

CANADA / JUDGMENT

## Bosa Properties (Sovereign) Inc. v. The Owners, Strata Plan EPS2461

2020 BCSC 1357

COURT

Supreme Court of British Columbia

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2020 BCSC 1357 Bosa Properties (Sovereign) Inc. v. The Owners, Strata Plan EPS2461

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Bosa Properties (Sovereign) Inc. v. The Owners, Strata Plan EPS2461,

2020 BCSC 1357

Date: 20200807

Docket: S-1912859

Registry: Vancouver

In the Matter of the Arbitration Act, R.S.B.C. 1996, c. 55

- and -

In the Matter of an Arbitral Award issued on or about August 13, 2019

Between:

Bosa Properties (Sovereign) Inc.

Petitioner

And

The Owners, Strata Plan EPS2461

Respondent

- and -

Docket: S1911608

Registry: Vancouver

In the Matter of the Arbitration Act, R.S.B.C. 1996, c. 55

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In the Matter of an Arbitral Award issued on or about August 13, 2019

Between:

The Owners, Strata Plan EPS2461

Petitioner

And

Bosa Properties (Sovereign) Inc.

Respondent

Before: The Honourable Madam Justice Sharma

Oral Reasons for Judgment

In Chambers

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Place and Date of Trial/Hearing:

Vancouver, B.C.

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[1] THE COURT: This is the written version of judgment rendered orally on August 12, 2020.

## I. INTRODUCTION

[2] This judgment addresses two petitions. The first seeks leave to appeal an arbitral award and the second seeks to enforce that same award. The second petition also sought the appointment of a receiver or administrator, but that relief was not pursued. The Award in question was rendered by arbitrator Lance Finch, Q.C., on August 13, 2019 (the "Award").

[3] The issues in the petitions concern certain agreements entered into with regard to a mixed use high-rise tower known as Sovereign, located in Burnaby. The agreements entered into deal with the following air space parcels:

- a) Air Space Parcel 1, which houses a hotel and is owned by the respondent;
- b) Air Space Parcel 2 which is a municipal air space parcel owned by the City of Burnaby;
- c) Parcel 3, which is retail space and is owned by the respondent;
- d) Parcel 4, retail space owned by an entity not involved in this litigation;
- e) Parcel 5, which is the mechanical air space parcel; and

- f) the remainder parcel which is the residential parcel.
- [4] The Owners, Strata Plan EPS2461, is a strata corporation comprised of the owners of units in the remainder parcel in the building. It seeks to appeal the Award. I will refer to it throughout as the petitioner.
- [5] In addition to owning three of the air space parcels, Bosa Properties (Sovereign) Inc. was the owner/developer of the building. It seeks to enforce the Award. I will refer to it as the respondent.

## II. BACKGROUND

- [6] Turning to the background, air space parcels are sold to raise capital for multi-level developments. Because the air space parcels and the eventual space in the building are stacked vertically, each parcel requires access and use of various building systems and other components vital to the normal functioning of the building. For example, the building requires an elevator for all levels and elevator shafts occupy an amount of space in each air space parcel.

### A. The Agreements

- [7] The respondent filed a disclosure statement regarding this development with the Superintendent of Real Estate in February 2011. It filed four subsequent amendments to that disclosure, the last one being in July 2014. Those disclosure statements expressly stated that there would be a cost-sharing agreement amongst the air space parcels, which would be registered on title. In the Award at paragraph 10, the arbitrator referred to certain definitions from those disclosure statements.
- [8] A series of easements are entered into setting out each parcel's access and use of these types of common spaces. In addition, an all-encompassing agreement governs the easements. In this case, that agreement (the Air Space Remainder Parcels Reciprocal Easement and Support Access Services System and Other Uses, section 29 Covenant in Equitable Charges, referred to as the ASP Agreement) was concluded and registered as a series of charges against the remainder parcel and other parcels in late December 2014.
- [9] The strata corporation did not yet exist. It was established upon deposit of the strata plan in early January 2015. At that point, the respondent controlled the strata corporation. Accordingly, for a time the respondent was both the building developer and the entity in control of the strata corporation.
- [10] As reproduced at paragraphs 11 to 12, and elsewhere throughout the Award, the ASP Agreement contains a number of definitions and other provisions relevant to the issues raised in this proceeding. Specifically, Article 37 of the ASP Agreement includes definitions for reimbursable costs, annual estimated budget of shared costs, and cost sharing. The definition of "shared use areas and systems" specified that, in addition to the general

definition contained therein, shared use areas and systems were "more particularly set out in Schedule D". That schedule set out each air space parcel's obligation as a percentage of costs such as structural, mechanical, electrical, water, sewer, fire protection, parking, swimming pool, and roof deck maintenance.

- [11] In mid-February 2015, a modification to the ASP Agreement was registered on title (the "Modification Agreement"). One of the modifications was the addition of a second page to Schedule D and its name was amended to Schedule D1. It was not disputed before the arbitrator that Schedule D1 forms part of the ASP Agreement.
- [12] The strata corporation held its first annual general meeting in April 2015 at which time a council was elected.

## B. The Award

- [13] The dispute in this case is about the allocation by the respondent of certain shared costs as set out in the ASP and Modification Agreement. The respondent asserts the petitioner has failed to pay its full share of shared costs since 2015. Because of that, the respondent commenced an arbitration proceeding as required by the ASP Agreement.
- [14] The arbitration was governed by the Arbitration Act and the rules of procedure for domestic commercial arbitration. It was held on July 29 to August 2, 2019, and the Award was rendered shortly thereafter.
- [15] After the Award was delivered, the petitioner applied to the arbitrator for clarification in late August 2019. The arbitrator considered that request and issued a letter on August 30th finding there was no need to alter the Award.
- [16] In mid-September 2019, the petitioner made a further application to the arbitrator for an additional Award, which he dismissed in December 16, 2019. In dismissing that application, the arbitrator noted that the petitioner was essentially attempting to reargue matters that had been fully addressed in the arbitration. He also stated the petitioner raised a new argument with regard to one issue. He pointed out that pursuant to s. 27 of the Act, an amendment to the Award could only be made to correct clerical or typographical errors, an accidental slip, or an arithmetical error, and the application must be made, absent consent, within 15 days of the Award. The arbitrator said the petitioner's application raised substantive issues and was an attempt to reargue matters on which he had already decided. In his view, the application bordered on an abuse of process.
- [17] The amount awarded to the respondent as of December 20, 2019, was \$1,295,593.27. Interest continues to run on that Award at a rate of five percent per annum, which comes to a daily rate of \$293.97.

[18] The respondent submits if the petitioner is not successful in getting leave to appeal, the court should grant leave under s. 29 to enforce the Award as an order of this Court. The petitioner's position is that an enforcement order is not necessary.

### III. LEGAL PRINCIPLES

#### A. Leave to Appeal an Arbitral Award

[19] Pursuant to s. 14 of the Arbitration Act, arbitration awards are final and binding. Case law has consistently held that the standard to interfere with an arbitral award is very high. In *Ed Bulley Ventures Ltd. v. Eton-West Construction Inc*, 2002 BCSC 826 at paras. 5-6, this Court stated that the high standard is necessary because people who choose commercial arbitration have elected to resolve their disputes in a forum that is speedy and final, without the intervention of the courts. The Court of Appeal noted one of the purposes of the high standard is to discourage appeals to court. It stated that is consistent with the objectives of the legislation which is to preserve arbitration as an alternate dispute forum: *Student Association v. BCIT*, 2000 BCCA 496 at para. 14. Thus the opportunity to bring an appeal under s. 31 of the Act is narrowly circumscribed: *Sattva Capital Corporation v. Creston Moly Corp.*, 2014 SCC 53.

[20] Specifically, under s. 31, a party needs to apply for leave to an appeal an award. The relevant subsections of s. 31 state:

31 (1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the Award if

- (a) all of the parties to the arbitration consent, or
  - (b) the court grants leave to appeal.
- (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
- (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
  - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
  - (c) the point of law is of general or public importance.

[21] There was no dispute that the petitioner was applying for leave pursuant to s. 31(2)(a). Therefore, the petitioner bears the burden to establish three things: that it has raised a question of law, that the result of the arbitration is of such importance to justify the court's intervention, and that the determination of the point of law may prevent a miscarriage of justice. However, even if those conditions are met, the court retains a discretion to deny leave: *Sattva*, para. 39.

- [22] The petitioner must persuade the court that the questions it has raised are not factual or questions of mixed law and fact, and that is the Cartographics decision. If it fails to do so, that would wholly dispose of the issue of granting leave because the court would have no jurisdiction to conduct the appeal, and that is a reference to Teal Cedar Products.
- [23] In Teal, the Supreme Court of Canada articulated the process for characterizing whether a question is a question of law, fact, or mixed law and fact for the purpose of granting leave under s. 31 of the Act. Essentially, a question of law is about the correct legal test, whereas questions of facts are about what took place, and mixed questions are questions about whether the facts satisfy the legal tests.
- [24] The SCC also cautioned courts not to be swayed by strategic attempts to frame mixed questions of fact and law as if they involve extricable questions of law (para. 43). The Court emphasized that unlike in civil cases, where identifying a mixed question of fact and law rather than a legal question would raise the standard of review, the same mistake on an appeal from arbitration awards "defeats a court's appellate review jurisdiction" (para. 46); see also Sattva para. 54. This again reflects the policy of the legislation to discourage parties who agree to arbitration from seeking relief from the courts.

## B. Contractual Interpretation

- [25] The issues in this case involve the interpretation and application of various provisions in the ASP Agreement and the Modification Agreement. In other words, the dispute between the parties centres on contractual interpretation. Sattva is the controlling case. It, too, involved an application for leave to appeal an arbitration award where the central issues were contractual interpretation. Thus, the threshold issue is for the applicant to establish it has raised a pure question of law.
- [26] Starting at paragraph 42, the Supreme Court of Canada discusses when a contractual interpretation issue is a question of law, starting with a review of the historical approach. Writing for the Court, Justice Rothstein noted an evolution in the law away from regarding contractual interpretation as only a legal issue towards incorporating into the analysis some consideration of the factual matrix in which the contract was entered into. He stated that, "the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction" where the overriding concern is to discern the parties' intent (para. 47).
- [27] Accordingly, the test boils down to requiring the decision maker to, "read the contract as a whole, giving words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time the contract was formed" (para. 47). The meaning of words can be derived from a number of contextual factors which may include the relationship between the parties and the purpose of the agreement (para. 48).

[28] In parallel with this evolution, Justice Rothstein noted another important development relevant to contractual interpretation was the court's decisions in Southam and Housen. Both cases articulated differences between questions of fact, questions of mixed fact and law, and questions of law. In light of both developments, he concluded the historical approach would no longer fit well with the concept of questions of law (para. 49):

Yet in contractual interpretation, the goal of the exercise is to ascertain the objective intent of the parties - a fact-specific goal - through the application of legal principles of interpretation. This appears close to a question of mixed fact and law, defined in Housen as "applying a legal standard to a set of facts" (paras. 26; see also Southam, at para. 35).

[29] He then commented that some courts still prefer to see contractual interpretation as primarily involving legal interpretation. He disagreed, concluding that the historical approach should be abandoned. He held that contractual interpretation "involves issues of mixed fact and law, as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix" (para. 50).

[30] Importantly, the Supreme Court of Canada specifically held that one central purpose in distinguishing between questions of law and those of mixed fact and law was to limit the intervention of appellate courts where the results can be expected to have an impact beyond the parties to the particular dispute, reflecting the role of those courts to ensure consistency in the law, rather than providing a new forum for parties to prolong their dispute.

[31] Nevertheless, inextricable questions of law can still arise in the course of contractual interpretation, but only where there has been the application of an incorrect principle, a failure to consider a required element of the legal test, or a failure to consider a relevant factor (para. 53).

[32] The Supreme Court of Canada also commented on the factual matrix, specifically saying that a consideration of surrounding circumstances does not offend the parol evidence rules. The key is to ensure the surrounding circumstances do not overwhelm the words of the agreement (para. 57).

#### IV. THE PROPOSED APPEAL

[33] In arguing that the arbitrator erred, the petitioner refers to five alleged errors in the Award relating to shared costs of the swimming pool facility, the roof deck, window washing, the parkade costs, and GST. In addition, the petitioner submits the arbitrator erred in failing to apply the principle of contra preferentem in its favour.

[34] The respondent submits that the petitioner has failed to identify a question of law. Specifically, it asserts that the petitioner has not identified in what way the arbitrator applied the wrong legal test, and instead merely argues his conclusions should have been different.

- [35] In the alternative, the respondent submits that the petitioner cannot demonstrate that the result of the Award is of such importance to warrant the court's intervention. It also submits the petitioner has not identified any possible miscarriage of justice that may be avoided by resolving the alleged questions of law.

## V. ANALYSIS

- [36] There is no dispute that contractual interpretation involves discerning the parties' intent at the time the contract was formed. There is one peculiarity regarding the agreements at issue in this case. As noted above, at the time the ASP Agreement was registered on title, there was no strata corporation. By the time the Modification Agreement was registered, there was a strata corporation but it was controlled by the respondent.
- [37] In that fashion, the agreements are atypical because the respondent was essentially contracting with itself. This has a direct impact on the legal analysis to be conducted as explained in *Interville Development Limited Partnership v. The Owners, Strata Plan BCS2313*, 2019 BCSC 112 at paras. 88 to 92.
- [38] One of the issues addressed in that case was whether there was an agreement between the parties about shared costs at a particular point. The issue was whether there had been a meeting of the minds, which boiled down to discerning the parties' intentions at the time.
- [39] Madam Justice Warren noted that the assessment of the parties' intentions was atypical because at the material time both parties had the same directing mind. Similar to this case, the relevant contract was concluded at a time when the builder and the strata corporation were controlled by related corporate entities. Corporate entities can only act through natural people to conclude contracts and otherwise enter into transactions. Accordingly, their intentions are gleaned from the actions of those authorized to act on their behalf. Madam Justice Warren explained, and I will read out part of a quote from paragraph 89:
- [89] . . . In other words, the state of mind of a company's directors and managers "is the state of mind of the company and is treated by law as such" [I will omit the citation]. As a limited partnership, Interville's intention is the intention of the natural persons authorized to act for its general partner, Henderson Development. There is no dispute that at the material time, which is from the moment the Strata Corporation came into existence until the sale of the first strata lot, the Strata Corporation was controlled by Interville. As such, it is inescapable that during the material time their respective intentions were one and the same.
- [40] Justice Warren goes on to discuss case law in the same vein, noting that the "unique role of the owner developer under the [Strata Property Act] at the time the owner developer controls the Strata Corporation" makes it "inescapable that Interville and the strata corporation had the same intentions during that time" (para. 92).

- [41] As noted above, the ASP Agreement and Modification Agreement were registered on title when the respondent controlled the strata corporation. While not determinative of any issue, these considerations are relevant to the factual matrix in this case.

## A. Question of Law

- [42] With the preceding comments in mind, I turn to consider whether the petitioner has raised a possible ground of appeal on any question of law.

### 1. Swimming Pool

- [43] The petitioner alleges the arbitrator erred in his conclusion that its proportion of shared costs of the swimming pool facility was 39.9%. Its position is that the split should be 50/50. It submits the arbitrator erred by relying on events occurring after the ASP Agreement was entered into and relying on an article in the ASP Agreement, and this is a quote, "unrelated to cost sharing between parcel owners" in the development.
- [44] This issue was addressed at paragraphs 28 to 38 of the Award. The arbitrator noted that Schedule D1 specified that swimming pool costs were to be allocated 60.1 percent to the petitioner 39.9 to the hotel, which was owned by the respondent. The petitioner argued there was a conflict between Schedule D1 and Article 32.6.8 of the ASP Agreement. That article read in part that costs related to maintenance, operation, etc., of the swimming pool facility would be shared equally. On that basis, the petitioner submits there was ambiguity.
- [45] The arbitrator rejected the petitioner's position. The crux of his reasoning is at paragraph 36. He found the petitioner's position overlooked the disclosure statement and the closing words of that article. He concluded that "when the documents were read together in their entirety and in context of the elements comprising pool costs", the percentage allocation for pool costs contained in Schedule D1 applies. It is implicit that he found no ambiguity as asserted by the petitioner.
- [46] The petitioner points to the arbitrator's reference at paragraphs 31 and 33 and 35 to evidence from two of the respondent's witnesses as the basis for its argument that the arbitrator relied on subsequent events. I disagree.
- [47] The arbitrator's analysis on this issue is concisely articulated in paragraph 36. His conclusion is based on the wording of the contractual terms read in their entirety. The reference to the witnesses' evidence explained how the shared pool costs were invoiced, but it was not the basis upon which the arbitrator concluded that the split identified in Schedule D1 was applicable.
- [48] I also find that the petitioner has not accurately captured the arbitrator's reference to Article 32.6.8. As noted above, the petitioner argued the arbitrator referred to wording in that article unrelated to cost sharing. In my view, that argument has no merit. Article 32.6.8 is titled "Cost sharing swimming pool facility" so it is clearly relevant. Rather than relying only on the phrase "shared equally" as proposed by the petitioner, the arbitrator looked at the

whole clause. Specifically, he noted the closing words state that the petitioner is responsible "in proportion to the unit entitlements which shall be calculated in a consistent manner and based on the habitable areas of the respective residential lots". He points out that Schedule D1 accomplishes this by basing shared costs on the floor areas occupied by the respective parties.

- [49] The petitioner has not identified in what way the arbitrator applied the wrong legal test when interpreting either Clause 32.6.8 or Schedule D1. Instead, the petitioner's submissions outline its disagreement with that interpretation, and in my view that does not raise an inextricable error of law.

## 2. Roof Deck

- [50] Before the arbitrator, the petitioner argued that because it had no easement over the entire roof deck, it should not be part of the shared use areas and systems. It further submitted the disclosure statement made no mention of an easement for the whole of the roof deck. The petitioner submits that the arbitrator erred by finding it held an implied licence. It says the error was fuelled by the arbitrator's reliance on events subsequent to the contract's conclusion.
- [51] This issue was discussed at paragraphs 18 to 27 of the Award. The arbitrator held it was clear from the definition that shared costs were not limited to matters referred to in any easement. He also pointed out that the last line of Schedule D referred to roof deck maintenance, allocating 58.8 percent of shared costs to the petitioner.
- [52] The arbitrator makes no direct or indirect reference to an implicit licence, nor is such implied in his reasoning. Accordingly, I find no basis for this proposed ground of appeal.
- [53] The arbitrator's dismissal of its argument about the roof deck was based firmly on the wording of the relevant contractual documents consistent with the proper legal test. Therefore, the petitioner has not raised any error in the legal test applied, and has not raised a question of law.

## 3. Window Washing

- [54] The petitioner submits the arbitrator's decision is contrary to the express wording of the ASP Agreement. Although its submissions purport to identify four different ways in which the arbitrator erred, its submission is really that the arbitrator erred by implying a term into the contract.
- [55] Window washing is addressed at paragraphs 39 to 45 of the Award. The arbitrator noted the petitioner argued its share should be 43.9 percent rather than 57.5; 43.9 represents the proportion of costs assigned generally to the petitioner for many shared-use areas and systems, based on percentage of floor area. However, window washing was not a subject listed in Schedule D1. Instead, it was the subject of a separate easement described in Articles 32.1 and 32.1.1.

- [56] The arbitrator comments that the percentage allocation for the petitioner for its share of window washing was based on the number of floors rather than floor area. That was because some floors in the building were below ground and would not require window washing.
- [57] He identified that Article 37(c) provided that if any portion of a parcel that fell into the definition of shared use was not reflected in the schedule, those costs and expenses shall be shared between the owners. If they could not agree on a percentage allocation, Article 37(c) stated it should be based on the area of such parcel measured in accordance with a BOMA standard. BOMA stands for Building Owners and Managers Association.
- [58] However, neither party provided the arbitrator or this Court with the applicable BOMA standard for windows and glass. Moreover, the petitioner does not assert that its preferred percentage, 43.9, was based on the applicable BOMA standard. Instead, it submitted the percentage was fair and equitable. However, at the same time, it alleged the arbitrator should not engage in an analysis of what might be manifest inequity or significant unfairness.
- [59] That phrase is significant because it appears in Article 37.11 titled "Modifications to an Owner's Share of Reimbursable Costs." That article states that the owners acknowledge and agree that its share of reimbursable costs set out in Schedule D "may not be changed or altered for any reason whatsoever, save and except" by written agreement or, if there is no agreement, by arbitration in the event of "manifest inequity and significant unfairness in the allocation of reimbursable costs".
- [60] The arbitrator accepted the petitioner's invitation in the absence of evidence as to the BOMA standard for windows and glass to assess what percentage would be fair and equitable. He held that the percentage of windows that needed washing was the fairest method and therefore 57.7 percent was justified.
- [61] The petitioner argues the arbitrator's reliance on what was fair and equitable meant he implied a term in the contract. In my respectful view, the petitioner's position in this Court and before the arbitrator is internally inconsistent. The ASP Agreement required, failing agreement, the percentage shares should be determined by a BOMA standard, yet the petitioner did not provide those to the arbitrator or to this Court.
- [62] Furthermore, its position was that its proposed percentage share, 43.9 percent, was fair and equitable, but said at the same time the arbitrator was prevented from determining if the allocated share represented manifest inequity and significant unfairness. No explanation was provided for this apparent contradiction within its position.

- [63] In my view, the arbitrator's assessment of the percentage was clearly a question of mixed law and fact. Because that approach was specifically requested by the petitioner, it appears unreasonable for it now to complain that the approach was used. Importantly, the petitioner does not identify what analysis should have guided the arbitrator, it simply disagrees with his conclusion. That does not raise a question of law.
- [64] I would not give effect to this proposed ground of appeal. In my view, the petitioner has not identified that the arbitrator applied the wrong legal test.
- [65] Even if I am wrong on that point and there was some error in approach (which I explicitly do not find), I would have exercised my discretion and not granted leave on this ground because the approach was specifically requested by the petitioner who does not now identify what it says should have been the correct approach, nor did it provide a BOMA standard it says should have been applied.
4. Parkade,
- [66] The petitioner's submissions take issue with how the arbitrator interpreted the definition of parkade based on the contract. The petitioner submits the arbitrator erred by implying terms in the contract and/or rewriting terms.
- [67] At paragraphs 46 to 62, the arbitrator dealt with this argument. He begins by identifying the relevant portions of the ASP Agreement addressing parking, most notably that the definition of parking facility contained in Article 1.104, that definition includes required parking spaces, ramps, and circulation lanes for vehicles' entrance, movement, and exit and loading bays in any similar or ancillary facility. Schedule D1 defines parking facility as those portions of the parking facility comprising the main security gate, entrance ramp, and drive aisle adjacent to the parking spaces located on Levels P1 and P5.
- [68] The arbitrator concluded "parking facility" must have the same meaning as Schedule D1 and "parkade" must mean the areas available for parking on Levels P1 through P5 as part of the parking facility. He made the obvious point that owners can only gain access to their parking levels by driving along the drive aisles leading from ground to P1, P2, P3, and below.
- [69] I am not persuaded that the petitioner has identified any error in the arbitrator's approach to this issue. The arbitrator's conclusions are based entirely on a reading of the contractual terms in their entirety. The petitioner has not identified how that approach does not conform to the correct legal test.
5. GST
- [70] The petitioner submits the arbitrator erred by concluding that the respondent could charge GST as part of its reimbursable costs. Its position is that directly contradicts the ASP Agreement itself.

- [71] Article 37 of the ASP Agreement stipulates that "any taxes with respect to costs incurred in a credit may be claimed from CRA" are to be deducted from the calculation of reimbursable costs. The arbitrator heard uncontradicted evidence from the respondent's witness that the petitioner was invoiced in accordance with that provision. That witness was not cross-examined and the arbitrator accepted her evidence as reliable and accurate. That is a finding of fact.
- [72] On that basis, the arbitrator concluded there was no merit in the petitioner's allegation that it was owed a further credit with respect to GST.
- [73] The petitioner has not identified in what way the arbitrator applied the wrong legal test or otherwise committed an error of law. He read the applicable provision in the ASP Agreement, referred to the uncontradicted evidence of a witness, and drew a conclusion.
- [74] I note that this issue is one which the petitioner sought clarification from the arbitrator. In his response, he noted a typographical error in the Award, but did not agree that anything required clarification.
- [75] I agree with the respondent that the petitioner has not identified in what way the arbitrator utilized the wrong legal test in interpreting or applying the contractual terms. Instead, its arguments delineate the petitioner's view of why the arbitrator was wrong in the result he reached. In doing so, the petitioner raises questions of mixed law and fact and not questions of law.

## B. Contra Preferentem

- [76] The petitioner submits the arbitrator erred by failing to apply the principle of contra preferentem in its favour. The principle is this: if a court is unable to resolve an ambiguity, the language of the contract will be construed against its author in those cases where the other party has had no meaningful opportunity to modify the wording; *Karim v. Seo*, 2010 BCSC 746, at para. 17.
- [77] The petitioner says the arbitrator should have resolved the ambiguity it submits was present with regard to the consideration of shared costs for the swimming pool and parkade. Similarly, it submits there was apparent contradictions among the ASP Agreement, the Modification Agreement, and disclosure statements with regard to the roof deck, window washing, and parkade, that ought to have been resolved to its advantage.
- [78] In support of its position, the petitioner relies on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co*, 2016 SCC 37. In *Ledcor*, the contractual term at issue was an exclusion clause commonly found in insurance contracts covering construction sites. One of the issues addressed was what standard of review an appellate court should apply to a trial judge's interpretation of a standard form insurance contract. The majority found the underlying facts provided an opportunity to clarify its ruling in *Sattva*.

- [79] The respondent submits Ledcor has no application because it concerned a standard form insurance contract. I agree, for the following reasons.
- [80] Ledcor's clarification of Sattva was specific to the appropriate standard of review of a trial judge's interpretation at first instance of a standard form contract or contract of adhesion, yet it was on this precise point that Justice Rothstein in Sattva emphasized the critical difference between a court's jurisdiction on an appeal from a trial judgment interpreting a contract and a proposed grant of appeal from an arbitral award under the legislation (see above para. 31). Sattva was a case about the same legislation at issue in this case, so it clearly applies.
- [81] The petitioner draws an analogy between the ASP Agreement and contracts of adhesion because, as noted above, the ASP Agreement was concluded and registered on title before the strata corporation existed and before it had an elected council. With respect, that attempt to analogize is overly simplistic. The ASP Agreement is a comprehensive all-encompassing agreement designed specifically for the Sovereign. It has no application to any other development. The contract is also heavily dependent and circumscribed by earlier disclosure statements.
- [82] Furthermore, as outlined in the Award and the preceding discussion of the alleged errors, I do not agree that there were ambiguities or contradictions within the contractual language that is a precondition to apply the principle of contra preferentem. For those reasons, I do not find there was an error in failing to apply it.

### C. Conclusions

- [83] In my view, none of the proposed grounds of appeal raise questions of law. As already noted, pursuant to s. 31(1) of the Act, which is a threshold requirement to granting leave. The petitioner has not met that threshold, so leave will not be granted. For those reasons, it is unnecessary for me to consider the issues specified in 32(2)(a) addressing miscarriage of justice and the importance of the Award.

### D. Enforcement

- [84] The respondent's petition seeks an order enforcing the Award pursuant to s. 27 of the Act. Because leave is required, a court exercises a supervisory power to determine an Award, whether an Award should be enforced: *Bekar v. TD Evergreen*, 2006 BCCA 266, at paras. 37-38. The Court of Appeal identified that leave may be refused, for example, if the Award was still subject to an appeal or all matters of importance had not been resolved (para. 38).
- [85] To be enforceable as an order of the court, the Award's terms must be clear and unambiguous: that is from *Sangha v. Goel*, 2019 BCSC 2267. I am satisfied the Award is clear and not ambiguous.

- [86] The respondent seeks leave to have the Award enforced and relies in part on the affidavit of John Martin, the respondent's director of commercial properties. He deposed that the respondent does not have the cash flow to be able to carry on operations while the petitioner has not paid its full allocation of proportion of shared costs since 2015. He says this has caused significant hardship as it was never intended that the respondent would carry any of the owners' costs.
- [87] The respondent contends that the petitioner faces no consequence for its failure to pay its full share because of s. 38.1 of the ASP Agreement. That section is a covenant (pursuant to s. 219 of the Land Title Act) in favour of the City of Burnaby. That covenant reads in part that, "under no circumstances whatsoever" can remainder owners' easements in air space parcel easement agreements be suspended, interrupted, or terminated because of any breach, default, trespass, or other wrong.
- [88] Thus, despite the petitioner not paying the full amount of its shared costs since 2015, the respondent has no ability to restrict, suspend, or prohibit any of the petitioner's access to shared spaces.
- [89] In addition to the financial implications arising from s. 38.1, the respondent submits that the petitioner has taken certain unilateral steps which the respondent views as being possibly dangerous to life and safety of the residents and occupants of the building. Mr. Martin deposed the petitioner installed a separate locking system at certain access points which are not tied into the fire panel and thus will not automatically disengage if an alarm is triggered. I understand that evidence may be in dispute.
- [90] The respondent also points out that in order to assess costs against the individual owners, an AGM has to be held at which time a resolution would need to be passed regarding payment. The respondent submits no meeting is currently scheduled. Based on the foregoing, the respondent argues there is some urgency to it receiving payment of the Award, and for that reason an order granting enforcement is appropriate.
- [91] The petitioner submits enforcement is not required. On behalf of her client, counsel indicated that the AGM will be held in September. It has been delayed since April because of the COVID pandemic. She also pointed out that even if the enforcement order is granted, pursuant to the legislation, the petitioner would still be required to convene an AGM and pass a resolution to implement payment.
- [92] In all the circumstances, I do find this is a situation where an enforcement order is appropriate. Although there was a delay in convening the next AGM because of COVID, that only accounts for the delay from March to about June of this year. There was no indication as to why no steps were taken before March since the Award was delivered last year. The petitioner did seek a clarification which was not allowed, but that was resolved at the end of September 2019.

- [93] The petitioner also sought an additional award, which was dismissed by the arbitrator at the end of December. However, the arbitrator noted that he considered that application to be bordering on an abuse of process, meaning that it was a step that he thought ought not to have been taken. I also take into account the circumstance that the respondent has no mechanism whatsoever, except the Award, to force payment.
- [94] For all those reasons, I do grant the enforcement order. I recognize that the legislation still requires that an AGM be conducted and a resolution be passed, but in my view there is no reason why the petitioner could not have given me more concrete evidence that it had taken significant steps.
- [95] Based on the foregoing, I dismiss the petition seeking leave to appeal the Award, but I grant the order seeking enforcement of the Award as sought by the respondent.

[SUBMISSIONS FROM COUNSEL]

- [96] THE COURT: Okay. Yes, all right, I do order that the respondent is entitled to its costs at Scale B with regard to both petitions. And I did not intend to say that the respondent abandoned the other relief sought in its petition, only that it was not addressed at this hearing. The other relief was adjourned.

"Sharma J."

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