Federal Court  Cour fédérale

Date: 20100702

Docket: T-1754-09

Citation: 2010 FC 724

Ottawa, Ontario, July 2, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

CHERYL RHODES and
KERRY MURPHY

Plaintiffs

and

COMPAGNIE AMWAY CANADA and
AMWAY GLOBAL

Defendants

REASONS FOR ORDER AND ORDER

Context

[1] The Plaintiffs have initiated a proposed class action proceeding in this case, and for this purpose have submitted a statement of claim challenging the Defendants' distribution system as a multi-level marketing plan and a pyramid scheme which does not comply with sections 52, 55 and 55.1 of the *Competition Act*, R.S.C. 1985, c. C-34. They are consequently seeking to recover from the Defendants, pursuant to section 36 of the *Competition Act*, their resulting losses and damages

estimated at $15,000. For the purposes of a class action based on the same or similar cause of action, the Plaintiffs also purport to represent all persons residing in Canada who distributed the Defendants' products since October 23, 2007, excluding the Defendants' employees and their affiliates and family members.

[2] The Defendants have answered these proceedings with a motion seeking an order dismissing or permanently staying the action and to compel arbitration on the basis that the Federal Court has no jurisdiction, as the matter is subject to compulsory binding arbitration under the terms of an arbitration agreement subscribed to by the parties.

[3] When the Defendants' motion was first submitted, the Plaintiffs responded by a motion for directions from this court which resulted in this Court's Order dated May 5, 2010 directing that the Defendants' motion to stay and to compel arbitration would be heard on June 18, 2010 before any motion for certification of the class action. For the purposes of disposing of the motion for directions, the parties then argued before the Court that what was at stake in the motion to stay and to compel arbitration was both the scope, validity and enforceability of the arbitration agreement and notably of the limited class action waiver it contains, and whether this court or an arbitrator should decide the scope, validity and enforceability of the arbitration agreement: see paragraph 55 of the Defendants' motion to stay and to compel arbitration.

[4] However, at the subsequent hearing on the merits of the Defendants' motion to stay and to compel arbitration, both the Defendants and the Plaintiffs limited their arguments to whether this

Court or an arbitrator should decide the scope, validity and enforceability of the arbitration agreement. Thus, only the jurisdictional issue was argued by the parties to the exclusion of the substantive issue which, according to both parties, was to be decided at a later date by either the arbitrator in arbitration proceedings or by this Court at the certification stage of the class action, as the case may be, following the outcome of this Court's decision here.

[5] It is useful to note that the hearing was adjourned for a few minutes to allow the parties time to consider whether the limited scope of their respective arguments was in conformity with this Court's Order of May 5, 2010, and both parties clearly stated that they were both of the view that only the jurisdictional issue was before the Court. The counsel for the Defendants going as far as to confirm, at the specific oral request of this Court, that he was not relying on the substantive provisions of the arbitration agreement, specifically subparagraphs 11.3.9 and 11.3.10 of the Amway Rules of Conduct reproduced below.

[6] It is consequently on the basis of this limited issue, as defined before this Court by the parties at the hearing of this motion, that these reasons for judgement have been prepared.

Position of the Defendants

[7] The Defendants assert that the entire dispute between the parties pertains to Amway's compensation plan resulting from the agreement entered into with the Plaintiffs. This compensation plan dispute is subject to arbitration pursuant to the terms of the agreement. The arbitration provisions of the agreement are themselves subject to the Ontario *Arbitration Act, 1991*, S.O. 1991,

c. 17, which provides in subsection 7(1) that the court in which a proceeding in respect of a matter to be submitted to arbitration is commenced, "shall, on the motion of another party to the arbitration agreement, stay the proceedings."

[8] The Defendants note that subparagraph 11.3.9 of the Amway Rules of Conduct, reproduced below and which forms part of the agreement, specifically provides for a limited class action waiver for individual claims exceeding $1,000. The claim made by the Plaintiffs in this case is for over $15,000, and this claim is consequently subject to this waiver.

[9] The Defendants add that the fact that the Plaintiffs in this case are relying on provisions of the *Competition Act* does not evacuate the arbitrator's jurisdiction over the dispute. The arbitrator has the authority to interpret and apply statutory provisions such as the provisions of the *Competition Act* raised in these proceedings. In *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17, the Supreme Court of Canada ruled that the *Copyright Act*, R.S.C. 1985, c. C-42 does not exclude the jurisdiction of arbitrators acting pursuant to a binding arbitration agreement, despite the fact that section 37 thereof provides the courts with original jurisdiction for civil remedies under that Act. A similar reasoning should be applied concerning civil remedies under the *Competition Act*.

[10] The Defendants also add that the fact that the action is brought by the Plaintiffs as a class action does not change the fundamental nature of the dispute. The Supreme Court of Canada has ruled that a plaintiff cannot ask the court to retain jurisdiction over a matter that is subject to an

arbitration agreement, merely because the plaintiff has chosen the procedural vehicle of a class action to assert the claim. In *Bisaillon v. Concordia University*, 2006 SCC 19, [2006] 1 S.C.R. 666, the Supreme Court of Canada confirmed that an arbitration agreement in a collective agreement divests the jurisdiction of the courts, and that the instituting of proceedings as a proposed class action does not operate to confer jurisdiction on a court when it is otherwise lacking. These principles were extended to all consensual arbitration agreements, even arbitration agreements included in consumer contracts, by *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R.801 ("*Dell*").

[11] Moreover, the Defendants assert that the arbitrator has sole jurisdiction to rule on his own jurisdiction should there be, as here, a debate regarding his jurisdiction. This results from the *compétence-compétence* principle recognized by the Supreme Court of Canada in *Dell* and reiterated in *Rogers Wireless v. Muroff*, 2007 SCC 35, [2007] 2 S.C.R. 921 ("*Rogers*"). Consequently, in the context of this motion to stay, the test to be applied by this Court is not whether, as an absolute, the dispute falls within the terms of the arbitration agreement, but rather whether it is arguable that it does, leaving the question to be resolved in the first instance by the arbitrator, as was decided by Prothonotary Hargrave in *Campney & Murphy v. Bernard & Partners*, 2002 FCT 1136, 224 F.T.R. 265 and by the Ontario Court of Appeal in *Dancap Productions Inc. v Key Brand Entertainment, Inc.*, 2009 ONCA 135.

[12] In this case, the limited class action waiver arguably applies to the claim submitted by the Plaintiffs, and consequently these class action proceedings should be stayed in order to allow the arbitrator to decide upon the scope, validity or enforceability of the arbitration agreement and, notably, of the limited class action waiver.

Position of the Plaintiffs

[13] The Plaintiffs argue that the agreement the parties entered into specifically confers jurisdiction over the dispute to the courts rather than to the arbitrator.

[14] Subparagraph 11.3.10 of the Amway Rules of Conduct, which forms part of the agreement, specifically provides that "[c]lass action claims <u>are not arbitrable</u> under these Rules under any circumstances" [emphasis added]. Pursuant to this subparagraph 11.3.10 of the Amway Rules of Conduct, it is only "in the event a court declines to certify a class, [that] all individual plaintiffs shall resolve any and all remaining claims in arbitration."

[15] Moreover, though subparagraph 11.3.9 of the Amway Rules of Conduct does contain a limited class action waiver for claims exceeding $1,000, that waiver is said to be "severable in the event any <u>court</u> finds it unenforceable or inapplicable in a particular case" [emphasis added].

[16] Consequently, the Defendants assert that, under the very terms of the agreement, class action claims are excluded from arbitration and any dispute as to the enforceability or applicability of the class action waiver is to be decided by the courts. The *compétence-compétence* principle relied upon

by the Defendants simply does not apply here in light of the clear and unambiguous language of the Amway Rules of Conduct which have been incorporated into their agreement.

[17] The Plaintiffs also note that a controversy exists as to the application outside of Quebec of the principles set out in *Dell* and *Rogers*, and that this controversy should soon be resolved by the Supreme Court of Canada in the case of *Seidel v. Telus Communications Inc.*, [2009] S.C.C.A. No. 191 (QL) it recently heard. In any event, the Plaintiffs argue that this legal controversy should not affect the disposition of this motion by this Court, since the issues raised by this motion can easily be decided on the sole basis of the clear language of the agreement entered into by the parties.

Analysis

[18] The parties agree that a binding arbitration agreement applies and that the pertinent provisions of that agreement are to be found in the following subparagraphs of the Amway Rules of Conduct:

> 11.3.9 No party to this agreement shall assert any claim as a class, collective or representative action if (a) the amount of the party's individual claim exceeds $1,000, or (b) the claiming party, if an IBO, has attained the status of Platinum either in the current fiscal year or any prior period. This subparagraph shall be enforceable when the applicable law permits reasonable class action waivers and shall have no effect when the applicable law prohibits class action waivers as a matter of law. In any case, the class action waiver provision, as well as any other provision of Rule 11, is severable in the event any court finds it unenforceable or inapplicable in a particular case.
>
> 11.3.10 Class action claims are not arbitrable under these Rules under any circumstances; but in the event a court declines to certify a class, all individual plaintiffs shall resolve any and all remaining claims in arbitration.

[19] The parties also agree that the arbitration agreement is governed by the Ontario *Arbitration Act, 1991,* including particularly subsections 7(1) (2) and (5) thereof which read as follows:

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.	**7.** (1) Si une partie à une convention d'arbitrage introduit une instance à l'égard d'une question que la convention oblige à soumettre à l'arbitrage, le tribunal judiciaire devant lequel l'instance est introduite doit, sur la motion d'une autre partie à la convention d'arbitrage, surseoir à l'instance.
(2) However, the court may refuse to stay the proceeding in any of the following cases:	(2) Cependant, le tribunal judiciaire peut refuser de surseoir à l'instance dans l'un ou l'autre des cas suivants :
1. A party entered into the arbitration agreement while under a legal incapacity.	1. Une partie a conclu la convention d'arbitrage alors qu'elle était frappée d'incapacité juridique.
2. The arbitration agreement is invalid.	2. La convention d'arbitrage est nulle.
3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.	3. L'objet du différend ne peut faire l'objet d'un arbitrage aux termes des lois de l'Ontario.
4. The motion was brought with undue delay.	4. La motion a été présentée avec un retard indu.
5. The matter is a proper one for default or summary judgment.	5. La question est propre à un jugement par défaut ou à un jugement sommaire.
[…]	[…]
(5) The court may stay the proceeding with respect to the	(5) Le tribunal judiciaire peut surseoir à l'instance en ce qui

matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,	touche les questions traitées dans la convention d'arbitrage et permettre qu'elle se poursuive en ce qui touche les autres questions, s'il constate :
(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and	a) d'une part, que la convention ne traite que de certaines des questions à l'égard desquelles l'instance a été introduite;
(b) it is reasonable to separate the matters dealt with in the agreement from the other matters.	b) d'autre part, qu'il est raisonnable de dissocier les questions traitées dans la convention des autres questions.

[20] I agree with the Plaintiffs that the provisions of the Amway Rules of Conduct are clear: a) class action claims are excluded from arbitration, and b) any controversy concerning the unenforceability or inapplicability of the limited class action waiver set out in subparagraph 11.3.9 of the Amway Rules of Conduct is to be decided by the courts. Consequently, both class action claims and any controversies concerning the enforceability or applicability of the limited class action waiver are not "matter[s] to be submitted to arbitration under the [arbitration] agreement" as contemplated by subsection 7(1) of the Ontario *Arbitration Act, 1991*.

[21] Indeed, the terms used in the Amway Rules of Conduct, which form part of the parties' agreement, suffer no ambiguity. Subparagraph 11.3.10 provides that "[c]lass action claims are not arbitrable under these Rules under any circumstances". Likewise, subparagraph 11.3.9 of the Rules indicates that "the class action waiver provision […] is severable in the event <u>any court</u> finds it unenforceable or inapplicable in a particular case" [emphasis added].

[22] This Court further finds 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.

[23] In any event, even if the Amway Rules of Conduct did not clearly defer to the authority and jurisdiction on the courts, which this Court finds that they do, this Court would not agree with the Defendants that the *compétence-compétence* principle set out in *Dell* and *Rogers* applies in this case. First, the exclusion of class actions from arbitration as set out in the Amway Rules of Conduct raises no controversy of fact or of law. Second, in light of the issues raised in the class action by the Plaintiffs, the enforceability or applicability of the limited class action waiver contained in subparagraph 11.3.9 of these Rules of Conduct must be analysed and decided with regard to the provisions of the *Competition Act*; this raises primarily questions of law. When the challenge to the arbitrator's jurisdiction is based on a question of law, Justice Deschamps instructed as follows in *Dell* at paragraph 84 [emphasis added]:

> First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate. In

> addition, the danger that a party will obstruct the process by manipulating procedural rules will be reduced, since the court must not, in ruling on the arbitrator's jurisdiction, consider the facts leading to the application of the arbitration clause.

[24] The recent decision of the Ontario Superior Court of Justice in *Stoneleigh Motors Ltd. v. General Motors of Canada Ltd.*, 2010 ONSC 1965 is apposite to this case. In *Stoneleigh Motors*, the dispute concerned a class action proceeding initiated by various automobile dealers against General Motors of Canada ("GM") following reductions in the GM dealer network within the context of the bankruptcy reorganization of the American parent corporation General Motors Corporation. GM argued that the dispute was contemplated by a binding contractual arbitration agreement and that consequently the court proceedings on the class action should be stayed in favour of arbitration. The Ontario Superior Court has no difficulty assuming jurisdiction to interpret the arbitration agreement so as to decide if the dispute was contemplated by its terms. It found that the dispute was not one that was subject to the arbitration agreement following the very terms of that agreement.

[25] In this case, the parties have entered into an agreement which clearly confers jurisdiction and authority on the courts over class action claims and over the enforceability or applicability of the limited class action waiver. The Amway Rules of Conduct are largely dictated by the Defendants themselves, and these Rules exclude these types of disputes from the arbitration process.

[26] The Defendants say that the Plaintiffs' claim is contemplated by the limited class action waiver provision set out in subparagraph 11.3.9 of the Amway Rules of Conduct. The Plaintiffs say that this limited class action waiver is unenforceable or inapplicable in light of, *inter alia*, the terms of the *Competition Act*. This dispute concerns the enforceability or applicability of the limited class action waiver which, according to the very terms of subparagraph 11.3.9 of the Amway Rules of Conduct, are matters to be decided by a court.

[27] Consequently, the Defendants' motion shall be dismissed with costs to the Plaintiffs.

ORDER

THIS COURT ORDERS that the Defendants' motion to stay and to compel arbitration is dismissed with costs on this motion awarded to the Plaintiffs.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1754-09
STYLE OF CAUSE:	CHERYL RHODES and KERRY MURPHY v. COMPAGNIE AMWAY CANADA and AMWAY GLOBAL
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