

# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *City of Nanaimo v. Millennium Nanaimo  
Properties Ltd.*,  
2010 BCSC 1703

Date: 20101130  
Docket: S60133  
Registry: Nanaimo

Between:

**City of Nanaimo**

Plaintiff

And

**Millennium Nanaimo Properties Ltd. and Suro Development Company**

Defendants

Before: The Honourable Mr. Justice Shabbits

## Reasons for Judgment

Counsel for the plaintiff:

G. McDannold

Counsel for the defendant Millennium  
Nanaimo Properties Ltd:

A. Prior

No one appearing for Suro Development  
Company

Place and Date of Chambers Hearing:

Nanaimo, B.C.  
October 28, 2010

Place and Date of Judgment:

Nanaimo, B.C.  
November 30, 2010

[1] The plaintiff, City of Nanaimo, is a local government continued under the provisions of the *Local Government Act* R.S.B.C. 1996, c. 323 (the “City”).

[2] The defendant, Millennium Nanaimo Properties Ltd., is a corporation incorporated under the *Business Corporations Act* S.B.C. 2002, c. 57 with its registered office at 1500 - 1040 West Georgia Street, Vancouver, British Columbia (“Millennium”).

[3] In its Amended Notice of Civil Claim, the City alleges that it and Millennium and the defendant, Suro Development Company (“Suro”) were parties to various agreements, (the “Amended Partnering Agreement”), whereby Millennium and Suro were to develop and construct a number of projects.

[4] The history of the Amended Partnering Agreement is as follows. The City entered into a Partnering Agreement on October 25, 2004. It was amended with an Amended Partnering Agreement on March 27, 2006, and with the first Amendment Agreement dated June 28, 2007, the subject waiver and second Amendment Agreement dated January 30, 2008, and the third Amendment Agreement dated April 2, 2009.

[5] Pursuant to the terms of the Amended Partnering Agreement, the City paid Millennium and Suro development fees, project management fees, and costs, charges and expenses.

[6] The City claims that pursuant to the terms of the Amended Partnering Agreement, it is entitled to repayment of the monies that it paid. Alternatively, the City claims damages for breach of contract.

[7] Millennium applies under s. 15 of the *Commercial Arbitration Act* R.S.B.C. 1996, c. 55 to have this action stayed.

[8] Millennium seeks a stay because it submits that the Amended Partnering Agreement provides for dispute resolution of the City’s claims pursuant to the *Commercial Arbitration Act* of British Columbia.

[9] The City has refused to arbitrate. It submits that the agreement to arbitrate does not encompass its claims in the Amended Notice of Civil Claim.

[10] Millennium submits that no Event of Default as that term is defined in the Amended Partnering Agreement, ever occurred. Millennium denies that the City is entitled to the repayment of monies, or to damages for breach of contract.

[11] Section 15 of the *Commercial Arbitration Act* is as follows:

(1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

(2) In an application under subsection 1, the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

(3) An arbitration may be commenced or continued and an arbitral award made even though an application is made under subsection 1 and the issue is pending before the court.

(4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the Court to grant that measure.

[12] In *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C.C.A.), 43 C.P.R. (3d) 390, the British Columbia Court of Appeal considers an appeal from the decision of a judge in chambers granting a stay of proceedings pursuant to the provisions of s. 8 of the *International Commercial Arbitration Act* S.B.C. 1986, c.14. Section 8 of that *Act* is the same as s. 15 of the *Commercial Arbitration Act*.

[13] In *Gulf Canada Resources*, Mr. Justice Hinkson writes this at para. 37:

37. Before exercising its jurisdiction to grant a stay the court must be satisfied that the applicant has met the requirements set out in s-s.(1) of s.8. It is only if the court is satisfied that those matters have been established that it must then grant the stay, subject to the provisions of s-s.(2).

[14] The City and Millennium are both parties to the arbitration agreement. This application is brought by Millennium before filing a response to civil claim or taking any other step in this proceeding. The application is made in the court in which the City has commenced legal proceedings. Section 15(2) is not of application.

[15] *Gulf Canada Resources* holds that if the requirements of s.15(1) are met, then the court must grant the stay. If those requirements are present, the court does not have a discretion not to grant the stay. Therefore, the only issue on this application is whether the City's claims are ones that it agreed would be submitted to arbitration.

[16] The City and Millennium disagree about the interpretation of the Amended Partnering Agreement. They disagree about whether the agreement to arbitrate encompasses the City's claims. This raises the question as to how the disagreement as to the interpretation of the agreement to arbitrate should be resolved. Should it be arbitrated under the agreement to arbitrate, or should the stay be refused and the scope of the agreement to arbitrate decided in this proceeding?

[17] This issue is discussed by Hinkson J.A. at paras. 39 to 44 of *Gulf Canada Resources*:

39. The court continues to have some residual jurisdiction to exercise on an application for a stay of legal proceedings pursuant to s.8 of the *Act*.

40. Thus, if the court concludes that one of the parties named in the legal proceedings is not a party to the arbitration agreement or if the alleged dispute does not come within the terms of the arbitration agreement or if the application is out of time, the court should not grant the application.

41. In the present proceedings, the appellant Gulf contends that the agreement does not cover the claim or claims being advanced by Gulf in the legal proceedings, that there is no dispute between the parties and that takes the position that it is not a party to the agreement. These issues are subsidiary to the principal argument advanced on behalf of the appellant, namely, that the court continues to enjoy a jurisdiction to determine the matters referred to in s.8(1) of the *Act*.

42. While I have concluded that the court does have such jurisdiction, I regard it as more limited than the jurisdiction contended for on behalf of the appellant.

43. Considering s.8(1) in relation to the provisions of s.16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the

scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

44. Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[18] Southin J.A. delivers separate reasons in *Gulf Canada Resources*. She writes this at para. 68:

68. Thirdly, once an arbitration agreement is shown to exist, the court ought not to construe it narrowly with a view to avoiding the operation of s. 8. Here, to adopt the appellant's submission on the word "performance" would be to undermine the Act. Whether anticipatory repudiation falls within that word, it not being plain that it does not, is for the arbitrator to determine. When it is not plain that the matters in dispute in the action fall outside the arbitration agreement, the question whether they fall within it is not, in the first instance, for the court but for the arbitrator.

[19] The British Columbia Court of Appeal reaches the same conclusion in *Prince George (City) v. McElhanney Engineering Services Ltd.*, [1995] B.C.J. No. 1474; 61 BCAC 254.

[20] I am of the opinion that it is settled law that the stay must be granted unless it is "clear" or "plain" that the City's claims fall outside the arbitration agreement. If the issue is "arguable", the question, in the first instance, is not for the court but for the arbitrator.

[21] Millennium's draft Response to Civil Claims opposes the granting of the relief sought by the City in its Amended Notice of Civil Claim for these reasons. It pleads:

- a) No Event of Default, as that term is defined in the Amended Partnering Agreement, ever occurred, and therefore Millennium is not required to repay any of the development fees or management fees.

- b) The terms of the Amended Partnering Agreement relied upon by the City are unenforceable at law and equity as they constitute a penalty.

[22] The agreement to arbitrate is within section 19 of the Amended Partnering Agreement.

[23] Section 19(5) provides that a number of matters would not be the subject of arbitration.

[24] Those matters include the City's approval of the approved design, the settlement by the parties to the Amended Partnering Agreement of terms of subsidiary agreements, and the approval by any party of the conditions attached to the re-zoning or subdivision or the issuance of any statutory permit, approval or permission for development of lands.

[25] Millennium submits that those exceptions relate to the role of the City as local government rather than to the role of the City as developer and that section 19(5) exceptions are not matters of dispute.

[26] Section 19(7) provides that a matter to be decided in the sole discretion of the City shall not be subject to arbitration under section 19.

[27] Section 7.5 provides that section 19 shall not apply to a matter to be determined by the City under section 7.

[28] Section 7.3 provides that if Millennium did not on or before March 31, 2010, provide proof to the City that it had secured financing for the construction of the Hotel acceptable to the City in its sole discretion, and commenced construction of the Hotel in a manner acceptable to the City in its sole discretion, then an Event of Default shall be deemed to have occurred.

[29] Millennium agrees that it did not, on or before March 31, 2010, secure financing for the construction of the Hotel and commence construction of the Hotel, but it refers to section 17 of the Amended Partnering Agreement and it submits that the Amended Partnering Agreement requires that a determination must be made

following those failures to perform as to whether those failures to perform constitute an Event of Default. Millennium submits that two reasons why there has not been an Event of Default are that the failures to perform were caused by Force Majeure and that Millennium used its best efforts to secure financing, thereby meeting its contractual obligations

[30] Sections 19(7) and 7.5 provide that the questions whether Millennium secured financing acceptable to the City and whether Millennium commenced construction in a manner acceptable to the City are not subject to arbitration. Millennium agrees that it did not secure financing and commence construction. Millennium submits that those matters are not in dispute and that it is not seeking to arbitrate the questions whether it obtained financing satisfactory to the City and whether it commenced construction in a manner acceptable to the City.

[31] The City submits that Section 7 provides that the question as to whether there has been an Event of Default under section 7.3 is for it to decide. Millennium submits that section 7 provides that the City shall determine whether there has been financing acceptable to it secured and whether there has been construction started in a manner acceptable to it, but section 7 does not provide that the City shall determine whether there has been an Event of Default.

[32] Millennium disputes that there has been an Event of Default. The City submits that section 7.5 deems the existence of an Event of Default.

[33] In my opinion, it is not plain that the Amended Partnering Agreement provides that the question whether there has been an Event of Default falls outside the agreement to arbitrate. In my opinion, that question must be decided, at least in the first instance, by arbitration.

[34] The strength or weakness of either party's position on a question is not of relevance to this application. A submission that it is unlikely that one side or the other will succeed on arbitration is not reason to refuse arbitration. I am not

reviewing or considering the merits of matters in dispute. This application relates to a consideration as to which process must be used to decide disputes.

[35] Section 18.5 of the Amended Partnering Agreement and the provisions of the Amended Partnering Agreement that immediately follow relate to “Compensation to City for Termination of this Agreement”. Millennium submits that the clause in the Amending Partnering Agreement on which the City’s claims are founded is a penalty clause that is not enforceable.

[36] The City submits that if that affords Millennium a defence to its claims, then it does so by way of being a defence to this action and that Millennium’s submission that the City is relying on a penalty clause is not a dispute that is subject to the agreement to arbitrate.

[37] Section 19 is the “Dispute Resolution” clause of the Amended Partnering Agreement. It provides for arbitration in the circumstance where “any dispute arises between the parties with respect to this Agreement”.

[38] Millennium submits that the question whether the compensation clause is a penalty clause is a dispute that has arisen between the parties with respect to the Amended Partnering Agreement and that it is therefore subject to the agreement to arbitrate.

[39] Millennium’s submission is arguable. *Gulf Canada Resources* holds that where it is arguable that the dispute falls within the agreement to arbitrate, that the stay should be granted and the matter left for determination by the arbitral tribunal.

[40] I am of the opinion that the *Commercial Arbitration Act* requires that these proceedings be stayed as against Millennium and that the court does not have the discretion not to stay these proceedings as against it.

[41] I order that these proceedings as against Millennium be stayed pursuant to s. 15(1) of the *Commercial Arbitration Act*.

[42] Millennium is entitled to the costs of this application in any event of the cause. Those costs are payable on the conclusion of this proceeding.

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Mr. Justice S. J. Shabbits