CITATION: AIG Insurance Co. of Canada v. Canjam Trading Ltd, 2015 ONSC 149
COURT FILE NO.: CV-14-0051481-0000
DATE: 20150108

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: AIG Insurance Company of Canada, Applicant

AND:

Canjam Trading Limited, Respondent

BEFORE: Justice Carole J. Brown

COUNSEL: *Jamieson Halfnight & Anne Juntunen*, for the Applicant

Katrina Marciniak, for the Respondent

HEARD: December 18, 2014

ENDORSEMENT

[1] The applicant, AIG Insurance Company of Canada ("AIG"), brings this application for the appointment of an arbitrator pursuant to an arbitration agreement and s. 10(1) of the *Arbitration Act, 1991*, S.O. 1991 C 17. The respondent, Canjam Trading Limited ("Canjam"), opposes this application on the grounds that the arbitration agreement between the parties does not apply to this dispute or alternatively, that there has been undue delay on the part of AIG and the limitation period for commencing an arbitration proceeding has passed.

Background

[2] AIG is the successor in interest to the insurer that issued two trade credit insurance policies, Policy 6498876 and Policy 6498927 (the "Policies") to Canjam, a Canadian exporter. The Policies insured Canjam against the risk that its overseas customers would fail to pay for goods received. The Policies provided that in the event AIG paid a claim, it would be subrogated to Canjam for any recoveries obtained from the delinquent customer.

[3] In 2002, Canjam submitted two claims under the Policies on the basis that a Jamaican customer had defaulted on payments for shipments of salted fish and meat products sent to Jamaica. After investigating the claims, AIG compensated Canjam pursuant to the Policies for a total of $356,548.50 Canadian.

[4] The parties then entered into a Release and Assignment Agreement (the "Release"), which stipulated that the recoveries, for which AIG was subrogated pursuant to the Policies, would proceed as follows: Canjam would be left in control of the recovery effort, would act diligently to recover from the customer using its best efforts, and after paying the costs and

expenses of its recovery effort, would pay all recovery proceeds to AIG, which would be divided between the parties pursuant to a formula set forth in the Policies.

[5] Sometime in 2004, Canjam obtained judgment in Jamaica against the delinquent customer. On August 10, 2004, representatives of AIG requested details of any expenses that Canjam had applied against any recoveries. Canjam did not respond. On May 3, 2006, representatives of AIG requested a reconciliation of Canjam's recoveries and expenses, as well as a remittance of any net recoveries. Canjam did not respond. On March 27, 2012, representatives of AIG wrote Canjam seeking an audit of the recoveries. Again, Canjam did not respond.

[6] On November 11, 2013, AIG commenced a civil action against Canjam in Jamaica where the recovery efforts had taken place. AIG's claim against Canjam sought "…an Account of all sums payable by the Defendant to the Claimant pursuant to insurance policies numbered 649-887 and 649-8927 and a Release & Assignment Agreement entered into on or about the 9th January 2003 and for specific performance of the Release & Assignment Agreement."

[7] On January 22, 2014, Canjam brought an application to strike. In support of Canjam's application, Ms. White, the president of Canjam, filed an affidavit swearing that the parties to the dispute were a Canadian company and a Canadian bank, all elements of the contracts – the Policies and the Release – were to be performed in Canada, and the Policies contained a choice of law clause stipulating that they were governed by Ontario law. In light of Canjam's application to strike, AIG discontinued the Jamaican action on April 15, 2014.

[8] On July 28, 2014, AIG served Canjam with a Notice of Intent to Arbitrate. According to AIG, it commenced the proceeding as an arbitration rather than a civil action because Canjam had taken the position in its application to strike that this dispute was governed by the Policies, and the Policies contain mandatory arbitration clauses. Clause VII C of each Policy reads:

> Should any dispute arise between the Insured and the Company under this policy which cannot be settled amicably, the matter in dispute shall be referred to three persons in Canada, one to be appointed by each of the parties hereto, and the third by the two so chosen who shall act as chairman of the proceedings. Should either the Insured or the Company fail to appoint an arbitrator or should the two arbitrators so chosen fail to agree on a third arbitrator, then the parties to the arbitration shall apply to the appropriate federal or Provincial court in Ontario, Canada for the appointment of such arbitrator…

[9] On September 23, 2014, AIG appointed its arbitrator, the Hon. J Douglas Cunningham and requested Canjam to appoint its arbitrator pursuant to the Policies. On October 10, 2014, Canjam advised AIG that it would not participate in an arbitration.

Position of Canjam

[10] Canjam does not dispute the validity of the Policies or the Release. Nor does it deny that under the Release, it was contractually obligated to reimburse AIG for funds recovered from the delinquent customer. Nor does Canjam deny that, as of this application, it has failed to do so.

[11] Nevertheless, despite the foregoing, and despite conceding that the Policies contain binding arbitration clauses, Canjam maintains that this dispute should not go to arbitration. According to Canjam, the Release, which did not contain an arbitration clause, was a new contract. Unlike the "typical situation" in cases like this, the Release here was not an acknowledgement of subrogation and reimbursement provisions contained within the Policies. Instead, the Release replaced the Policies and now governs this dispute. The Release extinguished any entitlements that AIG may have had under the Policies—it created a new status quo. Canjam notes that while the Release incorporates certain aspects of the Policies, it does not explicitly incorporate the arbitration clauses. These were "specifically and intentionally omitted from the new contract..." In support of its position, Canjam relies on the decision of the Nova Scotia Superior Court in *Standard Life v. Landry*, 2012 NSSC 228, which dealt with the creation of *per se* fiduciary duties and which has little in common with this case.

[12] Canjam also submits that based on the wording of AIG's Notice of Intent to Arbitrate there can be no doubt that the heart of the dispute is the alleged breach of the Release. Canjam maintains that this dispute is about Canjam's obligations under the Release, not the Policies.

[13] In the event that the arbitration clauses do apply to the dispute, Canjam makes two time-based submissions. First, Canjam submits that there has been undue delay by AIG, who has acted contrary to the spirit of the arbitration clause. AIG made demands of Canjam in 2004, in 2006, and then again in 2012, but did not commence litigation until 2013. According to Canjam, this delay "is beyond excessive and cannot be considered anything but undue delay." Second, Canjam submits that AIG is time-barred by the *Limitations Act, 2002*, SO 2002 c. 24 Sched. B. Limitation periods apply to reimbursement agreements between insurers and insureds. As AIG was aware of Canjam's judgment against the delinquent customer by August 10, 2006, and Ontario only has a two-year limitation period, the limitation period for AIG to proceed against Canjam has long since expired.

Position of AIG

[14] It is the position of AIG and that Canjam's objections are without merit.

[15] First, AIG emphasizes that the Policies mandate arbitration for "any dispute [under the Policies] which cannot be settled amicably." This dispute has to do with whether Canjam, as AIG's former insured and the recipient of claim proceeds, should provide information to AIG so AIG can ascertain whether Canjam owes it any portion of the recoveries. It is therefore "any dispute" between Canjam and AIG arising under the Policies. According to AIG, this conclusion is consistent with *Ontario Federation of Labour v. Ontario (Minister of Economic Development, Trade & Tourism)*, (1996) 31 O.R. (3d) 302, 140 D.L.R. (4th) 686, a case cited by Canjam, in which the Court stated at para. 22 that the scope of an arbitration cause "must be determined in light of its particular language and the relationship between the parties." Further, AIG submits that the Release does not stand alone. It is a three-page document that requires the Policies for meaning and terms, and cites the Policies numerous times. AIG also notes that there is no "entire agreement" clause or other similar language in the Release suggesting that it was intended to stand on its own.

[16] Second, as regards Canjam's argument that the proceeding should have been brought earlier, AIG submits that it would have commenced this action sooner but for the fact that Canjam gave continued assurances that information as regards the status of its recovery operations would be forthcoming. In any event, AIG submits that because it served a Notice of Intent to Arbitrate on July 28, 2014, the arbitration was commenced well-within the two-year limitation period, which began sometime after AIG sent a formal audit request to Canjam on March 27, 2012. After all, the limitation period for AIG's claim could not begin to run until such time as AIG formally demanded an audit of Canjam's recovery streams *and* AIG was aware that Canjam would refuse to provide one. The fact that Canjam had obtained an order against its delinquent customer did not make AIG aware that Canjam would refuse to submit to an audit of its recovery streams. According to AIG, at the time of the request, Canjam was still representing that it would cooperate with AIG.

Issues

[17] This application turns on the following two issues:

a. Is the dispute between AIG and Canjam governed by the Policies such that the mandatory arbitrations clauses apply, or did the Release replace the Policies?

b. Has AIG caused undue delay contrary to the spirit of the arbitration clause and/or were arbitration proceedings commenced outside the applicable two-year limitations period?

Analysis

Do the arbitration clauses apply to this dispute?

[18] For the purposes of determining whether an arbitration clause applies, the nature of the dispute must first be determined: *Ontario Federation of Labour*, *supra*. In this case, the dispute is about AIG's entitlement to know whether (and how much) money was recovered by Canjam from the delinquent customer. Contrary to the submissions of Canjam, the dispute does arise under the Policies. This dispute is rooted in the payment of covered claims under the Policies and the recovery priorities agreed to as part of that payment.

[19] Because this dispute arises under the Policies, the answer to the above question turns on whether the Policies – which are otherwise valid and enforceable contracts – were replaced by the Release. Canjam submits that the Release extinguished the Policies. AIG maintains that the Release cannot stand alone as it derives meaning and terms from the Policies. I find AIG's argument persuasive.

[20] A release is the relinquishment in whole or in part of a right or claim. In this case, the Release discharged AIG from a claim by Canjam under the Policies. While a release may provide parties with a "clean slate" by ending the parties' contractual relationship, this is not always the case. A release does not necessarily amount to mutual rescission. The intention of the

parties in signing the release must be considered. A release is, after all, a written contract: Fred D. Cass, *The Law of Releases in Canada*, (Aurora, Canada Law Book: 2006) at 1.

[21] As the Supreme Court of Canada recently emphasized in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, 373 D.L.R. (4th) 393 at para. 47, the overriding concern when interpreting contracts is to "determine the intent of the parties and the scope of their understanding." A contract must be read as a whole and words must be given their ordinary and grammatical meaning. Moreover, surrounding circumstances must be considered. As Rothstein J. explained in *Sattva*,

> Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50).

[22] Contrary to the submissions of Canjam, the Release, read as a whole and with consideration for the surrounding circumstances, reflects an understanding that the Policies would continue to define the parties' relationship and that certain provisions would remain in force.

[23] The Release is a short, three-page document that records the payment of claims under the two Policies, each of which are ten pages in length. The Release does not contain an "entire agreement" clause. Nor does it contain any other language purporting to exhaustively determine the parties' rights and obligations. Further, the Release not only references the Policies, it explicitly incorporates certain conditions into the agreement. For example, clause 3.b.2. of the Release states that "all additional funds received will be shared according to the terms and conditions of Section VI. E. of the Policy."

[24] Canjam submits that ordinarily, a Release will merely repeat the subrogation and reimbursement provisions already contained within a policy, confirming that the insured understands that they are bound by those provisions. According to Canjam, the fact that Clause 3.b. of the Release modifies how the insured and the insurer will share in further Recoveries distinguishes this Release from ordinary subrogation and reimbursement agreements. Canjam

also submits that the fact that the Release places recovery obligations on Canjam (whereas the Policies do not) supports its position that they are distinct and separate contracts and further, that the Release replaces the Policies.

[25] Contrary to this submission, the fact that the Release modifies the terms of the Policies dealing with Recoveries does not mean the Policies have been extinguished. Parties to a contract are free to vary the terms of that contract through written agreement. To do so does not extinguish the contractual relationship.

[26] While not determinative, the subsequent conduct of Canjam in the Jamaican proceedings may be considered when interpreting the Release: *Montreal Trust Co. of Canada v. Birmingham Lodge Ltd.* (1995), 24 OR (3d) 97, 125 D.L.R. (4th) 193 (C.A.) at 100. Although Canjam strenuously denies that it avoided litigation in Jamaica on the grounds that the dispute is governed by the Policies, Canjam did made representations to that effect. In the sworn affidavit evidence of Ms. White, the president of Canjam, one of the reasons given for why the action should not be brought in Jamaica reads as follows: "Clause VII G of each of the policies contains a choice of law clause, which stipulates that the policies should be governed by the laws of the Province of Ontario, Canada." As with clause VII C (the arbitration clause), clause VII G is not explicitly referred to in the Release. Although this is just one consideration of many, I am of the view that the conduct of Canjam does indicate that it viewed the Policies as continuing to define the parties' relationship even after the Release was signed.

[27] Based on the evidence, I am satisfied that while certain of the provisions regarding the cost of the recovery may have been added in the Release, the genesis of the Release is the Policies, and the Policies continue in force despite the Release. Neither contract stands alone, but mutually informs the other. Further, I am of the view that although the dispute does involve Canjam's obligations under the Release, the dispute nevertheless arises from the Policies, such that the mandatory arbitration provisions apply. A court will invalidate an agreement to arbitrate "[o]nly where it is clear that the dispute is outside the terms of the arbitration agreement." Where it is arguable that the dispute falls within the terms of the arbitration agreement…those matters should be left to the arbitral panel: *Dalimpex Ltd. v. Janicki*, [2003] 64 O.R. (3d) 737, 228 D.L.R. (4th) 179 (C.A.) at para. 21 citing Hinkson J.A. of the British Columbia Court of Appeal in *Gulf Canada Resources v. Arochem International* (1992), 43 C.P.R. (3d) 390, 11 B.C.A.C. 145 at 397.

Should these proceedings have been brought earlier?

[28] I am satisfied, given the evidence before me, that there was not undue delay on the part of AIG which would preclude operation of the arbitration provisions. The delay was satisfactorily explained by virtue of the fact that AIG gave Canjam ongoing opportunities to respond to its requests for status updates regarding the recovery operations and when it ultimately determined that formal audit would be necessary given Canjam's failure to reply, AIG again gave Canjam the opportunity to provide the documentation requested. I accept that this was done in good faith on the part of AIG. Thereafter, AIG commenced litigation in Jamaica and subsequently withdrew

that litigation and commenced an application in Ontario based on arguments made by Canjam in its application to strike.

[29] Regarding Canjam's limitation period argument, I am satisfied that AIG is not time-barred by the *Limitations Act, 2002*. Section 5(1) of the *Limitations Act* reads as follows:

> **Discovery**
> **5.** (1) A claim is discovered on the earlier of,
>
> (a) the day on which the person with the claim first knew,
>
> (i) that the injury, loss or damage had occurred,
>
> (ii) that the injury, loss or damage was caused by or contributed to by an act or omission,
>
> (iii) that the act or omission was that of the person against whom the claim is made, and
>
> (iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and
>
> (b) the day on which a reasonable person with the abilities and in the ircumstances of the person with the claim first ought to have known of the matters referred to in clause (a). 2002, c. 24, Sched. B, s. 5 (1).

[30] AIG sent the formal demand for an audit to Canjam on March 27, 2012. It then served a Notice of Intent to Arbitrate on July 28, 2014. I am satisfied, given the lack of evidence to the contrary, that it was reasonable for AIG to wait four months for a reply before determining that Canjam had refused this request. The day on which a reasonable person with the abilities and in the circumstances of AIG first ought to have known that Canjam had refused to provide an accounting falls within two years of the Notice of Intent to Arbitrate. Although AIG may have had knowledge of Canjam's judgment, as well as Canjam's reluctance to communicate, mere knowledge of a possible claim is not sufficient to trigger the commencement of time for limitation purposes: *Consumers Glass Co. v. Foundation Co. of Canada Ltd.* (1985) 51 O.R. (2d) 385, 20 D.L.R. (4th) 126 (C.A.) at paras. 41-42.

[31] I note that AIG is not claiming that Canjam owes it a portion of recoveries. AIG could not claim this because it does not know what Canjam recovered. I accept AIG's submission that although it was aware of Canjam's judgment against its delinquent customer as early as 2006, the applicable limitations period for the claim that Canjam has failed to remit net recoveries has not yet begun to run because AIG has not discovered whether it has such a claim. Only after Canjam submits to an audit, or releases the information voluntarily, can AIG discover that it has a claim for net recoveries against Canjam. At this juncture, there is no evidence to establish that Canjam has realized recoveries. Canjam's continued silence and its decision to reveal nothing to AIG regarding its recovery are relevant to this finding. Had Canjam, at any point during their numerous correspondences and communications told AIG that it had recovered excess amounts from the customer but refused to remit them, the applicable limitations clock would have started running earlier.

[32] Based on the evidence and case law, I am satisfied that this dispute arises as a result of AIG's subrogation rights under the policy and its attempt to determine what amounts have been recovered in order to enforce those rights pursuant to the policies. While certain of the provisions regarding cost of the recovery may have been added in the release, the genesis of the release is the Policies and, I am of the view that this dispute arises from the policies, such that the mandatory arbitration provisions apply. I am also satisfied that arbitration should not be invalidated for undue delay and that the claim is not barred by the *Limitations Act, 2002*.

[33] Having made these findings, it is unnecessary to address the parties' submissions regarding the jurisdiction of an arbitral panel. Given the above findings, there is no need for the arbitral panel to determine whether it can hear the dispute.

[34] Accordingly, I order that the respondent select an arbitrator of its choice by on or before January 19, 2015, failing which I appoint the Hon. Colin Campbell as arbitrator.

[35] I would urge the parties to agree upon costs, failing which I would invite the parties to provide any costs submissions in writing, to be limited to three pages, including the costs outline. The submissions may be forwarded to my attention, through Judges' Administration at 361 University Avenue, within thirty days of the release of this Judgment.

Carole J. Brown, J

Date: January 8, 2015