceedings are in respect of a matter that the parties agreed to submit to arbitration; and
>
> (d) the party applying for a stay in favour of arbitration does so before taking any "step" in the court proceedings.
>
> If all the technical prerequisites are met, the mandatory stay provision is engaged and the court should move on to the second component of the analysis.
>
> [84] It is important to note that the standard of proof applicable at the first stage is lower than the usual civil standard. To satisfy the first component, the applicant must only establish an "arguable case" that the technical prerequisites are met (McEwan and Herbst, at § 3:47; *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379, 18 B.C.L.R. (6th) 322, at paras. 26 and 32, citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 1992 CanLII 4033 (BC CA), 66 B.C.L.R. (2d) 113 (C.A.), at paras. 39-40).

[31] In the appeal before us, only the technical prerequisites are relevant.

[32] In his reasons, the Federal Court Judge noted that "[t]he burden on a plaintiff seeking to escape an arbitration clause is high". In *Peace River*, the Supreme Court stated:

> the standard of proof applicable at the first stage is lower than the usual civil standard. To satisfy the first component, the applicant must only establish an "arguable case" that the technical prerequisites are met.

Therefore, the burden is on the party seeking the stay (which would generally not be the plaintiff) and the burden is only to establish an arguable case that the technical prerequisites are met.

[33] In *Peace River*, the relevant provincial arbitration legislation was the *Arbitration Act* of British Columbia, which is not applicable in the case before us. The role that the fourth technical prerequisite identified in *Peace River* can play in denying a stay is illustrated by the decision of the Alberta Court of Appeal in *O'Hara v. Wawanesa Mutual Insurance Company*, 1990 ABCA 259 (*O'Hara*). In that case, the insurance contract provided that any claim for indemnification would be resolved by agreement and, failing that, by arbitration. The insured commenced an action against the insurance company. The insurance company filed a defence in which it referred to the arbitration clause but also addressed the merits of the claim.

[34] The Chambers Judge granted a stay in favour of arbitration but the Court of Appeal overturned the decision of the Chambers Judge. The Court of Appeal referred to sections 3 and 4 of the *Arbitration Act*, RSA 1980 c. A-43. In particular, section 3 stipulated that the application for a stay in favour of arbitration had to be brought before the party requesting the stay filed any pleadings or took any other step in the proceeding. Filing the defence precluded the insurance company from making an application for a stay in favour of arbitration.

[35] The decision to deny the stay in *O'Hara* was based on the particular wording of the *Arbitration Act* of Alberta that required the stay application to be made before the delivery of any pleadings or the taking of any other step in the proceeding.

[36] In the matter before us, none of the parties referred to any *Arbitration Act* that is applicable.

[37] The *United Nations Foreign Arbitral Awards Convention Act*, R.S.C. 1985, c. 16 (2nd Supp.) (*Convention Act*) approved the *Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, adopted by the United Nations Conference on International Commercial Arbitration in New York on June 10, 1958, (the Convention) as set out in the schedule attached to the *Convention Act* and declared the Convention to have the force of law in Canada (section 2).

[38] While the Convention generally relates to the recognition and enforcement in a particular country of arbitral awards made in another country, Article II of this Convention requires each Contracting State (which includes Canada) to respect arbitration provisions:

> 1 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.
>
> 2 The term "agreement in writing" shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams.
>
> 3 The court of a Contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of this article, shall, at the request of one of the parties, refer the parties to arbitration, unless it finds that the said agreement is null and void, inoperative or incapable of being performed.

[39] Gold Line submitted that the Convention requires the Federal Court to refer the matter to arbitration once the first three technical prerequisites identified by the Supreme Court in *Peace River* have been identified, unless the Federal Court finds that the applicable agreement is null and void, inoperative or incapable of being performed. The question of whether a party has taken a step in the Federal Court proceeding (the fourth technical prerequisite identified in *Peace River*) does not arise under the Convention.

[40] I agree with the submissions of Gold Line that the fourth technical prerequisite identified by the Supreme Court in *Peace River* (that the party seeking the stay not have taken any step in the court proceedings before applying for the stay) is not a technical prerequisite in the matter before us. The wording of the Convention adopted in the *Convention Act* does not include this particular restriction and the parties did not identify any other statute that imposes this particular restriction.

[41] There is also no similar restriction in section 50 of the *Federal Courts Act*, R.S.C. 1985, c. F-7:

50 (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	**50 (1)** La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or	*a*) au motif que la demande est en instance devant un autre tribunal;
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.	*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige.

[42] There is no statutory provision that would require Gold Line to apply for a stay before it files a defence or a counterclaim.

[43] GEM submits that the actions of Gold Line in the Federal Court proceeding resulted in Gold Line waiving its right to seek arbitration. The Federal Court Judge did not explicitly state that Gold Line had not waived its right to arbitration. However, the Federal Court Judge noted, in paragraph 24, that prior to filing a defence Gold line had sent a request to GEM to consent to a stay in favour of arbitration, and in filing its defence, Gold Line specifically pled that the Federal Court is not the proper forum and that the dispute should be resolved by arbitration. Gold line did not waive its right to arbitration.

VI. Conclusion

[44] I would dismiss the appeal with costs.

"Wyman W. Webb"
J.A.

"I agree.
Donald J. Rennie J.A."

"I agree.
George R. Locke J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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