

CANADA / JUDGMENT

Appleton & Associates v. Branch MacMaster LLP

2020 BCCA 187

COURT

British Columbia Court of Appeal

DECIDED

2 July 2020

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2020 BCCA 187 Appleton & Associates v. Branch MacMaster LLP

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Appleton & Associates v. Branch MacMaster LLP,

2020 BCCA 187

Date: 20200702

Dockets: CA46438; CA46439

Docket: CA46438

Between:

Appleton & Associates

Appellant

(Petitioner)

And

Branch MacMaster LLP

Respondent

(Respondent)

- and -

Docket: CA46439

Between:

Branch MacMaster LLP

Respondent

(Petitioner)

And

Appleton & Associates

Appellant

(Respondent)

Before:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Tysoe

The Honourable Mr. Justice Harris

On appeal from: Orders of the Supreme Court of British Columbia, dated

October 19, 2019 (Appleton & Associates v. Branch MacMaster LLP,

2019 BCSC 1733, Vancouver Dockets S192266 and S192341).

Counsel for the Appellant:

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Counsel for the Respondent:

L.P. Brasil

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Place and Date of Hearing:

Vancouver, British Columbia

May 28, 2020

Place and Date of Judgment:

Vancouver, British Columbia

July 2, 2020

Written Reasons by:

The Honourable Mr. Justice Tysoe

Concurred in by:

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Harris

Summary:

In an arbitration between the parties, the respondent was awarded indemnity costs of an interim relief application and the main arbitration. The appellant filed a petition seeking to set aside the arbitral award under s. 30 of the Arbitration Act on the basis that the arbitrator made several arbitral errors, and the respondent filed a petition seeking an order under s. 29 of the Act to enforce the award. The chambers judge hearing the petitions found an arbitral error in the procedure for assessing costs of the interim relief application, but refused to set aside the award and granted the respondent's petition. Held: Appeals allowed, in part. Having found an arbitral error, the chambers judge had a discretion under s. 30 of the Act to refuse to set the award aside only if the prerequisites contained in s. 30(2) were met, which they were not in this case. The award is remitted to the arbitrator for reconsideration, and the order enforcing the award is stayed pending the outcome of that reconsideration.

Reasons for Judgment of the Honourable Mr. Justice Tysoe:

- [1] The appellant, Appleton & Associates ("Appleton"), appeals two orders of a chambers judge dated October 10, 2019, in relation to an arbitration award dealing with competing claims of the parties. Despite having found that an arbitrator committed an arbitral error during the course of an arbitration, the judge refused to set aside the award and gave leave for the award to be enforced in the same manner as a judgment. He was of the view that the amount potentially affected by the error would have been recoverable under another head of the claims under arbitration.

Background

- [2] The claims under arbitration arose under a letter agreement between three law firms who were jointly retained by a person who became a plaintiff in a proposed class action challenging a tax imposed on foreign purchasers of real estate in British Columbia. Appleton and the respondent, Branch MacMaster LLP ("Branch MacMaster"), were two of those three law firms. The agreement provided that any controversies or claims arising out of, or relating to, the agreement would be determined by arbitration.
- [3] Appleton believed that Branch MacMaster was in breach of the agreement and filed a notice of arbitration with the specified arbitral organization. In addition to other relief, Appleton claimed emergency interim relief against Branch MacMaster. The claim for interim relief was dismissed by an ad hoc arbitrator, who ordered Appleton to pay indemnity costs to Branch MacMaster, with the costs to be assessed in the main arbitration if the parties were unable to agree on the amount.

- [4] After the main arbitrator was appointed, Branch MacMaster delivered a counterclaim seeking reimbursement from Appleton of 50% of certain expenses it had incurred in the proposed class action and payment of its indemnity costs, as assessed, in relation to the interim relief application. Appleton filed a response to the counterclaim seeking its dismissal.
- [5] Prior to the arbitration taking place, Appleton made a request for production of documents from Branch MacMaster. One of the classes of documents requested was copies of bills rendered by the lawyer of Branch MacMaster in respect of the claim for interim relief, including detailed time breakdowns. Branch MacMaster objected to this request on the basis of solicitor-client privilege, as well as on the basis that the requested documents were not relevant to the arbitration because Appleton had not raised issues with respect to the reasonableness of the quantum of costs in relation to the interim relief application. In reply to the objection, Appleton stated that it had raised concerns about the "duplicative costs between the defense in the [interim relief application] and the defense filed in [the main] arbitration". The arbitrator denied the production request on the bases that Appleton had not proven the relevance of the requested documents, that Branch MacMaster had not relied on the requested information in making its claim, and that Appleton had not provided any evidence to indicate that the claimed costs of the interim relief application were unreasonable.
- [6] The arbitration hearing took place on October 18, 2018. During the course of the hearing, there was a discussion about the costs of the arbitration and it was agreed that the parties would submit post-hearing briefs with respect to the costs. In its post-hearing brief, Appleton submitted that it wanted to ensure that no double billing had occurred as between the billable hours submitted for the interim relief application and those submitted for the main arbitration, and that it had not been able to verify this information.
- [7] The arbitrator made an award dated December 31, 2018. She dismissed Appleton's claim. She awarded Branch MacMaster the amount of \$71,313 for the reimbursement of Appleton's share of expenses pursuant to the agreement, and she awarded Branch MacMaster indemnity costs of the main arbitration. She assessed the costs of the interim relief application in the amount of \$24,170.79 and costs of the main arbitration in the amount of \$122,012.78.
- [8] Each of the parties filed petitions in the Supreme Court of British Columbia with respect to the award. Appleton sought an order under s. 30 of the Arbitration Act, R.S.B.C. 1996, c. 55 [Act], on the basis that the arbitrator made several arbitral errors. Branch MacMaster sought an order under s. 29 of the Act, that the award could be enforced in the same manner as a judgment.

Legislative Provisions

- [9] Sections 29 and 30 of the Act read as follows:

29 (1) With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

(2) Despite subsection (1), leave of the court is not required if the award is in respect of a family law dispute.

30 (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.

(4) Nothing in this section restricts or prevents a court from changing, suspending or terminating all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended or terminated under the Family Law Act.

[10] The term "arbitral error" is defined in s. 1 of the Act 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;

[11] Section 31 of the Act, which is referred to in s. 30(3), deals with appeals of arbitral awards to the court on questions of law. There was no reliance on s. 31 in the proceedings before the chambers judge who heard the petitions. The subsection in s. 31 dealing with the power of the court reads as follows:

(4) On an appeal to the court, the court may

(a) confirm, amend or set aside the award, or

(b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

[12] Finally, s. 32 provides as follows:

32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act.

Decision of the Chambers Judge

- [13] In reasons for judgment indexed as 2019 BCSC 1733, the chambers judge set out the facts and the relevant legislative provisions. He commented that Appleton sought only to have the award set aside under s. 30(1)(a) and did not request the remission of the award back to the arbitrator under s. 30(1)(b).
- [14] The judge discussed the law regarding the requirements of natural justice in the assessment of costs, citing *Williston Navigation Inc. v. BCR Finav No. 3*, 2007 BCSC 190 [Williston], as followed by this Court in *Gichuru v. Smith*, 2014 BCCA 414, leave to appeal ref'd (2015), [2014] S.C.C.A. No. 547. He found that the arbitrator did not satisfy the requirements of natural justice in proceeding to assess the costs for the interim relief application on the erroneous assumptions that Appleton had agreed to a summary assessment of the costs and that no issue had been raised about the costs by Appleton.
- [15] With respect to the first reason given by the arbitrator in denying the document production request (i.e., Appleton had failed to prove relevance), the judge said the following:
- [53] It is true that there had been no specific objection raised to [Branch MacMaster's interim relief application] costs claim, at least not in the answer to the counterclaim. That does not mean, however, that the arbitrator could fairly proceed on the basis that there was no issue to be resolved in that regard. Appleton had sought dismissal of the counterclaim as a whole, including the quantified claim for [interim relief application] costs. As Appleton argued in the Redfern schedule, this was an issue on which [Branch MacMaster] carried the burden of proof. [Branch MacMaster] was required to prove the quantum of costs claimed, to the extent the amount was not admitted, and there was no such admission. Nor was there any waiver, express or implied, of Appleton's right to review more detailed information before being made to pay those costs.

The judge also found the second and third reasons for denying the document production request to be problematic, and he observed that there had been no discussion with the arbitrator about the process to be followed in assessing the quantum of the costs for the interim relief application. He concluded that the arbitrator committed an arbitral error in the procedure she followed, and he stated that he would consider whether the arbitral error justified setting aside the award after addressing other alleged arbitral errors.

- [16] The judge found that there had been no arbitral errors in respect of the other matters complained about by Appleton. With respect to the last of them dealing with the late payment of the filing fee for Branch MacMaster's counterclaim, he stated that, if there had been an arbitral error in the arbitrator dealing with the counterclaim in the face of the late payment, he would have held under s. 30(2) that the alleged error was a defect in form or a technical irregularity that would not justify setting aside the award (para. 92).
- [17] In paras. 93-96 of his reasons, the judge addressed the question of whether the arbitral error he found justified setting aside the award. He noted that the sole concern Appleton sought to raise before the arbitrator was whether some of the time recorded as billable hours by Branch MacMaster with respect to the interim relief application actually related to the main arbitration. He observed that, if that was the case, Branch MacMaster would still be entitled to recover those costs because it had been awarded costs of the main arbitration.
- [18] The judge also stated that, if he set aside the aspect of the award relating to the costs of the interim relief application, the only issue would be whether those costs were unreasonable or excessive, and Appleton had not sought to challenge the claim on that basis before the arbitrator. He concluded that the arbitral error did not justify setting aside the award in whole or in part. He dismissed Appleton's petition, and he granted Branch MacMaster's petition for an order that the award could be enforced in the same manner as a judgment. The dismissal of Appleton's petition is the subject matter of Appeal No. CA46438, and the granting of Branch MacMaster's petition is the subject matter of Appeal No. CA46439.

Discussion

- [19] Appleton's position is that the chambers judge erred in refusing to set aside the award once he found that there had been an arbitral error in the form of a breach of natural justice. It says that the judge did not have the discretion under s. 30(1) of the Act to refuse to set aside the award and that the judge's reasoning in refusing to set it aside was not consistent with the court's limited remedial jurisdiction to do so under s. 30(2) of the Act. It asks this Court to set aside the award.
- [20] In its factum, Branch MacMaster took the position that the word "may" in s. 30(1) is permissive in nature and provided the judge with a residual discretion to decline to set aside the award. It also submitted that, even though the judge did not explicitly state that he was assessing the arbitral error in terms of the discretion given in s. 30(2), his reasons demonstrated that he did conduct such an analysis. In the alternative, if the judge did err, Branch MacMaster submitted that the award did not need to be set aside and should be remitted to the arbitrator.

- [21] At the hearing of the appeals, Branch MacMaster did not press the primary position taken in its factum and relied on its argument that the judge properly exercised his discretion under s. 30(2) to refuse to set aside the award. However, as I will explain later in these reasons, it is my view that the judge did not purport to refuse to set aside the award pursuant to s. 30(2) and it is therefore necessary to determine whether he had the discretion to do so under s. 30(1).
- [22] Section 29 of the Interpretation Act, R.S.B.C. 1996, c. 238, requires that the word "may" in an enactment is to be construed as permissive and empowering, but that does not mean that the word gives an unfettered discretion to the decision maker. As explained in *R. v. Johnson*, 2003 SCC 46 at para. 17, one must consider the purpose and scheme of the legislation and contextual factors to determine whether the word "may" is accompanied by a duty to exercise the given power. Or, as expressed in *Heare v. I.C.B.C.* (1989), 34 B.C.L.R. (2d) 324 (C.A.), the word "may" indicates a power of discretion, and it is necessary to consider the scope of the area of discretion.
- [23] Examples of cases in which this Court has interpreted the word "may" to confer less than an absolute discretion, include *Meek v. Enright* (1977), 81 D.L.R. (3d) 108 (B.C.C.A.); *Seaview Land Estates Ltd. v. South* (1981), 124 D.L.R. (3d) 610 (B.C.C.A.); and *Li v. Global Chinese Press Inc.*, 2014 BCCA 53.
- [24] Counsel cited two British Columbia court decisions commenting on the meaning of s. 30 of the Act. In *Ford Motor Company of Canada Ltd. v. Sheriff*, 2012 BCSC 891 at para. 25, Justice N. Smith stated that the court has the option of doing nothing upon finding an arbitral error, but only if the conditions set out in s. 30(2) are met. In *Westnav Container Services Ltd. v. Freeport Properties Ltd.*, 2010 BCCA 33 at para. 50, leave to appeal ref'd [2010] S.C.C.A. No. 95, Justice Saunders commented that s. 30 allowed the court to do nothing even if arbitral error is found, but it is unclear whether she was referring to s. 30(2) in that regard.
- [25] In my opinion, s. 30(1) does not give the court a residual discretion to refuse to set aside an arbitral award upon finding that an arbitral error has been committed. Section 30(1) gives the court the option of either setting aside or remitting an award if there has been an arbitral error (or if the award was improperly procured), and s. 30(2) sets out the only circumstances in which the court may uphold the award despite the occurrence of an arbitral error.
- [26] It is my view that the word "may" in s. 30(1) gives the court the power to set aside or remit the award, and I infer from s. 30(2) that the court has the duty to exercise the power except in the circumstances described in s. 30(2). If the Legislature had intended the court to have a general discretion to uphold an award despite the occurrence of an arbitral error, s. 30(2) would have been unnecessary, and the courts presume that legislatures do not include meaningless provisions in statutes: *Medovarski v. Canada* (Minister of Citizenship and Immigration); *Esteban v. Canada* (Minister of Citizenship and Immigration), 2005 SCC 51 at para. 31. If the circumstances described in s. 30(2) were simply examples of a general

discretion to uphold awards despite arbitral error, one would have expected the Legislature to have qualified s. 30(2) with a phrase like "without limiting s. 30(1)". I also note that s. 30(2) is conjunctive in nature so that the circumstances in clauses (a) and (b) are both necessary conditions for the court to refuse to set aside an award when there has been an arbitral error.

- [27] The intention of the Legislature is also evident from s. 31, which deals with appeals on questions of law. Section 31(4) provides that on such an appeal the court may confirm, amend or set aside an award or remit the award to the arbitrator. Hence, the court is permitted to uphold the award even if an error of law in the award is identified. If the Legislature had wanted to give the court the same general discretion under s. 30 in respect of arbitral errors, it would presumably have used similar language.
- [28] In addition to my interpretation of s. 30(1) being required by the foregoing contextual factors and the scheme of the Act, it is also consistent with one of the main purposes of the Act. The Legislature was very specific in circumscribing the ability of the court to become involved in determining the outcomes of arbitrations. For example, s. 30(3) of the Act makes it very clear that, unlike the review of trial decisions by appellate courts, the court must not intervene in an arbitral award even if the arbitrator has made a palpable and overriding error of fact.
- [29] Consistent with the purpose of circumscribing the involvement of the court, the Legislature has given a supervisory role to the court to identify arbitral errors, but once the court has fulfilled that function, it is left to arbitrators to finalize the resolution of the dispute by having a new arbitration or by having the arbitrator reconsider the award. If the award is remitted to the arbitrator for reconsideration, it is left to the arbitrator to decide whether the award should remain unchanged after addressing the arbitral error. The exception the Legislature decided to create is set out in s. 30(2) where the error consists of a defect in form or a technical irregularity and no substantial wrong or miscarriage of justice would be caused by upholding the award.
- [30] Having concluded that the discretion to refuse to set aside an award upon a finding of arbitral error is constrained by the parameters set out in s. 30(2), I turn to the question of whether, on a reading of the judge's reasons as a whole, he exercised his discretion pursuant to s. 30(2). As I stated above, it is my view that the judge did not purport to refuse to set aside the award under s. 30(2). I reach this conclusion for three reasons.
- [31] First, in para. 92 of his reasons, which immediately preceded the four paragraphs containing the judge's reasoning in refusing to set aside the award, he stated that, if he had found another matter to amount to arbitral error, he would have held that the error would have fallen "within the ambit of s. 30(2) of the Act, as 'a defect in form or a technical irregularity' that could not possibly justify setting aside the award". Yet in paras. 93-96, the judge made no mention of s. 30(2) and did not use any of the wording of the conditions set out in s. 30(2). In these circumstances, if the judge was purporting to exercise a discretion

under s. 30(2), one would have expected him to refer to it or to make reference to the specified prerequisite(s).

- [32] Second, the reasoning of the judge in paras. 93-96 in refusing to set aside the award did not address both of the conditions contained in s. 30(2). The genesis of his reasoning was that there was no point in setting aside the relevant part of the award because Branch MacMaster was awarded the costs of the main arbitration (as well as the costs of the interim relief application) and Appleton had not challenged the reasonableness of the costs for the interim relief application before the arbitrator. This reasoning could satisfy the requirement of s. 30(2)(b) that there would be no substantial wrong or miscarriage of justice (albeit the reasoning does appear to be somewhat inconsistent with what the judge said in para. 53 of his reasons, reproduced above at para. 15). However, the reasoning did not touch in any way on the requirement of s. 30(2)(a) that the error consisted of a defect in form or a technical irregularity.
- [33] Third, the chambers judge relied on Williston in finding that there had been arbitral error. He quoted paras. 49-53 of Williston in support of the proposition that it was a breach of the rules of natural justice to summarily assess costs without compelling the party entitled to the costs to produce its accounts. The last of these paragraphs reads as follows:
- [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.

[Emphasis added.]

If the chambers judge was of the view that the summary assessment of Branch MacMaster's costs without production of the requested documents was a "defect in form or a technical irregularity" within the meaning of s. 30(2)(a), one would have expected him to explain why he was not following the very decision he did follow in finding the occurrence of arbitral error.

- [34] My conclusion that the judge did not purport to exercise his discretion under s. 30(2) does not, however, end the matter. An appeal is taken from the order made, not the reasons for judgment, and the order should not be set aside if it can be supported on other grounds that were before the judge. It is therefore necessary to consider whether the judge could properly have exercised his discretion under s. 30(2) to refuse to set aside the award.
- [35] The two prerequisites for refusing to set aside an award for arbitral error under s. 30(2) are: (a) the error consists of a defect in form or a technical irregularity; and (b) there would be no substantial wrong or miscarriage of justice. In my opinion, the first prerequisite was not met in this case. I agree with the statement of Justice Goepel at para. 53 of Williston that the summary assessment of costs without requiring production of relevant documents is a breach of the rules of natural justice that is more than a defect in form or a technical

irregularity. The summary assessment of costs without the production of relevant documents is not a defect in form and, although it may be considered to be an irregularity, it is not a technical one in the present context. The arbitrator made a ruling that the requested documents did not have to be produced and proceeded to summarily assess the costs of the interim relief application without the consent of Appleton. This is not an irregularity which can be properly characterized as technical.

- [36] Even if it could be said that the refusal to set aside the award would not cause any substantial wrong or miscarriage of justice, the first prerequisite(s) of s. 30(2) was not met in the circumstances. Thus, the court did not have the discretion to refuse to set aside the award.
- [37] It may be that the judge was led into error because he did not believe he had the option of remitting the award to the arbitrator for reconsideration. It is understandable that he was reluctant to set aside the award because the parties would have to undergo a new arbitration in circumstances where the arbitral error found by him may not have had any effect on the award made by the initial arbitrator. However, it was not a certainty that there would be no difference in the award because, if production of the requested documents is ordered, other issues regarding the reasonableness of Branch MacMaster's costs may be raised.
- [38] In its factum, Appleton appeared to continue to take the position that the only possible remedy for the arbitral error found by the chambers judge was the setting aside of the arbitral award. At the hearing of the appeals, Appleton acknowledged that it was open to this Court to remit the award to the arbitrator for reconsideration. I think it doubtful that a party can constrain the discretion the court does have under s. 30(1) to either set aside the award or remit it to the arbitrator by limiting the requested relief to only one of those remedies. In any event, Appleton's petition did not restrict the court to one remedy because, in addition to seeking an order setting aside the award, it requested "[s]uch other order as the court deems just". This request would encompass a remission of the award to the arbitrator for reconsideration.
- [39] In my opinion, the appropriate remedy in the circumstances is to remit the award to the arbitrator for reconsideration. It would not be appropriate to set aside the entire award when it contains determinations of claims that are unaffected by the arbitral error found by the chambers judge. As the only outstanding issue is the assessment of the costs for the interim relief application that may have been affected by the arbitral error, the remission to the arbitrator should be restricted to a reconsideration of the assessment of those costs. It may seem unfortunate that it is necessary to remit the matter back to the arbitrator when the arbitral error may have had little, if any, effect on the amount of the costs assessed by the arbitrator but, as I have discussed, the powers of the court in its role of supervising arbitral awards are narrowly circumscribed by the Act.

Disposition

[40] I would allow Appeal No. CA46438 and order that the award be remitted to the arbitrator for reconsideration of the assessment of the costs for the interim relief application, including taking steps necessary to rectify the arbitral error found by the chambers judge. I would stay the order that is the subject matter of Appeal No. CA46439 pending the outcome of the arbitrator's reconsideration of the award, with liberty to apply to the Supreme Court of British Columbia after the reconsideration as circumstances may require.

[41] As Appleton has been successful in having Appeal No. CA46438 allowed but unsuccessful in obtaining the orders it sought in these two appeals, I would order that the parties bear their own costs of the appeals.

"The Honourable Mr. Justice Tysoe"

I AGREE:

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Harris"

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Prepared on 25 October 2026 · Esheria