Date: 20170623
Docket: CI 16-01-01918
(Winnipeg Centre)
Indexed as: Winnipeg Condominium Corporation No. 75 v. Imperial Properties Corp.
Cited as: 2017 MBQB 112

COURT OF QUEEN'S BENCH OF MANITOBA

B E T W E E N:

WINNIPEG CONDOMINIUM CORPORATION NO. 75,	)	Counsel:
plaintiff,	)	R. IVAN HOLLOWAY for the plaintiff
- and -	)	
IMPERIAL PROPERTIES CORP.,	)	GENE G. ZAZELENCHUK for the defendant
defendant.	)	
	)	JUDGMENT DELIVERED: June 23, 2017

GRAMMOND J.

INTRODUCTION

[1] The plaintiff Winnipeg Condominium Corporation No. 75 ("**WCC 75**") and the defendant Imperial Properties Corp. ("**Imperial**") entered into a contract (the "**Contract**") for property management services. The Contract contained an arbitration clause (the "**Arbitration Clause**"). WCC 75 terminated the Contract following a series of alleged breaches by Imperial, after which Imperial unilaterally paid to itself management fees for the balance of the term of the Contract.

[2] WCC 75 filed a claim for damages, including recovery of the management fees, and obtained an Order for Garnishment before Judgment (the "**Garnishing Order**"). The Garnishing Order resulted in a payment into Court of the full amount of the management fees claimed. Imperial now seeks both a stay of the action pursuant to the Arbitration Clause and a cancellation of the Garnishing Order.

ISSUES

[3] The issues to be decided on this motion are:

a) Does the Arbitration Clause apply such that the claim should be stayed pursuant to s. 7(1) of ***The Arbitration Act***, C.C.S.M. c. A120, (the "***Act***")?

b) If so, are there appropriate grounds to refuse to stay the claim pursuant to s. 7(2) of the ***Act***?

c) If the claim is stayed, should the Garnishing Order be revoked and the garnished funds paid out of Court to Imperial?

EVIDENCE

[4] The facts in this matter are not in dispute. On or about July 1, 2014, WCC 75 and Imperial entered into the Contract, for a three-year term commencing on August 1, 2014. The Contract reflected a number of duties and responsibilities of each of WCC 75 and Imperial.

[5] The Contract also contained the following clause (article 12):

> If at any time during the currency of this agreement any dispute, difference or question shall arise between the parties hereto touching the parties, or any issue shall arise touching the construction or meaning or effect of this Agreement, anything herein contained, or the rights or liabilities of the parties under this

> agreement, every such difference or question shall be referred to a single arbitrator. . . In all respects *The Arbitration Act of Manitoba* and all amendments thereto shall govern such proceedings.

[6] WCC 75 states that Imperial discharged its duties pursuant to the Contract in an incompetent, dishonest, insubordinate, disrespectful and unprofessional manner. On or about January 26, 2016, WCC 75, through counsel, wrote to Imperial and gave notice that WCC 75 was terminating the Contract effective March 30, 2016.

[7] In response to the notice of termination, Imperial relinquished its responsibilities to WCC 75 effective March 31, 2016. On April 21, 2016, Imperial provided to WCC 75 a financial package for the period ending March 31, 2016 which included a bank reconciliation of WCC 75's accounts. This reconciliation reflected that on March 31, 2016, a payment was made from WCC 75's bank account to Imperial, in the amount of $27,636.00. This payment was not a standard monthly fee to be paid to Imperial pursuant to the Contract. When WCC 75 questioned Imperial with respect to this payment, Imperial advised that the payment "is for the management fee for the rest of the term ending 2017".

[8] On or about April 29, 2016, counsel for WCC 75 received from counsel for Imperial a letter dated April 19, 2016, disputing the allegations raised by WCC 75 in January 2016 with respect to Imperial's performance under the Contract. In addition, counsel for Imperial stated: "I have advised my client to exercise its right under the contract and withhold management fees to the end of the 36 months as contemplated by the contract". Counsel for Imperial further stated, "If you and your client have any

objections, you may look to your remedies". This letter was the only communication by Imperial to WCC 75 in response to the January 2016 termination letter.

[9] Imperial disputes whether WCC 75 was entitled to terminate the Contract, but acknowledges that the Contract was terminated effective March 30, 2016.

[10] On May 13, 2016, WCC 75 filed the Statement of Claim, together with a Motion for Garnishment Before Judgment pursuant to Court of Queen's Bench Rule 46. That motion was heard on a without notice basis, at which time the Contract was in evidence, but the Arbitration Clause was not discussed. The motion was granted on May 16, 2016, and Imperial's bank paid into Court the sum of $27,711.00 on May 31, 2016.

[11] On May 24, 2016, Imperial filed a motion for:

a) A stay of proceedings of the Statement of Claim.

b) An Order cancelling the Notice of Garnishment (before Judgment) issued on May 16, 2016.

c) If necessary, an Order returning the funds paid into Court to the Garnishee.

d) Costs of the motion.

DOES THE ARBITRATION CLAUSE APPLY?

ANALYSIS

[12] The ***Act*** provides as follows:

> **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 unfair or unequal treatment of a party to an arbitration agreement;

(d) to enforce awards.

Stay

7(1) Subject to subsection (2), 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.

Refusal to stay

7(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 Manitoba law;

(d) the motion was brought with undue delay;

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

[13] The ***Act*** was interpreted by the Manitoba Court of Appeal in ***Hopkins v. Ventura Custom Homes Ltd.***, 2013 MBCA 67, 294 Man.R. (2d) 168 ("***Hopkins***"), wherein the Court stated at paragraph 15:

> Many courts at all levels have accepted the primacy of arbitration agreements and the need to respect the arbitration process that has been chosen by the parties.

and (quoting from ***Boart Sweden AB v. NYA Stromnes AB*** (1988), 41 B.L.R. 295 (Ont. H.C.)):

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of the case, and that is the very strong public policy of this jurisdiction that where parties have agreed by contract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.

[14] The Court in ***Hopkins***, *supra*, also stated at paragraph 16, quoting ***Ontario v. Ontario First Nations Limited Partnership***, (2004) CanLII 34913 (ONCA), (regarding s. 6 of the Ontario arbitration legislation, which is the same as s. 6 of the ***Act***):

> Section 6, while allowing more scope for judicial intervention than does the Model Law, directs the court *not* to intervene except for the specified purposes. The purposes listed should be construed narrowly in accordance with the objective of the section to restrain judicial intervention [emphasis in original]. … This is not only because the court should give effect to the parties' prior agreement to settle their disputes through arbitration, but also because on an appeal, the arbitrator's decision in the first instance may be of assistance to the court, and as well arbitration may provide a cheaper and more flexible process for making any findings of fact that might be necessary to decide the question. Rather, in exercising its discretion under s. 6, the court should take a pragmatic approach and intervene only when there are undoubted practical reasons for doing so. ....

[15] At paragraph 53, the Court in ***Hopkins***, *supra*, found that s. 7 of the ***Act*** requires a two-step analysis:

- the court must first determine whether the court proceeding is 'in respect of a matter in dispute to be submitted to arbitration under the agreement' (s. 7(1) of the *Act*);
- if the answer is no, then the court will not grant a stay;
- if the answer is yes, then the court must proceed to consider s. 7(2) of the *Act* and whether any of the five cases in (a) to (e) therein applies to permit the court to refuse to stay the court proceedings.

[16] The Court stated, at paragraphs 57 and 58, that with respect to the first step of the analysis, the court must interpret the arbitration provisions of an agreement, which requires a consideration of the principles of contractual interpretation as they apply to an arbitration clause. In particular, the court must give effect to the intentions of the parties as reflected in the words they have used. The contract should be construed as a whole, and all of the words in the contract are to be given meaning, if possible. In

addition, the absence of words may be considered. The goal is to determine the objective intent of the parties at the time of execution.

[17] The Court stated at paragraph 64 that:

> [W]hile the court's role in the interpretation of private arbitration clauses is to give effect to the intentions of the parties as reflected in their words, policy considerations in encouraging arbitration, and a generally broad and liberal attitude by the courts in favour of arbitration, where that option has been chosen, will impact the interpretation in any given case.

[18] In this case, the Arbitration Clause contains the limiting phrase, "If at any time during the currency of this agreement any dispute, difference or question shall arise" [emphasis added], but contains broad language in terms of the scope of disputes to be submitted to arbitration. Included are:

- any dispute, difference or question between the parties touching the parties;
- any issue touching the construction or meaning or effect of the contract;
- any issue touching anything contained within the contract; and
- any issue touching the rights or liabilities of the parties under the contract.

[19] Interpreting this clause broadly, the parties intended that any dispute or issue arising while the Contract was in existence would proceed to arbitration, including allegations relative to whether Imperial breached the Contract or its trust obligations by providing services in an incompetent, dishonest, insubordinate, disrespectful and unprofessional manner. As reflected above, a notice of termination issued on January 26, 2016 and the Contract was terminated on March 30, 2016. The next question, therefore, is whether the dispute or issue arose before the Contract was terminated.

[20] WCC 75 relies upon the phrase "during the currency of this agreement" in support of its argument that the pending claim should proceed, as the dispute did not arise during the currency of the Contract. WCC 75 takes this position because Imperial did not advise that it disputed WCC 75's allegations or entitlement to terminate the Contract until on or about April 21, 2016, well after the Contract was terminated.

[21] Given the broad language of the Arbitration Clause and the broad manner in which arbitration clauses are to be interpreted, I must reject WCC 75's argument. The issues and dispute between the parties arose at the time of the acts complained of, which apparently began shortly after performance of the Contract commenced in August 2014 and continued through January 2016.

[22] If I am wrong, and the issues and dispute did not arise at the time of the acts complained of, then they arose in January 2016 when WCC 75 made the allegations and issued the notice of termination of the Contract.

[23] I accept that the parties did not intend that the Arbitration Clause would apply to disputes that arose after the termination of the Contract. If they had so intended, they could have added language to the Contract such that the Arbitration Clause would have read "during the currency of this agreement or after the termination hereof", or similar language. The plain meaning of the Arbitration Clause, therefore, is that any dispute or issue that arose on or before March 30, 2016 would be submitted to arbitration. I am satisfied that the parties intended that this type of dispute would proceed to arbitration and that the parties are bound by that agreement. In reaching this conclusion, I have

reviewed the Contract as a whole, and have found no indication that the parties intended otherwise.

[24] I find, therefore, that the dispute is to be submitted to arbitration under the Contract, pursuant to s. 7(1) of the ***Act***.

[25] WCC 75 argued that Imperial waived its right to exercise the Arbitration Clause and that it does not come to Court with clean hands, on the basis that Imperial:

- failed to respond to the allegations of breach until after the Contract was terminated and the funds taken; and
- initially invited WCC 75 to invoke its "remedies" but failed to invoke the Arbitration Clause specifically until after the issuance of the Garnishing Order.

[26] WCC 75 relied upon ***Aspegren & Co. v. Polly***, 1909 CarswellOnt 77, 13 O.W.R. 442 (Co. Ct.) wherein the defendant did not object to the trial process in favour of arbitration until the trial itself, which took place almost five years after the claim was filed. That defendant was found to have waived its right to seek arbitration.

[27] Imperial denied that it waived its rights, and argued that the timing of its response to WCC 75's allegations is irrelevant. Imperial stated that it chose to rely upon "self-help" in triggering the unilateral payment, and that "self-help" often successfully ends a dispute between parties.

[28] In my view, Imperial raised the Arbitration Clause promptly after the claim was filed, moving for a stay only eight days after the Garnishing Order was obtained. In addition, the "remedies" that Imperial invited WCC 75 to invoke did not exclude reliance upon the Arbitration Clause. It was WCC 75 that chose to proceed by way of a

Statement of Claim. I am not satisfied that Imperial's conduct was sufficient to constitute a waiver of its rights pursuant to the Arbitration Clause and as such, I must reject WCC 75's argument on this point.

ARE THERE APPROPRIATE GROUNDS TO REFUSE TO STAY THE CLAIM?

ANALYSIS

[29] WCC 75 argued both that the dispute is not capable of being the subject of arbitration (s. 7(2)(c) of the ***Act***) and that the dispute is a proper one for summary judgment (s. 7(2)(e) of the ***Act***).

[30] WCC 75 bears the onus of establishing grounds to refuse to stay the claim, pursuant to ***Bloomer Hotel Corp. et al. v. Boehm Hotel Corp. et al***., 2009 MBCA 68, 240 Man.R. (2d) 69, wherein the Court stated:

> It is for the party who wishes to proceed by way of litigation rather than arbitration and who wishes to resist the stay to bring themselves within one of the five categories in s. 7(2) of the *Act*. If they do so successfully, the court may refuse to stay the proceedings, with the onus being on the party resisting.

IS THE DISPUTE INCAPABLE OF BEING THE SUBJECT OF ARBITRATION?

[31] WCC 75 relied upon various cases wherein it has been held that certain types of civil claims cannot be resolved by arbitration, including applications for oppression remedies, claims involving professional reputation, defamation claims and builders' lien remedies. The dispute between WCC 75 and Imperial, which involves breach of contract and breach of trust, does not fall within any of these categories.

[32] In most of the cases relied upon by WCC 75, the Court commented that regardless of the type of dispute, the parties to a contract containing an arbitration

clause are not presumed to have agreed to submit to arbitration all disputes between them. Rather, the contract in a given case must be interpreted to determine whether the parties agreed that a particular dispute will be resolved at arbitration. In addition, in the case of a statutory regime such as builders' lien legislation, the Court must consider whether an arbitrator has jurisdiction over the dispute pursuant to the legislation. As set out above, in this case, interpreting the Arbitration Clause broadly, I have found that the parties intended that any dispute or issue arising while the Contract was in existence would proceed to arbitration, including a claim for breach of contract and breach of trust.

[33] I do not accept, as submitted by WCC 75, that the nature of the dispute to be considered pursuant to s. 7(2)(c) of the ***Act*** is the motion for garnishment before judgment resulting in the Garnishing Order. Rather, pursuant to the authorities before the Court, it is the nature of the substantive dispute to which the Court must have regard, and not a pre-judgment remedy.

IS THE DISPUTE A PROPER ONE FOR SUMMARY JUDGMENT?

[34] WCC 75 stated that the portion of its claim to recover Imperial's unilateral payment of management fees is a proper one for summary judgment, on the basis that Imperial seized WCC 75's funds without authority, in clear breach of trust, and has filed no evidence in defence of that claim.

[35] WCC 75 relies upon ***B & N Holdings Ltd. v. Acrylon Plastics MB (1983) Inc***. (1999), 135 Man.R. (2d) 95 ("***B & N Holdings Ltd***."), wherein the Court stated at paragraph 16 that:

> In the instant case, the defendants have not contradicted the evidence adduced by the plaintiffs....When faced with a claim for rent arrears and damages, all the defendants stated in their affidavits was that they dispute the amount of the rent and the amount of the damages. That averment is insufficient for this court to determine whether there is a genuine issue and the issue comes squarely within the arbitration clause.

[36] Based upon the limited information that the defendants provided, the Court in ***B & N Holdings Ltd***., *supra*, found that s. 7(2)(e) of the ***Act*** applied and that the matter was a proper one for summary judgment, even though no motion for summary judgment was pending, as is the case here.

[37] Imperial stated that its damages flowing from WCC 75's breach of the Contract are the management fees that it would have received through the end of the term of the Contract. Imperial does not rely upon a particular clause in the Contract to justify the unilateral payment of management fees on March 31, 2016. Imperial has filed no evidence in support of its position that WCC 75 breached the Contract. The only response by Imperial to the substance of WCC 75's allegations is the letter of Imperial's counsel wherein he stated "I have advised my client that the allegations contained in your letter are spurious and exaggerated."

[38] The evidence filed by WCC 75, albeit in support of the motion for the Garnishing Order, establishes:

- the existence of the Contract, which sets out the terms of the relationship between the parties;
- the characterization of the monies collected by Imperial as trust monies; and
- the unilateral transfer by and to Imperial of $27,636.00.

[39] WCC 75 has established a *prima face* case as against Imperial with respect to breach of trust relative to the payment of $27,636.00, and Imperial, having filed no evidence, has failed to raise a real issue for trial.

[40] I note, however, that the repayment of $27,636.00 in management fees is only one element of WCC 75's claim. In addition, WCC 75 seeks from Imperial damages for breach of contract in the amount of $32,900.00, (or such other amount as may be proven), rescission, and punitive, aggravated and exemplary damages. There is no evidence before the Court with respect to any of these additional elements of WCC 75's claim, save and except for counsel's January 2016 letter to Imperial constituting notice of termination of the Contract.

[41] WCC 75 argued that its claim was driven by the breach of trust and that without the unilateral payment this matter would not have been pursued, as evidenced by the January letter which did not constitute a demand for payment (though the letter did reference a claim for damages). In addition, WCC 75 argued that the breach of trust component of its claim can be extricated from the whole of the dispute.

[42] In ***Hryniak v. Mauldin***, 2014 SCC 7, [2014] 1 S.C.R. 87, the Court stated that the consequences of a summary judgment motion must be considered in the context of the litigation as a whole. In particular, the Court stated that it may not be in the interests of justice to grant partial summary judgment. In my view, given that all causes of action herein arise from the same set of facts and involve the same parties and course of conduct, the whole of WCC 75's claim cannot be resolved by summary judgment. All of the elements must be heard and adjudicated upon.

[43] On this basis, I conclude that the dispute between WCC 75 and Imperial is not a proper one for summary judgment, pursuant to s. 7(2)(e) of the ***Act***.

IF THE CLAIM IS STAYED, SHOULD THE GARNISHING ORDER BE REVOKED?

[44] Having found that the dispute is to be submitted to arbitration pursuant to the Contract for the purposes of s. 7(1) of the ***Act***, and that the s. 7(2) exceptions do not apply, I must now consider the resultant impact upon the Garnishing Order.

[45] WCC 75 argued that it had a *prima facie* right to seek the Garnishing Order following on Imperial's unilateral payment of management fees, and that it had no choice but to file a Statement of Claim to avail itself of that remedy. WCC 75 also argued that there should be no separate mechanism pursuant to which the substantive dispute is to be resolved, as that approach will give rise to unfairness and a multiplicity of proceedings. WCC 75 pointed to ***Virdi v. Unicity Taxi Ltd***., 2005 MBQB 91, 194 Man.R. (2d) 63, at paragraph 32, and ***McCulloch v. Peat Marwick Thorne-T*** (1991), 1 Alta. L.R. (3d) 53, [1991] A.J. No. 1062 (Q.B.), at paragraph 24, wherein the Court concluded that matters which could not be wholly resolved by an arbitrator, because they included applications for oppression remedy, claims involving professional reputation, defamation claims and conspiracy claims must remain with the Court for adjudication.

[46] In the alternative, WCC 75 argued that if a stay is granted, that stay can be lifted in the future and that in the interim the funds can continue to be held in Court. WCC 75 submitted that the Garnishing Order is valid and is not a nullity.

[47] WCC 75 relied upon ***Weber v. Ontario Hydro***, 1995 SCC 108, [1995] 2 S.C.R. 929, wherein the Court stated:

> Only disputes which expressly or inferentially arise of out of the collective agreement are foreclosed to the courts [citations omitted]. Additionally, the courts possess residual jurisdiction based on their special powers. (paragraph 59)
>
> . . .
>
> It might occur that a remedy is required which the arbitrator is not empowered to grant. In such a case, the courts of inherent jurisdiction in each province may take jurisdiction. This court in St. Anne Nackawic, [[1986] 1 S.C.R. 704] confirmed that the New Brunswick Act did not oust the residual inherent jurisdiction of the superior courts to grant injunctions in labour matters (at p. 724). Similarly, the Court of Appeal of British Columbia in *Moore v. British Columbia (1988)*, 50 D.L.R. (4th) 29 at p. 38, accepted that the court's residual jurisdiction to grant a declaration was not ousted by the British Columbia labour legislation. (paragraph 62)
>
> . . .
>
> The exclusive jurisdiction of the arbitrator is subject to the residual discretionary power of courts of inherent jurisdiction to grant remedies not possessed by the statutory tribunal. (paragraph 72)

[48] WCC 75 argued that the policy underlying the foregoing approach is the same as that adopted in ***Hopkins***, *supra*, with respect to arbitration clauses generally, which is set out at paragraphs 13 to 17 above.

[49] Imperial asked that the Garnishing Order be cancelled, but did not allege any defect in the process under which the Garnishing Order was granted, such as a lack of full, frank and complete disclosure. Imperial has <u>not</u> asked that the Garnishing Order be set aside under Queen's Bench Rule 46.14(6), which would have required the establishment of a defence to the merits of the claim and evidence that the order is unjust or imposes undue hardship. Imperial submitted that the Garnishing Order must

be cancelled because the claim must be stayed and the Garnishing Order is, in effect, the fruit of the poisonous tree.

[50] Imperial acknowledged that pursuant to the decision in ***Weber***, *supra*, a party to an arbitration process may seek an injunction from the Court while the arbitration process is ongoing. In other words, the ***Act*** does not cease to apply just because relief is sought that the arbitrator cannot provide. Imperial also argued that in this case, when WCC 75 entered into the Contract, it elected to contract out of its right to seek pre-judgment remedies, such as an Order for Garnishment before Judgment.

[51] I note that ***Weber***, *supra*, while still good law, was decided before the ***Act*** was brought into force in Manitoba in 1997. At that time, and as referenced in ***Hopkins***, *supra*, the legislation was revised significantly. The following sections were added:

> **Powers of court**
>
> 8(1) The court's powers with respect to the detention, preservation and inspection of property, interim injunctions and the appointment of receivers are the same in arbitrations as in court actions.
>
> . . .
>
> **Order respecting property and documents**
>
> 18(1) On a party's request, an arbitral tribunal may make an order for the detention, preservation or inspection of property and documents that are the subject of the arbitration or as to which a question may arise in the arbitration, and may order a party to provide security in that connection.

[52] To date, neither of these sections appears to have been the subject of judicial consideration in Manitoba.

[53] Section 8(1) provides, among other things, that the Court retains its powers of detention and preservation of property in an arbitration context. The question is whether those detention or preservation powers include the issuance of an Order for

Garnishment before Judgment pursuant to Queen's Bench Rule 46.14. In considering the ordinary meaning of the section, regard must be had to the overall context of the ***Act*** and, in particular, the presumption against judicial intervention in arbitration proceedings set out in ss. 6 and 7 of the ***Act***.

[54] Imperial argued that s. 8(1) has no application to the case at bar, on the basis that the section should be construed strictly in favour of arbitration, and does not refer to an Order for Garnishment Before Judgment. Imperial also submitted that the words "detention" and "preservation" in s. 8(1) have a shared meaning. While there is no Queen's Bench Rule dealing with "detention", Rule 45 deals with "preservation" of property. Imperial submitted that a detention of property would generally include the preservation of that property, and conversely, preservation of property would generally include its detention.

[55] WCC 75 agreed that there is no express reference to an Order for Garnishment Before Judgment in s. 8(1), but noted that pursuant to ***Hopkins***, *supra*, the ***Act*** should be interpreted on a large and liberal basis. Accordingly, it is possible that an Order for Garnishment Before Judgment could be included under "detention" or "preservation" in s. 8(1). WCC 75 noted that the language of s. 8(1) mirrors some but not all of the content within Part X of the Queen's Bench Rules, dealing with the preservation of rights in pending litigation. WCC 75 acknowledged that s. 8(1) of the ***Act*** appears to provide a mechanism for parties seeking a remedy that is not available pursuant to the ***Act*** or the applicable arbitration clause.

[56] I note that the word "detention" is not defined in the ***Act*** and is not found in the Queen's Bench Rules. A review of the equivalent French term "garde" used in s. 8(1) does not further inform this analysis. In my view, on a plain reading, however, interim orders such as an Attaching Order or Order for Garnishment before Judgment represent an exercise of the Court's powers of detention, in the sense that pursuant to either type of order, funds or property are detained.

[57] If the word "detention", as used in s. 8(1) of the ***Act***, does not include reference to Attaching Orders or Orders for Garnishment before Judgment, it is not apparent to what powers that word is intended to refer, and its inclusion within the section would appear meaningless. I do not accept that the words "detention" and "preservation" are interchangeable within s. 8(1). As stated by Ruth Sullivan in *Sullivan on the Construction of Statutes*, 6th ed. (Markham: LexisNexis, 2014) at §8.23:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose.
>
> . . .
>
> [E]very word and provision found in a statute is supposed to have a meaning and a function. For this reason courts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant.

[58] Accordingly, the use of the word "detention" in s. 8(1) of the ***Act*** must have meaning, and must be interpreted within the overall context of the ***Act***. While the general policy underlying the ***Act*** supports the paramountcy of arbitration, it is well-established law, as set out above, that the Court retains certain powers even in an arbitration context. While judicial intervention in an arbitration proceeding must be

limited strictly to those situations contemplated by the ***Act***, it is clearly consistent with the objectives of the ***Act*** that the Court's power of "detention" as used in s. 8(1) of the ***Act*** includes Orders for Garnishment before Judgment, such as the Garnishing Order in this case.

[59] The word "preservation" is not defined in the ***Act***, but as noted by Imperial, is found in Queen's Bench Rule 45 which governs interim preservation of property, including property that is the subject of a dispute and that which might be used as evidence. There is no indication, however, that the use of the word "preservation" in s. 8(1) of the ***Act*** is tied only to the Court's powers of preservation pursuant to Rule 45. In my view, the inclusion of the word in s. 8(1) of the ***Act*** may be interpreted in the broader sense of the Court's preservation powers, whether pursuant to Rule 45, 46 or other.

[60] I must also consider the overall statutory framework and intent of the ***Act***. I note that pursuant to s. 6(a) of the ***Act*** (set out at paragraph 12 above) the Court is permitted to assist the arbitration process. Section 8(1) enables the Court to assist the arbitration process through the exercise of its powers as listed in that section, including detention and preservation. In other words, s. 8(1) enables the Court to fill gaps in the jurisdiction of an arbitrator, an approach that is consistent with the common law referenced at paragraph 47 above.

[61] Although specific powers are afforded to arbitrators pursuant to s. 18(1) of the ***Act***, including powers of detention, an arbitrator has no jurisdiction to issue an Order for Garnishment before Judgment, which is a unique remedy available to the Court

pursuant to s. 61 of ***The Court of Queen's Bench Act***, C.C.S.M. c. C280 and Queen's Bench Rule 46. Unlike the Court, arbitrators do not have the power to bind third parties, which is required for the issuance of either an Order for Garnishment before Judgment or an Attaching Order. In ***Farah v. Sauvageau Holdings Inc.***, 2011 ONSC 1819, [2011] O.J. No. 1242, the Court considered the *Ontario Arbitration Act* which contains language identical to ss. 8(1) and 18(1) of the ***Act***. The Court stated at paragraph 66:

> There is nothing in the Act that suggests that the Legislature intended to confer on arbitrators a jurisdiction commensurate with the court's jurisdiction over persons who are not parties to the agreement to arbitrate. ... [T]he Legislature recognizes in sections 6, 8(1), and 18(2) that the courts are available to fill any 'gaping holes' in the efficacy of arbitration proceedings. The approach of the Legislature is to limit the court's ability to stay arbitration proceedings and to direct courts to assist the arbitration process by making available the Superior Court's jurisdiction in aid of the arbitrator's jurisdiction, which is enhanced over the parties to the agreement to arbitrate but not over strangers to that agreement.

[62] In other words, s. 18(1) of the ***Act*** enables an arbitrator to detain or preserve property that is the subject of arbitration, or as to which a question may arise in the arbitration, and their order can be enforced by Court under s. 18(2). Where the property to be detained or preserved is in the possession of a third party, the litigant must seek a remedy from the Court, subject to meeting the requirements for the specific order sought.

[63] I note also, as argued by WCC 75, that an arbitrator often cannot be appointed on a without notice basis, which is generally the basis upon which Orders for Garnishment before Judgment and Attaching Orders are sought. The notice requirement in a particular case would, of course, depend upon the terms of the

applicable arbitration agreement. In this case, an arbitrator cannot be appointed on a without notice basis pursuant to the Arbitration Clause.

[64] To obtain an Order for Garnishment before Judgment, pursuant to s. 61 of ***The Court of Queen's Bench Act***, one must commence an action and meet the necessary requirements of Queen's Bench Rule 46.14. Doing so in the context of a dispute to be decided by arbitration will give rise to a multiplicity of proceedings, which generally speaking is to be avoided. I am satisfied, however, that dual proceedings in this context are a necessary component of the application of s. 8(1) of the ***Act***, as would be the case when one is seeking any special remedy from the Court in an arbitration context, including an injunction in a labour matter. Examples of cases wherein pre-judgment garnishing orders have been maintained in an arbitration context, albeit pursuant to a different legislative framework, include ***Trade Fortune Inc. v. Amalgamated Mill Supplies Ltd***. (1994), 113 D.L.R. (4th) 116, 89 B.C.L.R. (2d) 132 (S.C.) and ***Silver Standard Resources Inc. v. Joint Stock Co. Geolog*** (1998), 59 B.C. L.R. (3d) 196, [1998] B.C.J. No. 2887 (C.A.).

[65] On the basis of all of the foregoing, pursuant to s. 8(1) of the ***Act***, the Court retains jurisdiction to grant an Order for Garnishment before Judgment in a matter in which the substantive dispute will be decided by arbitration.

[66] I reject the argument of Imperial that upon a stay of the action the Garnishing Order becomes a nullity. No authority has been provided for the proposition that any or all steps taken in a proceeding before the issuance of a stay are void or otherwise a

nullity upon the issuance of a stay. In addition, the fact that a stay can be lifted belies this argument.

CONCLUSION

[67] Imperial's motion for a stay of the within action is granted. Imperial's motion to cancel the Garnishing Order is denied. Costs may be spoken to if requested by counsel.

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Grammond J.