
CANADA / JUDGMENT

0718698 B.C. Ltd. v. Ogopogo Beach Resorts Ltd

2019 BCSC 1503

COURT

Supreme Court of British Columbia

DECIDED

22 August 2019

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2019 BCSC 1503 0718698 B.C. Ltd. v. Ogopogo Beach Resorts Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

0718698 B.C. Ltd. v. Ogopogo Beach Resorts Ltd.,

2019 BCSC 1503

Date: 20190822

Docket: S124225

Registry: Kelowna

Between:

0718698 B.C. Ltd., Stewart Smith and Belco Holdings Inc.

Petitioners

And

Ogopogo Beach Resorts Ltd., 0724455 B.C. Ltd., Ermano Barone

and Elaine Barone

Respondents

Before: The Honourable Mr. Justice Dley

Oral Reasons for Judgment

Counsel for the Petitioners:

D. Horvath

Counsel for Respondents appearing via teleconference:

A. Pearson

Place and Date of Hearing:

Kelowna, B.C.

August 21, 2019

Place and Date of Judgment:

Kelowna, B.C.

August 22, 2019

- [1] THE COURT: In an arbitration proceeding, the petitioners were ordered to pay 75% of the actual legal fees and disbursements incurred by the respondents. The petitioners were not provided with information detailing the fees and disbursements of opposing counsel.
- [2] The petitioners argue that they were not provided sufficient information so as to assess the reasonableness of the fees and disbursements levied. As a result, the petitioners submit that the arbitrator failed to observe the rules of natural justice.
- [3] The petitioners also disagree with the arbitrator's ruling with respect to the distribution of funds in accordance with the terms of a settlement agreement. The petitioners argue that the decision should not have been made in the absence of a final audit setting out the parties' respective entitlement to the funds.
- [4] For the following reasons, the matter of fee billing particulars is referred back to the arbitrator for reconsideration. The complaint that the distribution of funds should not have been made in the absence of a final audit is dismissed.

Background

- [5] The parties had been involved in a joint venture to develop a condominium project in West Kelowna. Differences arose between them and they agreed to a settlement agreement with arbitration rights.
- [6] During a seven-year period, the arbitrator was involved in over 40 decisions in accordance with the arbitration provisions of the settlement agreement.
- [7] At the conclusion of the arbitration, the arbitrator awarded costs in favour of the respondents totalling \$452,398. Of that amount, \$305,515 was for 75% of the fee bills and disbursements rendered by the respondents' counsel and \$146,882 being 75% of the arbitrator's fees.
- [8] The award was as a result of a ruling arising out of a hearing that specifically dealt with the question of costs and the distribution of funds.

- [9] The parties were involved in a pre-hearing conference with the arbitrator. At the conclusion of that conference, the arbitrator established timelines for the respective submissions to be made.
- [10] The respondents had submitted that they should be entitled to their actual legal costs. In their reply, the petitioners argued that each party should bear their own costs or that costs be limited to a party/party scale. In the alternative, they submitted that if costs were to be awarded as actually incurred, then they should receive disclosure of the opposing solicitor's file in order to determine the reasonableness of the claimed fees. The petitioners pointed out that the respondents' "brief does not provide any particulars of the work done. It only provides a spreadsheet of time incurred, without any corresponding narrative". The petitioners referred to *Williston Navigation Inc. v. BCR Finav No. 3 et al*, 2007 BCSC 190 at paras. 50-57, and submitted:

In order to determine if the legal fees are objectively reasonable, a party must know the particulars of what the solicitor did. This requires an examination of the lawyer's work and disclosure of their file. This procedure provides the unsuccessful party with an opportunity to challenge the case being made against them is consistent with the rules of natural justice and existing case law on this issue.

- [11] In their submissions, respondents' counsel provided details of the hourly rates, hours billed, disbursements incurred, and confirmation that the accounts had been paid. Nowhere in the materials disclosed was there any description of the work done.
- [12] The arbitrator ruled as follows at paragraphs 7 and 10 of his decision:
7. So the question here, on the Claimants' application, is whether there is any good reason not to award actual and reasonable costs, having regard to the Claimants' general success in the various applications which were brought before me. I think there are grounds to award substantial costs but not necessarily full indemnity costs. There are mitigating circumstances here.
10. Taking into account all of the foregoing, particularly Mr. Smith's uncooperative and sometimes disdainful misconduct as outlined in Appendix B, I award costs to the Claimants as follows:
- (a) 75% of my fees as Arbitrator, including those which will form part of my final account following this award, for a total of \$146,882.43; and
- (b) 75% of the fee bills and disbursements of Church and Company amounting to \$305,515.86.
- [13] The settlement agreement between the parties outlined the formula to be followed with respect to the distribution of funds. In their initial submission, the petitioners relied on the unaudited financial statements for 2015 and claimed entitlement to 75% of the remaining funds. In a subsequent submission, the petitioners argued that the award should not be made until a final audit was done. The arbitrator ruled as follows at paragraphs 15 to 18:

15. The Respondents argue that distribution of the balance of the trust funds should be [made] out in accordance with each parties' percentage interest in the Joint Venture. The Respondents provide an accounting of the remaining capital balances based on an audit conducted by Grant Thornton in 2015.
 16. The Claimants point out that the Grant Thornton audit, on their analysis, is inaccurate and fails to take into account various transactions, with a net effect that the Respondents would have no entitlement to the remaining funds being held by Borden Ladner Gervais.
 17. The Respondents have also argued that there should be a full audit ordered of the capital accounts. I do not think this would serve any useful purpose as the capital accounts seem unrelated to the balance in the BLG trust account, which, as noted above, is to be divided equally between the Claimants and the Respondents.
 18. Having fully considered the arguments of both parties on this issue, I am inclined to agree with the Claimants' submission and direct that the balance remaining in the Borden Ladner Gervais trust account, after deducting the Cost Award, the Arbitrator's final account and any outstanding accounts of Borden Ladner Gervais and Grant Thornton be divided equally, with 50% being paid to the Claimants and 50% being paid to the Respondents or their representatives as directed by each parties' solicitors, and I so direct Borden Ladner Gervais to proceed accordingly.
- [14] The petitioners now argue that the arbitrator should have required an audit to be conducted to show that the funds should be distributed differently.

Legislation

- [15] The petitioners rely on s. 30 of the Arbitration Act, R.S.B.C. 1996, c. 55 for the relief sought. The relevant provisions of s. 30 state:
- (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
 - (a) set aside the award, or
 - (b) remit the award to the arbitrator for reconsideration.
 - (2) The court may refuse to set aside an award on the grounds of arbitral error if
 - (a) the error consists of a defect in form or a technical irregularity, and
 - (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
 - (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.
- [16] "Arbitral error", as referred to in s. 30, is defined in s. 1 as follows:

"arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

- (a) corrupt or fraudulent conduct;
- (b) bias;
- (c) exceeding the arbitrator's powers;
- (d) failure to observe the rules of natural justice;

[17] The petitioners allege that the arbitrator failed to observe the rules of natural justice. Section 30 is limited to relief based on a denial of natural justice. It does not encompass disagreement with an arbitrator's decision, which is more properly the subject of a s. 31 analysis.

Discussion

- [18] The petitioners relied on the unaudited financial statements to argue that they were entitled to 75% of the remaining funds. When it appeared that their argument might not be persuasive, the petitioners changed course and demanded that an audit be done instead. The essence of the petitioners' position now is not for the production of existing evidence but, rather, the creation of new evidence. It is an attempt to re-argue their previous submission on the basis that new evidence might provide a reason for the arbitrator to change his mind.
- [19] The arbitrator considered the petitioners' argument and determined that the capital account was not relevant to his analysis of the issue. That is not a denial of natural justice. He made a decision that was within his jurisdiction to do so. The fact that the petitioners disagree with the reasoning and decision is not the basis for a complaint that the arbitrator failed to observe the rules of natural justice.
- [20] Therefore, I dismiss the complaint that the arbitrator failed to observe the rule of natural justice when he declined to order an audit to create evidence that was not necessary to interpret the settlement agreement. Accordingly, the ruling that the balance of the funds in trust are to be divided equally is not to be disturbed.
- [21] With respect to the costs award, the petitioners have particularized their complaint to the quantum of the solicitor's accounts. There is no issue taken with respect to the arbitrator's accounts or the percentage (75%) allocated. The complaint is that there are insufficient details provided with respect to the work performed counsel.
- [22] The petitioners rely on Wiliston for the proposition that disclosure is necessary to allow for an informed analysis of a solicitor's account. At paras. 49- 53, the court stated:

- [49] Natural justice requires an arbitrator to act with a certain level of procedural fairness. The rules of natural justice and the duty of fairness are variable. Their content is to be decided in the specific context of each case and will depend on the circumstances of the case, the statutory provisions and the nature of the matter to be decided: . . . The failure of an arbitrator to give the parties a fair opportunity to argue costs has been held to be a denial of natural justice: . . .
- [50] Pursuant to s. 11(2) of the C.C.A., the Arbitrator may specify that costs include the actual reasonable legal fees incurred by a party. The present issue is not the Arbitrator's jurisdiction to make such an award but whether he followed the rules of natural justice in making his award.
- [51] BC Rail is not entitled to recover more than its objectively reasonable legal fees. The fact that a solicitor has billed a certain sum does not necessarily make the fee reasonable. This is of particular importance when the other party to the litigation is paying the bill. As noted by Seaton J. A. in *Royal Trust Corporation of Canada v. Clarke* (1989) . . . 35 B.C.L.R. (2d) 82 (C.A.) at 88:

The party who made that arrangement, the successful party in the litigation, might have made a very poor bargain. The bill rendered pursuant to the agreement might be justifiable between the solicitor and his client but thoroughly unjustifiable to impose on another. The client might have demanded more work to be done than was appropriate in the circumstances, or more lawyers and more expensive lawyers to be retained than were appropriate in the circumstances. Of course, at the taxation, if the other litigant is paying the bill the client will be particularly pleased to see that the bill is as high as possible.

- [52] In order to determine if the legal fee is objectively reasonable a party must know the particulars of what the solicitor did. This requires an examination of the lawyer's work and disclosure of their file. I adopt the comments of Kirkpatrick J., (as she then was), in *Canadian National Railway Company et al v. A.B.C. Recycling Ltd.* (2005) . . . 47 B.C.L.R. (4th) 185 (S.C.) at . . . 28:

I cannot conceive that a proper examination of CN's reasonably incurred legal costs could be made without disclosure of CN's file and examination of lawyers in respect of the file and matters arising therefrom. The simple presentation of a clients' bill to the Trial Judge (as occurred in *Edwards v. Bell*) combined with counsel's submission would not adequately allow ABC to challenge the reasonableness of CN's legal costs. Nor would it allow for the objective determination of the reasonableness of CN's legal costs.

- [53] In this case the Arbitrator refused to order production of the solicitor's file. Williston was given no meaningful opportunity to challenge the accounts. The Arbitrator's summary determination of legal fees was unfair to Williston and breached the rules of natural justice. In proceeding as he did the Arbitrator committed arbitral error. The error was far more than a defect of form or technical irregularity.

- [23] There is merit to the petitioners' submissions because, without some access to the billing records or the solicitor's files, an informed analysis cannot be made as to the reasonableness of the accounts. This was a failure to observe the rules of natural justice.
- [24] The request for a disclosure was contingent in the event an award of actual costs was made. It would be a waste of resources, costly and time consuming if the request for a disclosure had been accepted only to result in an award of no costs or costs on a lesser scale. The petitioners cannot be criticized for raising the disclosure issue in response to the respondents' claim for actual legal costs.
- [25] The issue of disclosure of information relating to the actual legal fees and disbursements is a matter for the arbitrator to decide. He has a number of options to consider, which may include orders for the disclosure of the respondents' counsel's files, disclosure of both parties' solicitor's files, or the time records describing the work done from one parties' counsel or from all counsel.
- [26] There is no reason to set aside the costs award, i.e. that the respondents are entitled to actual legal costs. That was within the arbitrator's jurisdiction to decide even without disclosure of the background data.
- [27] Therefore, the question of disclosure relating to the actual fees and disbursements rendered by the respondents' lawyers is remitted back to the arbitrator for reconsideration.
- [28] There has been divided success in this proceeding and, accordingly, each party shall bear their own costs.

"S.D. Dley J."

DLEY J.

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