IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *MRC Total Build Ltd. v. F&M Installations Ltd.,* 2019 BCSC 765

Date: 20190515
Docket: S1813447
Registry: Vancouver

Between:

MRC Total Build Ltd.

Plaintiff

And

F & M Installations Ltd.

Defendant

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for Plaintiff:	D.P. Lucas
Counsel for Defendant:	L.M. Low
Place and Date of Hearing:	Vancouver, B.C. April 25, 2019
Place and Date of Judgment:	Vancouver, B.C. May 15, 2019

INTRODUCTION

[1] The plaintiff MRC Total Build Ltd. ("MRC") and the defendant F & M Installations Ltd. ("F&M") are parties to a construction subcontract. MRC commenced this action to resolve a dispute that arose from that subcontract.

[2] F&M takes the position that the resolution of the dispute must be determined by arbitration pursuant to the terms of the *Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*Act*"). As such, F&M now applies to stay this action to allow an arbitration to proceed. MRC opposes this relief.

BACKGROUND FACTS

[3] On July 18, 2016, British Columbia Hydro Power and Authority ("BC Hydro"), as "Owner", and F&M, as "Contractor", entered into a construction contract (the "Prime Contract") to upgrade the Horne Payne Substation in Burnaby, B.C. (the "Project").

[4] On August 10, 2016, F&M, as "Contractor", entered into a subcontract with MRC, as "Subcontractor", to provide civil construction services relating to the Project (the "Subcontract").

[5] I will set out the specific provisions of the Prime Contract and Subcontract below in the discussion of the issues.

[6] In the summer of 2017, design problems arose in relation to the Project, resulting in delays in completing the work under both the Prime Contract and the Subcontract. These problems and delays caused disputes between BC Hydro/F&M under the Prime Contract and between F&M/MRC under the Subcontract.

[7] The specifics of the dispute between F&M and MRC are not relevant to this application, other than to note that MRC alleged that F&M failed to address its disputes with BC Hydro under the Prime Contract in a timely fashion, including under the dispute resolution provisions of that contract.

[8] In October 2018, when the issues with F&M remained unresolved, MRC demobilized its operations and left the Project site.

[9] On December 14, 2018, MRC filed this action against F&M claiming damages for breach of the Subcontract or, alternatively, a remedy for unjust enrichment or *quantum meruit*. Neither party have taken any further steps in the litigation beyond F&M's filing of this application.

THE LAW / ISSUES

[10] The relevant statutory provisions are s. 15(1) and (2) of the *Act*:

> **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 filing a response to civil claim or a response to family claim 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.

[11] In *Prince George (City) v. McElhanney Engineering Services Ltd.*, (1995), 9 B.C.L.R. (3d) 368 (C.A.) at para. 22, the court set out three prerequisites to the application of s. 15(1):

> a) a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
>
> b) the legal proceedings are in respect of a matter agreed to be submitted to arbitration; and
>
> c) the application is brought before the applicant takes a step in the proceeding.

[12] The test to be applied as to whether the court should stay legal proceedings in favour of arbitration was addressed in *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at para. 26, applying *Gulf Canada Resources Ltd. v. Arochem*

International Ltd. (1992), 66 B.C.L.R. (2d) 113 (C.A.) at paras. 39-40. At para. 29 in *Sum Trade*, the court stated “both scope and applicability are appropriate questions for the arbitral tribunal”.

[13] That is not to say that the Court has no role in the consideration of the first prerequisite under s. 15(1), namely whether an arbitration agreement exists. However, in *Sum Trade* at paras. 34-35, the court summarized its view that only in “clear” cases will the Court hearing a stay application rule on the existence of an arbitration agreement. If the issue is “arguable”, the Court should grant a stay and leave the question as to whether a party is bound to arbitrate the dispute to be decided by the arbitrator: *Prince George* at para. 53. This principle similarly applies to any issue as to the scope of the arbitration, however no issue in that respect arises here.

[14] Accordingly, any challenges to an arbitrator’s jurisdiction should first be determined by the arbitrator, although the Court may consider any challenge as to an arbitrator’s jurisdiction if it involves a pure question of law, or one of mixed fact and law requiring “only superficial consideration of the documentary evidence in the record”: *Sum Trade* at paras. 34-35.

[15] If the prerequisites of s. 15(1) are met, a stay of proceedings is mandatory unless the plaintiff establishes that the arbitration agreement is void, inoperative or incapable of being performed pursuant to s. 15(2) of the *Act*: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.,* 2008 BCCA 283 at para. 67.

[16] As with issues concerning the existence of the arbitration agreement, the application of s. 15(2) must also be “clear” before the Court will refuse a stay. If it is less than clear or it is arguable, it may be preferable to stay the action and leave these issues for determination by the arbitrator: *Sum Trade* at paras. 21, 37.

[17] No issues arise here with respect to the second and third prerequisites under s. 15(1), as stated in *Prince George*.

[18] MRC opposes F&M’s application for a stay on two bases, alleging:

a) there is no arbitration agreement between MRC and F&M (the first prerequisite under s. 15(1)); and

b) in the alternative, if s. 15(1) is satisfied, the arbitration agreement is "incapable of being performed" by MRC and F&M (s. 15(2)).

IS THERE AN ARBITRATION AGREEMENT?

[19] The parties agree that F&M bears the onus of proving the prerequisites under s. 15(1), including the only relevant one on this application, namely whether there is an agreement between the parties to arbitrate the dispute.

[20] The Subcontract does not contain any dispute resolution provisions, let alone any provision requiring arbitration of any disputes. However, the Prime Contract does. F&M takes the position that the Subcontract incorporates the dispute resolution provisions of the Prime Contract such that there is a similar requirement to arbitrate disputes under the Subcontract.

[21] MRC disagrees. MRC contends that it is clear and unambiguous on the face of the documents that the Subcontract did not incorporate the arbitration provisions found in the Prime Contract into the Subcontract.

[22] At this stage, the relevant provisions of the Prime Contract and Subcontract bear consideration.

The Prime Contract

[23] In Section 2.2, "Contract Documents" are defined to be the Prime Contract (the "Agreement") and various titled appendices.

[24] The list of appendices includes "Appendix A - General Conditions (Construction)". The relevant provisions of the General Conditions or "GCs" are:

> **GC.1 INTERPRETATION**
>
> **"Agreement"** means the form of agreement which is signed by the parties and included in the Contract Documents;
>
> **"BC Hydro"** means the entity identified as "BC Hydro" on the first page of the Agreement; …

"Contract" means the agreement between BC Hydro and the Contractor as defined and described in the Contract Documents, as may be amended, supplemented or restated from time to time;

"Contract Documents" means the documents listed and described in Section 2.2 of the Agreement; …

"Contractor" means the entity identified as "Contractor" on the first page of the Agreement [i.e. F&M]; …

"Contractor's Representative" has the meaning set out in GC.2.1; …

"Dispute Resolution Procedure" means the dispute resolution procedure set out in GC.12; …

"Hydro's Representative" has the meaning set out in GC.3.1; …

"Person" means any individual, sole proprietorship, corporation, company, partnership, unincorporated association, association, institution, entity, party, trust, joint venture, estate, cooperative or other judicial entity; …

"Representative" means the either Hydro's Representative or the Contractor's Representative, as the case may be; …

"Subcontractor" has the meaning set out in GC.4.14;

…

GC.2 CONTRACTOR'S REPRESENTATIVE

2.1 Appointment of Contractor's Representative

The Contractor will, upon executing the Agreement, designate in writing an individual (the "**Contractor's Representative**") to be the Contractor's representative and single point of contact with respect to the Contract. The Contractor will give prompt written notice of such appointment to Hydro's Representative. If, for any reason, the appointed Contractor's Representative is discontinued, then the Contractor will, as soon as practicable, appoint a replacement and give prompt written notice to Hydro's Representative of such replacement. If, at any time, Hydro's Representative, acting reasonably, objects to the Contractor's Replacement, then the Contractor will give consideration to replacing the Contractor's Representative with a Person acceptable to Hydro's Representative. The Contractor's Representative may, at the Contractor's election, be an employee of the Contractor, or be a consultant or other third party.

…

GC.3 HYDRO'S REPRESENTATIVE

3.1 Appointment of Hydro's Representative

BC Hydro will appoint an individual ("**Hydro's Representative**") to be BC Hydro's single point of contact with respect to the Contract. BC Hydro will give prompt written notice of such appointment to the Contractor. If, for any reason, the appointed Hydro's Representative's appointment is discontinued, then BC Hydro will, as soon as practicable, appoint a replacement and give prompt written notice to the Contractor of such replacement. If, at any time, the Contractor's Representative, acting reasonably, objects to Hydro's Representative, then BC Hydro will give consideration to replacing Hydro's

Representative with a Person acceptable to the Contractor's Representative. Hydro's Representative may, at BC Hydro's election, be an employee of BC Hydro, or be a consultant or other third party.

…

GC.4 EXECUTION OF THE WORK

…

4.14 Subcontractors

The following will apply with respect to all subcontractors, sub-consultants, suppliers, manufacturers and vendors (each, a "**Subcontractor**" and the term "Subcontractor" will be deemed to include all further subcontractors, sub-consultants, suppliers, manufacturers and vendors engaged below a Subcontractor) engaged to perform a portion of the Work:

(a) the Contractor will not, in the aggregate, subcontract more than 75% of the Work (such that no more than 75% of the Contract Price will be in payment for Work performed by Subcontractor(s)) without the prior written consent of Hydro's Representative, which consent may be arbitrarily withheld;

…

(f) the Contractor will:

(i) require all first tier Subcontractors to perform their work in accordance with the Contract Documents;

(ii) incorporate the terms and conditions of the Contract Documents into all agreement with first tier Subcontractors, including GC.4.14(d);

(iii) make commercially reasonable efforts to have the terms and conditions of the Contract Documents incorporated into all agreements with Subcontractors below the first tier to the extent the terms and conditions of the Contract Document are applicable to the Work being undertaken by such Subcontractors; …

…

(g) nothing in the Contract will be construed as creating any contractual relationship between BC Hydro and any Subcontractor or any other Persons engaged by or through a Subcontractor.

GC.12 DISPUTES

12.1 Dispute Resolution

Except as expressly set out otherwise in the Contract Documents, all disputes relating to or arising out of the Contract (each, a "**Dispute**") will be resolved in accordance with GC.12.

12.2 Good Faith Efforts to Resolve any Dispute

Without in any way limiting the parties' rights under the Contract, BC Hydro will encourage and support Hydro's Representative and the Contractor will

encourage and support the Contractor's Representative to use good faith efforts to resolve any Dispute promptly upon becoming aware of the Dispute, and the Representatives will continue to use such efforts after the delivery of a Dispute Notice, including the early full disclosure and exchange of all documents and information that may be relevant to the Dispute.

12.3 Dispute Notice

A party with a Dispute may, at any time, deliver written notice to the other party, with a copy to Hydro's Representative or the Contractor's Representative, as applicable, describing the Dispute (the "**Dispute Notice**"). A Dispute Notice will include, at a minimum:

(a) a summary of the facts relevant to the Dispute;

(b) the applicable provisions of the Contract relevant to the Dispute or other basis for the claim upon which the disputing party relies;

(c) additional supporting documentation, if any, as may be relevant to the dispute and available; and

(d) a clear statement of the resolution to the Dispute being sought by the disputing party.

12.4 Initial Settlement Meeting

Within 45 days of delivery of a Dispute Notice, or such other time as the parties may agree in writing, the Dispute will, if not already settled, be referred to a representatives(s) of each of the parties who, to the extent reasonably practicable, have not been previously involved in the events leading to the Dispute for a settlement meeting to occur within such 45 day period.

12.5 Additional Settlement

If a Dispute is not settled by a written agreement (a "**Settlement Agreement**") signed by authorized representatives of both parties after an initial settlement meeting held in accordance with GC.12.4, then, without extending the time limit set out in GC.12.7(b), BC Hydro may, in its sole discretion, direct in writing that an additional settlement meeting or meetings be convened at which BC Hydro will be represented by a new a representative(s). BC Hydro will give consideration to a request from the Contractor for an additional settlement meeting or meetings and for specific BC Hydro representatives to be in attendance at such meetings, but BC Hydro will not be obligated to agree to convene a requested additional settlement meeting nor to bring the requested individuals.

12.6 Representatives at Settlement Meetings

The parties will send representatives to the settlement meeting(s) as described in GC.12.4 and GC.12.5, in each case with authority to enter into a Settlement Agreement that is binding on the parties, and with instructions to use all commercially reasonable efforts to resolve the Dispute without delay. Except with the express written consent of the Contractor, BC Hydro's representative(s), in the meetings held pursuant to GC.12.4 or GC.12.5, will include a person(s) other than Hydro's Representative. Notwithstanding any

> other provision in GC.12, the parties may have any individuals in attendance at any settlement meeting, including their respective Representatives.
>
> 12.7 Ultimate Time for Settlement
>
> If a Dispute is not:
>
> (a) referred to the parties' representatives within the time specified in GC.12.4; or
>
> (b) settled by a Settlement Agreement within 90 days after receipt of the Dispute Notice, or such other time as the parties may agree in writing,
>
> then upon written notice of either party delivered to the other party, the unresolved Dispute will be submitted to arbitration pursuant to GC.12.8.

[25] GC.12.8 of the Prime Contract sets out specific provisions for the conduct of an arbitration, including that it is to be conducting in accordance with the rules of the British Columbia International Commercial Arbitration Centre and the *Act*.

The Subcontract

[26] The Subcontract defines "Contract" as comprising the Subcontract Agreement and various schedules. Schedule I is described as the "Prime Contract documents, drawings & specifications". "Prime Contract" is defined to mean:

> … the general contracting agreement between the Contractor [F&M] and the Owner [BC Hydro] and the plans, specifications and documents comprised therein. …

[27] Section 6 of the Subcontract , said to be a "key" provision by F&M, states:

> **6. Contract Documents and Drawings**
>
> The Prime Contract, associated drawings and specifications for the scope of work are attached in Schedule I and form part of this Subcontract Agreement. Subcontractor is to review in detail to ensure all the information required to perform scope of work has been provided. Subcontractor is to advise the Contractor in writing **14 days** in advance of the date you require this information to allow for the Contractor respond or obtain from Owner. Failure to do so may result in delays to the project and potential cost impacts not recoverable from the Contractor or the Owner.
>
> [Emphasis added.]

[28] The Subcontract does not contain any dispute resolution procedures and particularly, any requirement that the parties arbitrate disputes.

[29] There are various specific references to the Prime Contract in the Subcontract:

a) Under “Terms of Payment”, payment of holdbacks was to be accordance with the Prime Contract;

b) In Section 2, employees of the Subcontractor must conform to the environmental requirements under the Prime Contract;

c) In Section 5, all materials provided under the Subcontractor must conform to the Prime Contract documents and specifications;

d) In Section 7.2(vi), the limits of insurance to be provided by the Subcontractor must conform to the corresponding limits under the Prime Contract; and

e) In Section 13, the Subcontractor must promptly correct defects and deficiencies in the Work prior to or during the warranty period specified in the Prime Contract.

Discussion

[30] Per *Sum Trade*, the nub of the dispute between the parties on this application is whether it is “clear” or “arguable” that the terms of the Prime Contract (which includes an obligation to arbitrate any disputes: GCs 12.1/12.7) are incorporated into the Subcontract to similarly require that disputes under that contract be resolved in that fashion.

[31] MRC submits that it is clear that the arbitration provisions under the Prime Contract were not incorporated into the Subcontract. MRC further submits that such a conclusion is possible from only a review of the documents themselves. To the contrary, F&M says that it is clear that the requirement to arbitrate in the Prime Contract had been incorporated into the Subcontract. At the very least, F&M says it is “arguable” and the issue should be left for the arbitrator.

[32] F&M refers to a number of cases that consider whether an arbitration clause can be incorporated by reference from one contract into another to require a party to the latter contract to resolve disputes by arbitration. As F&M argues, incorporation by reference is an efficient drafting mechanism to avoid repeating the other contractual terms in the second contract.

[33] In *Sum Trade*, the court was considering agreements for the purchase of lentils that included a reference to a standard form contract drawn by the Grain and Feed Trade Association ("GAFTA"). The GAFTA contract included an express provision requiring arbitration of disputes. The court upheld the finding in this Court that it was arguable that the sale contracts had incorporated the GAFTA rules, including the requirement to arbitrate (paras. 38-42). The evidence before this Court included not only the documents, but evidence of the parties' exchange of draft contracts and industry practice (para. 39).

[34] In *Rettinger v. Loof*, [1998] B.C.J. No. 313 (S.C.), the parties had executed shareholders agreements, which contained an arbitration clause, and management agreements that did not provide for arbitration. At para. 29, Justice Drost concluded that the shareholders agreements were intended to be "umbrella agreements" so that their terms with respect to dispute resolution included disputes arising out of the ancillary contracts, namely the management agreements.

[35] In *Mussche v. Voortman Cookies Limited*, 2012 BCSC 953, the issue was whether the agreement between the parties included the terms of a policy manual and handbook which mandated arbitration of disputes. At para. 48, the Court found that the issue as to whether the handbook was incorporated into the parties' agreement was arguable. Applying *Prince George*, the Court concluded that the issue should be determined by the arbitrator.

[36] The final "incorporation by reference" case cited by F&M is *One West Holdings Ltd. v. Greata Ranch Holdings Corp.*, 2014 BCCA 67, leave to appeal ref'd [2014] S.C.C.A. No. 177. In *One West*, there were three agreements: a limited partnership agreement (LPA), a project management agreement (PMA) and a

purchase agreement (PA). One of the provisions of the PMA was an "entire agreement" clause in art. 17.1 that stated that the PMA, the LPA and PA constituted the entire agreement between the parties. The LPA contained a requirement to arbitrate disputes. The PMA and PA did not. One West was a party to the PMA but not the LPA.

[37] A dispute arose between the parties. Greata Ranch initiated an arbitration against the other limited partners and One West. One West argued that it should not be joined as a party to the arbitration because it did not sign the LPA and was therefore, not a party to an arbitration agreement.

[38] The arbitrator decided that One West was a proper party to the arbitration since the requirement to arbitrate had been incorporated by reference into the PMA by the "entire agreement" clause. The Court of Appeal upheld the arbitrator's conclusion that the "entire agreement" clause clearly and unambiguously defined the agreement of the parties (paras. 39-40). Accordingly, since One West was a party to the PMA, it had agreed that part of the agreement included the LPA, including the requirement to arbitrate.

[39] MRC does not take issue with the analysis and findings in the above cases. However, it says that none of the above cases addressed construction contracts and only addressed general contract principles. MRC refers to numerous authorities for the proposition that incorporation of an arbitration clause from a prime contract into a subcontract can only be accomplished by distinct and specific wording and not just a general reference to the prime contract. MRC argues that it is quite common for subcontracts to incorporate by reference only so much of the prime contract as is applicable to the particular work in question.

[40] In Thomas G. Heintzman, Bryan G. West and Immanuel Goldsmith's *Heintzman and Goldsmith on Canadian Building Contracts*, 5th ed. (Toronto: Carswell, 2014) (loose-leaf updated 2019, release 1), the authors state at 12-13 to 12-15:

> Since a subcontractor performs part of the work specified in the prime contract, it is quite common for a subcontract to incorporate by reference so much of the prime contract as it applicable to the particular work in question.
>
> …
>
> Even if the subcontract states that it incorporates the main contract, the meaning and purpose of that wording must be determined. …. How far the incorporation by reference clause should be applied beyond that meaning and purpose will depend upon the true intent of the parties. Even if the terms of the main contract are stated to be incorporated into the subcontract, there will still be an issue of interpretation as to whether the subcontracting parties really intended the disputed terms of the main contract to be incorporated into their contract when those terms are either unusual, or more suited to the main contract or to the relationship between the owner and the main contractor, or are inconsistent with the subcontract. Thus, the incorporation by reference has been held not to include: … dispute resolution ...

[41] In *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.*, [1996] O.J. No. 29 (Ont. Gen. Div.) at paras. 11-15, the court considered the documentation and concluded that the manifest intention of the parties to the subcontract was not to include the arbitration clause found in the prime contract since there were no "distinct and specific words" regarding arbitration.

[42] *Dynatec* has been followed by other courts in Canada but has not been considered in British Columbia. MRC refers to two other authorities.

[43] In *Sunny Corner Enterprises Inc. v. Dustex Corporation*, 2011 NSSC 172 at para. 21, the court similarly framed the discussion as a determination of the intentions of the parties. The court, following *Dynatec*, stated:

> [25] Sunny Corner says that a subcontract only incorporates an arbitral provision of a main contract if it does so expressly, which was not the case here. The authors of *Goldsmith* make the following remarks about the incorporation of arbitration provisions:
>
> > An arbitration clause in the prime contract may be incorporated by reference into the subcontract. However, such an incorporation must be specific. A general incorporation of the prime contract into the subcontract will not normally include the arbitration clause [*Goldsmith on Canadian Building Contracts* at p. 10/3] ....
>
> [26] In a similar vein, *Halsbury's Laws of England* (1992) states:
>
> > Where a sub-contractor agrees to be bound by the terms of a principal contract, which contains a clause referring disputes between the employer and the contractor to arbitration, this does not operate as a submission to arbitration of disputes between the contractor and the

> sub-contractor, *unless that term of the principal contract is expressly incorporated in the sub-contract.* [*Halsbury's Laws of England* 4th edn. Reissue, vol 4(2) (London: Butterworths, 2002) para. 493]
>
> [emphasis added]
>
> [27] A leading Canadian case on the circumstances in which a subcontract will incorporate provisions of a head contract is *Dynatec Mining Ltd. v. PCL Civil Constructors (Canada) Inc.* (1996), 25 C.L.R. (2d) 259, 1996 CarswellOnt 16 (Ont. C.J. (Gen. Div.)). In that case, Chapnik J. held that "[i]ncorporation of an arbitration clause can only be accomplished by distinct and specific words ..." (*Dynatic* at para. 11). She rejected the submission that an arbitration clause was incorporated by inference in a subcontract by virtue of not appearing on a list of excluded provisions. She concluded that "the manifest intention of the parties, as reflected on the face of the subcontract document, was not to include the arbitration clause therein; in the alternative, the matter was overlooked and cannot now be imposed upon the parties in the absence of agreement between them" (*Dynatec* at paras. 9 and 15). *Dynatec* is the authority cited for the statement in *Goldsmith* respecting the need for "specific" words of incorporation.

[44] At paras. 37-41, the court in *Sunny Corner* concluded that the arbitration clause was not incorporated by reference into the subcontract. The court agreed that an arbitration clause may only be incorporated by express and specific language and that a general incorporation of the prime contract into the subcontract will not normally include the arbitration clause. Here, the court did not find any express incorporation of the arbitration clauses in the prime contract into the subcontract.

[45] In *Nodricks Norsask Seeds Ltd. v. Dyck Forages & Grasses Ltd.*, 2014 MBCA 79, the court similarly considered and applied *Dynatec*. In the contract, there was a reference to “Arbitration: C.S.T.A.” “C.S.T.A.” referred to the Canadian Seed Trade Association, whose bylaws set out an arbitration process. At para. 29, after noting the lower court’s conclusion that the above term was ambiguous as to whether arbitration was required, the court concluded that there was no distinct and specific wording in the contract to incorporate the right to arbitrate.

[46] Here, the Subcontract defines the “Contract” to mean the Subcontract and includes the Prime Contract. Section 6 of the Subcontract provides:

> The Prime Contract, associated drawings and specifications for the scope of work are attached in Schedule I and form part of this Subcontract Agreement.
>
> [Emphasis added.]

The Prime Contract defines “Contract Documents” to mean the documents listed and described in Section 2.2 of the Prime Contract, which includes the General Conditions, including GC12, the mandatory arbitration provision.

[47] F&M also places some reliance on GC.4.14(f)(ii) that requires that F&M incorporate the terms of the Prime Contract into any subcontracts. To some extent, this begs the question as to whether that was done in the Subcontract, the seminal question here.

[48] MRC argues that, if the parties had intended to incorporate the arbitration resolution procedure into the Subcontract, it would expressly say so in the Subcontract. MRC says that the Subcontract only refers to some specific provisions of the Prime Contract, as noted above at paragraph 29.

[49] MRC further argues that the Prime Contract is attached as a schedule in the Subcontract only for reference purposes and that only those specifically mentioned clauses of the Prime Contract were intended to be binding on the Subcontractor, such as the scope of the work. However, GC.4.14(f)(ii) requires that the terms of the Prime Contract be incorporated into any subcontract and is a separate provision from GC.4.14(f)(iii) which requires incorporation of the Prime Contract “as applicable to the Work being undertaken by such Subcontractors”.

[50] It is therefore arguable that the references to the Prime Contract in the Subcontract were intended to refer to matters beyond simply the scope of the work and that there is no limitation as to what was incorporated into the Subcontract from the Prime Contract.

[51] MRC’s primary argument is that there is no express and specific provision in the Subcontract requiring arbitration or, at the very least, a specific reference to GC.12 in the Prime Contract and that it applies in the Subcontract. Accordingly, MRC argues that *Dynatec* dictates that the parties did not intend to require arbitration under the Subcontract. I agree that the Subcontract only includes a general reference to the Prime Contract and its appendices and that there is no

specific reference to the arbitration provisions in GC.12 of the Prime Contract or even just GC.12.

[52] However, in my view, it is less than clear that the *Dynatec* approach is an appropriate interpretive approach in discerning the intention of the parties under the Subcontract.

[53] Firstly, *Dynatec* has not been followed by any court in British Columbia. That case and the others that followed it are not binding on this Court.

[54] Secondly, *Dynatec*, *Sunny Corner* and *Nordricks* were all decided before the release of *Creston Moly Corp. v. Sattva Capital Corp.*, 2014 SCC 53. *Sattva* has undeniably clarified and/or changed how the court is to approach the interpretation process toward discerning the intentions of the parties in a contract:

> 47 Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744 (S.C.C.), at para. 27 *per* LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Minister of Transportation & Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69 (S.C.C.), at paras. 64-65 *per* Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:
>
> > No contracts are made in a vacuum: there is always a setting in which they have to be placed.... In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.
> >
> > (*Reardon Smith Line*, at p. 574, *per* Lord Wilberforce)
>
> 48 The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Geoffrey L. Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300 (Man. C.A.), at para. 15, *per* Hamilton J.A.; see also Hall, at p. 22; and McCamus, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme*

> *Ltd. v. West Bromwich Building Society* (1997), [1998] 1 All E.R. 98 (U.K. H.L.):
>
> > The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

[55] Arguably, the *Dynatec* requirement is a "technical rule" to interpret construction contracts that is no longer appropriate. All of the cases cited by both MRC and F&M start from the proposition that the fundamental role of the Court is to discern the intention of the parties in terms of the scope of their agreement. It is arguable that *Dynatec*, *Sunny Corner*, *Nordricks* and other cases that followed them do not rely on any principled basis to interpret construction contracts or arbitration clauses differently. I am not aware of any case law or authority on general contractual interpretation principles that support the argument that arbitration clauses are dealt with any differently than any other clauses, or that construction contracts are dealt with differently from any other contracts. Nor is there anything to suggest that such clauses and contracts are immune from the contractual interpretation principles as set out in *Sattva*.

[56] Indeed, the courts in *Dynatec*, *Sunny Corner*, *Nordricks* all, at the outset of their analysis, purport to discern the intention of the parties to the contract as to whether they intended to arbitrate their disputes.

[57] Thirdly, *Sattva* tells us that "surrounding circumstances" or the factual matrix can and generally should be considered in the interpretation exercise: paras. 46-47, 56-58. Here, I have no evidence of the surrounding circumstances that might be of assistance in discerning the intention of the parties on the arbitration issue. In *Sum Trade*, such evidence was before the Court (para. 39). For example, there may be industry practices that inform the issue of which I am not aware, such as was addressed in *Sum Trade* to some extent. F&M has referred to certain communications between the parties dealing with the dispute but I agree with MRC

that this cannot be considered as surrounding circumstances since those events took place after the Subcontract was entered into.

[58] Fourthly, as F&M argues, our Court of Appeal in *One West* found that a reference within an "entire agreement" clause to a separate agreement containing an arbitral clause was sufficient to bind the appellant to the arbitration agreement despite the appellant not being a party or signing the agreement containing the arbitral clause. In this case, there is a more direct reference to the GCs, although I acknowledge there is no specific mention of GC.12 or that GC.12 requires arbitration.

[59] Moreover, the approach of our Court of Appeal in the interpretation exercise has been inarguably to follow the *Sattva* paradigm as binding authority on all lower courts: *Sum Trade* at para. 24.

[60] I am unable in the above circumstances to conclude that it is "clear" that MRC did not agree to submit disputes under the Subcontract to arbitration. At the very least, it is arguable that it has done so. Accordingly, it is appropriate that the arbitrator undertake the task of determining that matter: *Sum Trade* at para. 29. At that time, the arbitrator can undertake the interpretation exercise in light of the authorities, including *Sattva*, and consider the appropriate evidence.

IS THE AGREEMENT INCAPABLE OF BEING PERFORMED?

[61] In the alternative, MRC contends that it and F&M are incapable of performing the arbitration agreement. The parties agree that MRC bears the onus of proving that the arbitration agreement is "incapable of being performed" and that accordingly, under s. 15(2) of the *Act*, the Court should not grant a stay.

[62] The court in *Prince George* adopted the following definition of "incapable of being performed":

> [35] … "incapable of being performed" connotes something more than mere difficulty or inconvenience or delay in performing the arbitration. For example, it is not sufficient to say it is incapable of being performed where one party could not or would not come up with the deposit necessary to pay the

> arbitrator. The incapacity must come from something beyond the control of the parties; for example, where the arbitration agreement specifies a particular arbitrator must hear the matter, but he or she is not available.

[63] In J. Kenneth McEwan and Ludmila B. Herbst's *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Aurora, Ont.: Canada Law Book, 2004) (loose-leaf updated Nov. 2017, release 15), at 3:40.90.30(d), the authors state:

> … An agreement only becomes incapable of performance if the circumstances are such that it could no longer be performed even if both parties were "ready, able and willing" to perform it. …

[64] MRC argues that the dispute resolution procedure contemplated by GC.12 of the Prime Contract cannot be initiated by either F&M or MRC. It argues that, on any reasonable interpretation of GC.12 of the Prime Contract, the entire dispute resolution scheme relies upon a party to the Prime Contract (BC Hydro or F&M) delivering a "Dispute Notice" to the other party in order to initiate the process. As a result, MRC says that it cannot undertake that process.

[65] However, I agree with F&M that MRC's narrow interpretation of GC.12 is questionable. The provisions in GC.12.2-12.6 involve matters specific to BC Hydro and F&M. Each are required to appoint Representatives, who receive any Dispute Notices and then undertake settlement discussions and meetings. Arguably, none of those provisions could apply to the Subcontract without any corresponding appointment by F&M and MRC of a "Representative" under the Subcontract.

[66] However, leaving that issue aside, GC.12 does not require that the Dispute Notice and settlement process necessarily take place. It is simply an option. GC.12.7 provides that, if that settlement process does not take place, the unresolved dispute will be referred to arbitration upon written notice being given by either party.

[67] In *One West*, the court addressed similar arguments that there was a potential conflict between the provisions of the LPA, on the one hand, and the PMA and PA, on the other, such that the incorporation by reference could not have been

intended because it would result in an "unworkable agreement": para. 42. This argument was rejected:

> [48] It is clear that the three agreements involve different aspects of the project and that provisions of each agreement that are specific to a particular aspect of the project likely will not apply to the parties involved in other aspects, but that does not mean provisions common to the project as a whole could not stand. In my view, the commitment to arbitrate is such a provision. I see nothing in the agreements that suggests otherwise.

[68] In my view, it is arguable that the parties here intended that the arbitration provisions in GC.12.7 were a "common" provision that was equally applicable and workable under both the Prime Contract and the Subcontract. On the face of it, the Subcontract could be interpreted to incorporate GC.12 (or just GC.12.7) such that the reference to BC Hydro as "Owner" and F&M as "Contractor" in the Prime Contract would read as F&M as "Contractor" and MRC as "Subcontractor" in the Subcontract.

[69] I conclude that it is arguable whether MRC and F&M are incapable of undertaking the arbitration process set out in GC.12. Therefore, it is arguable whether the arbitration agreement in "incapable of being performed" in accordance with s. 15(2) of the *Act*. Accordingly, it is appropriate that the arbitrator consider that matter in the first instance.

Conclusion

[70] I order that this action be stayed pursuant to s. 15(1) of the *Act* pending an arbitration being convened to consider the issues raised on this application and, if appropriate, the merits of the dispute.

[71] MRC is entitled to its costs of the proceeding in any event of the cause.

"Fitzpatrick J."