Federal Court of Appeal | Cour d'appel fédérale

Date: 20140527

Docket: A-357-13

Citation: 2014 FCA 136

CORAM: **BLAIS C.J.**
NOËL J.A.
SCOTT J.A.

BETWEEN:

COMPAGNIE AMWAY CANADA and AMWAY GLOBAL

Appellants

and

KERRY MURPHY

Respondent

Heard at Montréal, Quebec, on May 13, 2014.

Judgment delivered at Ottawa, Ontario, on May 27, 2014.

REASONS FOR JUDGMENT BY: NOËL J.A.

CONCURRED IN BY: BLAIS C.J.
SCOTT J.A.

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REASONS FOR JUDGMENT

NOËL J.A.

[1] This is an appeal from an interlocutory decision of the Federal Court, wherein Boivin J. (as he then was) (the Federal Court judge) granted the motion brought by Mr. Kerry Murphy (the respondent) to lift the stay of proceedings in his proposed class action (the class action or the

action) against Compagnie Amway Canada and Amway Global (the appellants) pursuant to subsection 50(3) of the *Federal Courts Act*, R.S.C., 1985, c. F-7.

[2] Section 50 of the *Federal Courts Act* insofar as it is relevant to the appeal provides:

50. (1) The Federal Court of Appeal or the Federal Court may, in its discretion, stay proceedings in any cause or matter	**50.** (1) La Cour d'appel fédérale et la Cour fédérale ont le pouvoir discrétionnaire de suspendre les procédures dans toute affaire :
(*a*) on the ground that the claim is being proceeded with in another court or jurisdiction; or	*a*) au motif que la demande est en instance devant un autre tribunal;
(*b*) where for any other reason it is in the interest of justice that the proceedings be stayed.	*b*) lorsque, pour quelque autre raison, l'intérêt de la justice l'exige
…	[…]
(3) A court that orders a stay under this section may subsequently, in its discretion, lift the stay.	(3) Le tribunal qui a ordonné la suspension peut, à son appréciation, ultérieurement la lever.

[3] In lifting the stay, the Federal Court judge gave effect to a reduction in the amount claimed by the respondent in the action which had the effect of bringing the matter outside the scope of a compulsory arbitration clause and class action waiver which prohibited the respondent from bringing any class action for individual claims exceeding $1,000 (the arbitration clause). The appellants maintain that the Federal Court judge erred in lifting the stay on this basis essentially because, in their view, the action had been permanently stayed or finally dismissed and therefore could not be revived.

[4] For the reasons which follow, I am of the view that the appeal cannot succeed.

FACTUAL BACKGROUND

[5] On October 23, 2009, the respondent, a distributor operating under contract with Amway Corporation Canada, instituted an action against the appellants pursuant to section 36 of the *Competition Act*, R.S.C., 1985, c. C-34 alleging that their business practices violated its sections 52, 55 and 55.1. In his statement of claim, the respondent sought damages from the appellants in the amount of $15,000 (Appeal Book, Vol. I at p. 18). He later filed a motion for certification (Appeal Book, Vol. II at p. 349).

[6] On March 31, 2010, the appellants filed a motion to stay and to compel arbitration on the basis that the Federal Court lacked jurisdiction with respect to the respondent's action, as it was subject to the arbitration clause (Appeal Book, Vol. I at p. 61 as amended June 1, 2011).

[7] On May 5, 2010, Mainville J. (as he then was), acting in a case management capacity, directed that the appellants' motion be heard in *limine litis* as a response to a motion filed by the respondent alleging that the appellants' motion to stay and compel arbitration was premature (*Rhodes v. Compagnie Amway Canada*, 2010 FC 498).

[8] The ensuing decision issued on July 2, 2010 deals exclusively with the question whether the Federal Court or the arbitration tribunal had the authority to pronounce on the enforceability of the arbitration clause. Mainville J. confirmed the Federal Court's jurisdiction in this regard,

leaving the substance of the motion to stay and compel arbitration to be decided later, at the same time as the motion for certification (*Rhodes v. Compagnie Amway Canada*, 2010 FC 724).

[9] These motions were heard on October 3, 4 and 5, 2011 before the Federal Court judge. By reasons issued on November 23, 2011, he gave effect to the arbitration clause, declared that the Federal Court had no jurisdiction over the respondent's claim for $15,000 and stayed the proceedings pursuant to subsection 50(1) of the *Federal Courts Act*. The reasons also affirm that the Federal Court has jurisdiction on claims not exceeding $1,000 (*Murphy v. Compagnie Amway Canada*, 2011 FC 1341 at paras. 28, 31 and 75).

[10] The respondent's appeal from the aforesaid decision was dismissed (*Murphy v. Amway Canada Corporation*, 2013 FCA 38, per Nadon J.A. concurred in by Gauthier and Trudel JJ.A.). As had been held by the Federal Court judge, this Court found that the arbitration clause effectively barred the respondent from bringing a motion for certification of a class proceeding for individual claims of $15,000.

[11] On February 28, 2013, the respondent brought a motion to lift the stay pursuant to subsection 50(3) of the *Federal Courts Act*, based on his stated intent to reduce the amount sought in his statement of claim from $15,000 to $1,000 (Appeal Book, Vol. II at p. 223). The Federal Court judge granted the respondent's motion and lifted the stay subject to the announced amendment being made. The amendment in question has since been brought (Appeal Book, Vol. II at p. 360).

[12] This is the decision now under appeal.

THE REASONS FOR LIFTING THE STAY

[13] The Federal Court judge lifted the stay pursuant to subsection 50(3) of the *Federal Courts Act*, subject to the condition precedent that the respondent's claim be reduced to $1,000 and that the remaining $14,000 be waived.

[14] In reaching this conclusion, the Federal Court judge took into consideration the fact that subsection 50(3) specifically empowered him to lift the stay which he had granted earlier and his own decision confirming the Federal Court's jurisdiction over class actions for an amount not exceeding $1,000, as later upheld by this Court. He also noted the appellants' concession that the Federal Court had jurisdiction over actions seeking $1,000 or less.

ALLEGED ERRORS

[15] The appellants challenge both the Federal Court's jurisdiction to hear the respondent's motion and the Federal Court judge's exercise of discretion in granting it.

[16] First, they argue that the Federal Court judge could not entertain the respondent's motion to lift the stay under subsection 50(3) of the *Federal Courts Act*, as he was *functus officio* following his decision granting the stay, as confirmed by this Court.

[17] In the appellants' view, the Federal Court judge did not have the power under subsection 50(3) of the *Federal Courts Act* to rescind his earlier decision. This decision was final, and therefore could not be later set aside by the order lifting the stay (Appellants' Memorandum at paras. 14 and 15).

[18] In a similar vein, the Federal Court judge could not relieve the parties from their obligation to submit the dispute to arbitration, as ordered by this Court. This order is in the nature of a mandatory injunction, which thus falls outside the purview of subsection 50(3) of the *Federal Courts Act* (Appellants' Memorandum at para. 16).

[19] According to the appellants, the Federal Court judge's earlier decision, as upheld by this Court, had the effect of "permanently staying" the respondent's action. This is how these decisions must be understood given the interim order issued by Gauthier J.A. on December 24, 2013 (*Compagnie Amway Canada v. Murphy*, A-357-13 at p. 2) (Appellants' Memorandum at paras. 17 to 19).

[20] Furthermore, assuming that the stay could be lifted pursuant to subsection 50(3) of the *Federal Courts Act*, the appellants contend that the test for lifting the stay was not met.

[21] Subsection 50(3) of the *Federal Courts Act* requires that the moving party show that the "facts upon which the stay was originally granted have so changed as to justify a lifting … of the stay" (Appellants' Memorandum at para. 25, citing *Del Zotto v. Canada (Minister of Revenue) (1996)*, 96 DTC 6222 at p. 6225 (FCA) (*Del Zotto*)). The appellants submit that nothing occurred

outside the amendment of the respondent's statement of claim and that this amendment cannot be viewed as a new fact, as the respondent knew from the outset that he was precluded from bringing a class action for claims above $1,000 (Appellants' Memorandum at paras. 27 and 28).

ANALYSIS

Standard of review

[22] The question as to whether the Federal Court judge could lift the stay when regard is had to his prior pronouncement is a question of law reviewable on a standard of correctness (*Housen v. Nikolaisen*, 2002 SCC 33 at para. 8). However, once it is established that he had the authority to lift the stay, the Federal Court judge's exercise of discretion pursuant to subsection 50(3) of the *Federal Courts Act* calls for deference (*Elders Grain Co. v. Ralph Misener (Ship)*, 2005 FCA 139 at para. 13).

Jurisdictional issue

[23] The appellants focus on the effect of the decision of the Federal Court judge, as upheld by this Court, giving effect to the arbitration clause and holding that the Federal Court had no jurisdiction over the respondent's action. The appellants' position as I understand it is that this decision had the effect of permanently staying or dismissing the respondent's action. As a result, the Federal Court was *functus officio* and the respondent was estopped from re-litigating the issue under the doctrine of *res judicata*.

[24] In my view, these arguments are based on a mischaracterization of the decision of the Federal Court judge, as confirmed by this Court, which only concerned the respondent's class action proceeding as described in the initial statement of claim, that is for individual claims in the amount of $15,000. Given the procedural history, it is clear that the debate between the parties was premised throughout on individual claims for that amount and that an amendment bringing the matter below the arbitration clause threshold was never foreclosed.

[25] For example, in the case management decision issued May 5, 2010 (2010 FC 498), Mainville J. acknowledged at paragraph 26 that "[t]he [p]laintiffs themselves recognized that if the [d]efendants are successful in having the arbitration agreement applied to their claim, they may be required to limit their damages in a class action to an amount not exceeding $1,000". [My emphasis] Mainville J. made a similar observation in his subsequent decision issued July 2, 2010 (2010 FC 724) at paragraph 22 where he said that "subsection 7(5) of the Ontario *Arbitration Act, 1991* would in any event allow this Court to continue to proceed with the class action for claims not exceeding $1,000 even if the limited class action waiver was eventually found to be enforceable and applicable" [My emphasis] (see also paras. 20 to 27).

[26] Also, a fair reading of the Federal Court judge's decision giving effect to the arbitration clause (2011 FC 1341) leaves no doubt as to scope of his conclusion:

> [28] The Court finds the parties' arbitration agreement to be clear. First, section 11.3.9 of the Rules of Conduct allows class actions for an amount not exceeding $1,000. Second, claims over $1,000 are subject to a class action waiver. Third, as stated in section 11.3.10, class actions are not arbitrable under the Rules of Conduct under any circumstances. Finally, for claims under $1,000, in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.
>
> …

> [31] Against this background, and considering the clear wording of both sections 11.3.9 and 11.3.10, the Court rejects the plaintiff's contention that the Court has jurisdiction over its class action claim and accordingly concludes that the plaintiff's claim for $15,000 must be heard (i) by an arbitrator and (ii) on an individual basis in accordance with the parties' arbitration agreement.
>
> [My emphasis]

[27] Similarly, in its decision dated February 14, 2013 (2013 FCA 38), this Court agreed with the Federal Court judge's findings, commenting that (Reasons at para. 38):

> … the Rules of Conduct include both an arbitration agreement and a class action waiver. Class actions are actually permitted for amounts below $1,000. However, class actions that exceed $1,000 are expressly prohibited by the Arbitration Agreement. The appellant, with his $15,000 claim, is barred from bringing a motion for certification of a class proceeding by reason of this provision.
>
> [My emphasis]

[28] That the above decisions were premised on a claim of $15,000 is explained by the fact that the appellants framed their position by reference to this distinction (Motion to Stay and to Compel Arbitration (as amended), Appellants' Written Representations, June 1, 2011, Appeal Book, Vol. I at pp. 76 and 77):

> 23. As a result of the above, Murphy claims that he has suffered damages of $15,000 and that he is entitled to claim these damages under s. 36 of the Act.
>
> 24. Amway Canada vigorously denies each and every one of these allegations.
>
> 25. As is apparent from the above, Murphy's claim is in respect of a matter to be submitted to arbitration under the Arbitration Agreement, since it arises out of an relates to Murphy's Independent Business, the IBO Compensation Plan and the Rules of Conduct, it involves Support Materials, and it is against Amway Global. Thus, these proceedings must be dismissed or stayed permanently.
>
> 25.1 Furthermore, since Murphy's claim herein exceeds $1,000, it cannot, under the Class Action Waiver provided for in Rule 11.3.9 of the Rules of Conduct, be asserted as a class, collective, or representative action.

> 25.2 Thus, the parties' intent is clear namely, that Murphy's claim being for an amount of $15,000, it must be heard (a) by an arbitrator and (b) on an individual basis. In flagrant violation of the dispute resolution procedure agreed to between the parties, Murphy seeks to have the claim heard instead (a) by a state-appointed court and (b) as a class action.
>
> [My emphasis]

[29] That no definitive end was brought to the respondent's action is consistent with the fact that subsection 50(1) of the *Federal Courts Act* is the power that was invoked by the appellants to stay the respondent's action (see para. 27 of the Appellants' Motion to Stay and Compel Arbitration, Appeal Book, Vol. I at p. 68). Pursuant to subsection 50(3), "any stay" granted pursuant to subsection 50(1) may be subsequently lifted where the circumstances which gave rise to its issuance are no longer present. The Federal Court judge relied on section 50 both for the initial grant of the stay and its subsequent removal.

[30] During the hearing of the appeal, counsel for the appellants placed great reliance on an interim order issued by Gauthier J.A. on December 24, 2013 staying the decision of the Federal Court judge pending the disposition of the present appeal. Counsel points to the passage of the order which reads:

> Upon considering the overall context, including the fact that a permanent stay had been ordered by the Federal Court and confirmed by this Court, I am satisfied that the stay should be granted …

[31] Counsel insists on the fact that Gauthier J.A. was a member of the panel who heard the appeal from the decision of the Federal Court judge and on the fact that she herself emphasized the word permanent. According to counsel, the order of Gauthier J.A. leads to the inescapable

conclusion that the stay issued by the Federal Court judge, as confirmed by this Court, was intended to be permanent in nature.

[32] I note that Gauthier J.A. was sitting as a single judge and, as is made clear by the case law to which she refers, her task was limited to determining whether there was a serious issue to be tried (*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at pp. 127 and 128). Indeed, she was to refrain from opining on the merits of the appeal (*RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at p. 337). I therefore reject the appellants' contention that Gauthier J.A. purported to express a definitive view of the matter now before us.

[33] The better view is that she was simply noting the fact that the decision of the Federal Court, as confirmed by this Court, to the effect that an action for $15,000 fell outside the jurisdiction of the Federal Court was final. No pronouncement was made as to the impact of the reduced claim other than the recognition that the appellants had raised a serious issue to be tried.

[34] In light of the above, the appellants' argument that the respondent's action for the reduced amount of $1,000 was bared by the issuance of the prior stay cannot succeed.

Exercise of discretion

[35] The appellants' central argument on this second issue is that the Federal Court judge misapplied the legal test under subsection 50(3), by lifting the stay in the absence of "new facts".

[36] The appellants emphasize the unprecedented nature of the order appealed from, highlighting the fact that the respondent "could not cite a single case where this Court, or the Federal Court, accepted that a [p]laintiff's initiative to amend his [s]tatement of [c]laim – without anything new outside the amendment itself having actually occurred – constituted a 'new fact' under [sub]section 50(3) [of the *Federal Courts Act*]" (Appellants' Memorandum at para. 28). However, the appellants themselves do not point to any principle or authority that would preclude a party's amendment to its statement of claim from being considered as a new fact under subsection 50(3) of the *Federal Courts Act*.

[37] There is no express requirement for the existence of new facts in subsection 50(3). However, as explained by this Court in *Del Zotto* (at p. 6225):

> …, once an order for a stay is made the jurisdiction to lift it, as we have observed, is conferred by subsection 50(3) of the [*Federal Courts Act*] and, unless the circumstances be exceptional or non-controversial, that jurisdiction is to be exercised upon motion supported by appropriate evidence showing that the facts upon which the stay was originally granted have so changed as to justify a lifting or partial lifting of the stay. …

[38] In the present case, the circumstances were non-controversial as the announced reduction of the claim from $15,000 to $1,000 brought the action below the arbitration threshold thereby eliminating the ground on which the stay was predicated. The appellants' only real concern appears to be that this factual change was entirely in the hands of the respondent. That is so. However, I do not see what impropriety flows from this given that the procedural history shows that the option of reducing the claim remained open throughout.

[39] I would dismiss the appeal, with costs.

"Marc Noël"

J.A.

"I agree.
Pierre Blais C.J."

"I agree.
A.F. Scott J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-357-13

(APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE RICHARD BOIVIN OF THE FEDERAL COURT OF CANADA (AS HE THEN WAS) DATED OCTOBER 9, 2013, DOCKET NUMBER T-1754-09.)

STYLE OF CAUSE:	COMPAGNIE AMWAY CANADA and AMWAY GLOBAL v. KERRY MURPHY
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	MAY 13, 2014
REASONS FOR JUDGMENT BY:	NOËL J.A.
CONCURRED IN BY:	BLAIS C.J. SCOTT J.A.
DATED:	MAY 27, 2014

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