Court of King's Bench of Alberta

Citation: Downright Demolition Ltd v McEwan, 2025 ABKB 427

Date: 20250714
Docket: 2403 21198
Registry: Edmonton

Between:

Downright Demolition Ltd

Plaintiff

- and -

Penny McEwan and Jamie McEwan

Defendants

Endorsement following
a Morning Chambers Application
of the
Honourable Justice Douglas R. Mah

A. Background

[1] The issue for decision is this: Does the existence of an arbitration clause in a Unanimous Shareholder Agreement (USA) preclude the Plaintiff from bringing a civil action against the Defendant for breach of an employment contract and breach of director and fiduciary obligations?

[2] This is an application for the staying of a civil action in favour of an arbitration.

[3] Downright Demolition Ltd alleges that its former director, shareholder and president, Penny McEwan, has stolen from and defrauded the company, and has misappropriated corporate

opportunity and confidential information for her own benefit and that of a competitor for whom she is now employed.

[4] Ms. McEwan was Downright's president between December 10, 2018 and September 6, 2024. On the latter date, she resigned as a director and as president and sold her 40% interest in Downright to another party.

[5] In the Statement of Claim, Downright alleges that Ms. McEwan was a key employee who breached her employment agreement as follows:

- Intentionally or negligently performed poorly in her role as President, so as to cause business loss;
- Misrepresented Downright's financial status by uttering fictitious invoices and causing subcontractors to submit fictitious invoices;
- Received customer payments in cash and kept these payments for herself;
- Misappropriated and sold scrap metal and salvage belonging to Downright, keeping the proceeds for herself;
- Charged personal expenses to the corporate credit card; and
- Charged the repair and maintenance costs of various personal vehicles to Downright's account.

[6] The Statement of Claim also alleges that Ms. McEwan has thereby breached her duties as a director and her fiduciary duties at common law. It also alleges that Ms. McEwan has engaged in a theft and embezzlement conspiracy with her son, Jamie McEwan, another former Downright employee. Jamie McEwan is not a party to the USA.

[7] Downright further alleges in the Statement of Claim that Ms. McEwan engaged in a cover-up of her wrongdoing and thus it was not discovered by Downright until well after the fact. Moreover, Mr. Knight, a current director of Downright, deposed in his Affidavit sworn June 3, 2025 that he learned as of February 2025 that Ms. McEwan was working for a competitor in the demolition field and was diverting work to the rival company that Downright would have otherwise performed, making use of proprietary and confidential information wrongfully taken from Downright.

[8] Ms. McEwan denies any wrongdoing in her Statement of Defence. She says the Action is nothing more than a thinly-veiled attempt to exact retribution for personal reasons.

[9] The USA contains an arbitration provision at section 20.2. It states that any dispute unresolved by negotiation under section 20.1 (with the exception of a dispute regarding the restrictive covenant in section 18) must be determined by final and binding arbitration. Section 20.1 provides that the parties must attempt in good faith to negotiate a resolution to:

> … any dispute, controversy, or claim arising out of or relating to this Agreement or the breach, termination or validity hereof, or in relation to a dispute in the ordinary course of business ...

[10] Accordingly, arbitration under section 20.2 is meant to apply to any dispute as defined in section 20.1.

B. Argument

[11] Ms. McEwan says the allegations against her in the Statement of Claim all arise from either the USA itself or is a dispute between the parties in relation to the ordinary course of business. That is, either the shareholder rights found in the USA depend on employment status and therefore the dispute arises from the USA, or employment disputes are part of the ordinary course of business.

[12] She invokes the general rule in section 7(1) of the *Arbitration Act* which stipulates that if a party to an Arbitration Agreement commences a Court proceeding in respect of an arbitrable matter under the Agreement, the Court shall, on the application of another party to the Agreement, stay the proceeding. The general rule affirms the policy objective of the *Arbitration Act* that autonomous parties should be bound by their choice of forum for dispute resolution: ***TELUS Communications Inc v Wellman***, 2019 SCC 19, [2019] 2 SCR 144 at para 63.

[13] Further, Ms. McEwan argues that none of the exceptions to the mandatory Stay listed in section 7(2) apply, not even that related to undue delay in bringing the Stay Application. She says that, relatively speaking, there has not been inordinate delay in bringing this Application.

[14] Finally, even if the civil action is also directed against a second defendant, Ms. McEwan's son Jamie, she contends that the action must still be stayed as regards her. Under section 7(5), the Court may allow matters not dealt with in the arbitration clause (i.e. in this case, the allegations against Jamie McEwan) to proceed in Court, but it must nonetheless stay the civil action in respect of matters that are dealt with in the arbitration clause (i.e. the allegations regarding Ms. McEwan): ***TELUS*** at para 69.

[15] Downright argues that the civil action deals with Ms. McEwan's breach of her employment contract and breach of director and fiduciary obligations. It says the Statement of Claim allegations do not arise from the USA nor Ms. McEwan's status as a former shareholder. It points out that Ms. McEwan's employment contract, which is a totally separate Agreement from the USA and which was specifically invoked in the Statement of Claim, contains no arbitration clause.

[16] As a matter of law, Downright says that if the matter in dispute is beyond the scope of the arbitration agreement, which depends on the wording of the arbitration clause, the lawsuit can and should proceed: ***Agrium Inc v Babcock***, 2005 ABCA 82 at para 14; ***Lamb v AlanRidge Homes Ltd***, 2009 ABQB 170 at paras 11 & 12.

[17] Further, Downright argues that there has been undue delay in bringing this Application such that the Application should in any event be refused under para (e) of section 7(2). In determining whether delay has been inordinate, the Court may consider the factors in ***Edmonton (City) v Lafarge Canada Inc***, 2015 ABQB 56 at para 43 which include length of delay, motivation for the Stay, how much has been spent on litigation and whether notice was given that arbitration is mandatory. Downright says that Ms. McEwan at this point has not even invoked arbitration by issuing a Notice to Arbitrate, although it concedes that the Statement of Defence does plead and rely upon the Arbitration Agreement and the *Arbitration Act* as a defence to the Statement of Claim.

[18] It further argues that sending allegations against Ms. McEwan to arbitration while litigating the allegations against Jamie McEwan in Civil Court would be fracturing, duplicative and inefficient: ***Lamb*** at paras 34 & 35.

C. Ruling

[19] For me, the issue that determines this Application is whether the subject-matter of the lawsuit against Ms. McEwan falls within the ambit of the arbitration clause in the USA. Before I deal with that, I'll dispose of a couple of what I consider to be subsidiary arguments.

[20] First, with regard to Downright's argument regarding efficiency, it seems to me that the Supreme Court of Canada's comments in ***TELUS*** at paras 63-73 have overtaken the Court's position in ***Lamb*** at paras 34 & 35 such that mandatorily arbitrable matters must be arbitrated while any remaining non-arbitrable matters may be severed from the arbitration and litigated in Civil Court. In addition, I find that the allegations against Jamie McEwan are capable of being separated from those against Ms. McEwan, however inefficient that might be. Thus, section 7(5) by itself does not provide a basis to continue the litigation against Ms. McEwan.

[21] Second, with respect to the question of inordinate delay, I find that Ms. McEwan did give timely notice to Downright of her position that arbitration is mandatory by pleading that exact thing in her Statement of Defence. Given when the Statement of Claim was filed (October 30, 2024), when the Statement of Defence was filed (January 9, 2025) and when the Application was filed (July 7, 2025), I say that the litigation has not proceeded with great alacrity but on the other hand, I cannot say the elapse of time means that Ms. McEwan has engaged in undue delay in bringing this Application. There is not much on the Court file to indicate intense litigation thus far. Thus, the factors set out in ***Edmonton v Lafarge*** do not inexorably lead to a finding of undue delay such that the application should be dismissed on that basis alone.

[22] I now turn to the question of whether the matters alleged in the lawsuit against Ms. McEwan fall with within mandatorily arbitrable subject-matter. I have reviewed both the USA and the Statement of Claim. The latter does not mention the former, not in the least. Nothing alleged in the Statement of Claim has anything to do with Ms. McEwan's role as a shareholder, or her rights and obligations as a shareholder, all of which are carefully defined and set out in the USA.

[23] While Ms. McEwan's employment status, or more precisely the termination of it, affects her rights and the rights of others under the USA, the various scenarios that might result from a termination of employment are not the subject matter of the Statement of Claim.

[24] In contrast, the employment contract signed by Ms. McEwan does set out duties and obligations. It is the alleged breach of the employment contract, along with breaches of statutory and common law duties, in the ways described above, which comprise the action against her.

[25] I conclude that the allegations do not arise out of or relate to the USA.

[26] The only remaining question is whether the allegations are "in relation to a dispute in the ordinary course of business." As stated, Ms. McEwan's position is that the disputed allegations fall within the ordinary course of business and thus are not litigable but must be arbitrated under the arbitration clause.

[27] Context is important. The arbitration clause is found in the USA. The USA deals with the relationship between the shareholders and between the company and the shareholders and broadly speaking how ownership of the company is determined should certain events occur. To a lesser extent, the USA deals with shareholder involvement in corporate governance matters. In my view, the dispute in relation to the ordinary course of business referred to in the USA's arbitration clause must still involve Ms. McEwan in the capacity of shareholder. As the Supreme

Court of Canada said in ***Tercon Contractors Ltd v British Columbia (Transportation and Highways)***, 2010 SCC 4 at para 64:

> The key principle of contractual interpretation here is that the words of one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and commercial context.

[28] From reading the USA, its purpose emerges as defining the rights and obligations of shareholders with regard to ownership of the company and their say in corporate governance. Isolating the phrase "in the ordinary course of business" and broadening it to include allegations of personal wrongdoing against Ms. McEwan in the capacity of an employee and director is discordant with the intent and purpose of the USA.

[29] Further, in the legal context, the phrase "ordinary course of business" means normal or usual activity occurring as part of the everyday operation of a business. For example:

- Sales in the "ordinary course of business" are carried out under normal terms and consistent with general commercial practices: ***Northwest Equipment Inc v Daewoo Heavy Industries America Corp***, 2002 ABCA 79 at para 115;
- What constitutes a payment made in the ordinary course of business is fact dependent, but payments made to purchase goods or services required for the on-going conduct of the business are made in the ordinary course of business: ***Orion Industries Ltd v Neil's General Contracting Ltd***, 2013 ABCA 330 at para 12;
- The Supreme Court of Canada found that a federal company that operated interprovincially and habitually transferred funds out of province to its Montreal headquarters did so in the ordinary course of business and not for the purpose of defeating creditors: ***Aetna Financial Services v Feigelman***, 1985 CanLII 55 (SCC), [1985] 1 SCR 2 at pg 36. Hence, a Mareva injunction should not be imposed.
- Paying wages to employees and remitting source deductions to the federal government is part of the ordinary course of business: ***Royal Bank of Canada v Sparrow Electric Corp***, 1997 CanLII 377 (SCC), [1997] 1 SCR 411 at pg 446.[1]

[30] Activities that occur as part of normal and ordinary business operations can be contrasted with the allegations made against Ms. McEwan in the Statement of Claim.

[31] One allegation accuses Ms. McEwan of either negligent or deliberate mismanagement of the business. Every other allegation accuses her of a dishonest act. Accusing the company's president of theft, embezzlement, fraud, falsifying financial statements, uttering forged documents, misappropriation of confidential information and conspiracy is not something that occurs in the "ordinary course of business" as understood in law.

[32] I do not mean for a moment to suggest there is validity to the allegations. I have no insight into the merits one way or the other. I am well aware that Ms. McEwan in her Statement

[1] This reference is from the dissenting minority judgment written by Gonthier J relating to the scope of the implied license granted to a borrower to sell inventory secured under *Bank Act* security. The majority did not comment on this conclusion by Gonthier J. The appeal was decided on a different point where the majority differed with the minority with regard to the binding effect of a federal deemed trust as it was then constituted under sections 227(4) & (5) of the *Income Tax Act*.

of Defence denies that she did anything wrong or dishonest. However, I conclude that the dispute that has arisen from the making of these allegations is not the type of dispute contemplated in the USA arbitration clause and is beyond its scope because:

- The Statement of Claim does not allege anything against Ms. McEwan *qua* shareholder; and
- The making of allegations of corruption and deliberate wrongdoing against the company's president falls outside the ordinary course of business.

[33] Accordingly, I decline to stay the Action. The Application is dismissed.

[34] If they wish, the parties may address costs of this Application by writing a single-page letter to me (excluding exhibits and authorities) within 30 days of the date of this Endorsement. It appears that costs would be restricted to a contested Morning Chambers Application.

Heard on the 11th day of July, 2025.
Dated at the City of Edmonton, Alberta this 14th day of July, 2025.

Douglas R. Mah
J.C.K.B.A.

Appearances:

Matthew A. Turzansky, Field LLP
for the Applicant/Defendant
Penny McEwan

Travis D. McKay, Prowse Chown LLP
for the Respondent/Plaintiff
Downright Demolition Ltd