IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: Pacific Erosion v. Western Quality Seeds
2003 BCSC 1743

Date: 20030909
Docket: S6417
Registry: Campbell River

Between:

Pacific Erosion Control Systems Ltd.

Plaintiff

And

Western Quality Seeds Inc.

Defendant

Before: The Honourable Mr. Justice Wong

Oral Reasons for Judgment

(In Chambers)

September 9, 2003

Counsel for the Plaintiff: B. Hutcheson

Counsel for the Defendant: A. MacDonald

Place of Trial/Hearing: Campbell River, B.C.

[1] **THE COURT:** This is an application by the defendant, Western Quality Seeds, that the action by the plaintiff be stayed pursuant to s. 8 of the ***International Commercial Arbitration Act*** and the inherent jurisdiction of this Court in order that the dispute raised in the statement of claim may be referred to arbitration.

[2] I need not review all of the factual bases on this matter as it is outlined in the facts of the brief submitted by the applicant's counsel, found on pages three to five inclusive. In essence, what the applicant defendant has stated is that they are assignees of the original contracting parties which is subject to an arbitration clause, and relies upon the comments by Mr. Justice Hinkson in the Court of Appeal decision of ***Gulf Canada Resources Ltd. v. Arochem International Ltd.***, [1992] B.C.J. No. 500, commonly called ***Arochem.***

[3] At page six of that judgment, the test formulated is that a stay of proceedings should be ordered where: (1) it is arguable that the subject dispute falls within the terms of the arbitration agreement; and (2) where it is arguable that a party to the legal proceedings is a party to the arbitration agreement.

[4] It is quite clear that Pacific Erosion Control Systems Ltd. is clearly an assignee of what was formerly Dawson, an original contracting party to the agreement.

[5] Western Quality Seeds is a subsidiary of Quality Seeds, who apparently entered into a contract with Dawson for some seeds, and there is an issue of whether it is a contract for exclusive distribution only in the eastern provinces. Quality

Seeds, and through them Western Quality, indicates that it is not specifically defined.

[6] In opposing the application for the stay, the plaintiff, Pacific Erosion Control Systems, has submitted that factually the issue at hand is nothing more than that Western Quality Seeds is a customer of Dawson, and that under those circumstances is not an assignee of one of the original parties. That has given me pause inasmuch as there are some documents that may support that proposition, but on the other hand, in its statement of claim and also in its position here there is indication that the plaintiff, Pacific Erosion, concedes that a form of exclusive distribution was given to Quality Seeds. I am of the view that this matter fits within the threshold outlined by Mr. Justice Hinkson. In any event it is arguable.

[7] In addition, on the question ultimately of jurisdiction, this does not preclude the plaintiff if it goes before the tribunal. Under s. 16(6) of the legislation it provides that if the tribunal rules as a preliminary question that it has jurisdiction, the parties may request the Supreme Court to decide that matter. So there is a matter of review, although limited, on that question.

[8] Under the circumstances, I am therefore of the view that

the stay is appropriate, and the matter will be referred to arbitration, and costs will follow this event here. Costs will be granted in this case.

[9] MR. HUTCHESON: Costs in any event?

[10] THE COURT: Yes.

[11] MR. MacDONALD: I'm just wondering, My Lord, perhaps we could just reserve the issue of costs, because if the issue of jurisdiction is raised before the arbitrator and my friend is not successful, and the matter comes back to the Supreme Court, it seems a little unfair that we should bear the costs today in any event of the cause. And I'm wondering if it might be best, in my submission, to reserve costs to that time at least.

[12] MR. HUTCHESON: My Lord, it seems -- I've never seen an application where a stay is granted where costs are not awarded to the successful applicant. The nature of the award certainly contemplates that the dispute is going to move on. And an appeal would come back successfully to the Supreme Court in the event that -- obviously, it would have to come back from the arbitration tribunal, and also they would have to be successful. So it seems to me reasonable that the costs issue should be settled now. And in the event it does come

back before the Supreme Court, then the Supreme Court can certainly order that costs in the original application should be paid to the other side. That is the sort of order that is granted, for instance, in this ***Burlington Northern Railroad*** case where the stay was granted; the stay was appealed successfully and then ultimately the Supreme Court of Canada said the stay should be granted. Well, during that course of time the parties were paying costs back and forth. So I see this as --

[13] THE COURT: Ultimately you are saying that in the end, depending on who is successful, it is an accounting feature?

[14] MR. HUTCHESON: It really is.

[15] THE COURT: Costs will be granted on this matter in any event.

[16] MR. HUTCHESON: Thank you.

"R.S.K. Wong, J."
The Honourable Mr. Justice R.S.K. Wong