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GLAHOLT LLP
CONSTRUCTION LAWYERS

BUILDING INSIGHT
GLAHOLT LLP NEWSLETTER

IN THIS ISSUE

Claims Made in Writing and Deference to Arbitrators

***Ledore Investments Limited (Ross Steel Fabricators & Contractors) v. Ellis-Don Construction Ltd.*, 2017 ONCA 518**

On a major bridge project in southwestern Ontario, the respondent Ellis-Don was the general contractor and Ledore was a subcontractor supplying steel to the project. The project was delayed, and Ellis-Don wrote a letter to Ledore stating that:

> In addition to impacting the schedule, Ross Steel also forced Ellis-Don to expend substantial monies to accelerate the work in an effort to recover the schedule. We are currently assessing the financial impact that Ross Steel's slippages have had on Ellis-Don and we intend to recover the costs from you.

The contract contained the following clause:

> 15.1 As of the date of the final certificate for payment of the prime contract, the contractor expressly waives and releases the subcontractor from all claims against the subcontractor, including without limitation those that might arise from the negligence or breach of this agreement by the subcontractor, except one or more of the following:

> (a) those made in writing prior to the date of the final certificate for payment of the prime contract and still unsettled; [Emphasis added.]

The question submitted to the arbitrator was whether the letter quoted above satisfied the requirement of clause 15.1(a), i.e. whether Ellis-Don had made a claim in writing to exclude the delay claim from the general application of clause 15.1. The arbitrator held that it had not, finding that while Ellis-Don might have contemplated a delay claim, the intention to claim was not the same as a claim. In so finding, the arbitrator distinguished case law such as *Doyle Construction Co. v. Carling O'Keefe Breweries of Canada Ltd.* (1988), 27 B.C.L.R. (2d) 89 (C.A.), which governs the sufficiency of notices of claim. The arbitrator held that clause 15.1 did not require a notice of claim, but a claim made in writing. That claim had not been made and, as a result, Ellis-Don had waived its right to recover. Ellis-Don's appeal was allowed by the Ontario Superior Court of Justice. J.N. Morissette J. held as follows:

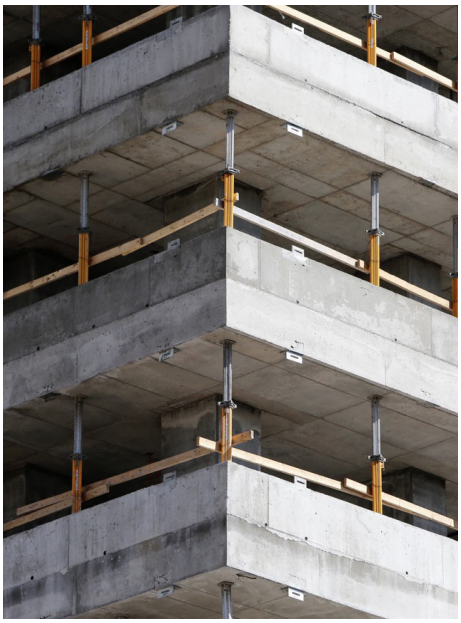
> 18. Doyle, provides legal authority for the general proposition that provisions requiring claims to be made in writing should be treated as provisions requiring written notice of claims, contrary to the approach taken by the arbitrator.
>
> 19. In this Court's view, the arbitrator erred in finding that 'claims made in writing" should not be treated as provisions requiring written notice of a claim.
>
> 20. As indicated above, not only was there legal authority for that general proposition, but also authority suggesting an approach precisely opposite to that taken by the arbitrator. In doing so, the arbitrator misapplied the general principles and considerations established by *Doyle* to reach his conclusion that Article 15.1 (a) had been satisfied but instead fashioned and applied his own test in that regard, contrary to the applied legal principles established.
>
> 21. For all of these reasons, the arbitrator's decision on the ground of appeal on which leave was granted, is set aside. Ellis-Don's letters and in particular the letter of January 18, 1999, did constitute an "unsettled claim made in writing" satisfying the provisions of Article 15.1 of the parties' agreement.

A further appeal to the Court of Appeal was allowed and the arbitrator's decision reinstated.

To begin with, the Ontario Court of Appeal once again stressed that deference is owed by courts when reviewing arbitral awards, reaffirming its two 2016 decisions in *Popack v Lipszyc ("Popack") and Ottawa (City) v Coliseum Inc. ("Coliseum")* to the same effect. The court held that the test for reasonableness, with respect to both tribunal and arbitral decisions, is a highly deferential one, encompassed in the formulation in the still leading case, *Dunsmuir v. New Brunswick*, 2008 SCC 9. A decision by a tribunal or arbitrator will not be set aside as long as it falls within a range of possible, acceptable outcomes which are defensible in respect of the fact and law.

In applying that standard, the court held that the arbitrator's interpretation of clause 15.1 was "eminently reasonable". With regard to the application of *Doyle*, not only was the arbitrator's decision not inconsistent with it, but the dichotomy he applied between the "intention to make a claim" and "an actual claim" was held to be similar to the distinction in *Doyle* between mere grumblings in meeting minutes and the making of an actual claim.

The arbitrator's decision was therefore reinstated.



AUTHOR:

Application to delete construction lien or application general?

On January 11, 2016, the Ontario Ministry of Government and Consumer Services introduced changes to the electronic land registration system in an attempt to simplify the process for removing a lien from title. Previously, "Discharge of Construction Lien" or "Application to Amend Based on Court Order" forms could be used when a construction lien was to be deleted, which led to some confusion when the lien was being released or vacated instead of being discharged. The Ministry created a new document titled "Application to Delete Construction Lien" in Teraview, which when registered advises that a construction lien has been deleted from the property and the reason for its deletion (e.g. discharged, vacated or released). If the party registering the "Application to Delete Construction Lien" is not the lien claimant, the Application must be accompanied by a court order vacating or discharging the lien and other statements from lawyers, including a confirmation that there is no sheltering lien.

Despite the direction by the Ministry to employ the "Application to Delete Construction Lien", it appears that in certain circumstances, parties can also delete liens within a shorter timeframe and with less cost by registering an "Application General". For example, when a lien has expired pursuant to section 36 of the *Construction Lien Act*, parties can simply register an "Application General" without obtaining a court order if the following four conditions are met:

1. Lawyers registering the "Application General" must represent a registered owner of a property (note that where there are multiple registered owners, the Ministry of Government and Consumer Services and the Toronto Land Registry Office have advised that they do not require all registered owners be listed as the Applicant on the "Application General");

2. There is no certificate of action registered within the prescribed time under the *Construction Lien Act;*

3. There are no other liens on title under which the expired lien could be sheltering; and

4. The expired lien is not that of a contractor or subcontractor whose work is still on-going or the improvement is not still underway, which could give rise to an argument that the periods for preservation and perfection have not yet expired.

Where all four conditions are met, a party can state in the "Statements" section of the "Application General" that pursuant to section 75 of the *Land Titles Act*, the register should be amended by deleting the lien, referring to the instrument number, as no certificate of action has been registered within the time prescribed by the *Construction Lien Act* and the lien has expired. A similar statement must also be made by the party's lawyer, as it is this lawyer's statement that the Land Registry Office will rely upon to delete the subject lien. No court order is required.

The Ministry of Government and Consumer Services and the Toronto Land Registry Office have also advised that lawyers may employ the "Application General" form to delete a lien if an action has not been set down for trial within the second anniversary of the commencement of the lien action in accordance with section 37 of the *Construction Lien Act*. The thrust of their advice appears to be that as long as there is a lawyer's statement that the lien has expired and the lawyer has referred to relevant sections of legislation, the Land Registry Office will rely entirely on the lawyer's statement and delete the lien.

It is not difficult to imagine how such weight given to a lawyer's statement could lead to significant risk that a lien will be erroneously or mistakenly deleted where a thorough investigation of title and the project status was not completed by the lawyer before the registration of an "Application General".

While the registration of an "Application General" may be a quicker and more cost effective way to delete liens from title than the "Application to Delete Construction Lien", lawyers must be certain that the four conditions set out above have been met before doing so. Lawyers should always be extremely cautious and only register an "Application General" to delete a lien when it is abundantly clear that there is no potential for a lien claimant to argue that it could have been sheltering under another lien, or that its contract or the improvement was on-going and therefore the lien had not expired.

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Limitations – When is a Proceeding "Appropriate"?

The Court of Appeal for Ontario has clarified the application of section 5(1)(a)(iv) of the *Limitations Act, 2002* in two recent cases: *ETR Concession Company Limited v. Day*, 2016 ONCA 709, and *Presidential MSH Corporation v. Marr Foster & Co. LLP*, 2017 ONCA 325.

The *Limitations Act, 2002* codified the previous common law "discoverability" principle and, critically for these 2 cases, introduced a new trigger for the commencement of the limitation period by including the additional requirement that the claimant know that recourse by way of action is "appropriate". Both cases turn on the interpretation and application of s 5(1)(a)(iv) of the *Limitations Act*, 2002.

ETR Concession Company Limited v. Day arose in an administrative context, which arguably drove the result. To collect toll charges, by statute, the 407 has 2 methods available: it can send a notice to the Ministry of Transportation resulting in a denial of a vehicle validation tag and license renewal, or it can commence a civil action in the courts.

The Court of Appeal noted that the denial of license renewal is a highly successful administrative remedy, and that if the limitation of 407 actions were to begin when charges were incurred, or even when the Ministry notice was sent, 407 would be required to commence hundreds of Small Claims Court claims for trifling amounts before the administrative process had run its course. That, the court held, was not reasonable.

Justice Laskin commented that the legislature added the requirement that an action be an "appropriate means" to s. 5(1) to assist the courts to function more efficiently, and to deter needless litigation. The Court of Appeal held that in the context of the 407 statutory framework and the alternate remedies provided for, on a proper interpretation of section 5(1)(a)(iv), 407 would not know an action was appropriate, and hence the limitation period would not start, until the administrative remedy had been exhausted or failed.

Presidential MSH Corporation v. Marr Foster & Co. LLP arose in a different context, an accountant's professional services.

MSH had a falling out with their former accountant, and claimed they had failed to file returns. They retained a new accountant and a tax lawyer to seek relief from the initial failure to file a return and subsequently make the filing to remedy the initial mistake.

While telling MSH that it was remedying the initial failure to file, the new accountant missed the period for filing. However, this accountant had sent MSH information from the CRA outlining the consequences for failure to file in time. The CRA sent a notice denying the deduction for late filing, which resulted in MSH suing the second accountant, who moved for summary judgment to dismiss the claim as out of time under the *Limitations Act*.

Justice Dunphy granted the motion for summary judgment and dismissed the claim, on the basis that all elements of section 5(1) were known to MSH more than 2 years before the commencement of the claim, even though the new accountant continued to represent that it was remedying the default, and continued to work actively with the tax lawyer. MSH appealed the dismissal.

The court allowed the appeal and set aside Justice Dunphy's decision under sections 5(1)(a)(ii) and (iv) on the basis that MSH did not know and should not have known that an action against the new accountant would have been "appropriate" at any time until the CRA rejection of the filing. Unlike lawyers, accountants are not required to report their own negligence to clients.

These decisions clarify the purpose and application of section 5(1)(a)(iv) of the *Limitations Act, 2002*, though it is difficult to predict their application in other contexts or in relation to other alternative processes such as mediation or arbitration.

The decision in *ETR 407* was made in a unique statutory and regulatory context that is difficult to analogize to general litigation. There seem to be few principles of general application that can be extracted from this decision outside of its unusual context.

MSH is of more general application, but it deals with discoverability, not alternate process or conditions precedent.

These decisions raise interesting questions as to when an action becomes appropriate in contracts containing tiered dispute resolution clauses. In the recent case of *Bombardier Transportation Canada Inc. v Metrolinx*, 2017 ONSC 2372, a contract contained a mandatory multi-step dispute resolution process, cumulating in an arbitration before a specialized Dispute Review Board. Justice Hainey granted an injunction to restrain contract remedies, but only to allow the Dispute Review Board process to proceed under the contract. The dispute resolution process as agreed upon in the contract had to be pursued, and a ruling had to

be made by the Dispute Review Board on the validity of the Notice of Default before it would be appropriate for Metrolinx to terminate the Contract for material default. Holding the parties to the dispute resolution process that they set out in the contract suggests that the courts may find that an action would not be "appropriate" under the *Limitations Act, 2002* until the parties have exhausted the dispute resolution mechanisms within a contract.

In another recent decision, *Pellerin Savitz LLP v. Guindon*, 2017 SCC 29, although out of Quebec dealing with a different limitations regime, the Supreme Court of Canada has held that a limitation period will be extended by a period of credit, which is consistent with the 407 "appropriate" analysis.

The overall purpose of the Limitations Act, 2002 is well-established as certainty, finality and avoiding unfairness of subjecting defendants to the threat of a lawsuit beyond a reasonable period of time. The purpose of section 5(1)(a)(iv) adds the specific requirement that the claimant know that a claim would be an "appropriate" means of pursuing recourse, to enable courts to function efficiently by deterring needless litigation. Therefore it is possible, depending upon the specific terms of a contract, that an alternative dispute resolution mechanism such as in Bombardier, particularly if expressed as a condition precedent to commencing an action, would make an action not "appropriate" under section 5(1)(a)(iv) until all available alternative remedies are exhausted.

The course of prudence, of course, is to avoid uncertainty where possible. A court would not defeat a claim if proceedings were commenced arguably prematurely, even in the face of a mandatory tiered dispute resolution provision operating as a condition precedent to action. If the commencement of proceedings were challenged, the court might stay them to let the dispute resolution process run its course.

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Court of Appeal Highlights Ongoing Gatekeeper Role of Trial Judge in Relation to Expert Evidence

In *Bruff-Murphy v. Gunawardena*, 2017 ONCA 502, the Ontario Court of Appeal emphasized the importance of the ongoing role of a trial judge as a gatekeeper, even after an expert is qualified to testify. In this case, the trial judge identified concerns that the expert witness crossed the line from an objective witness to an advocate for the defence. However, the trial judge did not exclude the opinion evidence or alert the jury about the problems with the witness's testimony. As a result, the fairness of the trial was irreparably compromised. The Court of Appeal allowed the appeal and ordered a new trial.

The appellant was hit from behind by the respondent while stopped in her car. The respondent admitted liability and the sole issue in the 23 day jury trial was what damages, if any, the appellant suffered.

The appellant alleged that as a result of the accident she suffered soft tissue damage in her neck, lower back and right shoulder. In addition, the appellant alleged that the accident left her in a chronic pain condition with attendant anxiety and depression. At trial, the appellant called a number of physicians who testified that she suffered in the manner complained of and the cause of her suffering was the motor vehicle accident. The defence called two medical experts who had been retained to conduct independent medical examinations. The medical expert in question on appeal was Dr. Monte Bail, a psychiatrist.

At trial, counsel for the appellant objected to Dr. Bail's testifying on the grounds that Dr. Bail's report was essentially an attack on the appellant's credibility and that Dr. Bail was biased. The trial judge ruled that Dr. Bail could not testify on certain sections of his report, primarily where Dr. Bail was critical of the reliability of the conclusions reached by other doctors who had examined

the appellant. The trial judge also warned Dr. Bail against testifying about the appellant's credibility.

Dr. Bail testified that his methodology was not to review medical records until after the examination. In this case, Dr. Bail met with the appellant for an hour, and subsequently spent 10 to 12 hours reviewing the appellant's medical records, noting discrepancies between what she had told him and her medical records. A large portion of Dr. Bail's report consisted of these discrepancies, which he never questioned the appellant on.

In summary, Dr. Bail's evidence was that the appellant did not develop any psychiatric disorders or limitations as a result of the accident and required no psychotherapy or psychotropic medication in relation to the accident. In addition, Dr. Bail testified the appellant's pre-accident psychiatric profile was not exacerbated by the accident and she did not require housekeeping or attendant care as a result of any psychiatric condition.

The Verdict

After the closing submissions, the trial judge delivered his charge to the jury, which had been previously reviewed at a conference by the parties. No objection was made to the charge and no special instructions regarding Dr. Bail's testimony was requested. The trial judge reviewed Dr. Bail's testimony briefly, but did not instruct the jury regarding the duty of expert witnesses or raise any concerns about Dr. Bail's testimony.

The jury assessed general damages at $23,500 and rejected all other heads of damages claimed.

The Court of Appeal applies *White Burgess*

Although the trial judge was highly critical of Dr. Bail's evidence, he allowed Dr. Bail to testify due to the very high threshold established by the Supreme Court in *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23. In *White Burgess*, released shortly before the judgment under appeal, the Supreme Court of Canada held that the basic structure for the law relating to the admissibility of expert evidence has two main components. The first component requires the court to consider the four traditional "threshold requirements" for the admissibility of evidence established by the Supreme Court of Canada in *R. v. Mohan*, [1994] 2 SCR 9, being (i) relevance, (ii) necessity in assisting the trier of fact, (iii) absence of an exclusionary rule; and (iv) the need for the expert to be properly qualified.

The second component is a "discretionary gatekeeping step" where the "the judge balances the potential risks and benefits of admitting the evidence in order to decide whether the potential benefits justify the risks". In *White Burgess*, the court held the lack of independence or impartiality on the part of an expert witness goes to the admissibility of the witness's testimony, not just to its weight.

In this case, the Court of Appeal held the trial judge erred in principle by failing to exercise this discretionary gatekeeper role. Instead, he appears to have believed that he was obliged to qualify Dr. Bail once he concluded that the witness met the *Mohan* threshold. On a proper balancing, the Court of Appeal concluded that the potential risks of admitting Dr. Bail's evidence far outweighed its potential benefit. In addition to the troubling methodology used by Dr. Bail, the Court held that Dr. Bail viewed his primary role as to expose inconsistencies and not to provide a truly independent assessment of the appellant's psychiatric condition. The task of comparing records to expose inconsistencies is a task for trial lawyers preparing for cross examination, and as the largest portion of Dr. Bail's report consisted of identifying such inconsistencies, the Court of Appeal found his report to offer little probative value.

The court reviewed the steps the trial judge should have taken. Most importantly, the Court cautioned that a trial judge must continue to exercise his gatekeeper function even after the qualification stage. When the eventual testimony of an expert justifies any concerns of impartiality raised during the qualification stage, the trial judge must recognize the acute risk to trial fairness. At this time, the trial judge must take action. The general residual discretion to exclude evidence whose prejudicial effect is greater than its probative value is always available to the court.

In this case, a mid-trial or final instruction that Dr. Bail's testimony would be excluded in whole or in part would have been appropriate. Alternatively, the trial judge could have asked for submissions from counsel on a mistrial, in the absence of the jury, and ruled accordingly. Although counsel for the plaintiff at trial did not seek instructions regarding Dr. Bail's evidence, the Court of Appeal held the admission of Dr. Bail's testimony resulted in a miscarriage of justice so as to warrant a new trial.

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Notable Case Law

LIEN DECISIONS

Dircam Electric v. Am-Stat Corp., 2017 ONSC 3421 (Div. Ct.)

An order declaring that a mortgage has priority over construction liens finally determines the relative priorities between those parties and therefore constitutes a final order appealable under s. 71 of the *Construction Lien Act*.

Campoli Electric Ltd. v. Georgian Clairlea Inc., 2017 ONSC 2784 (Master)

Following the Divisional Court decision in *Cast-Con Group Inc. v. Alterra (Spencer Creek) Ltd.* (2008), 71 C.L.R. (3d) 54 (Ont. S.C.J.); an Ontario master held that the trust claim limitations clock runs from when the default entitling a party to lien a project is discovered.

The master also clarified that section 8 of the *Construction Lien Act* does not require a *pro rata* distribution amongst all entitled creditors. So long as the funds go to a proper recipient, there is no breach of the statutory trust, and thus no potential personal exposure.

Airex Inc v. Ben Air Systems Inc., 2017 ONCA 390

Once a subcontractor demonstrates that it was a subcontractor on the project, supplied materials to the general contractor, and that the general contractor was paid on account of the project, the burden shifts to the general to show that the trust monies were properly applied.

Trotter and Morton Building Technologies Inc. v. Stealth Acoustical & Emission Control Inc., 2017 ABQB 262 (Master)

The construction of pump house buildings weighing up to 260,000 pounds was held to be a lienable supply even though the buildings were specifically constructed in a way allowing them be removed from the site and moved elsewhere without damaging them. The fact that the buildings were installed on a site specifically prepared for them and were designed to be fully integrated into the larger oil sands project in question made them an "improvement" for the purposes of the Act.

The court also accepted an alternative argument that the improvement in question was not a series of pump houses, but the Horizon oil sands project on which they were situated.

J.K. Engineering Ltd. v. Red Quest Developments Ltd., 2017 ABQB 75 (Master)

Work done by a builder to obtain a regulator's approval may give rise to a lien.

Construction Excedra Inc. v. Kingdom of Saudi Arabia, 2017 ONSC 105 (S.C.J.)

Where work was done on premises of a diplomatic mission, the immunities to which the property was entitled under the *Foreign Missions and International Organizations Act* and the *Vienna Convention on Diplomatic Relations* included that of immunity from attachment. A lien claim was consequently dismissed and the lien was discharged from the title to the property.

Norson Construction Ltd. v. Clear Skies Heating & Air Conditioning Ltd., 2017 ABQB 188 (Master)

Omitting the name or incorrectly naming the owner of the land to be charged will not vitiate the lien if no one is prejudiced by the error or omission.

OTHER CONSTRUCTION DECISIONS

Dirm 2010 Inc. v. Ontario (Minister of Infrastructure), 2017 ONSC 2174 (Master)

Subcontractor was retained to provide concrete topping to parking structure. There were some deficiencies in the subcontractor's work, and the general contractor served notice of default, allowing the subcontractor only three days to "completely correct, replace and/or re-execute all such faulty or defective work". When the subcontractor failed to do so, it was removed from the site. The general contractor later admitted that it would have been impossible for the sub to correct the defaults in three days. The master held that none of the defaults listed in the Default Notice and relied on by the general constituted a substantial failure of performance of the contract sufficient to justify the termination, nor did the cumulative effect of the default items listed constitute a substantial failure of performance by the sub, particularly in light of the general's failure to allow the sub a reasonable opportunity to rectify and complete the contract work. As the innocent party, the subcontractor was entitled to the lost profit on the balance of the contract work.

Maglio Installations Ltd. v. Castlegar (City), 2017 BCSC 870

Where an invitation to tender required the bidder to complete a preliminary construction schedule, the City's acceptance of a bid submitted without such a schedule amounted to breach of Contract A. The City's argument that the bid deficiency was non-material was rejected. The governing test was whether the defect was as to an important or essential element of the invitation to tender and, second, whether on an objective basis there was a substantial likelihood that the defect would have been significant in the deliberations of the owner in deciding which bid to select.

Surespan Construction Ltd. v. Saskatchewan, 2017 SKQB 55

An invitation to tender required the bidder to hold a prescribed welding certification. The plaintiff did not hold that certification when it submitted its bid or at any time thereafter. It argued that it did not intend to do the welding work itself, but retain a subcontractor with the prescribed welding certification. The court held that bid was non-compliant, that the non-compliance was material and the owner was within its right to reject the bid.

Sutherland Lofts Inc. v. Peck, 2017 ONCA 368

A lack of particulars is not fatal to the validity of an Order to Remedy Unsafe Building under s. 15.9(4) of the *Building Code Act*. The Court of Appeal made the following general recommendation: Given that an Order to Remedy Unsafe Building under the Act is necessarily fact-specific to the particular building or property for which the order is issued, it is not possible to make general, practical suggestions about the level of specificity required for such an order. However, if the CBO already has an engineering report, it would be helpful to attach it to the order requiring remediation, if it has not already been delivered to the person receiving the order.

ARBITRATION DECISIONS

KAEFER Industrial Services Ltd. v. Vale Newfoundland & Labrador Ltd., 2017 NLTD(G) 65

AECOM Consultants Inc. v. Tata Steel Minerals Canada Ltd., 2017 NLTD(G) 72

In Newfoundland and Labrador, compatibility of arbitration in the context of a mechanics' lien action does not mean that a stay will be appropriate in every dispute involving a commercial arbitration provision. Although as a general rule, the court ought to allow the issue to be settled in the agreed upon forum, the court nevertheless retains a discretion to order that the issue not go to arbitration in appropriate cases. The court may make an order staying the proceedings upon being satisfied that there is no sufficient reason why the matter should not be referred to arbitration in accordance with the submission; and that the applicant was, at the time the proceedings started, and still is, ready and willing to do all things necessary for the proper conduct of the arbitration.