IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Tylon Steepe Homes Ltd. v. Pont,***
2009 BCSC 103

Date: 20090205
Docket: 80986
Registry: Kelowna

Between:

Tylon Steepe Homes Ltd.

Plaintiff

And

Charles Eli Pont and Jill C. Pont

Defendants

And

**1216393 Ontario Inc., Tylon Steepe Development Corporation
And Dennis Kretschmer**

Defendants by way of Counterclaim

Before: The Honourable Mr. Justice Burnyeat

**Reasons for Judgment
(from Chambers)**

Counsel for the Plaintiff and Defendants by way of Counterclaim	D.W. Donohoe
Counsel for the Defendants	F.G. Potts & S.W. Urquhart
Date and Place of Hearing:	January 7 and 8, 2009 Vancouver, B.C.

[1] The Plaintiff, Tylon Steepe Homes Ltd. (“Homes”) and the Defendants by way of Counterclaim, 1216393 Ontario Inc. (“Ontario”), Tylon Steepe Development Corporation (“Development”) and Dennis Kretschmer, apply for an order that the Action of Homes and the Counterclaim of the Defendants be stayed pending the delivery of an award by an arbitrator appointed to resolve the disputes between Homes and the Defendants arising under the terms of an October 4, 2007 building contract (“Contract”) and, in the alternative, a Direction that the issues for submission to the appointed arbitrator be determined prior to the commencement of any trial of this Action or Counterclaim.

BACKGROUND

[2] In March of 2004, the Defendant signed an offer to purchase relating to a lot within the Crystal Waters subdivision at Kalamalka Lake and paid a deposit to the solicitors for Development and Ontario. In August of 2005, the Defendants received a letter from the solicitor for the developers informing them that their contract was cancelled as it was not possible for the development to proceed due to government authority issues. On August 25, 2005, Mr. Kretschmer wrote to the Defendants enclosing an amended contract which saw an increase price for the property to $269,700.00. The Defendants signed that amended contract and, on February 3, 2006, Ontario executed a transfer of Strata Lot 24, Section 24, Township 14, District Lots 5237 and 5238, Osoyoos Division Yale District, Strata Plan KAS2946 ("Property") to the Defendants. That transfer was registered in the Land Title Office on February 17, 2006.

[3] On January 11, 2007, the Defendants received a quotation from Homes for the construction of a home on the Property. There were negotiations and discussions regarding the proposed construction costs. On October 12, 2007, the Defendants paid the deposit required under the Contract and, on October 24, 2007, the Contract was signed by the Defendants and Homes.

THE CONTRACT

[4] The price was set out as $867,097.00 with the purchase price payable as follows:

(a) $86,709.00 By way of a deposit on the execution of this Agreement;

(b) $124,862.00 When the basement of the Work is ready for backfill;

(c) $375,586.00 When the windows, exterior man doors and roofing have been installed in the Work;

(d) $146,077.00 When the house is at taping stage;

(e) $43,154.00 When finish carpentry is complete;

(f) $90.709.00 Upon the substantial completion of the work.

The Goods and Services Tax has not been included In the amount of the Contract and will be added to the amount of each of the above draws.

[5] The Contract also contained the following:

Provided that all advances shall be subject to the provisions of the Builders' Lien Act, the final advance and balance of the purchase price shall be paid upon the issuance of a Certificate of Substantial Completion of the Work and upon the Contractor making the work available to the Owner for possession. Whether made by the Owner or their mortgagee, Builders' Lien holdbacks shall be released to the Contractor FORTY SIX (46) DAYS after the draw date for which the builders' lien holdback had been taken and the Owner has confirmed by a search of the Title to the lands that no Builders' Liens have been registered. In the event that Builders' Liens have been registered, the holdback shall be dealt with in accordance with the existing Builders' Lien legislation.

[6] Attached to the Contract were a number of "Conditions of Contract" including the following:

2. REGULATIONS, LAWS, ETC. — This contract shall be interpreted as if it had been made in the Province of British Columbia and shall be interpreted and enforced in accordance with the laws of the said province.

15. DISPUTE CLAUSE — In the case of any dispute between the Owner and the Contractor during the progress of the Work, or afterwards with respect to matters specifically designated as being subject to resolution by arbitration or after the termination or breach of contract as to any matter arising hereunder, either party thereto shall be entitled to give the other notice of such dispute and to demand arbitration thereof. After such notice and demand being given, in writing, the parties shall:

(a) within FIVE (5) DAYS jointly select a single arbitrator, or

(b) if after the expiration of the time mentioned in (a) the parties fail to select a single arbitrator, they shall each appoint an arbitrator within FIVE (5) DAYS who shall, within FIVE (5) DAYS select a third arbitrator as chairman. However, if within FIVE (5) DAYS a party who has been notified of a dispute

> fails to appoint an arbitrator, then the arbitrator representing the party not in default may without notice to the other, decide the issue In dispute, or, if within FIVE (5) DAYS the two arbitrators do not agree on the appointment of the third arbitrator, either party may, with notice to the other, apply to the Justice of the Court of Queen's Bench of British Columbia for the appointment of the third arbitrator.
>
> The decision of the single arbitrator or of any two of the three arbitrators (as the case may be) shall be final and binding upon the parties and they shall not have recourse to any court by way of action at law. The cost of arbitration shall be paid In accordance with the direction of the arbitrator or arbitrators failing which the procedures in the Arbitration Act of Canada shall govern.

PROGRESS OF CONSTRUCTION

[7] It was not until April, 2008 that construction of the home commenced. By the end of April, 2008, the foundation was poured so that the framing could begin. In April, the Defendants paid the further $124,862.00 plus G.S.T. as contemplated under the Contract.

[8] In May, 2008, the financial institution of the Defendants advised that they would not be advancing any further funds until the home had achieved the "Closed/Lockup stage". On May 1, 2008, the financial institution of the Defendants sent a representative to check on the progress of construction and a determination was made by that representative that the home was 14% complete. On May 2, 2008, the financial institution of the Defendants approved an advance of $176,000.00 on an approved mortgage of $950,000.00 based on 14% completion.

[9] There were a number of meetings during May and June, 2008 as well as discussions regarding the Contract. In a July 28, 2008 "Statement", Homes referred to "Draw (c)" and provided an invoice for $394,365.30, a credit of $19,189.98 and set out the "Total Due" as being $375,175.32.

POLLON PROCEEDINGS

[10] In proceedings commenced by a number of plaintiffs against Ontario and Mr. Kretschmer (Supreme Court of British Columbia Action No. S-084489 – Vancouver Registry) ("Pollon Action"), a number of plaintiffs including Mr. Pollon commenced an action for specific performance relating to their original contracts with Ontario and Development relating to the same Strata Plan.

[11] In early July, 2008, the Defendants read an article regarding the Pollon Action and Mr. Pont states that he and his wife: "… discovered that Mr. Kretschmer's representations that the Defendants [in the Pollon Action] had won the Lawsuit were untrue." On July 24, 2008, the Defendants advised that they would be attempting to join in the Pollon Action and requested that Homes complete the construction to the "close stage" as their financial institution required that before advancing any further monies. After this advice was received by the Defendants by Counterclaim, the July 28, 2008 "Statement" was then sent to the Defendants by Homes. On September 19, 2008, motion materials were delivered to the solicitor for Homes regarding the addition of the Defendants to the Statement of Claim in the Pollon Action.

RELIANCE ON THE ARBITRATION CLAUSE UNDER THE CONTRACT

[12] In a September 25, 2008 letter from the solicitor for Homes to the solicitors for the Defendants, a demand was made that the dispute between the parties be referred to arbitration. In a September 30, 2008 response, the Defendants advised through their solicitor that they did not agree to arbitration. Subsequently, a notice pursuant to the Contract and the ***Commercial Arbitration Act***, R.S.B.C. 1996, c. 55 ("***Act*** ") was provided to the Defendants and to The British Columbia International Commercial Arbitration by Homes setting out the nature of the dispute as follows:

> The Claimant has supplied labour and materials for the construction of the single family dwelling on land owned by the Respondents at Lot 24, Crystal Waters development at Kalamalka Lake, near Vernon B.C. to an unpaid value of $375,175.32, as invoiced by it to the Respondents on its statement of account dated July 28, 2008. The Respondents have refused to pay any portion of this debt and have claimed recovery of the sum of $211,571.00 paid to the Claimant by the Respondents for the Claimant's previous invoices for its construction work. The Respondents allege damages for delay in construction and deficiencies in workmanship and supervision by the Claimant. The Claimant disputes such allegations.

II. THE REMEDIES SOUGHT

The Claimant seeks an award ruling that:

(a) The Respondents are indebted to the Claimant for the value of the Claimant's work and materials supplied pursuant to the terms of the Agreement and the Claimant's statement of account.

(b) The Respondents are liable to pay damages to the Claimant for its loss of profit and any expense incurred by the Claimant arising out of the wrongful breach of the Agreement by the Respondents.

(c) Costs of the arbitration.

FILING OF THE CLAIM OF LIEN

[13] A Claim of Lien pursuant to the ***Builders Lien Act*** was filed against the Property by Homes on October 21, 2008 under LB250990 ("Lien"). In the Lien signed by Mr. Kretschmer as the President of Homes, it is stated that Homes is entitled to a builders' lien against the Property for: "supply labour and material to build a new home on above noted property" and that: "The sum of $255,982.00 is or will become due and owing to Tylon Steepe Homes Ltd. on September 19, 2008."

[14] On October 27, 2008, a Notice to Commence an Action was delivered by the Defendants to the solicitor for Homes. On November 14, 2008, a Writ of Summons and Statement of Claim was filed by Homes and subsequently served on the Defendants. The Defendants filed an Appearance to the Action on November 28, 2008.

[15] In addition to this motion that the Counterclaim and the Action of the Plaintiff be stayed pending arbitration, the Plaintiff and the Defendants by way of Counterclaim also have motions before the Court that certain portions of the Counterclaim be struck out pursuant to Rule 19(24), that the Defendants attend before a court reporter to be cross-examined on their affidavits pursuant to Rule 44 of the ***Rules of Court*** and that certain portions of the Counterclaim be struck out or dismissed pursuant to Rule 18 of the ***Rules of Court***.

POSITION OF THE PARTIES

[16] It is the position of Homes that the ***Act*** applies and that there should be a stay of proceedings until an arbitrator or arbitrators decide the questions which are set out in the Notice to Arbitrate. It is submitted that the order sought should be made under s. 15 of the ***Act*** which states:

> 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.
>
> (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

[17] In opposing the application of Homes, the Defendants submit that: (a) Condition 15 of the Contract "has no application to any matters in dispute between the parties"; (b) Condition 15 is void; (c) "The essence of the matters at issue is not within the scope of …" Condition 15; (d) Condition 15 is not a "true arbitration agreement which would compel the parties to arbitrate disputes"; and (e) the Plaintiff and the Defendants by Counterclaim either "… singly or collectively, have clearly taken steps in this proceeding so as to disentitle themselves to the relief they seek."

DISCUSSION, CASE AUTHORITIES, AND DECISION

[18] There are a number of difficulties with what was intended by Condition 15 of the Contract. The first "dispute" referred to in Condition 15 is a dispute between the "Owner and the Contractor during the progress of the Work". The word "Work" is not defined but it is clear that the work on the building is no longer ongoing. Accordingly, I can conclude that the first part of Condition 15 does not apply at this time by virtue of the phrase "during the progress of the Work".

[19] The "second" dispute which is to be resolved by arbitration is a dispute between the Owner and the Contractor: "… afterwards with respect to matters specifically designated as being subject to resolution by arbitration or after the termination or breach of contract as to any matter arising hereunder …." If that clause is read as one clause, it is clear that it also does not apply as the matters which are set out in the Notice to Arbitrate are not matters set out in the Contract as being "specifically designated as being subject to resolution by arbitration". While there are other matters which are "specifically designated", the matters which are in dispute are not.

[20] However, if the clause is divided so that the "third" dispute between the Owner and the Contractor which is subject to arbitration is a dispute "… after the termination or breach of contract as to any matter arising hereunder …." Then, the Plaintiff will be able to argue that Condition 15 applies to the current dispute between the parties as there has been a termination of the Contract by the Defendants and there is a matter arising "hereunder" either in the context of whether there was a right to termination or under the Contract generally.

[21] Accordingly, I cannot accede to the submission of the Defendants that Condition 15 was only meant to apply during the period of actual construction and afterwards in limited areas specifically designated. While I find that the Contract was a contract of adhesion and while the wording of Condition 15 is not clear, I am satisfied that the use of the word "or" between the "three" disputes allows the interpretation submitted on behalf of the Plaintiff. The use of the word "or" two times establishes three separate times when disputes between the Owner and Contractor can be subject to arbitration.

[22] However, there are at least two other matters which draw into question whether or not Condition 15 is void, inoperative or incapable of being performed. Condition 15(b) provides that, if the two arbitrators cannot agree on the appointment of a third arbitrator, either party to the arbitration can apply to a Justice of the Court of Queen's Bench of British Columbia for the appointment of a third arbitrator. There is no such court. While Homes would be in a position to apply to rectify the Contract in this or other proceedings in the Supreme Court of British Columbia, there would be no way for rectification to occur in the context of an arbitration unless the parties agreed that the arbitrators could have resort to the Supreme Court of British Columbia if they could not agree on a third arbitrator. I am satisfied that the arbitrators could not reach such an agreement as arbitrators have only the powers which are provided to them under the Agreement which creates the arbitration. Given the circumstances, it is impossible for me to conclude that the Defendants would provide these arbitrators with the power to have access to the Supreme Court of British Columbia.

[23] The next matter is the fact that the cost of the arbitration is to be made in accordance with the direction of the arbitrator or arbitrators "… failing which the procedures of the ***Arbitration Act of Canada*** shall govern." This reference creates two difficulties. First, there is no "***Arbitration Act of Canada***". Rather, the federal legislation is the ***Commercial Arbitration Act***, 1985, c. 17, C-34.6 ("Federal Act"). Second, even if a reference to the Federal Act could be substituted for the present reference, s. 5(2) of the Federal Act appears to limit the applicability of that ***Act*** to arbitrations where: "… at least one of the parties to the arbitration is Her Majesty in Right of Canada, a departmental corporation or a Crown corporation or in relation to maritime or admiralty matters."

[24] While Homes provided notice pursuant to the ***Act***, even though there was no reference to that Act in the Contract and while Condition 2 of the Contract provides that the Contract is to be interpreted as if made in the Province of British Columbia, I cannot conclude that the ***Act*** applies. Condition 2 only requires that the Contract is to be interpreted as if made in British Columbia and "enforced in accordance with the laws of the said province", there is no specific provision that the parties contemplated they would resort to a specific statute which was not set out under the Conditions and which is not named when others are. Even on the assumption that the ***Act*** applies, it could not have been contemplated that the arbitration would be carried on under that Act but that, if the arbitrators failed to arrive at a consensus as to the cost of the arbitration, that question would be governed by the procedures under the "***Arbitration Act of Canada***" which either does not exist or does not apply.

[25] Again, Homes would be in a position to seek rectification of this Condition under the Contract in this or other

proceedings in the Supreme Court of British Columbia but not in an arbitration under the ***Act*** even if that British Columbia legislation applies.

[26] After taking into account all of the matters raised while attempting to give meaning to Condition 15 of the Contract, I have concluded that it is either void or incapable of being performed.

[27] The Defendants also submit that Condition 15 is an agreement that the remedies provided under the ***Builders Lien Act*** are not available so that Condition 15 is therefore void pursuant to s. 42(2) of the ***Builders Lien Act*** which states: "An agreement that this Act is not to apply, or that the remedies provided by it are not to be available for a person's benefit, is void."

[28] The former section under the ***Act*** provided specific protections for employees against the formation of agreements that would deprive them from the remedies provided under the ***Builders Lien Act***. It is submitted on behalf of the Defendants that the Legislature saw fit to expand the protections afforded to employees to all persons afforded protection under the ***Act***.

[29] There appears to have been no judicial interpretation within British Columbia of the scope of s. 42(2) of the ***Act***. Therefore, the Plaintiff relies on the decision in ***BWV Investments Ltd. v. Saskferco Products Inc.***, [1995] 2 W.W.R. 1 (C.A.) where the Court dealt with a lien, a subsequent referral of the matter to arbitration, and the argument that the agreement to arbitrate was void because it would infringe the substantive and procedural rights created under s. 99(1) of the Saskatchewan ***Builders Lien Act***, which provides: "Any covenant in any agreement by any person who provides services or materials to an improvement that this Act or any provision of this Act does not apply is void."

[30] In concluding that there was nothing in the Act that expressly or impliedly abrogated the right to use mechanisms such as arbitration and that the arbitration clause did not offend s. 99(1) of the ***Act***, Gerwing J.A. on behalf of the Court stated:

> While it is true the *BLA* makes provision for determining the quantum of monies owing by and to parties involved in a construction project, the purposes underlying the legislation do not suggest this is an exclusive mechanism to determine quantum. …There is nothing in the *BLA* that expressly or impliedly abrogates the right to use the mechanisms available prior to the passing of the *Act* for the determination of quantum in contracts where liens have arisen. In light of the general law, then, a builders' lien action is not the only route to a determination of quantum in relation to contracts where liens have arisen.
>
> It follows that a clause in an agreement providing for arbitration to determine quantum where a dispute between parties to the agreement arises is not a "covenant...that this *Act* or any provision does not apply" within the meaning of s. 99(1) of the *Act*, even if one party happens to be a "person who provides services or materials to an improvement". In other words, to invoke an arbitration clause in these circumstances is to invoke what the general law makes available. It is not to invoke a procedure designed to undermine the purposes underlying the *Act*. (at paras. 43-4)

[31] Similarly, I cannot conclude that Condition 15 of the Agreement is an agreement which provides that the provisions of the ***Builders Lien Act*** do not apply or that the remedies available under the ***Builders Lien Act*** are not available. Accordingly, I cannot conclude that Condition 15 is void on that ground. There are a number of ways the quantum of what might be owing by the Defendants to the Plaintiff might be determined. First, in a debt action. Second, in an action under the ***Builders Lien Act*** where there would be a determination not only of whether the lien was valid but also the amount of the lien and the priority of that lien. The inclusion of Condition 15 does not have as its primary purpose an agreement that the ***Builders Lien Act*** does not apply. In this regard, I note that Article 2 of the Contract makes specific provisions to the ***Builders Lien Act***. Accordingly, I take that as further evidence that it was not intended that this was an agreement that the ***Builders Lien Act*** would not apply even though the question of the quantum of the lien would be dealt with by arbitration rather than under the ***Builders Lien Act***.

[32] The next submission of the Defendants is that the Contract was only entered into by the Defendants as a result of fraudulent misrepresentations made by the Defendants by Counterclaim so that the Contract is void. In this regard, they rely on the findings of fact made by Myers J. in the Pollon Action where it was alleged that Mr. Kretschmer represented to those defendants that any delay in completing the initial contract for the purchase of

their property was the result of acts by the District of Lake Country, that the Defendants by Counterclaim had no choice but to cancel the initial contract and offer an amended contract at a higher purchase price with a clause requiring the Defendants to contract with Mr. Kretschmer or one of his companies for the construction of their home, and that Mr. Kretschmer represented to the Defendants that he had won a lawsuit commenced by other purchasers.

[33] ***James v. Thow***, [2005] B.C.J. (Q.L.) No. 1292 (B.C.S.C.), deals with the issue of whether allegations of fraud will defeat an application for a stay of proceeding, the jurisdiction of the Court in the face of an arbitration agreement, and the doctrine of severability. On the issue of whether the allegation of fraudulent misconduct impugned the agreement to arbitrate, Wedge J. applied the severability doctrine to sever the agreements from the remainder of the contract in deciding that the allegations did not impugn the arbitration clause within the agreement. In this regard, Wedge J. cited at length the decision of the English Court of Appeal in ***Harbour Assurance Co. (U.K.) Ltd. v. Kansa General International Insurance Co. Ltd.***, [1993] 1 Lloyd's Law Reports 455 where Hoffman L.J. stated:

> In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, as the House of Lords did in *Heyman v. Darwins Ltd.*, whether the rules strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of *contracts d'adhesion* in which the arbitrator is in practice the choice of the dominant party. Thus saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be.
>
> As Lord Justice Ralph Gibson has pointed out the same is true of allegations of fraud. (at pp. 468-9)

[34] In ***Thow***, *supra*, Wedge J. concluded that is was open to the arbitrator to decide whether the contract itself had been induced by fraud:

> In my view, the marked legislative change reflects the development of the law concerning arbitration of disputes arising from commercial contracts as described by Hoffman L.J. in *Harbour Assurance*. The court's discretion is now confined to circumstances in which it is clear that the arbitration agreement, as distinct from the contract containing it, is "void, inoperative or incapable of being performed". (at para. 97)
>
> Based on the case law, the provisions in the legislation and the legislative history, I concluded that the allegations of fraud must clearly impugn the arbitration agreement as distinct from the contract as a whole. Further, I conclude that on an application for a stay of proceedings, there must be sufficient materials before the court on which to base a summary determination that the arbitration agreement itself is void. (at para. 99)

[35] I cannot conclude that the alleged fraud which is said to have induced the Defendants to enter into the Contract actually induced the Defendants to enter into the arbitration provisions contained in Condition 15 of the Contract. Without in any way deciding whether the alleged misrepresentations were made, relied upon, and resulted in the ability of the Defendants to bring the Contract to an end or to seek damages, I am satisfied that Condition 15 is severable from the Contract itself. Accordingly, I cannot find that Condition 15 of the Contract is void and unenforceable by virtue of the fact that the Defendants agreed to arbitration only after alleged fraudulent misrepresentations were made.

[36] Relying on the following decisions, the Defendants submit that clause Condition 15 does not amount to an "arbitration agreement" pursuant to the ***Act*** as the clause is permissive and not mandatory: ***Re McNamara Construction of Ontario Ltd. and Brock University***, [1970] O.J. (Q.L.) No. 1797 (C.A.); and ***Babb Construction Ltd. v. Fong***, [1984] N.J. (Q.L.) No. 151 (S.C.).

[37] In ***McNamara***, *supra*, the clause involved was that either party "… shall be entitled to give to the other notice of such dispute and to request arbitration thereof …." At the lower court, Wright J. found that this clause amounted to nothing more than a right to include arbitration of a dispute as something to consider. On behalf of the

majority, Gale, C.J. agreed that the right to give notice was no right at all and suggested language which might have been used had the parties intended to compel arbitration:

> Had the parties intended to bind themselves to an obligation to arbitrate any dispute that might arise, it would have been very easy to have art. 44 read generally in this way:
>
> > In the case of any dispute arising between the Owner (or the Architect acting on his behalf) and the Contractor as to their respective rights and obligations under the Contract, the parties shall proceed to arbitration thereof in accordance with the applicable law of the place of the building. (at para. 23)

[38] In ***Babb***, *supra*, the following clause was found not to be an agreement to submit to binding arbitration:

> In the case of any dispute arising between the Owner (or the Architect acting on his behalf) and the Contractor as to their respective rights and obligations under the Contract, either party hereto shall be entitled to give to the other notice of such dispute and to request arbitration thereof; and the parties may, with respect to the particular matters then in dispute, agree to submit the same to arbitration in accordance with the applicable law of the place of building.

[39] Condition 15 does not require that "all disputes" be submitted to arbitration. I conclude that it is permissive and merely provides a party with the right to request arbitration if it so chooses. I am not able to distinguish between the phrase which was used in Condition 15 ("either party thereto shall be entitled to give the other notice of such dispute and to demand arbitration thereof") and the phrase which was used in ***Babb***, *supra* ("either party hereto shall be entitled to give to the other notice of such dispute and to request arbitration thereof"). Accordingly, I am not able to distinguish the decision reached in ***Babb****, supra*, as I conclude that there is no difference between the ability of one party "to demand arbitration" and one party "to request arbitration". I find that the existence of an arbitration clause has not been established and that Condition 15 cannot be relied upon by the Plaintiff to require the arbitration that it seeks. There is nothing in Condition 15 which makes arbitration mandatory. Accordingly, I make a finding under s. 15(2) of the ***Act*** that Condition 15 is inoperative.

[40] The final matter raised by the Defendants is that the application for the stay of proceedings can no longer be made because s. 15(1) of the ***Act*** provides that the application to the Court to stay the legal proceedings must take place: "… before delivery of any pleadings or taking any other step in the proceedings …." Here, the Plaintiff issued a Writ of Summons and a Statement of Claim, and the Plaintiff and the Defendants by Counterclaim have brought a motion under Rule 18 of the ***Rules of Court*** to strike out parts of the Counterclaim, a motion to seek to cross-examine the Defendants and other affiants on their affidavits relating to the opposition by the Plaintiff of the application by the Defendants that the Lien be cancelled on payment of a nominal amount into Court. It is the submission of the Defendants that the only step that is required to commence a lien action once notice has been given is the issuance of a Writ of Summons and that all other steps amount to a decision taken by the Plaintiff that all issues between the parties would be dealt with in the context of this Action rather than pursuant to Condition 15 of the Contract.

[41] In ***Snap-On-Tools of Canada Ltd. v. Korosec***, [2002] B.C.J. (Q.L.) No. 3125 (B.C.S.C.), Sigurdson J. found that an action had been commenced, a statement of defence filed, a counterclaim filed, a defence to the counterclaim filed, a list of documents prepared by and forwarded by the plaintiff to the defendant, and a demand for discovery of documents forwarded by the defendant to the plaintiff. In view of the steps taken by the defendant, Sigurdson J. concluded that the defendant was not entitled to seek a stay under s. 15(1) of the ***Act***.

[42] In coming to this conclusion, Sigurdson J. relied on the decision of Saunders J., as she then was, in ***Sandbar Construction Ltd. v. Pacific Parkland Properties Inc.*** (1992), 66 B.C.L.R. (2d) 225 where there was a writ of summons, a statement of claim and a lis pendens filed along with a letter advising the defendant that commencement of the builders lien action did not constitute voluntary commencement of proceedings contrary to the intention of the plaintiff to arbitrate all disputes between the parties. The defendant filed its defence and a counterclaim for slander of title. No defence to the counterclaim had been filed by the plaintiff as defendant by counterclaim. Saunders J. concluded that an application for a stay of proceedings was not "any other step in the proceedings" so as to disqualify the party from seeking arbitration and that a plaintiff could apply for a stay of proceedings under s. 15(1) of the ***Act*** provided that it had taken no step beyond commencement of the action and necessary delivery of the initiating documents. A stay of proceedings was ordered. A stay also was ordered

regarding the counterclaim as there was a finding that the claim and counterclaim were inextricably entwined.

[43] Here, the situation is complicated by the fact that the application for the stay of proceedings is made on behalf of the Plaintiff who commenced the Action and on behalf of both Plaintiff and the Defendants by way of Counterclaim. As a "party to the legal proceedings", the Defendants by way of Counterclaim can make the application that they did. However, the prohibition against making such an application applies not only to "a party to an arbitration agreement" but also to "a party to the legal proceedings". Accordingly, I am satisfied that both the Plaintiff and the Defendants are bound by the prohibition contained in s. 15(1) of the ***Act*** that they may only apply before "taking any other step in the proceedings". In any event, no distinction is made as to whether it is the Plaintiff or the Defendants by Counterclaim who are making the applications noted. However, I can conclude that the application to strike out portions of the Counterclaim can only have been made by the Defendants by Counterclaim. At the same time, the application that the Defendants and other affiants be cross-examined on their affidavits can relate only to the opposition of the Plaintiff to the application of the Defendants that the Lien be removed from the title to the Property without security or with only nominal security.

[44] While it would have been possible for the Plaintiff to respond to the notice provided to it by the Defendants by merely filing a Writ of Summons and then filing a Certificate of Pending Litigation against the Property, I am satisfied that the coincidental filing of Statement of Claim does not constitute the taking of another step in the proceedings. The filing of a concurrent Statement of Claim is merely a precautionary measure in order that all parties to the proceeding can be provided with a full outline of what is being claimed by the Plaintiff. I am also satisfied that the filing of a Writ of Summons, a Statement of Claim, and a Certificate of Pending Litigation at the same time is in accordance with accepted practice within the Province.

[45] However, I am satisfied that the other steps taken in the proceedings by the Plaintiff and the Defendants by Counterclaim constitute further steps in the proceedings. The appropriate procedure to have been followed by the Plaintiff was an immediate application for a stay of proceedings once the Writ of Summons and the Statement of Claim had been filed and served. The appropriate procedure to have been followed by the Defendants by Counterclaim would have been to file an appearance and then make an immediate application for a stay of proceedings. There was no undue delay in bringing a motion to stay the proceedings: ***Ottawa Roughriders Inc. v. Ottawa (City)*** (1995), 44 C.P.C. (3d) 27 (Ont. Ct. Gen. Div.) at para. 20. However, the applications by the Plaintiff and the Defendants by Counterclaim in reaction to the application by the Defendant that the Lien be discharged without security or, in the alternative, with nominal security amount to the "taking any other step in the proceedings". I find that the Plaintiff and the Defendants by Counterclaim are disentitled to the arbitration that is contemplated under Condition 15 of the Contract by virtue of the fact of their "taking any other step in the proceedings".

[46] In addition to the matters set out above which lead me to the conclusion that the Plaintiff cannot resort to the arbitration that is contemplated under Condition 15 of the Contract, I also find that there can be no arbitration pursuant to the ***Act***. While the Plaintiff has attempted to resort to the ***Act*** even though Condition 15 does not provide that as an option, it hardly could have been contemplated by the parties that an arbitration would proceed under that ***Act*** only to have a subsequent ruling by the Court on an application for leave to appeal any award made that the arbitrator or arbitrators had no jurisdiction under the ***Act*** to make the award that was made.

CONCLUSION

[47] I find that Condition 15 of the Contract is incapable of being performed, is void and is inoperative. If the ***Commerical Arbitration Act*** applies, I am satisfied that s. 15(2) of the ***Act*** applies so that an order staying these proceedings should not be made. On the assumption that the ***Act*** does not apply, while I have the jurisdiction to stay proceedings if it is appropriate to do so, I see no grounds for doing so in this case. Accordingly, I dismiss the application of the Plaintiff and Defendants by Counterclaim for a stay of proceedings pursuant to s. 15 of the ***Act***.

"G.D. Burnyeat J."

The Honourable Mr. Justice Burnyeat