IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *G & J Technologies Inc. v. Bond,*
2024 BCSC 1657

Date: 20240906
Docket: S136243
Registry: Kelowna

Between:

G & J Technologies Inc. and Gebhard Wager

Plaintiffs

And

James Bond

Defendant

Before: The Honourable Justice A. Ross

Reasons for Judgment

Counsel for the Plaintiffs:	L. Nykolaychuk
Counsel for the Defendant:	M. Sveinson
Place and Date of Trial/Hearing:	Kelowna, B.C. July 30, 2024
Place and Date of Judgment:	Kelowna, B.C. September 6, 2024

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Introduction

[1] The defendant, Mr. Bond, applies for an order staying this proceeding pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2. He says that the plaintiffs' action is barred and must proceed by way of arbitration.

[2] In response, the plaintiffs submit that Mr. Bond is not covered by the arbitration clause upon which he seeks to rely.

[3] The underlying dispute relates to the souring of a business relationship between the plaintiffs and Kelso Technologies Inc. ("Kelso"), a publicly traded company. Mr. Bond was the chief executive officer ("CEO") of Kelso.

[4] The plaintiffs have proceeded through an arbitration against Kelso. In this action, the plaintiffs allege that Mr. Bond made misrepresentations that fell outside of his work for Kelso. I discuss those allegations below.

Issues

[5] An application under s. 7 of the *Arbitration Act* can bring forward several issues. However, based upon some reasonable concessions made by the plaintiffs at the hearing, the only issues for me to decide are:

a) Has Mr. Bond met the onus required under s. 7 of the Arbitration Act for me to stay the legal proceedings? In particular, has the defence made out an "arguable case" that Mr. Bond is a non-signatory party to the arbitration clause?

b) Is Mr. Bond estopped from raising this issue?

c) Should the plaintiffs be given leave to amend their claim?

Overview

[6] The following facts are not disputed:

a) Mr. Bond was, at all material times, the CEO of Kelso.

b) Kelso and the plaintiffs entered into a technology development agreement ("TDA") in 2016.

c) The TDA provided that Kelso was engaging the plaintiffs to assist in developing the technology necessary to create a commercially marketable off-road vehicle (the "Project").

d) Mr. Bond signed the TDA on behalf of Kelso as its CEO and authorized signatory. The TDA was also signed by the chief operating officer of Kelso.

e) On behalf of G & J, the TDA was signed by Mr. Peter McFadden, the president. The TDA was also signed by the individual plaintiff, Mr. Gebhard Wager, although it does not indicate the capacity in which Mr. Wager signed.

f) The parties to the TDA were the plaintiffs and Kelso.

g) The TDA contained an arbitration clause (discussed below).

h) The ensuing business relationship under the TDA was not smooth. Kelso terminated the TDA in 2021.

i) After Kelso terminated the TDA, the plaintiffs brought a claim against Kelso by way of a Notice to Arbitrate.

j) By letter, dated January 19, 2022, the plaintiffs wrote to Kelso's counsel and advised that they planned to sue Mr. Bond.

k) The arbitration proceeded to hearing.

l) On January 20, 2023, (after the conclusion of the arbitration hearing, but while the arbitration decision was pending), the plaintiffs commenced this action.

m) The arbitration decision was released on April 25, 2023.

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n) The plaintiff was awarded certain damages. Other parts of the claim were dismissed.

o) Mr. Bond has not responded to the action except to bring this application.

[7] Mr. Bond says that the plaintiffs should not be able to sue him or make a claim against him outside of the arbitration clause in the TDA. He says that, as CEO of Kelso, he was a non-signatory party to the TDA. Hence, he is covered by the arbitration clause. As discussed below, the onus on Mr. Bond is to show that there is an "arguable case" that he was a non-signatory party.

[8] In response, the plaintiffs submit that Mr. Bond is not a non-signatory party to the arbitration clause and he is not entitled to its protection. They submit that there is no arguable case that he is a non-signatory party. They also argue that Mr. Bond had notice (during the course of the arbitration) that the plaintiffs were bringing this action and he did not raise any objection within the arbitration proceeding. They submit that he is estopped from raising the issue now.

The Arbitration Clause

[9] I discuss the legal principles below. However, there is no dispute between the parties that each case of this type must be decided on its own facts and on the particular wording of the clause in question. I set out the arbitration clause here because it forms the basis of the rest of my decision:

> 10.12 Arbitration. All disputes arising out of or in connection with this contract, or in respect of any defined legal relationship associated therewith or derived therefrom, will be referred to and finally resolved by arbitration of a single arbitrator under the Rules of Procedure of the British Columbia International Commercial Arbitration Centre. The appointing authority will be the British Columbia International Commercial Arbitration Centre. The place of arbitration will be Vancouver, British Columbia, Canada. The decision of the arbitrator will be binding upon both parties and no appeal will lie therefrom. Notwithstanding the above arbitration provision, nothing herein will preclude a party from applying to a court of competent the jurisdiction for an order enjoining any activity by another party pending the hearing of the arbitration.

[10] Mr. Bond submits that this is a very broad arbitration clause. I discuss that submission below.

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Applicable Law: "Competence-Competence" Principle

[11] The main issue for me to decide is whether there is an arguable case that Mr. Bond is a non-signatory party to the agreement. There are other elements to the test under s. 7, but the plaintiffs do not rely upon them.

[12] First, both sides agree that the guiding principle on applications under s. 7 is the "competence-competence" principle. That principle was described by Justice Matthews in *3-Sigma Consulting Inc. v Ostara Nutrient Recovery Technologies Inc*., 2023 BCSC 100 [*3-Sigma*]:

> [7] The guiding principle for applications under of the *Arbitration Act* is "competence-competence", whereby jurisdictional issues relating to the scope of the arbitration agreement are to be resolved in the first instance by the arbitrator: *Peace River Hydro Partners* at para. 39, citing *Dell* at para. 70; *Clayworth* at para. 24. Competence-competence has been enshrined in British Columbia law by the combined operation of s. 22 of the *Arbitration Act* and R. 20(2) of the British Columbia International Commercial Arbitration Centre Rules (now the Vancouver International Arbitration Centre): *Seidel* at para. 28; *Peace River Hydro Partners* at para. 41.

[13] It follows that if I determine that there is an "arguable case" that Mr. Bond is a non-signatory party to the TDA, then the "competence-competence" principle provides that it is up to the (potential future) arbitrator to decide that issue in full. Thus, if I find an arguable case is made out, I must issue a stay of this proceeding in order for that decision to be made by an arbitrator.

[14] The parties agree that the defendant bears the onus to make out an arguable case. If that onus is met, then the onus switches to the plaintiffs to establish that the arbitration clause is void, inoperable or incapable of being performed. This onus-switching was explained by Justice Matthews in *3-Sigma*:

> [8] The general rule for stay applications under s. 7 is that if the applicant makes out an arguable case that the parties and the issues in dispute are subject to an arbitration agreement (s. 7(1)), and the party opposing the stay does not assert or establish that the arbitration agreement is void, inoperable or incapable of being performed (s. 7(2)), the court must stay the proceeding in favour of arbitration: *Clayworth* at para. 21; *Dell* at para. 84.
>
> [9] The arguable case standard provides "room for a judge to dismiss a stay application when there is no nexus between the claims and the matters

> reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction": *Clayworth* at para. 30.
>
> [10] The party opposing the stay application may assume the burden of establishing that the arbitration agreement is void, inoperable or incapable of being performed, thus defeating the application: *Arbitration Act*, s. 7(2).

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[15] In this case, the plaintiffs concede that the arbitration clause is not void inoperable or incapable of being performed. As noted, an arbitration has completed. Instead, the plaintiffs' argument is that Mr. Bond has never been a party to the TDA.

[16] The plaintiffs' position derives from the three-part test for a s. 7 determination. That test was described (again, by Matthews J.) in *3-Sigma*:

> [12] The three-part test for the s. 7(1) determination, on which the applicant bears the burden…:
>
> a) a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
>
> b) the legal proceedings are in respect of a matter agreed to be submitted to arbitration; and
>
> c) the application must be brought before the applicant takes a step in the proceeding.

[17] The plaintiffs rely on the first element of this test. They say that Mr. Bond is not a "party to an arbitration agreement". The plaintiffs concede (for the purpose of this application, without necessarily accepting) that the 2nd and 3rd elements are met.

[18] To be clear, the plaintiff's position is that Mr. Bond was not a party to the TDA or the arbitration clause. The plaintiffs submit that there is no arguable case that Mr. Bond is a party. Hence, they submit, he does not meet the first part of the test and the application should be dismissed.

[19] The law summarized in *3-Sigma* also makes it clear that I am limited the scope of my analysis. There is significant discussion in *3-Sigma* regarding what constitutes a question of law vs question of fact vs a mixed question of law and fact:

> [18] Where the issue is a mixed question of fact and law, the court may decide the issue only if it can do so with a superficial regard to the record: *Peace River Hydro Partners* at paras. 42–43; *Dell* at para. 85.

> [19] The question of whether the dispute falls within the scope of the agreement is not often a pure question of law. It is usually a question of mixed fact and law, as "[i]t requires an analysis of the nature of the dispute and an interpretation of the arbitration clause, considered with the terms of the contract as a whole in their factual context": *Clayworth* at para. 44, citing *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 21; *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53. Accordingly, the court may only interpret the arbitration agreement to determine whether the dispute falls within the scope of the arbitration agreement if it can do so with only a superficial review of the record, otherwise, the court must leave the matter for the arbitrator to decide on a thorough review of the evidence: *Peace River Hydro Partners* at para. 42.

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[20] All parties agree that I am faced with a mixed question of fact and law. On that basis, Mr. Bond submits that (if he is successful) I should limit my order to granting the stay as requested. That will leave the questions regarding the remainder of the proceedings to the next arbitrator, should the plaintiffs commence a further arbitration. This process, again, accords with the "competence-competence" principle.

[21] The plaintiffs submit, on remedy, that I am not bound to refer all issues to the potential arbitrator. They suggest that an intermediate step should be undertaken. I address that submission below.

Law on Non-Signatory Parties

[22] The primary issue is whether Mr. Bond has put forward an arguable case that he is a non-signatory party to the TDA and, hence, covered by the arbitration clause. Both sides referred me to a significant number of decisions setting out applicable principles relating to non-signatory parties.

[23] In *DNM Systems Ltd. v. Lock-Block Canada Ltd.*, 2015 BCSC 2014, Justice Skolrood (as he then was) described the four scenarios wherein a non-signatory to an agreement can be considered a "non-signatory party":

> [77] In determining who the proper parties are, the arbitrator may include non-signatories to the arbitration agreement in certain circumstances. Those circumstances are summarized in *Commercial Arbitration in Canada* as follows at 2-48:

> (1) the contractual agreement between a party and the non-party incorporates the arbitration clause by reference;
>
> (2) there is between a party and a non-signatory an agency relationship;
>
> (3) the corporate relationship between a parent and its subsidiary may be sufficiently close as to justify piercing the corporate veil and holding one corporation legally accountable for the actions of the other; and
>
> (4) a non-party is bound by an estoppel.

[24] Both parties accept that these four circumstances apply to proceedings under the *Arbitration Act*.

[25] Mr. Bond's position is that he acted as agent for Kelso.

[26] In addition, Mr. Bond argues that the plaintiffs have alleged, within the arbitration, that Mr. Bond's representations were binding on Kelso. Mr. Bond relies on those allegations as an indication that the plaintiffs' position (in the arbitration) was that his representations bound Kelso. Hence, Mr. Bond must have been an agent, and he qualifies as a non-signatory party.

[27] In support of this proposition, Mr. Bond points to the decision of Justice McIntosh in *Northwestpharmacy.com Inc. v. Yates*, 2017 BCSC 1572. In that decision, McIntosh J. accepted a number of propositions that were set out in counsel's written submission. At para. 54, McIntosh J. accepted the following principle (after the citation of a number of cases):

> 105. These cases each involved situations where the applicant sought a stay of proceedings, or to enforce an arbitral award, as against a non-signatory, whereas in this case the parties applying for the stay are non-signatories who seek a stay against a signatory to the arbitration agreement. An analogous situation arose in *Lambsmead Limited v. Pharmawest Pharmacy Ltd.*, 2014 BCSC 218, where the court concluded that, where the plaintiffs treat the defendants as the nominees of a signatory to the contract or as the true parties to the contract containing the arbitration clause, the defendants may apply for and receive a stay under s. 8 of the ICAA.
>
> [Emphasis added.]

[28] With those considerations in mind, I now address the parties' submissions.

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The Overlap of the Notice to Arbitrate and the Notice of Civil Claim

The Defence Position

[29] The defence position, in the main, is that Mr. Bond is clearly a non-signatory party to the TDA. He was the agent of Kelso in negotiating and carrying out the TDA. Hence, all of his actions were undertaken as the agent of Kelso and he is entitled to the protection (and the burden) of the arbitration clause. Mr. Bond bases his position on the factors discussed below.

The Arbitration Clause

[30] Mr. Bond submits that the wording of the arbitration clause is broad. Hence, the parties intended to include, rather than exclude, all manner of disputes.

[31] In answer to the plaintiffs' argument that Mr. Bond did not sign the TDA, Mr. Bond notes the opening wording of the clause. It covers "[a]ll disputes arising out of or in connection with this contract, or in respect of any defined legal relationship associated there with portal derived therefrom". Mr. Bond submits that the issues raised in the notice of civil claim are disputes that arise out of, or in connection with, the TDA. Hence, he says, he is covered by that language.

Notice of Civil Claim

[32] With that underlying submission in mind, the defence says that the context of the plaintiffs' allegations in this action are relevant. Mr. Bond submits that there is substantial overlap between the claims made in the Notice to Arbitrate and the claims made in the notice of civil claim. Further, the defence submits that the allegations in the Notice to Arbitrate relate to the representations made both before and after the signing of the TDA.

[33] Hence, following on the submission above, Mr. Bond says this action clearly arises out of, or is connection with, the arbitrated disputes, because the allegations in the two proceedings overlap.

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[34] This submission requires some description of the plaintiffs' two pleading documents.

[35] The notice of civil claim alleges, at para. 12 (paraphrased):

a) Prior to the signing of the TDA, Mr. Bond made representations during the negotiations including:

i. Kelso had the technological expertise, personnel, financial resources and commitments to accomplish the Project and bring it to market within months;

ii. the project would proceed to proof of concept by the summer of 2017;

iii. Kelso would devote sufficient financial resources to the project;

iv. Kelso would pay the plaintiffs US$10,000 per month as long as Kelso continued to pursue the project;

v. if Kelso chose not to advance the project, the rights to the plaintiffs' technologies would revert back to the plaintiffs;

vi. Mr. Bond believed in the technology so much that if Kelso did not pursue it, Mr. Bond would pursue the technology with the plaintiffs through another one of Vaughan's companies.

(The notice of civil claim describes these representations as the "Initial Representations".)

b) The plaintiffs entered into the TDA in reasonable reliance on these Initial Representations made by Mr. Bond.

[36] Paragraph 16 of the notice of civil claim alleges that, during the term of the TDA, Mr. Bond made further misrepresentations to the plaintiffs, including (again paraphrased):

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a) Mr. Bond would move the project from Texas to Kelowna;

b) the value of Kelso's shares would go up significantly in value, and Mr. Wager would have the opportunity to be a director in a related company;

c) after the completion of 10 vehicles, Kelso would compensate the plaintiffs for all outstanding issues between Kelso and the plaintiffs;

d) the purpose of the TDA was to license the plaintiffs' technology to Kelso for the purposes of building an off-road vehicle, not for ownership of the plaintiffs' patent;

e) Mr. Bond wanted to license more of the plaintiffs' ideas including other types of vehicles;

f) Kelso had military contacts and opportunities interested in the patents and technologies;

g) Mr. Bond wished to separately license the plaintiffs' suspension technology for on road purposes after the original project was operational.

(The notice of civil claim describes these representations as the "Further Representations".)

[37] Paragraph 22 of the notice of civil claim alleges that the Initial Representations and the Further Representations were untrue.

Comparison to Notice to Arbitrate and Arbitration Decision

[38] The defence compares the allegations regarding the Initial Representations and the Further Representations to the allegations in the Notice to Arbitrate and to the Arbitration Decision.

[39] The Notice to Arbitrate sets out the claim against Kelso. It states (at paras. 6, 13, 15, and 21):

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a) Paragraph 6:

> Before and after the parties entered into the [TDA], the respondent, through its president, James Bond, represented to and expressly assured the claimant that:
>
> > the respondent had the technological expertise, resources and financial basis to accomplish the Project;
> >
> > the respondent would advance the Project expeditiously and without delay; and
> >
> > the respondent would devote sufficient financial resources to the project to ensure advanced without delay.
>
> (Collectively, the "Assurances")

b) Paragraph 13 of the Notice to Arbitrate asserted that Mr. Bond's statements (his Assurances) were binding on Kelso.

c) Paragraph 13 states, "In addition to the above, the Respondent's Assurances are an implied term of the [TDA]."

[40] Paragraph 15 of the Notice to Arbitrate addressed the issue of monthly payments:

> Pursuant to clause 3 of the [TDA], [Kelso] agreed to compensate the [the plaintiffs] as follows:
>
> > $10,000 USD per month during the term that the [plaintiffs] continued to actively provide the Services to [Kelso];

[41] Paragraphs 21, 22, and 48 of the Notice to Arbitrate addressed the delays beyond 2017:

> 21 Resulting from the [Kelso] Assurances, the parties originally anticipated that the Project would proceed to proof of concept and the manufacturing process by 2017, with prototype testing to take place by the summer of 2017.
>
> 22 However, the Project did not proceed as the parties initially anticipated, and there were numerous delays caused by [Kelso] as a result of its breach of the Assurances…
>
> …
>
> 48 In breach of the [TDA], starting on or about December 31, 2020, [Kelso] failed to pay the $10,000 USD monthly payment to the [plaintiffs] …

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[42] The defence submits that these paragraphs indicate the substantial overlap in the issues raised by the plaintiffs in the arbitration and the action. In addition, the defence points to the overlap in damages claimed.

[43] The notice of civil claim provides particulars of the losses suffered by the plaintiffs which are as follows:

a) bank charges and interest charges incurred by the plaintiffs because Kelso delayed in reimbursing the plaintiff's expenses incurred in relation to the Project;

b) loss of income;

c) loss of royalties;

d) loss of opportunity.

[44] Mr. Bond submits that these claims for damages mirror the Notice to Arbitrate which states:

> 54. As a result of the above breaches, the Claimants suffered loss and damages, including:
>
> a) increased interest charges and costs to carry the cost of the Project's expenses while the Respondent delayed in reimbursing same;
>
> b) loss of opportunity;
>
> c) loss of royalties arising from the Agreement due to the Respondent's delays in completing the Project …

[45] The defence submits that these paragraphs represent a significant overlap between the two pleading documents. Mr. Bond submits that this provides context for the plaintiffs' claims against him personally in this action. The allegations in this action have a strong link, if not a complete overlap, with the issues that proceeded to arbitration.

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[46] Further, Mr. Bond notes that, in the arbitration proceeding, the plaintiffs took the position that Mr. Bond's statements prior to the execution of the TDA were binding on Kelso (*i.e*., they were implied conditions).

The Plaintiffs' Position

[47] The plaintiffs make three main points in response to this application:

a) On January 19, 2022, prior to Kelso filing its defence in the arbitration proceeding, the plaintiffs put Kelso on notice of their plan to bring this action against Mr. Bond (outside of the arbitration). The plaintiffs confirmed they would hold those claims in abeyance pending the resolution of the arbitration proceeding. Neither Kelso nor Mr. Bond took any steps to have the arbitrator rule on Mr. Bond's status in the arbitration proceeding. Hence, Mr. Bond should be estopped from relying on the arbitration clause.

b) Mr. Bond is clearly not a signatory to the TDA. He only signed it as CEO of Kelso, not in his personal capacity. Hence, he is not entitled to rely on the arbitration clause. The plaintiffs submit that Mr. Bond cannot fit himself into any of the four categories set out by Skolrood J. in *DNM Systems*. Mr. Bond is not an agent of Kelso.

c) The issues raised in the Notice to Arbitrate were substantially narrowed by the time the arbitration hearing proceeded.

[48] On the first point, the plaintiffs argue that a form of estoppel applies. Mr. Bond had the opportunity to have the arbitrator decide whether he was a proper party to the arbitration proceeding. He chose not to do so. He should not be allowed to raise the jurisdiction issue now, after the arbitration proceeding is complete.

[49] On the second point, the plaintiffs submit that Mr. Bond's attempt to call himself the "agent" of Kelso turns the law of agency on its head. They submit that the law of agency provides that an agent (Mr. Bond) is endowed by the principal

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(Kelso) with the power to bind the principal to a contract and to make the principal liable for that contract. The law of agency does not state that an agent is bound by (or protected by) the principal's contract. The plaintiffs submit that there is no evidence that when Mr. Bond signed the TDA as Kelso's representative, he intended the arbitration clause to bind him personally.

[50] The plaintiffs submit that this action against Mr. Bond relates to representations made by Mr. Bond. They say that they suffered losses as a result of their reliance on Mr. Bond's misrepresentations and they should be allowed to pursue those losses against Mr. Bond.

[51] In specific answer to the defence submissions regarding the overlap between the arbitration pleading and this action, the plaintiffs note that, while their initial Notice to Arbitrate contained the paragraphs described above, the issues that went before the arbitrator were significantly narrowed. Hence, the defendant's reliance on the "overlap" is misplaced.

Discussion and Analysis

[52] I will address the plaintiffs' three arguments first.

Is Mr. Bond estopped from relying on the arbitration clause?

[53] As noted above, the plaintiffs submit that Mr. Bond had notice that the plaintiffs would pursue this action. He took no step to determine his status within the arbitration proceeding. Hence, the plaintiffs submit, he cannot now rely upon the arbitration clause.

[54] In relation to that estoppel argument, I find that Mr. Bond made no election. There is no evidence that he responded in any way to the plaintiffs' counsel's letter. I find that his silence did not indicate that he was taking any position.

[55] Further, in my opinion, the letter of notification from the plaintiffs' counsel could not have had the effect that the plaintiffs seek to impose. The letter, dated January 19, 2022, notified Kelso's counsel of the intention to sue Mr. Bond. The

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letter indicated that the plaintiffs would "hold the claim against Mr. Bond in abeyance pending resolution of the arbitration proceedings."

[56] In my opinion, upon receiving the letter, Mr. Bond could not have known what step to take. He might reasonably have thought that if the plaintiffs were successful in the arbitration proceeding, there may be no claim to pursue against Mr. Bond personally.

[57] More importantly, while the plaintiffs in this action seek to put the onus on Mr. Bond (to clarify his status with the arbitrator), there was clearly nothing stopping the plaintiffs (within the arbitration proceeding) from seeking a determination of Mr. Bond's status within that proceeding. They took no steps in that regard. I am aware of no onus on a potential defendant (in Mr. Bond's position) that would supersede any obligation on an existing plaintiff.

[58] On that basis, I do not accept the submission that Mr. Bond is estopped by his inaction in response to the January 19, 2022 letter from counsel.

Agency

[59] Second, I do not accept the plaintiffs' position on the law of agency.

[60] The defence submits that there is an arguable case that Mr. Bond was, in relation to Kelso, a person who could bind Kelso to a contract. That proposition seems beyond doubt. Mr. Bond signed the TDA as one of the representatives of Kelso. His signature on the document bound Kelso.

[61] If more evidence was required (which it is not), the plaintiffs' Notice to Arbitrate pleaded that Mr. Bond's representations were binding on Kelso and became implied terms of the TDA. Hence, the plaintiffs' position within the arbitration proceeding was that Mr. Bond had bound Kelso to the contract and the representations.

[62] On that basis, I do not accept the plaintiffs' second proposition. I find there is an arguable case that Mr. Bond acted as Kelso's agent.

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Was there overlap in the arbitration hearing?

[63] The third point proffered by the plaintiffs is that the issues that proceeded to arbitration were substantially narrowed.

[64] On that point I note two things.

[65] First, whether or not those allegations proceeded to the arbitration hearing, the plaintiffs clearly thought that those allegations were covered by the arbitration clause when they drafted the Notice to Arbitrate.

[66] Second, I note the decision of Arbitrator Logan. At para. 362, the decision outlines the damages and relief that was either awarded or dismissed. Included among the 18 paragraphs of relief either granted or dismissed were the following (paraphrased):

a) Issues relating to the ownership of technology were resolved.

b) Kelso was ordered to pay G & J US$120,000 comprising 12 months where Kelso had failed to pay the agreed-upon sum of US$10,000 per month.

c) “The claim by the Claimants that Kelso breached an implied obligation in the TDA to devote sufficient resources and to advance the Project without delay is dismissed.”

[67] These three paragraphs of relief overlap with the claims made in the notice of civil claim against Mr. Bond.

[68] I accept the submission of Mr. Bond that the issues addressed by the arbitrator significantly overlap with the action now being brought against him. This overlap provides me with further confirmation that there is an arguable case that Mr. Bond was a non-signatory party.

[69] For all the reasons set out above, I find there is an arguable case that Mr. Bond is a non-signatory party to the TDA and, hence, the arbitration clause. I reach this conclusion, based upon my superficial review of the factual matrix, the

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wording of the arbitration clause, and the overlap in the pleadings. In particular, the following provide the basis for an arguable case:

a) The arbitration clause is drafted in a broad manner. It does attempt to limit claims that are arbitrable. It seeks to be expansive, not restrictive.

b) Corporations can only speak through representatives. In this case, Kelso's representative was Mr. Bond. I accept the defence position that there is an arguable case that the representations alleged by the plaintiffs, if proven, would constitute Mr. Bond, as the agent of Kelso, promoting Kelso's interests.

c) Hence, I find it is arguable that Mr. Bond's situation was foreseen by one of the four circumstances set out by in the *DNM Systems* case.

d) The claim, at its core, is a claim against Kelso. Hence, there is an arguable case that Mr. Bond was the agent of the principal, Kelso, during the stages that form the basis of the notice of civil claim.

Proper Form of Relief

[70] I noted above that the plaintiffs proposed an alternative form of relief. The plaintiffs suggested that if I accepted the defendant's submissions, that the plaintiffs should be provided with the opportunity to amend their pleadings to eliminate any overlapping claims.

[71] I decline to accede to this request. In coming to this conclusion, I am cognizant of the further statement adopted by Justice McIntosh in *Northwestpharmacy.com Inc.* at para. 54.

> 112. The Court should not permit a party to avoid an arbitration clause – which that party itself bargained for – by naming related parties as defendants but declining to name the signatory to the contract. To do so would elevate form over substance and permit parties to arbitration agreements to avoid the application of those agreements through selective and artful pleading. Having sought the benefits of the arbitration clause, the plaintiff should not be able to escape the burdens.

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[72] In my opinion, those comments apply to this case.

Disposition

[73] It follows from my decision as outlined above that I grant the relief sought by the defendant in his notice of application; I order that this action is stayed, pursuant to s. 7 of the *Arbitration Act*.

[74] The notice of application seeks special costs or costs of the application.

[75] In my opinion, the proper result is an award of costs at scale B to the defendant for the preparation for and appearance to argue this application. Those costs are payable in any event of the cause. Given that the matter may never return to this Court, those costs are payable forthwith.

"A. Ross J."

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