In the Court of Appeal of Alberta

Citation: Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc, 2024 ABCA 369

Date: 20241118
Docket: 2301-0256AC
Registry: Calgary

Between:

Husky Oil Operations Limited

Appellant /
Cross-Respondent

- and -

Technip Stone & Webster Process Technology, Inc.
and Technip USA, Inc.

Respondents /
Cross-Appellants

The Court:

The Honourable Justice Jolaine Antonio
The Honourable Justice Kevin Feehan
The Honourable Justice Karan Shaner

Memorandum of Judgment

Appeal from the Order by
The Honourable Justice M.J. Lema
Dated the 28th day of September, 2023
Filed on the 3rd day of May, 2024
(2023 ABKB 545, Docket: 1601-16599)

Memorandum of Judgment

The Court:

I. Introduction

[1] The appellant, Husky Oil Operations Limited, filed a statement of claim against the respondent equipment suppliers, Technip Stone & Webster Process Technology, Inc. and Technip USA, Inc. It alleged breach of warranties and negligence in manufacture.

[2] The chambers judge interpreted the contract between the respondents and the appellant's general contractor. Among other things, the contract provided that the appellant could enforce warranty claims directly against the respondents. It also contained a dispute resolution provision culminating in a mandatory arbitration clause. The chambers judge concluded the warranty dispute had to proceed in arbitration. He struck those claims but allowed the negligence claims to proceed. The appellant appeals the striking of its warranty claims. The respondents cross-appeal, arguing the negligence claims must also proceed by arbitration and should have been struck as well.

[3] At issue is whether and to what extent the appellant is bound by an arbitration provision contained within the contract it relies on for its warranty claims, but to which it was not a party. We conclude that if a non-party can be bound to arbitrate a right granted by contracting parties, and thereby be precluded from accessing the courts, the contracting parties must make that requirement clear and explicit. The contract at issue did not do so. Therefore, the appeal is allowed and the cross-appeal is dismissed.

II. Background facts

[4] The appellant retained Snamprogetti Canada Inc., which later became Saipem Canada Inc., (the Contractor) for the engineering, procurement and construction of a steam-assisted gravity drainage oil sands project northeast of Fort McMurray. The Contractor entered into a contract with one or both of the respondents (one or both referred to as the respondents) for the design, manufacture, fabrication and delivery of 10 steam generator modules for the project. The appellant was not party to that contract.

[5] That contract provided that all warranties given by the respondents were extended to the appellant. Clause PC 9 reads:

> All warranties given by VENDOR shall be given for the benefit of both the PURCHASER and CLIENT and the warranties may be enforced by either the PURCHASER or CLIENT through the VENDOR.

VENDOR is defined to mean the respondents, PURCHASER to mean the Contractor, and CLIENT to mean the appellant.

[6] The contract contained a dispute resolution provision at clause PC 13. Subclause PC 13.2 provides that disputes arising out of the associated purchase order are to be settled in accordance with PC 13:

> In the event of a dispute between the PARTIES as to the performance of the SUPPLY or the interpretation, application or administration of the PURCHASE ORDER DOCUMENTS, the VENDOR shall perform the SUPPLY as directed by PURCHASER. All disputes between the PARTIES not resolved by the initial decision of PURCHASER's Representative, and all disputes arising out of this PURCHASE ORDER and its performance shall be settled in accordance with this PC 13.

PARTIES is defined to mean both the Contractor and the respondents but does not include the appellant. PURCHASE ORDER is defined to mean the agreement between the Contractor and the respondents for the supply of the related goods and services.

[7] The four subclauses after PC 13.2 address negotiation (PC 13.3) and mediation (PC 13.4, 13.5 and 13.6) of disputes arising between the “PARTIES”, again not including the appellant. The final two subclauses of PC 13 address arbitration. The first provision is unintelligible. Neither provision refers to the “PARTIES”:

> PC 13.7: GENERAL TERMS AND CONDITIONS FOR PURCHASE ORDER DOCUMENTS - HIGH COMPLEXITY - GTC-COR-MATE-001-E Rev 05 shall be referred to and finally resolved by arbitration under the rules of the International Chamber of Commerce in accordance with the Arbitration Act of Alberta (the "Act").
>
> PC 13.8: All disputes arising out of or in connection with the present PURCHASE ORDER shall be finally settled under the Rules or Arbitration of the International Chamber of Commerce by one or more arbitrators appointed in accordance with the said Rules.
>
> The governing law shall be the laws of the Province of Alberta and the federal laws of Canada applicable therein, and the location of the arbitration shall be Calgary, Alberta, Canada.
>
> [formatting in original]

[8] The respondents manufactured and supplied the steam generator modules to the project. Around the time of commissioning in October 2015, the appellant discovered what it alleges were defects in the modules, rendering them unsafe and unfit for their intended use.

[9] In November 2015, the appellant advised the respondents it was considering making warranty claims under the contract. In December, it provided the respondents a detailed list of alleged warranty issues. In April 2016, it sent a letter to the respondents submitting a "formal warranty claim" against them, relying in particular on clause PC 9.

[10] In December 2016, the appellant filed a statement of claim in relation to the issues, but it did not serve that claim on the respondents. In November 2017, the appellant amended its statement of claim and served it on the respondents. The appellant noted that it did not require any formal response at that time and was prepared to hold its claim in abeyance on certain conditions. Counsel for the appellant asserts the respondents continued to discuss the matter with the appellant but did not offer to arbitrate the dispute.

[11] In October 2020, after the appellant requested a defence, the respondents brought an application to dismiss or stay the action. The respondents relied on PC 13.7 and 13.8 to argue for the first time that the contract required the dispute to be resolved by arbitration. It submitted the appellant could not take the benefit of the contractual warranty without also taking the corresponding obligations and burdens, including the requirement to arbitrate. It further argued the appellant was out of time to invoke arbitration and therefore without a remedy.

III. Decisions below

[12] By endorsement dated June 6, 2022, an applications judge held the appellant was not bound to arbitrate under PC 13 of the contract. He noted the contract does not expressly state the appellant must pursue its warranty claims by arbitration, and that the appellant is not a party to the contract. He concluded PC 13.8 could not be used to impose mandatory arbitration on the appellant in the circumstances. He dismissed the respondents' application, allowing the appellant to pursue its warranty claims by court action.

[13] The respondents appealed to the chambers judge. By decision dated September 28, 2023, the chambers judge allowed the appeal and struck the warranty claims: *Husky Oil Operations Limited v Technip Stone & Webster Process Technology Inc*, 2023 ABKB 545 [*Chambers Decision*].

[14] In the chambers judge's view, the debate between the parties distilled to the nature of the rights conferred by the contract on the appellant – were the warranty rights free standing, not subject to limitations and conditions; or were they qualified or limited, such that they could only be enforced by arbitration: *Chambers Decision* at paras 19–21.

[15] In answering this question, the chambers judge first considered whether the contract purported to subject the appellant's warranty claims to arbitration. He held that it did. While some of the dispute resolution provisions applied only to "disputes between the PARTIES", the parties departed from this formulation for the final clause in PC 13.2 and in PC 13.8, referring broadly to "all disputes". He reasoned that the wider scope of "all disputes" was intended to capture disputes arising from the appellant enforcing its rights. The collective effect of PC 9, PC 13.2 and PC 13.8 was that if the appellant wanted to enforce the warranties given to it under the contract, any dispute had to be resolved by arbitration: *Chambers Decision* at paras 22–27.

[16] Next, the chambers judge considered whether the foregoing interpretation amounted to an impermissible imposition on a non-party without consent. He concluded it did not. It was within the respondents' power to decide whether any conditions or terms should attach to the warranty rights it extended to the appellant as a non-party. It limited those rights by requiring arbitration. He found, "Once [the appellant] decided to enforce its warranty right against the subcontractor, it effectively agreed to arbitration of any disputes over them": *Chambers Decision* at paras 28–45.

[17] As the appellant was bound by PC 13.8, and as it failed to commence arbitration within the applicable limitation period, the chambers judge concluded it was too late for the appellant to seek arbitration. On that basis, he struck the appellant's warranty-based claims, allowing only the negligence-based claims to proceed: *Chambers Decision* at paras 89–112.

IV. Grounds of appeal

[18] The appellant appeals, arguing in part that the chambers judge erred in: 1) finding the arbitration provision in the contract applied to it; and 2) determining that it agreed to arbitrate its warranty claims. The respondents cross-appeal, arguing that because the chambers judge found the appellant was a party to the arbitration agreement, he erred in failing to further find that the negligence claims were also subject to mandatory arbitration.

[19] The appellant raises other grounds of appeal, but its first two are determinative.

V. Analysis

[20] Individuals, including corporations, can resolve their civil disputes in many ways. At one end of the procedural spectrum is informal discussion. At the other end is litigation in the courts. Methods other than litigation generally require consent.

[21] Arbitration in particular "owes its existence to the will of the parties": *Dell Computer Corp v Union des consommateurs*, 2007 SCC 34 at para 51 [*Dell*]. Its "essence... is that it is consensual": J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 4th ed (Huntington, New York: Juris Publishing, 2022) at 47. Except where arbitration is mandated by statute, its express premise under the *Arbitration Act*, RSA 2000, c A-43 is the existence of an "arbitration agreement", being an agreement "by which 2 or more persons agree to submit a matter in dispute

to arbitration". The modern view is that parties should be held to their contractual agreements to arbitrate. As such, courts will stay actions where an arbitration agreement exists and applies: *Arbitration Act*, ss 1(1)(a), 2(1), 7(1); *International Commercial Arbitration Act*, RSA 2000, c I-5, ss 1(1), 2, 4, 10, Schedule 1, article II and Schedule 2, articles 7 and 8; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41 at para 49 [*Peace River*].

[22] Here, the appellant says it never agreed to arbitrate and so should not be forced into arbitration and out of the courts. The respondents contend, and the chambers judge found, that by taking up the warranty under the contract, the appellant was bound to all aspects of the contract, including the arbitration provisions.

[23] For a defendant signatory to rely on an arbitration provision, it must establish the technical requirements for a mandatory stay of proceedings on an "arguable case" basis, including that an arbitration agreement exists, and that the plaintiff was a party to it: *Peace River* at paras 78, 81–84, 159. The chambers judge held that whether the appellant "is subject to the contract's arbitration provisions" is a question of mixed fact and law requiring "no more than a superficial consideration of the evidentiary record" to decide: *Chambers Decision* at paras 13–14. We agree. The necessary legal conclusions can be drawn from the undisputed facts. As such, it was appropriate in this case for the chambers judge to determine this question: *Peace River* at para 42; *Uber Technologies Inc v Heller*, 2020 SCC 16 at paras 32, 36; *Seidel v TELUS Communications Inc*, 2011 SCC 15 at paras 28–30; *Dell* at para 85.

[24] The appellant was not a signatory to the contract. An "entity connected with a signatory to a contract containing an arbitration agreement may become bound as a 'party' by operation of law". However, the Supreme Court recently stated "*all* non-signatories, whether they are agents, trustees in bankruptcy, receivers, or assignees, may claim *only* through or under a signatory, upon stepping into its contractual shoes" [emphasis in original]: *Peace River* at paras 105, 113. The appellant does not claim through or under either signatory. It has not stepped into the "contractual shoes" of either signatory. Instead, it claims under the terms of a provision that expressly extended to it the benefit of certain warranties.

[25] Courts, conscious of privity, are appropriately wary when contracting parties assert that non-signatories should be bound by the terms of a contract, including terms regarding dispute resolution. The doctrine of privity stands for the proposition that a contract cannot, as a general rule, confer rights or impose obligations on any person except the parties to it: *London Drugs Ltd v Kuehne & Nagel International Ltd*, [1992] 3 SCR 299 at 415–416, 1992 CanLII 41 [*London Drugs*].

[26] The doctrine can be relaxed where non-parties seek to rely on contractual provisions made for their benefit. In *London Drugs*, the majority recognized a principled exception to privity "dependent on the intention of the contracting parties". The basis for the exception was "the express or implied stipulation by the contracting parties that the benefit of the clause will also be shared by" the non-party. In *Fraser River Pile & Dredge Ltd v Can-Dive Services Ltd*, [1999] 3

SCR 108, 176 DLR (4th) 257 [*Fraser River*], the Supreme Court described two "critical and cumulative factors" for determining whether the principled exception applies (*Fraser River* at para 32):

> (a) Did the parties to the contract intend to extend the benefit in question to the third party seeking to rely on the contractual provision? and (b) Are the activities performed by the third party seeking to rely on the contractual provision the very activities contemplated as coming within the scope of the contract in general, or the provision in particular, again as determined by reference to the intentions of the parties?

[27] In *Landex Investments Company v John Volken Foundation*, 2008 ABCA 333 [*Landex*], this Court considered whether the principled exception to privity applied to allow a non-party to rely on an arbitration clause to stay a contracting party's action against it. This Court held the necessary intention was not present, as the contracting parties had expressly precluded collateral covenants conferring benefits on strangers to the contract. This Court did not go so far as to hold that the principled exception to privity could never be applied to allow a defendant to invoke an arbitration clause in a contract to which they were not a party.

[28] This Court in *Landex* did not decide whether the principled exception to privity could be used *against* a non-party to require it to submit a dispute to arbitration. At issue in this case is whether the respondents can impose the "procedural burdens" (*Peace River* at para 183) of the arbitration clause on the appellant as a non-party. The Supreme Court in both *London Drugs* and *Fraser River* noted its reasons should not "be taken as affecting in any way the law as it relates to the imposition of obligations on third parties" (*London Drugs* at 416) or as being "applicable to" the law regarding "the situation in which a contract imposes obligations on a third party" (*Fraser River* at para 21). The reason for this is obvious: while the "intention of the contracting parties" (*London Drugs* at 449) can fairly determine benefits conferred by those parties, their intention cannot fairly determine what obligations are owed by others. In considering whether an obligation to arbitrate could be imposed on a non-party, the Federal Court of Appeal in *T Co Metals LLC v Federal Ems (Vessel)*, 2012 FCA 284 at para 96 [*T Co Metals*] put it this way:

> There is little reason for the law to restrict those who, by agreement, wish to confer a benefit on a person who is a stranger to their agreement. However, the question of privity has a different cast when parties seek, by their agreement, to impose an obligation upon a stranger. The law has little interest, outside the law of tort, in imposing obligations on those who have not agreed to them.

[29] Here, the respondents do not argue the principled exception to privity imposes a free-standing obligation on the appellant. Instead, they argue the warranty conferred on the appellant under the contract by virtue of the principled exception to privity was intended by the contracting parties to be subject to the requirement to arbitrate. This is a nuanced distinction that calls for significant caution.

[30] As the parties have pointed out, there is no authority directly determining whether or not contracting parties can contractually bind a true non-party to arbitration. The decision of the Federal Court of Appeal in *T Co Metals* comes closest. It considered whether the benefit conferred by the contracting parties in that case was "a qualified benefit in the sense that [it] could only be invoked through arbitration proceedings". However, it held that on a proper construction the contract did not require that. For the purposes of this appeal, we need not decide whether imposing an obligation to arbitrate, absent the advance consent of the affected party, is possible.

[31] If it is possible to do so, the requirement to arbitrate must be manifest. It must be expressed in clear and explicit language. Relying only on the principles of contract interpretation to find the obligation is not enough. That is because contract interpretation considers in part "circumstances known to the parties at the time of formation of the contract" and determines "the intent of the parties and the scope of their understanding" (*Sattva Capital Corp v Creston Moly Corp*, 2014 SCC 53 at para 47), whereas non-parties will not be aware of those circumstances, intentions and understandings.

[32] If the obligation to arbitrate is not clear and explicit, the non-party may choose litigation to enforce the benefit they have been conferred without realizing the contracting parties intended mandatory arbitration. By the time the contracting party raises the obligation to arbitrate, it may be too late for the non-party to change tracks.

[33] That is what the appellant says happened here. There is no evidence before us to suggest the appellant was involved with the negotiations leading to the formation of the contract, or that it had any knowledge of the intentions of the contracting parties or their understanding.

[34] The chambers judge failed to consider the importance of mutual consent and the unique difficulties that arise when contracting parties attempt to impose an obligation on a non-party. In this case, the effect would be to restrict a non-party's access to the courts. His conclusion that the appellant was required to arbitrate turned on his determination of the "correct interpretation" of the contract (*Chambers Decision* at paras 13, 26), but was not supported by clear and explicit wording. Although he stated the "requirement for clearly-expressed benefit-limiting or benefit-availability terms" was met (*Chambers Decision* at para 49), he was referring to a different requirement expressed in *Fraser River* in the context of contracts of insurance. He did not apply the required threshold for assessing the asserted arbitration obligation in this case. Therefore, even if it is possible for arbitration to be imposed on a non-party beneficiary as argued by the respondents, the trial judge erred in his approach.

[35] The requirement to arbitrate in this case was not manifest. It was not expressed in clear and explicit language. As this litigation has shown, competing interpretations were reasonably available on the face of the contract. Under one interpretation, the appellant was bound to arbitrate. Under the other, it would not be able to compel arbitration even if it had wanted to. The appellant proceeded on the basis of the latter interpretation and the respondents responded with the former. Their positions could easily have been reversed. Had the appellant proceeded by way of referral

to arbitration, the respondents could have argued it was required to litigate and that it was out of time to do so. Ultimately, we agree with the applications judge that the contract did not contain "express clear provisions directly on point". It did "not expressly state that Husky must pursue the warranty claim by arbitration". That is the type of clear language that was, at minimum, required before the appellant could be deprived of its ability to access the courts.

[36] This conclusion determines both the appeal and cross-appeal.

VI. Conclusion

[37] The appeal is allowed, and the cross-appeal is dismissed.

Appeal heard on October 9, 2024

Memorandum filed at Calgary, Alberta
this 18th day of November, 2024

Antonio J.A.

Feehan J.A.

Shaner J.A.

Appearances:

P.J. Scheibel, KC
J.D. Fraese
for the Appellant

S.B.G. Matthews
M.V. Stoker
for the Respondents