COUR SUPÉRIEURE

CANADA
PROVINCE DE QUÉBEC
DISTRICT DE MONTRÉAL

N° : 500-17-046532-084
500-11-036021-091

DATE : Le 7 mai 2009

SOUS LA PRÉSIDENCE DE : L'HONORABLE PIERRE JOURNET, J.C.S.

GRAEME JOHNSON
Demandeur
c.
KENSINGTON CAPITAL PARTNERS LIMITED
and
THOMAS KENNEDY
and
HUMBERTO AQUINO
and
RICHARD NATHAN
Défendeurs

JUGEMENT CORRIGÉ

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[1] Il appert qu'une erreur s'est glissée dans le jugement rendu par le soussigné le 29 avril 2009, en omettant d'inscrire le numéro de dossier 500-11-036021-091;

[2] Vu les dispositions de l'article 475 du *Code de procédures civil du Québec*;

[3] Vu qu'il y a lieu de corriger cette erreur;

[4] **POUR CES MOTIFS, LE TRIBUNAL** ;

[5] **CORRIGE** le jugement du 29 avril 2009 pour y ajouter le numéro de dossier 500-11-036021-091.

_____
PIERRE JOURNET, J.C.S.

Me Mathieu Bouchard
Irving Mitchell
Procureur du demandeur

Me Daniel Urbas
Me Tommy Tremblay
Borden Ladner Gervais
Procureurs de la défenderesse Kensington Capital Partners Ltd

Me Karim Renno
Osler Hoskin Harcourt
Procureur des défendeurs Kennedy, Aquino, Nathan

Date d'audience : Le 9 avril 2009

SUPERIOR COURT

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No: 500-17-046532-084

DATE: April 29, 2009

IN THE PRESENCE OF: THE HONOURABLE PIERRE JOURNET, J.S.C.

GRAEME JOHNSON
Plaintiff
v.
KENSINGTON CAPITAL PARTNERS LIMITED
and
THOMAS KENNEDY
and
HUMBERTO AQUINO
and
RICHARD NATHAN
Defendants

JUDGMENT

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[1] Graeme Johnson is a shareholder and employee of Kensington Capital Partners Limited and the other shareholders of the company are Thomas Kennedy, Humberto Aquino and Richard Nathan.

[2] Johnson's proceedings were amended by Plaintiff on March 27 2009, to add a new co-defendant Kensington Investment Management inc. Three separate causes of action are asserted namely :

a) a claim for $333,333.33 representing (10) months of salary, in replacement of an insufficient notice of termination of employment that was paid by his employer.

b) a claim for $200,000 representing damages for defamation of character.

c) an order for the purchase of Plaintiff's shares at their fair value. The amendments of March 2009 added conclusions of the same nature against the new co-defendant.

d) Plaintiff also seeks a declaration of oppression with respect to four (4) new conclusions asking the Court to declare that the conduct of the Defendants towards him to have been oppressive.

[3] The Defendants have answered the Plaintiff's conclusions with two Motions to Dismiss.

[4] A first Motion was served by the Defendant Shareholders. They argue that this Court does not have jurisdiction over the causes of action and should dismiss the claim against them. They allege that the dispute should be submitted to an arbitrator as provided for in the shareholder's Agreement dated as of December 20, 2007.

[5] A second Motion was filed by the Defendant Companies. They also claim that this Court has no jurisdiction and ask to refer the demand to arbitration.

[6] The Defendants also claim subsidiarily that the Superior Court of justice for Ontario has exclusive jurisdiction to adjudicate the application for oppression should this Court find that the matter should be referred to arbitration.

ANALYSIS

[7] The first step of the court's analysis is to examine the arbitration clause. The second step is to analyze the claims and determine if they fall within the said arbitration clause.

[8] Clause 10.6 of the Shareholders' Agreement states :

10.6 Arbitration

(a) Any dispute, controversy or claim arising under, out of or relating to this Agreement («Dispute»), including its formulation, validity, binding effect, interpretation, performance, breach or termination, as well as claims for remedies and other non-contractual claims which cannot be resolved within twenty-one (21) days after written notice by any Party to the other Parties (a «Notice to Arbitrate»), shall be referred to and finally determi9ned by arbitration in accordance with the provisions of the *Arbitration Act* (Ontario), except as varied or excluded by this Agreement. Any Party may initiate proceedings by delivering

> a Notice to Arbitrate to the other Parties. A Notice to Arbitrate shall be in writing and shall set out a concise description of the Dispute to be submitted to arbitration. The arbitration, including the rendering of the award or decision, shall take place in Toronto, Ontario which shall be the place of arbitration.

[9] The jurisdiction of Quebec Courts is governed by article 3148 CCQ which states :

> 3148. In personal actions of a patrimonial nature, a Québec authority has jurisdiction where
>
> (1) the defendant has his domicile or his residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Quebec but has an establishment in Québec, and the dispute relates to its activities in Quebec;
>
> (3) a fault was committed in Québec, damage was suffered in Québec, an injurious act occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to it all existing or future disputes between themselves arising out of a specified legal relationship;
>
> (5) the defendant submits to its jurisdiction.
>
> However, a Québec authority has no jurisdiction where the parties, by agreement, have chosen to submit all existing or future disputes between themselves relating to a specified legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authority.

[10] If this Court concludes that it has no jurisdiction over the dispute, it will apply article 940.1 CCP which reads as follows :

> 940.1 Where an action is brought regarding a dispute in a matter on which the parties have an arbitration agreement, the Court shall refer them to arbitration on the application of either of them unless the case has been inscribed on the roll or it finds the agreement null.
>
> The arbitration proceedings may nevertheless be commenced or pursued and an award made at any time while the case in pending before the Court.

[11] If the arbitration clause is complete, this Court will have no jurisdiction over the share valuation process and will therefore dismiss it forthwith.

[12] The Supreme Court of Canada[1] has set the criterias to determine whether the arbitration clause should be considered a complete undertaking to arbitrate :

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1. *Zodiak International Productions Inc.* v. *Polish people's Republic*, [1983] 1 S.C.R. 529, p. 533 et 543.

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1. VALIDITY OF A COMPLETE UNDERTAKING TO ARBITRATE IN QUEBEC LAW

A complete undertaking to arbitrate, described variously as true, real or formal, is that by which the parties undertake in advance to submit to arbitration any disputes which may arise regarding their contract, and which specifies that the award made will be final and binding on the parties.

This may be contrasted, first, with a clause which is purely optional. Il may also be contrasted with a «pre-judicial» or «condition precedent» arbitration clause, which requires the parties to submit their dispute to arbitration, but does not preclude an action in the ordinary courts of law once the arbitration is completed. It may further be contrasted with the submission defined as follows.

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2. THE NATURE OF THE UNDERTAKING TO ARBITRATE STIPULATED IN THE CONTRACT AT BAR

I have no hesitation in finding, like the Court of Appeal, that the undertaking to arbitrate stipulated in the contract at bar is a complete undertaking to arbitrate.

The *Code of Civil Procedure* contains no provision regarding the form of an undertaking to arbitrate. It will be sufficient if it contains the essential ingredients, namely that the parties have undertaken to execute a submission and that the arbitration award is final and binding on the parties.

The languages used cannot in my opinion be interpreted in any other way : «Any controversy or claim [. . .] shall be settled by arbitration and judgment upon the award resulting from such arbitration may be entered in any Court having jurisdiction thereof».

The verb «shall» is imperative. «Settled» means «réglé». In the context, «régler» means according to *Petit Robert* «résoudre définitivement» (finally resolve).

It is sufficient to refer to the following cases in which terms similar or comparable to those used here have been held to constitute complete undertakings to arbitrate : *Commission scolaire régionale des Bois Franc (supra) : «sera réglé»; Liman (supra)* : «shall be finale settled»; *Prevost Silk Screen Inc*. v. *Produits Franco Inc.*, J.E. 80-298 (S.C.), rendered on March 12, 1980: «shall be settled by arbitration».

[13] Upon review of the arbitration clause at hand this Court fins that it is complete undertaking to arbitrate which compels the parties to arbitration by its use of the word

«shall» and by stating that the dispute shall be «finally determined». The agreement provides that the arbitration award will be final and binding upon the parties.

[14] Article 3148 C.C.Q. provides that when the parties choose to submit their dispute to an arbitrator, the Court has no jurisdiction with respect to the dispute.

[15] The Supreme Court of Canada has recognized and affirmed the clear meaning of article 3148, para. 2 C.C.Q.:

> « Thus the wording and legislative context of art. 3148 para. 2 C.C.Q. confirm that in enacting the provision, the legislature intended to recognize the primacy of the autonomy of the parties in situations involving conflicts of jurisdiction. »
>
> *GreCon Dimter inc*. v. *J.R. Normand inc*., [2005] 2 S.C.R. 401, para. 24 [Tab 13].

[16] With respect to article 3148, para. 2 CCQ, our Courts have recognized that the right to arbitrate is a fundamental right : the Québec Superior Court stated in *9064-1622 Quebec inc*. v. *Société Telus Communications* (*Telus Mobilité)*[2] *:*

> «L'arbitrage est un droit fondamental des citoyens et une forme d'expression de leur liberté» [emphasis added].

[17] It is well established that the effect of a valid undertaking to arbitrate is to remove the dispute from the jurisdiction of the ordinary courts of law.

[18] The Supreme Court of Canada in *Dell Computer Corp.* v. *Union des consommateurs* explained and applied the effect of an arbitration clause as follows :

> «The effect of exclusive arbitration clauses is to create a «private jurisdiction» that implicates the loss of jurisdiction of state-appointed authorities for dispute resolution, such as domestic courts and administrative tribunals.»
>
> Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, para 85 [Tab 12].

[19] Therefore, in this case, by application of section 10.6(a) of the Shareholders Agreement, the parties have chosen to submit all disputes, controversies or claims arising under, out of or relating the agreement, including claims for remedies and other non-contractual recourses to an arbitrator.

[20] The Share Claim is a «dispute, controversy or claim» covered by section 10.6 of the Shareholders Agreement.

[21] As a result, the Superior Court of Quebec has no jurisdiction over the Share Claim.

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2. *9064-1622 Quebec inc.* c. *Société Telus Communications (Telus Mobilité*), J.E. 2008-136374 (S.C.),

[22] As it clearly appears from the record, all of the criteria set forth in Article 940.1 CCP are met in that (1) the arbitration clause is complete, (2) the Court is presently seized with the case, (3) the case has not been inscribed on the roll, and (4) a party is asking for the matter to referred to arbitration[3].

[23] These arguments suffice to dispose of the Defendants' Motion to dismiss the share Claim, which is therefore granted, even if the action is based on the alleged oppressive actions of the Defendants, following the Quebec Court of Appeal decision in *Acier Leroux*[4].

[24] In that instance, the Court was asked to consider whether an application for oppression could be subjected to arbitration or whether it was a matter of public order and therefore fell outside the purview of arbitration clauses pursuant to Article 2639 CCQ.

[25] Justice Hilton, writing for a unanimous bench, clearly stated that an oppression claim could be arbitrated provided that the arbitration clause was drafted in such a way so as to include the allegations as a basis for such oppression :

> « Despite doctrinal support for the notion that the oppression remedy under the CBCA is one of public order since it invokes concepts of fraud and bad faith, I believe that the evolution of the case-law demonstrates that in principle the parties to a shareholders' agreement can fashion an arbitration clause that would enable an arbitrator to adjudicate an oppression remedy. That conclusion is implicit from this Court's judgment in *Camirand*, and flows as well from the elaborate judgment of LeBel, J. unfettered autonomy of parties in deciding what they may submit to arbitration, and which also emphasized the liberal and generous interpretation that courts should give to arbitration clauses.
>
> On the latter subject, the comments of Rayle, J., as she then was, in *Bridgeport International Canada Inc*. v. *Ericsson Canada Inc.* bear repetition :
>
> [8] Since the 1986 modifications to the Civil Code of Lower Canada, arbitration agreements must no longer be treated as constituting an exception to the principle of unconditional access to the judicial process. As pointed out by Professor John E.C. Brierley, arbitration agreements now constitute a complete alternative means dispute-solving by the courts.
>
> [9] These agreements should not therefore be perceived as limiting the rights of the parties. They simply identify, when clearly drafted, a preferred way by which these rights may be exercised.
>
> [10] They should, therefore, be interpreted in a liberal way. »

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3. *Robitaille* v. *Robitaille*, J.E. 2004-1485 (C.S.).
4. *Acier Leroux inc.* v. *Tremblay*, J.E. 2004-669 (C.A).

[26] As such, the dispute here is clearly one that arises «under, out of or relating to this Agreement, including its formulation, validity, binding effect, interpretations, performance, breach or termination, as well as claims for remedies and other non-contractual claims» within the meaning of the Shareholders Agreement.

[27] The subsidiary arguments relating to the jurisdiction of the Ontario Superior Court of Justice does not require any additional comments, given the interpretation of the arbitration clause in this case.

DEFAMATION AND SEVERANCE CLAIMS

[28] Article 3149 CCQ gives jurisdiction to the Quebec Courts to hear an action involving a contract of employment of a worker whose domicile or residence is in Quebec.

[29] It was also admitted by all Defendants that the Severance Claim and the Defamation Claim were within the jurisdiction of the Quebec Superior Court.

[30] The conclusions sought in the Share Claim being submitted to arbitration, the other claims finding their source in an employment contract containing no arbitration clause, will be decided by this Court.

[31] The two remaining sought are distinct from the Share Claim and will then be decided separately.

[32] Such a division in claims hearings was decided by Justice Lévesque who wrote[5].

> «20. Les conclusions en injonction et la conclusion pour condamnation à un montant de 51 754.68 $ sont du ressort de la Cour supérieure au moins à ce stade-ci des procédures. De même en est-il de la conclusion accessoire relative à la signification du jugement en injonction.
>
> 21. Quant aux autres conclusions, elles doivent être renvoyées aux arbitres puisqu'elles sont des questions de fond qui ne peuvent être décidées, du moins à ce stade-ci par le Tribunal. »

[33] The Court's decision was later confirmed by the Court of Appeal who wrote[6]:

> «13. As Kaufman, J. says, the claims in the present case could, and perhaps should, have grounded two separate actions. «Action A», within the jurisdiction of the Superior Court, continues before that court; but «Action B» was held to outside the Court's jurisdiction and was deferred to arbitration; the judgment thus maintaining a declinatory exception against «Action B» was final : that «action» is no longer before the Court.»

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5. *Groupe AML inc*. & al. v. *Beaudoin & al.* J.E. 89-361 (S.C.).
6. *Groupe AML inc*. v. *Beaudoin*, [1989] R.D.J. 151 (C.A.).

[34] **FOR THESE REASONS**, the Court :

[35] **GRANTS** the Motion to Dismiss the Share Claim against the Defendants;

[36] **DECLARES** that the Share Claim, falls within the exclusive jurisdiction of an arbitrator;

[37] **WITH COSTS** against the Plaintiff;

[38] **DECLARES** that the other claims for defamation of character and for damages in lieu of notice against the Defendants Kensington Capital partners and Kensington Investment Management inc. shall proceed before this Court;

[39] **COSTS TO FOLLOW** for these claims.

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PIERRE JOURNET, J.S.C.

Me Mathieu Bouchard
Irving Mitchell
Attorney for the Plaintiff

Me Daniel Urbas
Me Tommy Tremblay
Borden Ladner Gervais
Attorneys for the Defendant Kensington Capital Partners Ltd

Me Karim Renno
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Attorney for the Defendants Kennedy, Aquino, Nathan

Date of hearing: April 9, 2009