Federal Court of Appeal | Cour d'appel fédérale

Date: 20210413

Docket: A-23-20

Citation: 2021 FCA 70

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

GREAT WHITE FLEET

Appellant

and

ARC-EN-CIEL PRODUCE INC.

Respondent

Heard by online video conference hosted by the Registry on February 17, 2021.

Judgment delivered at Ottawa, Ontario, on April 13, 2021.

REASONS FOR JUDGMENT BY: RENNIE J.A.

CONCURRED IN BY: STRATAS J.A.
WEBB J.A.

Federal Court of Appeal  Cour d'appel fédérale

Date: 20210413

Docket: A-23-20

Citation: 2021 FCA 70

CORAM: **STRATAS J.A.**
WEBB J.A.
RENNIE J.A.

BETWEEN:

GREAT WHITE FLEET

Appellant

and

ARC-EN-CIEL PRODUCE INC.

Respondent

REASONS FOR JUDGMENT

RENNIE J.A.

[1] Great White Fleet (GWF) appeals the order of the Federal Court (2020 FC 23, *per* Heneghan J.) dismissing its motion to stay an action commenced against it by Arc-En-Ciel Produce Inc.

[2] The background facts may be briefly stated.

[3] Arc-En-Ciel commenced an action against GWF in the Federal Court seeking damages allegedly sustained to a cargo of perishables shipped from Costa Rica to Etobicoke, Ontario. The contract or bill of lading between GWF and Arc-En-Ciel contained a forum selection clause specifying that any proceedings arising from the contract were to be commenced in the United States District Court, Southern District of New York and determined according to the laws of the United States.

[4] GWF brought a motion under subsection 50(1) of the *Federal Courts Act*, R.S.C. 1985, c. F-7 to stay Arc-En-Ciel's action on the basis of that forum selection clause. In response, Arc-En-Ciel contended that section 46 of the *Marine Liability Act*, S.C. 2001, c. 6 (MLA) rendered the forum selection clause ineffective and permitted the action to proceed in Canada.

[5] The Federal Court found that GWF had an agent in Canada, with the result that paragraph 46(1)(*b*) of the MLA was triggered and permitted the litigation to proceed in Canada. However, GWF contended this finding was irrelevant. In its view, the contract was not "a contract for the carriage of goods by water" within the meaning of section 46 and was entirely beyond the reach of the legislation. GWF argued that the forum selection clause should be respected and that the Court should exercise its discretion to stay the action.

[6] The Federal Court rejected this argument. After reviewing the contract, the Federal Court concluded that the contract was "a contract for the carriage of goods by water" within the meaning of section 46 (Federal Court Reasons at paras. 35, 41). But the Federal Court also held

that it was “premature” to make this finding and that the question whether section 46 of the MLA was engaged was best left to trial (Federal Court Reasons at paras. 29-30, 46).

[7] This required the Federal Court to consider GWF’s alternate ground for a stay based on the discretionary power of the Court under section 50 of the *Federal Courts Act*.

[8] In addressing this question, the Federal Court stated that the burden rested on Arc-En-Ciel to show that there was “strong cause” as to why the forum selection clause should not be enforced (*Z.I. Pompey Industrie v. ECU-Line NV*, 2003 SCC 27, [2003] 1 S.C.R. 450 at paras. 24, 39 (*Z.I. Pompey*); Federal Court Reasons at para. 47).

[9] After examining the affidavits with respect to the shipment of the cargo and commenting on the lack of information as to the location of witnesses and the application of foreign law, the Federal Court concluded that Arc-En-Ciel’s action would be barred under a limitation provision under American law. Although GWF offered to refrain from arguing the limitation defence, the Federal Court stated that there was no evidence that counsel’s “offer” would be binding on the United States District Court. Therefore, “[u]pon the basis of the evidence submitted, the arguments advanced, and the relevant law, including jurisprudence”, the Federal Court concluded Arc-En-Ciel had shown a “strong cause” for the Court to exercise its discretion to deny the motion for a stay (Federal Court Reasons at paras. 46, 47, 49, 51).

[10] For the reasons that follow, I would allow the appeal and remit the matter to a different judge of the Federal Court for re-determination in accordance with these reasons.

[11] Section 46 determines what test the Court must apply on the stay motion. If applicable, the *forum non conveniens* test applies: *Magic Sportswear Corp. v. Mathilde Maersk (The)*, 2006 FCA 284, [2007] 2 F.C.R. 733 at paras. 33 and 34. If not, the strong cause test applies. As the Supreme Court in *Z.I. Pompey* (at paras. 37-39) noted:

> Section 46 (1) of the *Marine Liability Act* , which entered into force on August 8, 2001, has the effect of removing from the Federal Court its discretion under s. 50 of the *Federal Court Act* to stay proceedings because of a forum selection clause where the requirements of s. 46 (1) (*a*), (*b*), or (*c*) are met. […]
>
> […] Section 46 (1) in no way mandates a prothonotary to consider the merits of the case, […]
>
> [I]n the absence of applicable legislation, for instance s. 46 (1) of the Marine Liability Act, the proper test for a stay of proceedings pursuant to s. 50 of the Federal Court Act to enforce a forum selection clause in a bill of lading remains [the "strong cause" test].

[12] A plaintiff who is entitled to the benefit of section 46 should not have to also meet the burden of establishing strong cause, and it would be an error of law to both decline to determine the application of section 46 and refuse to grant a stay. For these reasons, questions as to the application of section 46 of the MLA should generally be settled prior to trial. Leaving this question to the trial judge defeats one of the purposes of section 46, which is to bring certainty to questions of jurisdiction. Forcing the parties to spend the time and money preparing for a trial which the Federal Court, in the end, may determine it should not hear, does not advance the objective expressed by Rule 3 of the *Federal Courts Rules*, S.O.R./98-106, of ensuring "[the] most expeditious and least expensive determination of every proceeding on its merits."

[13] In the circumstances, the Federal Court made contradictory findings as to whether or not section 46 applied, finding that the question was premature (para. 29), that it was not necessary

to decide the nature of the contract (para. 26), but nevertheless concluding that it was a "simple" contract of carriage of goods by water (para. 41).

[14] If section 46 does not apply, a stay of proceeding must be granted unless the plaintiff can demonstrate strong cause that it would not be reasonable or just to require the plaintiff to adhere to the forum selection clause (*Z.I. Pompey* at paras. 21, 39). This is in contrast to a request for a stay based on the *forum non conveniens* test, where the Court weighs all the relevant considerations, unmoored to a starting presumption and the associated shifting of the burden to the party seeking the stay. The law on this point is clear: "strong cause" and *forum non conveniens* are two discrete tests, with different burdens.

[15] As noted earlier, the Federal Court recognized that the burden was on Arc-En-Ciel to show strong cause why the forum selection clause should not be enforced. However, the Federal Court did not analyse the issues and evidence from that perspective. The Federal Court noted the paucity of evidence with respect to the location of witnesses and the application of foreign law, but did not address the considerations set out in *(The) (Cargo Owners) c. "Eleftheria" (The)*, [1970] P. 94, [1969] 1 Lloyd's Rep. 237 at 242 (Adm. Div.), which include cost and convenience, and prejudice. Nor did the Federal Court assess the evidence in light of the recognized legal and evidentiary burdens resting on Arc-En-Ciel. While the Federal Court noted that GWF abandoned its *forum non conveniens* argument, the reasons reflect, in part, the *forum non conveniens* test (see, *e.g.*, paras. 42, 48, 51).

[16] The Federal Court appears to have limited the consideration of discretionary considerations to the existence of the limitation period. However, the reasons do not explain why the prejudice associated with the limitation period was not addressed by GWF's undertaking to not pursue that defence, other than to say that the undertaking would not be binding on the American court. While I share the Federal Court's concern about the enforceability in an American court of an oral undertaking given in the course of argument, the reasons, alone, amount to conjecture and do not, again, reflect that the legal obligation to establish prejudice rested with the plaintiff.

[17] Turning to the issue of remedy, counsel have requested that we make the decision that the Federal Court did not make and determine whether the bill of lading was "a contract for the carriage of goods by water."

[18] I would not accede to that request.

[19] As noted by the Federal Court, the record before it was lacking. If it was "premature" to settle the question on a motion, as the Federal Court found, it is more so in this Court. We would be interpreting the bill of lading and determining the scope of section 46 *de novo*, without the benefit of the Federal Court's views on either the question of construction or statutory interpretation. As a standard form contract, the bill of lading, would, on appellate review, be subject to a correctness review. Determining the question in these circumstances would deprive the parties of an opportunity to appeal and would be contrary to the guidance of this court (*Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161, 400 D.L.R. (4th) 723 at para. 157; see

also, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23 at para. 4.

[20] The proper recourse is to remit the matter to the Federal Court for determination of the applicability of subsection 46(1). If subsection 46(1) applies to the contract(s) in issue, the *forum non conveniens* test applies. If section 46 does not apply, the Federal Court can then consider, if necessary, the argument that there is strong cause to refuse to enforce the forum selection clause. I note that the requirements under paragraphs 46(1)(*a*)-(*c*) of the MLA need not be reanalysed as the Federal Court concluded that paragraph 46(1)(*b*) was met and neither party has challenged that finding (Federal Court Reasons at para. 34).

[21] I would allow the appeal and send the matter back to a different judge of the Federal Court for redetermination in light of these reasons. I would make no order as to costs.

"Donald J. Rennie"
J.A.

“I agree.
David Stratas J.A.”

“I agree.
Wyman W. Webb J.A.”

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-23-20
STYLE OF CAUSE:	GREAT WHITE FLEET v. ARC-EN-CIEL PRODUCE INC.
PLACE OF HEARING:	HEARD BY ONLINE VIDEO CONFERENCE HOSTED BY THE REGISTRY
DATE OF HEARING:	FEBRUARY 17, 2021
REASONS FOR JUDGMENT BY:	RENNIE J.A.
CONCURRED IN BY:	STRATAS J.A. WEBB J.A.
DATED:	APRIL 13, 2021

APPEARANCES:

Richard Desgagnés Katherine Shaughnessy-Chapman	FOR THE APPELLANT
Matthew Hamerman	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Brisset Bishop S.E.N.C. Montreal, QC	FOR THE APPELLANT
De Man Pillet Montreal, QC	FOR THE RESPONDENT