COURT OF APPEAL FOR ONTARIO

CITATION: Black & McDonald Limited v. Eiffage Innovative Canada Inc., 2023 ONCA 91
DATE: 20230209
DOCKET: C70823 & C70824

Huscroft, Miller and Nordheimer JJ.A.

DOCKET: C70823

BETWEEN

Black & McDonald Limited

Plaintiff (Appellant)

and

Eiffage Innovative Canada Inc., Francois Bordachar, Aliraza Pirzada and Sherry Alward

Defendants (Respondents)

DOCKET: C70824

AND BETWEEN

Black & McDonald Limited

Plaintiff (Appellant)

and

Liberty Mutual Insurance Company

Defendant (Respondent)

Christopher Afonso and Linette King, for the appellants

Julie Rosenthal and Jill Snelgrove, for the respondents Eiffage Innovative Canada Inc., Francois Bordachar, Aliraza Pirzada and Sherry Alward

Laura Delemere and Byron Taylor-Conboy, for the respondent Liberty Mutual Insurance Company

Heard: January 31, 2023

On appeal from the orders of Justice Grant R. Dow of the Superior Court of Justice, dated May 27, 2022, with reasons reported at 2022 ONSC 1855.

REASONS FOR DECISION

[1] These two proceedings arise out of a construction project involving a bridge over the Fraser River in Delta, British Columbia. The appellant appeals in both proceedings from the decision of the motion judge who granted a stay of these proceedings on the basis that British Columbia was the more convenient forum for their determination.

[2] The respondent, Eiffage Innovative Canada Inc., was the general contractor for a project involving the expansion of the Alex Fraser Bridge located near Vancouver, British Columbia (the “Project”). The Minister of Transportation and Infrastructure of British Columbia (the “Ministry”) is the owner of the Project and contracted with Eiffage under a Major Works Contract dated August 10, 2018 (the “Prime Contract”) for the amount of $19,239,986.46 plus applicable taxes.

[3] The appellant and Eiffage entered into a stipulated price contract on October 31, 2018, pursuant to which the appellant became a subcontractor for Eiffage on the Project (the “Subcontract”). Eiffage was to pay $4,772,795.22 for the scope of the work. The subcontract provided that the appellant was to complete its work on a timeline that would enable Eiffage to achieve a main contract “completion date” of June 28, 2019.

[4] Ultimately, the appellant claims that it completed all of the work under the Subcontract, but Eiffage failed to pay, despite having been paid itself for the completion of the Prime Contract. Eiffage contends that the appellant did not complete its work in a timely fashion and consequently Eiffage did not meet its contracted completion date. As a result, the Ministry has deducted late payment penalties from the amounts otherwise due to Eiffage for the Project.

[5] The appellant commenced a proceeding in Ontario for unpaid invoice/breach of contract claims against Eiffage and tort claims arising from breach of trust against the individual defendants (the “Eiffage Individuals”).

[6] The respondent, Liberty Mutual Insurance Company, issued a Labour & Materials Payment Bond to Eiffage on the Project. The appellant commenced a separate action against Liberty Mutual for payment under the Payment Bond.

[7] Before the motion judge, Eiffage conceded that the Ontario court had jurisdiction *simpliciter*. As a result, the motion judge dealt only with the argument that Ontario was not the convenient forum for the resolution of the dispute. Eiffage, among other arguments, contended that British Columbia was the more convenient forum.

[8] Liberty Mutual contends that the Payment Bond requires that any action under it has to be commenced in British Columbia due to what it says is a choice of forum clause in the Payment Bond.

[9] There are certain provisions in the various contracts that are relevant to the issues raised. They are:

Prime Contract:

> Clause 80.01 that the contract "shall be governed, construed, and interpreted in accordance with the laws of British Columbia."
>
> Clause 80.02 that Eiffage "attorns itself to the exclusive jurisdiction of the courts of the Province of British Columbia".

Subcontract:

> Article 2.1 that the "requirements, terms and conditions of the Prime Contract as far as they are applicable to the Sub-Contract, shall be binding upon the contractor and the sub-contractor".
>
> Article 10.2.1 that the "laws of the Place of the Work shall govern the Sub-Contract Work".

Payment Bond:

> Section 3 that “no suit or action shall be commenced by any claimant … (c) other than in a Court of competent jurisdiction or in a Province or Territory of Canada in which the subject matter of the Contract, or any part thereof, is situated and not elsewhere, and the parties agree to submit to the jurisdiction of such Court."

[10] The motion judge concluded that British Columbia was the more convenient forum for the resolution of the Eiffage action and stayed the Ontario action. The motion judge also stayed the Liberty Mutual action but did not give any reasons for that conclusion other than to say that “similarly” that action was stayed. It is unclear what the motion judge found to be the similarity between the two proceedings, other than the result.

The Eiffage Action

[11] Somewhat confusingly, Eiffage argues that, notwithstanding its concession that the Ontario court had jurisdiction *simpliciter* over the claim, the courts of British Columbia have exclusive jurisdiction over actions under the subcontract. It bases this submission on clause 80.02 of the Prime Contract which it contends is applicable to the subcontract by virtue of Article 2.1. More specifically, Eiffage says that clause 80.02 is “applicable” to the subcontract as that term is used in Article 2.1 of the subcontract. The motion judge appears to have acceded to this submission as he said, in his reasons, at para. 24:

> Further, the parties accepted "the exclusive jurisdiction of the courts of the Province of British Columbia" (GC80.02).

[12] It is entirely unclear how Eiffage reconciles its concession that the Ontario court has jurisdiction *simpliciter* with its contention that the courts of British Columbia have exclusive jurisdiction. It is possible that an exclusive jurisdiction clause could be seen as rebutting the jurisdiction of the Ontario court as that result is explained in *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, [2012] 1 S.C.R. 572, but that was not the argument advanced before us. Further, assuming one can get to that result, an exclusive jurisdiction clause would oust the jurisdiction of the Ontario court and there would then be no need to engage in a *forum non conveniens* analysis. However, the *forum non conveniens* analysis forms the entire basis for the orders below and none of the parties suggested that the matter should have been decided on any other basis.

[13] In yet a further confusing aspect of its submission, Eiffage simultaneously contended that the jurisdiction of the British Columbia courts was “non-exclusive” but that this non-exclusive jurisdiction should weigh heavily in the *forum non conveniens* analysis. It is difficult to understand how the jurisdiction of the British Columbia courts could be non-exclusive in light of the express language of clause 80.02 of the Prime Contract that the courts of British Columbia have exclusive jurisdiction, if that clause can be applied to the subcontract.

[14] We do not accept either version of Eiffage's argument. We do not agree that clause 80.02 is "applicable" to the subcontract. In that regard, we also do not agree, as submitted by Eiffage, that the word "applicable" means "suitable" in this context. If that were the proper meaning of the word "applicable" virtually every clause of the Prime Contract could be seen as being suitable for the subcontract.

[15] Rather, we find that the proper interpretation of the word "applicable" is that it requires that the subcontract has made, either expressly or by implication, a term of the Prime Contract relevant to the subcontract. There is nothing in the subcontract that purports to make the exclusive jurisdiction clause applicable to the subcontract. Indeed, there are separate provisions in Part 8 of the subcontract that expressly deal with dispute resolution, including a reference to court proceedings as one route for the resolution of disputes. No reference is made in Part 8 to the exclusive jurisdiction clause in the Prime Contract. If Eiffage had intended to have the exclusive jurisdiction clause contained in the Prime Contract apply to its subcontracts, it would have been a simple matter for Eiffage to have included it in Part 8, but it did not. Eiffage's effort to now incorporate the exclusive jurisdiction clause from the Prime Contract through Art. 2.1 does not succeed.

[16] We then turn to the issue of the *forum non conveniens* analysis. The motion judge set out the common factors that are generally considered in that analysis. Those factors include:

(a) the location where the contract in dispute was signed;

(b) the applicable law of the contract;

(c) the location of witnesses, especially key witnesses;

(d) the location where the bulk of the evidence will come from;

(e) the jurisdiction in which the factual matters arose;

(f) the residence or place of business of the parties; and

(g) the loss of a legitimate juridical advantage.

[17] These factors are drawn from *Young v. Tyco International of Canada Ltd.* 2008 ONCA 709, 92 O.R. (3d) 161, at para. 26. The appellant takes issue with the statement of those factors as opposed to the statement of factors contained in *Van Breda,* at para. 105. In our view, nothing turns on the difference. The factors referred to in *Van Breda* are drawn from the *Uniform Court Jurisdiction and Proceedings Transfer Act* ("CJPTA") developed by the Uniform Law Conference of Canada. They do not have any direct application to a proceeding in Ontario. However, the factors stated in *Young* do not differ in any material respects and, in any event, are stated not to be exhaustive. It is not clear that had the motion judge considered the CJPTA factors, rather than the *Young* factors, the result would have been any different.

[18] In his consideration of the *Young* factors, the motion judge found that the exclusive jurisdiction clause applied to the subcontract. He appears to have relied

heavily on that finding for his conclusion that a stay of the Ontario action should be granted. For the reasons we have set out above, the motion judge erred in reaching that conclusion. Given that error, his *forum non conveniens* analysis is flawed and is not entitled to any deference from this court.

[19] On our view of the analysis, the location where the contract in dispute was signed favours Ontario as that is where the contract was negotiated and signed.

[20] The law of the contract favours British Columbia. That conclusion flows from Article 10.2.1 which provides that the "laws of the Place of the Work shall govern the Sub-Contract". The Place of Work was clearly British Columbia. That said, however, this factor carries little weight when one appreciates that there is no appreciable difference in the laws of British Columbia from the laws of Ontario as they apply to this dispute. This is a breach of contract claim at its heart and the law relating to such a claim is the same as between those provinces.

[21] The location of witnesses, especially key witnesses, is difficult to determine because the evidence, such as it is, is inconclusive. The Eiffage Individuals are resident in Ontario as are many of the persons involved from the appellant's side. Eiffage says that the two employees most concerned with the Project from their side were in British Columbia. However, Eiffage had to acknowledge that those two people are no longer employed by Eiffage and Eiffage has no current information as to where they reside.

[22] Further, on this point, the motion judge found that this factor was neutral because of "the post COVID reality that converted court proceedings from in person to virtual." We do not agree that that reality renders this factor neutral. Virtual appearances by witnesses cannot be safely equated to appearances in person in terms of their impact on the fact-finding process. Further, there is no way of knowing, at this point in time, whether the trial of this action will proceed virtually or in person or a combination of both – the most likely result. We also do not know what witnesses might appear in person and which might appear virtually. All of that said, we do accept that this new reality will often lessen the weight to be given to this factor.

[23] In terms of where the bulk of the evidence will come from, invoices, payments and communications were exchanged between the parties in Ontario. However, that does not change the fact that the work undertaken, and the reasons for any delays in the completion of the work, will naturally involve the location where the work was performed, i.e., British Columbia. Given those countervailing considerations, we agree with the motion judge that this factor does not significantly favour one side or the other.

[24] Regarding the jurisdiction where the factual matters arose, we also agree with the motion judge that this factor favours British Columbia.

[25] The residence or place of business of the parties all favour Ontario.

[26] Finally, there is no loss of any juridical advantage by having this action proceed in Ontario as opposed to proceeding in British Columbia.

[27] A proper analysis of the factors demonstrate that they do not clearly favour one jurisdiction over the other. That result then leads into the overriding principle that “on a forum non conveniens motion, the standard to displace the plaintiff's chosen jurisdiction is high”: *Young,* at para. 28. That standard was not met in this case. The Eiffage action in Ontario ought not to have been stayed.

The Liberty Mutual Action

[28] Liberty Mutual’s submission rests entirely on its position that section 3(c) of the Payment Bond requires that any action be commenced in British Columbia. The precise wording of that section bears repeating:

> No suit or action shall be commenced by any claimant
>
> …
>
> (c) other than in a Court of competent jurisdiction or in a Province or Territory of Canada in which the subject matter of the Contract, or any part thereof, is situated and not elsewhere, and the parties hereto agree to submit to the jurisdiction of such Court.

[29] Some additional facts are relevant to this issue. First, the Payment Bond was required by the Ministry, that is, the owner of the Project. It essentially obligates Liberty Mutual to ensure that Eiffage pays its subcontractors for work done by them. Second, the Payment Bond is a standard form contract although there is no evidence as to whose standard form contract it is. Third, the Payment

Bond is a contract between Liberty Mutual and Eiffage. The appellant is not a party to the Payment Bond, although it is entitled to advance a claim under it.

[30] The motion judge did not undertake any analysis of the proper interpretation of the words “in which the subject matter of the Contract, or any part thereof, is situated” found in section 3(c) nor how those words should be applied in the context of this case. Liberty Mutual says that the subject matter of the Prime Contract is the Project and the Project is situated in British Columbia. The appellant says that the subject matter of the Prime Contract, in this context, is the subcontract it has with Eiffage. The subcontract was negotiated and entered into in Ontario and thus that subject matter, or a part thereof, is situated in Ontario.

[31] The provision in the Payment Bond is ambiguous. It is a term that could have different meanings depending on the particular factual situation that it is being applied to. It is also clear that the terms of the Payment Bond were developed to apply to obligations arising in different jurisdictions. For example, there is a term of the Payment Bond by which Liberty Mutual agrees not to take advantage of Article 2365 of the *Civil Code of Québec*, C.Q.L.R. c. CCQ-1991. That term clearly has no application to the facts of this case.

[32] In our view, any ambiguity in this term of the Payment Bond should be resolved against Liberty Mutual. It is Liberty Mutual that is relying on the standard form contract and who is imposing the requirements of that standard form contract

on the appellant. While the principle of *contra proferentem* may not technically apply to this situation, since there is no evidence that Liberty Mutual drafted the standard form contract, the rationale for the principle ought to still drive the proper interpretation. If it is fair to resolve ambiguities against the party who prepares the document, it would seem equally fair to resolve ambiguities against the party who imposes a standard form contract on others: *Bank of Montreal v. Korico Enterprises Ltd.* (2000), 50 O.R. (3d) 520, 190 D.L.R. (4th) 706 (C.A.), at para. 16. If Liberty Mutual wishes to avail itself of this exclusive jurisdiction clause, then it bears the onus of bringing itself within its express terms. Once again, had Liberty Mutual wished to confine actions under the Payment Bond to a particular province, it could have clearly so stipulated in the Payment Bond. It did not do so.

[33] Further, it should be beyond debate that these two actions will have to be tried together. To do otherwise would open the door, not only to multiple proceedings, but, more importantly, to the prospect of inconsistent findings. The appellant has to be successful in its allegations underlying its claim against Eiffage in order to be successful in its claim in the Liberty Mutual action. We note on this point that Eiffage, in its factum, says that the factual allegations in the two actions are “identical”. If the appellant proceeds against Eiffage in Ontario and is successful, would that determination be binding on a court in British Columbia if the Liberty Mutual action proceeds there or would the Eiffage claim have to be relitigated in that proceeding? Those types of issues must be avoided.

[34] Even if s. 3(c) of the payment bond is an applicable forum selection clause, it is recognized that a court can relieve against the application of a forum selection clause, if the enforcement of that clause "would frustrate some clear public policy": *Expedition Helicopters Inc. v. Honeywell Inc*., 2010 ONCA 351, 100 O.R. (3d) 241, at para. 24. There is a clear and well-established public policy against allowing multiple proceedings that risk the prospect of inconsistent findings. That would be the result if the Liberty Mutual action proceeds in British Columbia while the Eiffage action proceeds in Ontario. Therefore, if the forum selection clause applies in this case, we would relieve against its effect.

[35] The Liberty Mutual action should not have been stayed.

Conclusion

[36] The appeals are allowed and the orders below are set aside. The two actions may proceed in Ontario. The appellant is entitled to its costs of the appeals fixed in the amount of $16,000 as against Eiffage and $11,000 as against Liberty Mutual, both amounts being inclusive of disbursements and HST. The costs below remain in the amounts fixed by the motion judge but are now payable by Eiffage and Liberty Mutual to the appellant.

"Grant Huscroft J.A."
"B.W. Miller J.A."
"I.V.B. Nordheimer J.A."