

CANADA / JUDGMENT

Aujla v. Aujla

2021 BCSC 1126

COURT

Supreme Court of British Columbia

DECIDED

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2021 BCSC 1126 Aujla v. Aujla

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aujla v. Aujla,

2021 BCSC 1126

Date: 20210609

Docket: E53286

Registry: New Westminster

Between:

Ravinder Kaur Aujla

Claimant

And

Paramjit Singh Aujla and Avtar Singh Aujla

Respondents

Before: The Honourable Justice Schultes

Reasons for Judgment

Counsel for the Claimant:

E.K. Chhina

Counsel for the Respondent, Paramjit Singh Aujla:

C.K. Sabharwal

Counsel for the Respondent, Avtar Singh Aujla

M.S. Dhanoya

Place and Date of Hearing:

New Westminster, B.C.

November 6, 2020

Place and Date of Judgment:

New Westminster, B.C.

June 9, 2021

Introduction

- [1] This is an application by Paramjit Aujla, one of the respondents in this family law matter, to set aside an arbitration agreement or, failing that, to restrict the arbitration to the number of days that were originally agreed to by the parties.

Background

- [2] The claimant Ravinder Aujla filed her notice of family claim in 2017, and amended it in 2019. She seeks orders with respect to parenting, support and property division. Mr. Aujla's father Avtar is also named as a respondent because he is on title of the former family residence with Mr. Aujla, and Ms. Aujla asserts that he actually holds his interest in it in trust for her and his son.
- [3] There were discussions among counsel in early 2020 about resolving the matter by arbitration. Mr. Aujla deposes that Ms. Aujla's counsel initially took the view that such an arbitration would take seven days to complete, but that he was not willing to agree to a proceeding of that length. He says that his counsel conveyed that he would agree to three or four days, and he attaches an email from her to the other parties' counsel on January 16, setting out that position. An arbitration was then set for that number of days in May.
- [4] Those dates had to be adjourned because of the pandemic. Mr. Aujla attaches a "post-telecon memorandum to counsel" prepared by the arbitrator, Morag MacLeod, Q.C., setting out the matters that were agreed to in a phone call involving her and counsel on April 1. This included the agreement that the arbitration would be adjourned to September 8 - 11.
- [5] At the end of June counsel discussed a schedule for completing examinations for discovery and exchanging the necessary material for the arbitration, including documents, affidavits and financial statements. Following a further discussion with counsel, Ms. MacLeod issued another memorandum, setting out the agreed "time line" of actions by counsel.

- [6] On August 18, 2020, the parties signed a written agreement to arbitrate with Ms. MacLeod. There is no specific reference in it to the numbers of days of the arbitration in it, only to the arbitrator's rate and to the requirement of a retainer of \$45,000 to be paid by a certain deadline.
- [7] The disclosure process leading up to the September dates was contentious. According to Mr. Aujla, Ms. Aujla's counsel did not adhere to the schedule for disclosing documents. Instead, her counsel sought to examine him for discovery on documents that had not been listed by the agreed deadline, and included a large number of such documents in the voluminous proposed joint book of documents for the hearing. When he sought to provide affidavits from third parties to counter Ms. Aujla's allegations of family violence during the relationship, her counsel objected to them.
- [8] A further discussion was held with the arbitrator on September 1. Mr. Aujla has been informed by his counsel that Ms. Aujla's counsel intended to provide additional witnesses and affidavits and that his counsel did not have sufficient time to review and prepare them before the scheduled dates. As recorded by the arbitrator, this discussion resulted in an agreement that the current dates would be adjourned and that seven days would be set for the arbitration, beginning on November 12[1]. A revised time line was set for the delivery of outstanding documents and any further affidavits. The cost was to be an additional \$15,000 (the previous retainer had been \$45,000).
- [9] Mr. Aujla advises that his counsel was not able to speak to him before the seven day hearing was set, and that in fact he was not agreeable to that occurring. His counsel informed the arbitrator and the other counsel of his position later that day.
- [10] He no longer wishes to participate in the arbitration process, citing the increased costs of a longer hearing than he originally agreed to, and the lack of certainty that the arbitration will finish within even that extended period, given the large number of documents and witnesses. In his view, the advantages of an arbitration over a trial, in terms of efficiency and cost, are no longer present. In that regard, he notes the availability of early trial dates at the recently-opened courthouse in Abbotsford.
- [11] In contrast, Ms. Aujla emphasizes the role played by Mr. Aujla's decision, shortly before the September dates, to call additional witnesses to rebut the domestic violence allegations. She has been making those allegations for a considerable period of time, so he would not have been surprised by them, and they are relevant mainly to her claim for occupational rent after being evicted from the former family home. Contrary to the correspondence among counsel on August 21, to the effect that he might be calling second witness on the issue of domestic violence in addition to the one he had identified, he eventually provided five witnesses on that issue, who mainly offer evidence of his character (as opposed, I took it, to rebutting any of her specific allegations). This required her to call an additional three witnesses to refute that proposed evidence, which her counsel advised to the other counsel of on August 31.

- [12] Crucially from her point of view, it was with the agreement of all counsel, in light of these developments, that the new seven-day period was set. It was only after that agreement that Mr. Aujla expressed his objection.
- [13] In an effort to accommodate the original time estimate, Ms. Aujla is prepared not to call the three additional witnesses that she identified. She also proposes additional steps that could be taken to keep the matter within that period - (1) having counsel provide written submissions so that the hearing time is spent only on cross-examination on the affidavits, and (2) cross-examining any witnesses who cannot be accommodated within the four days outside of the actual hearing, and then providing the arbitrator with the transcripts of the cross-examinations.
- [14] She explains that despite an order to that effect, Mr. Aujla is not paying child support, and that consequently her ability to obtain any financial compensation in relation to this matter likely depends on a declaration of her interest in the family home, as part of the arbitration. She also emphasizes the very significant legal fees she currently has outstanding, and her need to make use of the arbitration process "to cut my losses and pay my outstanding fees".

Discussion

- [15] The Family Law Act was recently amended to include provisions dealing with the arbitration of family law disputes. Section 19.3 permits applications of the kind being made by Mr. Aujla here:

Setting aside arbitration agreements

19.3 (1) On application by a party to an arbitration agreement, the Supreme Court may set aside or replace with an order made under this section all or part of the arbitration agreement if satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;
 - (b) a party did not understand the nature or consequences of the agreement;
 - (c) other circumstances existed that would, under the common law, cause all or part of a contract to be voidable.
- (2) The Supreme Court may decline to act under subsection (1) if, on consideration of all of the evidence, the Supreme Court would not replace the arbitration agreement with an order that is substantially different from the terms set out in the agreement.
- [16] These provisions came into force on September 1, 2020, concurrently with the new Arbitration Act, S.B.C. 2020, c. 2. Family law arbitrations were previously dealt with by provisions of the now-repealed Arbitration Act, R.S.B.C. 1996, c. 55. Section 70 of the new legislation, which deals with transition, makes its provisions applicable "if the arbitral

proceeding is commenced on or after the date this section comes into force" (also September 1, 2020). Implicitly, family law arbitration proceedings commenced before then will continue to be conducted under the former Arbitration Act, as they were previously: Family Law Sourcebook for British Columbia, Continuing Legal Education Society of British Columbia, c. 11.1. "Arbitral proceeding" is not defined in the new Arbitration Act.

- [17] While the arbitration hearing in this case has not been held yet, it seems clear that the overall proceeding commenced earlier in 2020, by the arbitrator being retained and the arbitration being scheduled, followed by the various pre-hearing conferences. Certainly in the context of ordinary court matters, the concept of "proceeding" tends to be applied to the overall process rather than to a specific hearing (e.g., "a step in a proceeding", etc.).
- [18] At the end of the day however, it does not matter whether s. 70 refers to the commencement of the actual arbitration hearing or not, because the predecessor in the former Arbitration Act is virtually identical to s. 19.3 of the FLA, although it dealt with setting aside the subsequent award as well:

2.1(3) An arbitration agreement respecting a family law dispute, and an award arising from a family law dispute, may be set aside or replaced by the court under the Family Law Act if the court is satisfied that one or more of the following circumstances existed when the parties entered into the agreement:

- (a) a party took improper advantage of the other party's vulnerability, including the other party's ignorance, need or distress;
- (b) a party did not understand the nature or consequences of the agreement;
- (c) other circumstances that would, under the common law, cause all or part of a contract to be voidable.

2.1(4) A court may decline to act under subsection (3) if, on consideration of all of the evidence, the court would not replace the arbitration agreement with an order that is substantially different from the terms set out in the arbitration agreement.

- [19] Given that the written agreement was entered into eight months after the parties had apparently agreed to embark on an arbitration, and did not contain all of the terms that they had agreed on by that point, one can infer that the overall agreement was partly oral and partly in writing.
- [20] The evidence of how this agreement came into existence, and of its essential terms, is scant. In essence, we have Mr. Aujla's assertion, which is not contradicted, that the length of the arbitration hearing was important to him, and that the length proposed by his counsel in the attached email provided the basis on which he was willing to enter into it.

- [21] There is no evidence upon which I could find that Ms. Aujla took advantage of any vulnerability on his part to cause him to enter into it, or that he did not understand its nature or consequences. While he may have insisted that the hearing not exceed a certain length, there is no suggestion that he did not understand the basic nature of an arbitration, or how he could be bound by its outcome.
- [22] That leaves subsection s. 2.1(3)(c). Dealing with similar language in s. 93(3)(d) of the FLA, which permits the court to set aside agreements respecting property division that would be voidable at common law, Justice Johnston explained, in *Donnelly v. Weekly*, 2017 BCSC 529:
- [126] At common law, a contract may be voidable if it were formed as a result of duress, undue influence, fraud, or some misrepresentations. Unconscionability was developed by the courts of equity to relieve against bargains that were contrary to good conscience. It is unclear, and counsel did not address, whether the legislature intended to exclude equity when it inserted the phrase "voidable at common law".
- [23] Similarly in *Azanchi v. Mobrhan-Shafiee*, 2019 BCSC 1392, varied on other grounds, 2021 BCCA 55, Justice Branch elaborated that:
- [119] Generally, a "voidable" contract is one that exists but is flawed in such a way that the innocent party has the option to undo the contract if they so choose. Until that is done, the contract is valid and enforceable: Bruce MacDougall, *Introduction to Contracts*, 3rd ed. (Toronto: LexisNexis, 2016) at 179-180
- [24] Once again there is no evidence upon which to base a finding that any duress, undue influence, fraud or misrepresentation played a role in this agreement being reached. I think it is reasonable to assume that the legislature understood the difference between equitable and common law remedies when it specified the latter in sub-section (c), but even if equitable remedies can also be considered, there is no evidence on which to base a finding of unconscionability.
- [25] If it has any valid contractual basis, I think that Mr. Aujla's application really rests on the doctrine of frustration - that the subsequent lengthening of the hearing has created a situation fundamentally different than the one he agreed to. The essential principles underlying this doctrine were helpfully summarized by Justice Silverman in *0707448 B.C. Ltd. v. Cascades Recovery Inc.*, 2011 BCSC 1065:
- [58] Frustration of a contract occurs when:
1. A supervening event occurs:
 - (a) after the formation of the contract;
 - (b) for which the contract makes no provision; and
 - (c) which is not the fault of either party, which is not self-induced, and which was not foreseeable.

2. The supervening event so significantly changes the nature of the contractual rights/ obligations which the parties could reasonably have contemplated at the time of execution, that:
 - (a) the contract is now totally different from what the parties intended; or,
 - (b) a fundamental contractual term has become incapable of being performed; or,
 - (c) new circumstances in which performance is called for would render it a thing radically different from that which was undertaken by the contract; or,
 - (d) the thing undertaken would, if performed, be a different thing from that contracted for; or,
 - (e) it has totally affected the nature, meaning, purpose, effect and consequence of the contract so far as concerns either or both parties.
3. The differences between the contract before the supervening event, and after:
 - (a) must be permanent, not temporary or transient;
 - (b) are not mere inconvenience, but fruitlessness;
 - (c) are not merely expense or onerousness.

[59] The result of the foregoing is that it would be unjust to hold the parties to the literal sense of the contract's stipulations in the new circumstances; hence, frustration.

[60] The data for assessing whether the foregoing has occurred are:

1. the terms and construction of the contract (read in light of the existing circumstances); and
2. the events which occurred.

[61] All of the foregoing propositions are derived from the following cases:

Naylor Group Inc. v. Ellis-Don Construction Ltd., 2001 SCC 58;

KBK No. 138 Ventures Ltd. v. Canada Safeway Limited, 2000 BCCA

295 ;

National Carriers Ltd. v. Panalpina (Northern) Ltd. (1981), 1 All E.R. 161

(H.L.);

Davis Contractors Ltd v. Fareham U.D.C., [1956] A.C. 696 (H.L.); and

Folia v. Trelinski (1997), 14 R.P.R. (3d) 5 (B.C.S.C.)

[26] More generally, as Justice Dickson (then a member of this court) aptly expressed it in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303:

- [364] A contract will not be frustrated simply because its performance has proven more onerous than expected or because the future did not unfold as the parties hoped that it would: *Britton v. Buhr*, [1994] B.C.J. No. 229; *Racz v. Rudolph*, [1998] Y.J. No. 97 (C.A.); *Delta Food Processors Ltd. v. East Pacific Enterprises Ltd.*, [1979] B.C.J. No. 1245.
- [27] As a threshold matter, I do not think the doctrine of frustration falls within the ambit of ss. (c). Although it is a common law doctrine, it relieves both parties from further performance of the contract, rather than rendering it voidable.
- [28] Even assuming it is available however, I do not think the requirements for its application have been met. Specifically:
- The increase in the length of hearing was to a significant extent self-induced, by the introduction of Mr. Aujla's additional witnesses, not by an external supervening event. I appreciate that he felt he needed to respond to the allegations of abuse that were being levelled at him, but this was still a discretionary strategic response within the litigation, one that he was not compelled to put forward if the length of the hearing was his greatest priority;
 - The difference between what was agreed to and the current situation may actually be "temporary or transient", in that Ms. Aujla remains willing, according to her affidavit to take steps to reduce the length of the hearing to its original length;
 - This a situation in which the increase in the length of the hearing has, at worst, created inconvenience for Mr. Aujla, rather than leading to the "fruitlessness" of the arbitration as a whole, in the sense that it would not be able to achieve its purpose of resolving the issues among the parties; and
 - Without making light of the additional cost to him, the effects of this increase in length are "merely expense or onerousness", not an alteration in the nature of the process.
- [29] The last difficulty that Mr. Aujla faces, assuming that the previous ones could be overcome, is that his counsel, while clothed in apparent authority as his agent, agreed to the seven-day hearing during the September 1 meeting, thus amending the terms of the agreement going forward. Ms. Aujla was certainly entitled to rely on Mr. Aujla's counsel's representations to that effect, in the absence of any limitations on counsel's authority having been communicated to her, and the suggestion by him that his counsel acted without or contrary to his instructions on that point does not affect the validity of the amended agreement: see for example *Le Soleil* at paras. 346-8. Although the apparent authority of solicitors arises most frequently in the context of enforcing settlement agreements, the underlying agency principles are the same.
- [30] As a result, I can find no basis under the applicable legislative provisions to set this arbitration agreement aside, or to substitute an order imposing the original time limit, and Mr. Aujla's application must be dismissed.

[31] I do not think that the determination of success in this application depends on the ultimate outcome of this action, so Ms. Aujla will be entitled to her costs in any event of the cause, at the ordinary scale of difficulty. Avtar Aujla consented to his son's application and participated in the hearing through counsel, so he will also be liable in costs.

"Schultes J."

[1] In recognition of the short period between the arbitration dates and this application, counsel adjourned it by consent to await this decision, initially to March 2021.

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