Court of Queen's Bench of Alberta

Citation: Condominium Corporation 012 5331 v. W. De Silva Properties Inc., 2009 ABQB 650

Date: 20091113
Docket: 0703 15278
Registry: Edmonton

Between:

Condominium Corporation 012 5331

Plaintiff

- and -

W. De Silva Properties Inc., William De Silva P. Eng., Calbridge Drywall Ltd., Liam Construction Inc., Avid Hamilton, David Hamilton Operating As "GMH Architects", and the said GMH Architects, Terracon Geotechnique Ltd., Jacobsen Hage Engineering, S.E. Hage Engineering Ltd., E.B. Jacobsen Engineering Ltd. and Alberta Permit Pro

Defendants

Reasons for Judgment
of the
Honourable Madam Justice L.J. Smith

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[1] The Alberta New Home Warranty Program (ANHWP) applies for an Order staying an Arbitration between Condominium Corporation 012 5331 (Plaintiff) as Claimant and Liam Builders (Alberta) Ltd. (Liam Builders) and ANHWP as Respondents.

[2] ANHWP also applies for an Order adding ANHWP as a Defendant to this action, Court of Queen's Bench Action No. 0703 15278 (the proceeding) between the Plaintiff and several defendants including Liam Construction Ltd., the alleged builder of the condominium, but not Liam Builders.

[3] The application is dismissed.

Facts

[4] ANHWP is a private warranty provider for member builders for qualifying construction defects. Liam Builders became a member of ANHWP prior to building Riverwalk Villas in two phases.

[5] According to the rules of ANHWP, substantially similar Condominium Common Property Warranty Certificates (Warranty Certificate) were issued for each phase of Riverwalk Villas. The Warranty Certificate forms the warranty contract which provides limits of $1.5 million for each phase of Riverwalk Villas upon proof of a qualifying defect within a time frame.

[6] The Plaintiff takes the position that a qualifying defect is provable in relation to Riverwalk Villas. The qualifying defect is alleged to be a Structural Defect as defined in the Warranty Certificate:

> (q) "Structural Defect" is a Defect in material or workmanship that results in damage due to the failure of a Load Bearing Part to provide stable and adequate support for the Common Property or is not in compliance with the Alberta Building Code in effect as at the date the building permit was issued for the Condominium. Excluded are driveways, basement, garage and parkade floors, patios, swimming pools, sidewalks, retaining walls and all other concrete work which is not load bearing. Non-compliance with the Alberta Building Code is considered a Defect covered by this Warranty only if the non-compliance constitutes an unreasonable health or safety risk, or has resulted in, or is likely to result in, material damage to the Condominium.

[7] Further, the Plaintiff is of the view that the qualifying defect arises from a failure to construct in accordance with the Alberta Building Code giving rise to the application of the definition of Defect from the Warranty Certificate:

> "Defects" are workmanship and material which are not in compliance with the Program's Workmanship and Material Guidelines or were noted on the Certificate of Compliance and have not been resolved or are not in compliance with the Alberta Building Code in effect as at the date the building permit was issued for the Condominium or any condition which renders the Common Property not fit for use as determined by the Program in its sole discretion. Non-compliance with the Alberta Building Code is considered a Defect covered by this Warranty only if the non-compliance constitutes an unreasonable health or safety risk, or has resulted in, or is likely to result in, material damage to the Condominium.

[8] The Warranty Certificate limits the time period within which a defect must fail to provide load bearing in order to qualify as a Structural Defect.

[9] The Warranty Certificate imposes strict limits upon the Plaintiff in relation to taking unilateral action to remedy a failure. If it fails to adhere to those limits, the Plaintiff risks termination of the Warranty Certificate.

[10] The Warranty Certificate sets out time limits within which procedural steps must be taken by the plaintiff.

[11] The Warranty Certificate prescribes a Conciliation procedure. That procedure is mandatory and the result is final and binding.

[12] The Conciliation procedure was followed. It was determined that the foundation of the load bearing walls of Riverwalk Villas had not failed within the time limit specified in the Warranty Certificate.

[13] The Warranty Certificate prescribes an Arbitration procedure, and provides that the rules for Arbitration are those of the ANHWP and that Arbitration is final and binding.

[14] The Plaintiff initiated Arbitration under the ANHWP Rules on November 27, 2007 naming Liam Builders and ANHWP as the respondents. Two days later it commenced this proceeding against a number of Defendants but not the two respondents to the Arbitration.

[15] In the Arbitration, the Plaintiff concedes that it did not file within the required 30 day limit all of its documents relevant to the Arbitration as required by the ANHWP Rules. The first order of business in the Arbitration may very well be the question of whether the requirement for strict compliance with the ANHWP Rules, which do not form part of the Warranty Certificate, breaches the Rules of Natural Justice.

[16] Two years have passed since the Plaintiff initiated Arbitration. No progress has been made. The Plaintiff is not responsible for the delay. The Plaintiff has made plain its wish to proceed with Arbitration. Some responsibility for the delay can be ascribed to ANHWP, but most of the delay arose from circumstances which need not be reiterated here.

[17] A new arbitrator has been appointed. The Plaintiff wishes to proceed to Arbitration in accordance with the terms of the Warranty Certificate.

[18] Meanwhile, this proceeding has moved through pleadings, Affidavits of Records, and Examination for Discovery is set to commence on November 9, 2009.

[19] ANHWP's Reply in the arbitration asserted, in addition to the substantive denial, that the Arbitration was not the best forum for resolution of the dispute. It further alleged that the failure, if there was one, was caused by the negligence of one of the Plaintiff's employees.

[20] Further, ANHWP issued Third Party Notices in the Arbitration to entities from which it was seeking contribution and indemnity. Those entities have refused to engage in the Arbitration and cannot be forced to do so, not being parties to the Warranty Certificate.

[21] It is the position of ANHWP that arising from its right to contribution and indemnity and its right of subrogation, described below, it ought to be permitted to participate in the proceeding so that all of the issues can be dealt with in one proceeding. The right to subrogation is set out in the Warranty Certificate as one of the obligations of the Plaintiff:

> **4. CONDOMINIUM CORPORATION OBLIGATIONS**
>
> (b) The Condominium Corporation:
>
> (i) Agrees that the Program upon making any payment or assuming liability under this Condominium Common Property Warranty Certificate protection coverage, is subrogated to all rights of recovery of the Condominium Corporation against any person, corporation or other entity who may have caused or contributed to the occurrence of any liability under this coverage protection. The Program may bring action, at the Program's expense, in the name of the Condominium Corporation or the Program to enforce such rights. The Condominium Corporation shall fully support and assist the Program in the pursuit of its subrogated rights...

[22] The Plaintiff notes that ANHWP has not made any payment or assumed liability under the Warranty Certificate protection coverage.

[23] ANHWP submits that the warranty issues and the negligence issues cannot be reasonably separated. There is a danger of inconsistent factual findings and verdicts all of which leads to manifest unfairness.

Adding ANHWP as a Defendant

[24] Rule 38 sets out the circumstances in which a party may be added. Sub-rule (6) is relied upon by ANHWP:

> 38(6) The court may, upon being satisfied by any person not a party to an action;
>
> (a) that he is interested in the subject matter or result of the action, and
> (b) that he should be allowed to defend the action or any issue therein,
>
> order the person to be added as a defendant and make all necessary directions.

[25] The Statement of Claim alleges negligent construction. It contains no allegations against ANHWP. Nevertheless, it is clear that ANHWP has an interest, in a broad sense, in both the subject matter and the result of the proceeding. The question is whether ANHWP should be added as a defendant.

[26] Counsel agree that the relevant test is as set out by the Court in ***MacDonald v. Taubner***, 2006 ABQB 138, 22 E.T.R. (3d) 148:

> 57 The test under s. 38(3) was set out in ***Amoco Canada Petroleum Co. v. Alberta & Southern Gas Co.*** (1993), 10 Alta. L.R. (3d) 325 (Q.B.), and approved by the Court of Appeal in ***CPCS Ltd. v. Western Industrial Clay Products Ltd.*** (1995), 31 Alta. L.R. (3d) 257 (C.A.):
>
> > (a) Can the question to be settled between the Plaintiff and the Defendants be effectually and completely settled without adding the party sought to be joined?
> >
> > (b) Will the order which the Plaintiff seeks directly affect that party's enjoyment of their legal rights?
>
> 58 The test is similar under R. 38(6). Rule 38(6) deals with the situation in which a party not named to the action seeks to be added, and is therefore not directly applicable. The test was set out in ***CPCS Ltd. v. Western Industrial Clay Products Ltd.*** at para. 4:
>
> > The test for permitting joinder under Rule 38(6) is stated in ***Fullwood v. Master Excavators Ltd.*** (1981), 34 A.R. 541 (Q.B.) and ***Royal Bank of Canada v. Page Petroleum Ltd.*** (1989), 102 A.R. 347 (C.A.). The initial test is whether the applicant has an interest, that is, a legal interest, in the outcome of the proceedings. The second branch of the test differs depending on which case is followed. In ***Fullwood*** the test is expressed as a question of whether it is just and convenient to add the person. In ***Royal Bank v. Page Petroleum*** the concern is that the interest of the applicant will not be adequately protected unless it is allowed to participate in the proceedings.

[27] ANHWP maintains it has a legal interest in the proceeding arising from its rights to subrogation and to contribution and indemnity, and also arising from the alleged substantial similarity of the factual issues. To support its conclusion on the factual issues, ANHWP refers to paragraphs of the Statement of Claim which allege structural failure. ANHWP asserts it needs to be present in the proceeding to ensure the right facts are before the court. On the second part of the test, whether it is articulated as 'just and convenient' or 'that the interest of the [ANHWP] will not be adequately protected', ANHWP also asserts the factual issues together with the danger of inconsistent findings of fact, inconsistent verdicts, and protection of the right to subrogation and to contribution and indemnity.

[28] The Plaintiff submits that ANHWP's position is fundamentally inconsistent with its position in the Arbitration that it has no obligation to the Plaintiff. Its subrogation rights arise upon payment or assumption of liability, neither of which has occurred.

[29] In my view, ANHWP cannot be said to have a legal interest in the proceeding. Its right of subrogation arises in accordance with the contract, the Warranty Certificate. In the Arbitration it denies liability under the Warranty Certificate and therefore the circumstances in which a legal interest would arise are not yet present.

[30] In my view, the right to contribution and indemnity of the ANHWP does not arise where there are no allegations against it as a defendant in the proceeding.

[31] Matters of fact as to how, why or when a building failed cannot give rise to a legal interest, at least in the circumstances before the Court.

[32] I deny this part of the application on these grounds.

[33] However, I also note that the wish of ANHWP to be present as a Defendant in the proceeding seems incompatible with its obligation to compensate the Plaintiff and its consequent right of subrogation if the circumstances for compensation are proven in accordance with the terms of the Warranty Certificate.

[34] I dismiss the application to add ANHWP as a defendant to the proceeding.

Stay of the Arbitration

[35] The *Arbitration Act*, R.S.A. 2000, c. A-43 (the Act) sets out the circumstances under which a court may intervene in an arbitration or proceeding.

> **Court intervention limited**
>
> 6 No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried on in accordance with the arbitration agreement;
>
> **(c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;**

(d) to enforce awards.

Stay

7(1) If a party to an arbitration agreement commences a proceeding in a court in respect of a matter in dispute to be submitted to arbitration under the agreement, the court shall, on the motion of another party to the arbitration agreement, stay the proceeding.

(2) The court may refuse to stay the proceeding in only the following cases:

(a) a party entered into the arbitration agreement while under a legal incapacity;

(b) the arbitration agreement is invalid;

(c) the subject-matter of the dispute is not capable of being the subject of arbitration under Alberta law;

(d) the motion to stay the proceeding was brought with undue delay;

(e) the matter in dispute is a proper one for default or summary judgment.

(3) An arbitration of the matter in dispute may be commenced or continued while the motion is before the court.

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the matter in dispute shall be commenced, and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court's refusal is without effect.

(5) The court may stay the proceeding with respect to the matters in dispute dealt with in the arbitration agreement and allow the proceeding to continue with respect to other matters if it finds that

(a) the agreement deals with only some of the matters in dispute in respect of which the proceeding was commenced, and

(b) it is reasonable to separate the matters in dispute dealt with in the agreement from the other matters.

(6) There is no appeal from the court's decision under this section.
[emphasis added]

[36] ANHWP cites three cases to support its position that the Court should stay the arbitration: ***New Era Nutrition Inc. v. Balance Bar Company***, 2004 ABCA 280, 357 A.R. 184, ***Olymel S.E.C. v. Premium Brands Inc.***, 2005 ABQB 312, 7 B.L.R. (4th) 250, and ***Lamb v. AlanRidge Homes Ltd.***, 2009 ABQB 170, 309 D.L.R. (4th) 214.

[37] In ***New Era*** Conrad J.A. (for the Court) stated:

> 3 I would allow the appeal and stay the arbitration. The legislative intent behind section 7 of the *Arbitration Act* is to discourage duplicitous proceedings where there are overlapping matters that cannot be reasonably divided. I am satisfied that where one party has both sued and arbitrated the same issues, it would be manifestly unfair to deny the other party the remedy contemplated by statute where the matters in dispute cannot be reasonably separated. In my view, the other party can apply under section 6(c) of the *Arbitration Act* to stay the arbitration rather than make an application under section 7 for a remedy it does not want, and does not think appropriate - namely, to stay the litigation. Multiple proceedings in the circumstances here could involve far more than the mere "inconvenience" of having witnesses participate in two proceedings. The chambers justice should have determined whether the overlapping matters could be reasonably separated.

[38] Conrad J.A. also addressed the purpose of s-s. 6(c):

> 42 Subsection 6(c) allows the court to act to "prevent manifestly unfair or unequal treatment of a party to an arbitration agreement." This subsection was not part of the Institute's draft legislation and it was added to the proposed amendments at the same time as subsections 7(4) and 7(5). It is worth noting, as well, that by including the power to cure unfairness or inequality in section 6, the Legislature rejected section 5 of the Institute's proposed legislation which would have restricted court intervention to only those matters described specifically in the legislation.

[39] The purpose of s. 7 is discussed in paragraphs 36, 37 and 38 of the decision:

> 36 Section 7 contains much of what was in section 8 of the Institute's draft legislation. It contains the mandatory requirement that the court stay an action, upon application, subject to a short list of situations in which the court can refuse such an application (section 7(3)). Significantly, however, section 7 contains two subsections that were not part of the Institute's draft legislation.
>
> 37 First, subsection 7(4) indicates that the effect of a refusal to stay the action is to prohibit an arbitration from commencing or continuing, and renders anything

already done in connection with the arbitration without effect. Second, subsection 7(5) deals with a stay of litigation in the situation where not all of the matters in dispute are covered by the arbitration agreement. It allows the court to stay those parts of an action, covered by an arbitration agreement, provided the matters can be reasonably separated. If the matters in dispute cannot be reasonably separated, then the litigation continues and the arbitration is stayed by virtue of section 7(4).

38 The inclusion of these two subsections in section 7 indicates that the Legislature, despite its desire to promote and fortify the process of arbitration, recognized the significant and substantive problems where litigation proceeds on the same issues in different forums. It did not approve of multiple proceedings on the same matters. This is consistent with the general position taken by the courts. As Moore C.J.Q.B. stated in ***Edmonton Northlands v. Edmonton Oilers Hockey Corp.*** (1993), 147 A.R. 113 at para. 26:

> The courts of Alberta generally recognize a rule against multiple prosecution. It is trite law that commencing a second action while one is currently pending is an abuse of process: ***German v. Major*** (1985), 62 A.R. 2; 39 Alta. L.R. (2d) 270; 20 D.L.R. (4th) 703; 34 C.C.L.T. 257 (C.A.).

[40] Wittmann A.C.J.Q.B. (as he then was) in ***Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.***, 2006 ABQB 933, 406 A.R. 23 applied the test for determining a duplicity of proceedings as set out in ***Alberta v. Alberta Union Provincial Employees***, [1984] A.J. No. 879, 53 A.R. 277 (C.A.):

> 23 In my view, the approach taken by the Court in ***Boart***, which is consistent with the two English decisions and ***Nanisivik*** and ***Marineserve***, is preferable to the more strict approach exemplified by Master Funduk's application of the ***AUPE*** test in ***Sitko***. This Court is bound by the decision in ***AUPE***, and must apply the test therein. However, it is appropriate to apply that test in the context and the spirit of the authorities cited above, which suggest that the Court must have a view to the efficient resolution of disputes and the efficient management of the resources of the Court and the parties.

APPLICATION OF THE TEST

24 The first step in the test set out in ***AUPE*** is a determination of whether the issues in the Arbitration Proceeding and the Action are substantially the same. The fundamental issue in both the Arbitration Proceeding and the Action is the existence of Non-Traditional Coverage under Part IV of the Policy. I do not believe that it is necessary for the result in the Arbitration Proceeding to determine the outcome of the Action. I prefer the manner in which the question is framed in ***Boart***: Where the matters in dispute in the Action are inextricably bound up with the matter the parties

> agreed to arbitrate, it is appropriate to conclude that the first step of the test has been met. The fact that the central issue in both proceedings is the existence of coverage is sufficient in the present case to meet the first step of the test for a stay.
>
> 25 I am further satisfied that, in the absence of a stay, the continuance of this action will work an injustice upon JLT. In the event that the matter proceeds as it currently stands, JLT would likely be in the position of having to proceed on the basis that it must establish the existence of Non-Traditional Coverage under Part IV of the Policy, at least until there is a decision in the Arbitration Proceeding. In the event that the Arbitration Proceeding determines that there was no coverage, or only partial coverage, the entire complexion of JLT's defence to the action would likely change: it may then become necessary to challenge the decision in the Arbitration Proceedings and the manner in which Western conducted its case there. Western and the Underwriters will be bound by the arbitration decision; JLT will not.

[41] ANHWP is not a party to the proceedings. Section 6(c) of the Act offers protection to a party. ANHWP's application to become a defendant in these proceedings was based in part upon an allegation of manifest unfairness or unequal treatment if it was not made a defending party.

[42] The risk to potential rights of subrogation has not yet arisen since ANHWP's right to subrogation has not yet arisen. Once the right arises, if it does, steps may be taken in the proceeding, or in a separate proceeding depending on the Court's direction as to the most suitable process for the protection of and the determination of these rights.

[43] Rights of contribution and indemnity, if any, arising under the terms of the Warranty Certificate, the Membership Contract or statute, as against any of the defendants in the proceeding, cannot arise since the ANHWP is not a party to the proceeding. As with the rights of subrogation, if the right to contribution and indemnity arises, ANHWP may have a basis upon which to assert its position.

[44] ANHWP submits that manifest unfairness or unequal treatment also arises from the substantial similarity of the issues in the Arbitration and the proceeding. Section 7 of the Act allows the court to stay proceedings or parts of proceedings in certain circumstances. The essence of the s. 7 inquiry relates to the question of whether the two matters overlap on certain issues, or whether they can be reasonably separated.

[45] The matter at issue in the Arbitration is whether the failure alleged by the Plaintiff amounts to a Structural Defect which manifested within a certain period of time. Fault for the failure, if found, is not relevant but for the question of whether the Plaintiff's employee caused the problem. Nor is fault apportioned.

[46] The matter at issue in the proceeding is whether the failure alleged by the Plaintiff is due to negligence of one or more of the defendants; duty of care and standard of care of various professions and trades will be in issue. Timing of the alleged failure is not in issue.

[47] While some of the engineering evidence relevant to the Arbitration issue may be relevant to the issue of negligence and fault finding, much of it will not be relevant. In particular, it is not relevant to the proceeding whether the failure was a Structural Defect as defined in the Warranty Certificate provable within a certain period of time.

[48] To summarize, the central issue in the proceeding is which of the defendants, if any, are answerable in negligence for the deterioration, distress, cracking and movement of the foundation walls, and if so to what extent. The central issue in the Arbitration is whether the problem with the walls constitutes a Structural Defect which is covered by the Warranty Certificate. In my view, the issues for the Arbitration can be reasonably separated from the issues in the proceeding.

[49] Further, a finding at Arbitration that the failure is not compensable under the Warranty Certificate is not inconsistent with a finding of negligence on the part of one or more of the defendants in the proceeding. The facts which must be found on the Arbitration issue are not necessary in order for the Plaintiff to be successful in the proceeding. Nor are adverse fact findings in the Arbitration fatal to the Plaintiff in the proceeding, in part, since the issue in the proceeding is not time limited.

[50] Liam Builders maintains it is a guarantor for Liam Construction. They are, however, separate legal entities. Like ANHWP, Liam Builders is not a party in the proceeding.

[51] In my view, there is an insufficient link between the Arbitration and the proceedings to justify a stay of the arbitration. The parties are not common. The legal and factual issues are different. Some of the evidence may overlap. However, the evidence required to make a finding on the Warranty Certificate is a small subset of the evidence which will be called at trial. The matters can be reasonably separated. No manifest unfairness arises.

Stay of the Proceeding

[52] W. De Silva Properties Inc. (De Silva), one of the Defendants in the proceeding (none of the other Defendants chose to file briefs), asserts that the litigation ought to be stayed to permit the Arbitration to proceed.

[53] I reiterate my comments above regarding s. 7 of the Act. In my view, the nature of the link between the Arbitration and the proceeding precludes the need for a stay, partial or otherwise, of the litigation.

Conclusion

[54] The application is dismissed. Counsel who argued the matter may speak to costs if they wish to do so.

Heard on the 2nd day of November, 2009.
Dated at the City of Edmonton, Alberta this 12th day of November, 2009.

L.J. Smith
J.C.Q.B.A.

Appearances:

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