Date: 20231218
Docket: CI 21-01-33885
(Winnipeg Centre)
Indexed as: Field Farms Marketing Ltd. v. Zeghers Seed Inc.
Cited as: 2023 MBKB 183

2023 MBKB 183 (CanLII)

COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

FIELD FARMS MARKETING LTD.,	) D. Tomas Masi
	) Paul R. Kathler
applicant,	) for the applicant
- and –	)
ZEGHERS SEED INC. and ZEGHERS SEED INC. o/a ZEGHERS CANADA,	) Maria L. Grande
	) for the respondent
respondent.	)
	) JUDGMENT DELIVERED:
	) December 18, 2023

GREENBERG J.

INTRODUCTION

[1] The applicant seeks an order declaring that the dispute between it and the respondent, over a contract for the sale of spelt, be arbitrated before the National Grain and Feed Association ("NGFA") pursuant to an arbitration clause in the contract. The respondent says that it never agreed to an arbitration clause and, in any event, if it did agree to that clause, there is no need for this court to grant an order declaring so. The applicant can simply file a complaint before the NGFA. The respondent says that the

reason the applicant is seeking an order from this court directing that the matter go to arbitration is to overcome the limitation period under the NGFA rules, which period has lapsed.

[2] For the reasons that follow, I am dismissing the application.

BACKGROUND

[3] In March 2020, the parties entered into a contract pursuant to which the applicant was to sell a quantity of spelt to the respondent for delivery to the respondent's client in Israel. The contract contained a number of specifications regarding the quality of the spelt. On April 24, 2020, after receiving a certificate of analysis on the spelt, the respondent refused to accept the spelt. The respondent says that the spelt did not meet the specifications in the contract and was not fit for human consumption. However, the spelt had already been delivered to Israel. Although the respondent rejected the product, the applicant arranged to sell it directly to the respondent's client in Israel, for a significantly reduced price (USD $32,000), to use as animal feed. The applicant says that the respondent owes it the balance of the contract price (USD $152,000).

[4] When the respondent refused payment, the applicant made a claim on its receivable insurance. On May 21, 2020, the respondent was contacted by the insurance adjuster. The respondent advised the adjuster of the history of the transaction. The respondent heard nothing further from the adjuster. On January 25, 2021, the applicant sent a demand letter to the respondent. The respondent did not respond with payment. The applicant then referred the matter to a collection agency who contacted the respondent and sent a further demand notice to the respondent. The respondent's lawyer

2023 MBKB 183 (CanLII)

advised the collection agency of the background and the collection agency did not pursue it. During all of this, neither the applicant, nor the insurance company, nor the collection agency mentioned arbitration to resolve the dispute between the parties.

[5] The respondent heard nothing further on the matter until the applicant filed this application requesting a declaration that the dispute should proceed to arbitration by the NGFA.

The NGFA

[6] The NGFA is a trade association based in the United States that offers arbitration services to grain businesses. The applicant is a member of the NGFA. The respondent is not. The arbitration rules of the NGFA allow it to consider a dispute between a member and a non-member "by consent of both parties or by court order."

[7] The NGFA rules provide that an arbitration complaint must be filed with the NGFA within 12 months after a claim arises or within 12 months after the expiration date for the performance of the contract, whichever occurs last. Where a court orders arbitration between a member and non-member, the complaint can be filed within 30 days of the issuance of the order, even if the 12-month period has elapsed.

The Contract

[8] As I said, in March 2020, the parties entered into a contract for the sale of spelt. The spelt was to be delivered between March 31 and June 30, 2020. The spelt was shipped from Liverpool on April 1, 2020. It was rejected by the respondent on April 24, 2020.

2023 MBKB 183 (CanLII)

[9] The applicant says that it was a term of the contract that disputes under the contract would be arbitrated by the NGFA. The contract is a one-page document setting out the buyer's name and contact information, the product description, quantity, shipping and packing units, shipping schedule, pricing, currency, payment terms and destination. It is signed by both parties at the bottom and dated. Underneath the signatures, in small print, is the following:

> The General Sales Terms of Field Farm Marketing Ltd. ("GST") are hereby incorporated by reference in this Sales Agreement with the same force and effect as if the GST were fully set forth here at length. The GST are hereby made a material part of this Sales Agreement. A copy of the GST is available upon request from Field Farms Marketing Ltd. or can be viewed and/or downloaded from the Field Farms Marketing Ltd. website at: [website omitted]

[10] In comparison to the one page contract signed by the parties, the GST of Field Farms is four pages of very small print containing 37 clauses, one of which provided that disputes between the parties would be resolved by arbitration by the NGFA.

[11] The respondent had not dealt with the applicant before this contract was negotiated. They say that they never saw the GST, were unaware of the arbitration clause and did not agree to it.

POSITION OF THE PARTIES

[12] The applicant asks the court to determine the proper forum for the resolution of its dispute with the respondent. It acknowledges that that determination would require the court to interpret the provisions of the contract between the parties. The respondent says that I have jurisdiction to interpret the contract on the basis of King's Bench Rule 14.05. That rule allows a litigant to proceed by application where they request the

2023 MBKB 183 (CanLII)

interpretation of the terms of a contract. The rule is simply a procedural rule. It does not give the court jurisdiction. However, s. 34 of ***The Court of King's Bench Act***, C.C.S.M. c. C280, gives the court jurisdiction to grant declaratory relief.

[13] The respondent says that this court does not have jurisdiction to decide this issue. The determination of the jurisdiction of the NGFA, including whether the parties agreed to arbitration by it, must be dealt with by the NGFA arbitrator once a complaint is filed. Further, the respondent says that, if the court accepts that the respondent agreed to an arbitration clause, the court should not grant the relief requested since the applicant failed to comply with the NGFA rules and file a complaint within the time limits prescribed therein.

ANALYSIS

[14] The applicant offered no explanation for not filing a complaint with the NGFA. It seems to suggest that it requires a court order to establish the jurisdiction of the NGFA. However, the respondent referred to arbitration decisions of the NGFA in the applicant's favour in situations similar to the case at bar, that is to say, where the defendant was not a member of the NGFA but had signed a contract agreeing to arbitration by it. In those decisions, the NGFA assumed jurisdiction on the basis of the contract, not because there was a court order. The applicant would have had no reason to believe that, had it filed a complaint in this case, the respondent would challenge the jurisdiction of the NGFA. The applicant would not have known that the respondent disputed the existence of an arbitration clause in the contract until it served the respondent with this Notice of Application.

2023 MBKB 183 (CanLII)

Do I have jurisdiction to grant the relief claimed?

[15] The type of order that the applicant seeks - a finding that the dispute must go to arbitration - is usually sought in the context of a stay application by a defendant where a plaintiff has filed a claim for breach of a contract that contains an arbitration clause. There is no such claim before the court. This application is a "free standing" request for a declaration as to the proper forum when there is no apparent need for that order.

[16] The applicant concedes that a declaration as to the proper forum would require the court to interpret the contract between the parties and that, based on the "competence-competence principle", this is an issue that is usually determined by the arbitrator. It relies on an exception to the competence-competence principle, which applies where the determination of an issue depends on a question of law or mixed fact and law and the factual questions can be decided on the basis of documentary evidence. The Supreme Court has recently commented on the principle in ***Peace River Hydro Partners v. Petrowest Corp.***, 2022 SCC 41, per Coté J.:

> (1) General Principle
>
> [39] Competence-competence is a principle that gives precedence to the arbitration process. It holds that, generally speaking, "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction" …
>
> . . .
>
> [41] In light of the foregoing, it is well established in Canada that a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator … This reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement ...
>
> (2) Exceptions to the Competence-Competence Principle
>
> [42] The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves

2023 MBKB 183 (CanLII)

> pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record . .. This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate"
>
> [references omitted]

[17] The exceptions to the competence-competence principle do not assist the applicant here. While the interpretation of a contract is a question of mixed fact and law (***Sattva Capital Corp. v. Creston Moly Corp.***, 2014 SCC 53), the facts in this case are contentious. The issue cannot be decided based on a superficial consideration of the record. Nor is it appropriate to use Rule 14.05 where there are contentious facts. That is to say, even if I have jurisdiction to interpret the contract, I would not do so on the basis of affidavit evidence. The trial of an issue would be required.

[18] The applicant relies on ***Razar Contracting Services Ltd. v. Evoqua Water***, 2021 MBQB 69, where the court did exercise jurisdiction to determine whether the contract between the parties contained an arbitration clause. But, in that case, the court found that the material facts were not disputed (see para. 29).

[19] I note that, while the applicant says that I have jurisdiction to determine whether the contract contains an arbitration clause, it says that I cannot determine whether the limitation period in the NGFA rules has expired, even though on that issue the facts do not appear to be contentious. This is a convenient position for the applicant to take since, as I explain below, a declaration in its favour on the issue of the proper forum would extend the limitation period.

2023 MBKB 183 (CanLII)

[20] The applicant also relies on ***The International Commercial Arbitration Act***, C.C.S.M., c. C151, which, the applicant says, applies to the alleged arbitration clause in the contract here. That Act adopts the ***Uncitral Model Law on International Commercial Arbitration***. Article 8 of the ***Model Law*** provides:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.
>
> 1. Le tribunal saisi d'un différend sur une question faisant l'objet d'une convention d'arbitrage renverra les parties à l'arbitrage si l'une d'entre elles le demande au plus tard lorsqu'elle soumet ses premières conclusions quant au fond du différend, à moins qu'il ne constate que ladite convention est caduque, inopérante ou non susceptible d'être exécutée.
>
> [emphasis added]

[21] Article 8 allows a defendant to seek a stay of proceedings where an action has been commenced to enforce a contract and that contract provides for international arbitration. The article does not add anything to King's Bench Rule 21.01, which also allows for a stay of proceedings in those circumstances. In any event, both Article 8 and Rule 21.01 apply only where an action has been commenced in this court. They do not give the court jurisdiction to order that a matter proceed to arbitration where there is no pending proceeding before the court.

Limitation Period

[22] Assuming that the respondent did agree to arbitration, that arbitration would be subject to the NGFA rules, which include the limitation period referred to earlier. The respondent says that the limitation period expired on April 24, 2021, 12 months after the

2023 MBKB 183 (CanLII)

respondent refused to accept the grain. At the latest, it expired on June 30, 2021, 12 months after the expiration date for performance of the contract. The applicant filed this Notice of Application on December 30, 2021. The applicant argues that I have no jurisdiction to determine if the limitation period has expired but says that, if I grant the order requested, it will rely on the NGFA rule that allows 30 days from the issuing of an order to file a complaint. As I said, the applicant provided no explanation as to why it did not file a complaint before the NGFA within the timeframe allowed. There appears to be no reason to bring this application except to get around the limitation period that would otherwise bind the applicant.

[23] What the applicant is effectively seeking is an order extending the limitation period for filing a complaint with no explanation as to the merits of that request. The applicant has framed its application as a request for a declaration as to the proper forum to resolve its dispute with the respondent, but it is seeking that declaration in order to trigger the 30-day extension to the limitation period that would otherwise apply.

CONCLUSION

[24] The question of what is the proper forum to determine the dispute between the parties depends on the terms of the contract and whether the respondent agreed to arbitration. That issue should be decided by an NGFA arbitrator once a complaint is filed. The applicant chose not to file a complaint. Even if my jurisdiction were not restricted by the competence-competence principle, I would not exercise my discretion to consider the issue. While the court has broad discretion to grant declaratory relief, it should not do so in the absence of a genuine issue requiring determination (***Glass v. Shelter Canadian***

2023 MBKB 183 (CanLII)

Properties Limited et al, 2013 MBQB 132). There was no need to bring this application. The applicant could have simply proceeded with a complaint before the NGFA. As I said, it appears this application was brought to overcome the missed limitation period. The comments of Harvison Young J. in ***Bailey v. Canada (Attorney General)***, [2008] O.J. No. 4066 (S.C.) (QL) are apt here:

> 14 At its heart this aspect of the declaration seeks to challenge the validity of the 1994 transaction in which Cameco purchased the property from Bud's Auto. The time period for a direct attack on the 1994 property transaction has expired. Pursuant to s. 24 of the *Limitations Act*, any claim challenging that transaction would had to have been commenced prior to December 22, 2000, being 6 years after the transaction. A declaration would accordingly be inappropriate: "[i]f a plaintiff could avoid the *Limitations Act* by the simple stratagem of asking for a declaration of a state of affairs that is not disputed, and then attaching remedial relief to that declaration, there would not be much left of the Act." (*Yellowbird v. Samson Cree Nation No. 444*, [2006] A.J. No. 721, 2006 ABQB 434, para 38).

[25] The applicant asks that, if I do not declare that the matter should proceed to arbitration, I should declare that the dispute be heard by this court. The applicant does not need a declaration to allow it to file a claim in this court. What may flow from filing a claim will be decided in the course of that proceeding.

[26] Costs may be spoken to if they cannot be agreed upon.

_______________________________J.

2023 MBKB 183 (CanLII)