

CANADA / JUDGMENT

Brown v. Smithwick

2024 BCCA 83

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 83 Brown v. Smithwick COURT OF APPEAL FOR BRITISH COLUMBIA Citation: Brown v. Smithwick, 2024 BCCA 83 Date: 20240301 Docket: CA49458 Between: Timothy Tristan Brown Appellant (Respondent) And Thomas Smithwick, K.C. and Tom Smithwick Consulting Services Ltd. Respondents (Claimants) Before: The Honourable Mr. Justice Fitch (In Chambers) On appeal from: An award of an Arbitrator under the Arbitration Act, S.B.C. 2020 c. 2, dated October 3, 2023 (Brown v. Smithwick). Oral Reasons for Judgment Counsel for the Appellant: J.W.T. Robinson Counsel for the Respondent: S.D. Dvorak Place and Date of Hearing: Vancouver, British Columbia March 1, 2024 Place and Date of Judgment: Vancouver, British Columbia March 1, 2024 Summary: Application for leave to appeal an arbitral award. The arbitration has not concluded. Issues remain outstanding. Held: The application for leave to appeal is premature and is adjourned to await conclusion of the arbitration. While a discretion exists to entertain a leave application in these circumstances, the general rule, and the policy of the law, is against it. The interests of justice do not require the application to be heard at this time.

- [1] FITCH J.A.: The applicant, Timothy Tristan Brown, applies pursuant to s. 59 of the Arbitration Act, S.B.C. 2020 c. 2, [AA] for leave to appeal an arbitral award made on October 3, 2023 (the "Award"). Mr. Brown only seeks to appeal the portion of the Award in which it was concluded that the debt he owes to the personal respondent, Thomas Smithwick K.C., falls within s. 178(1)(e) of the Bankruptcy and Insolvency Act, R.S.C. 1985, c. B-3 [BIA] and would not, therefore, be released following an order for discharge in his personal bankruptcy.
- [2] The applicant seeks leave on grounds that the arbitrator erred in law in concluding that the debt fell within s. 178(1)(e) of the BIA in the absence of a finding that a causal connection existed between the applicant's fraudulent misrepresentations and the creation of the debt.
- [3] The arbitration has not been completed. The arbitrator concluded that he was unable to proceed to quantify the debt in the absence of further submissions. In his interim award, the arbitrator specifically reserved jurisdiction to consider the submissions of the parties respecting the quantification of the debt owed to the respondent. Those submissions have not yet been made.

- [4] The respondents oppose the application on a variety of grounds, including that the proposed appeal raises no extricable question of law. Even if it does, I understand that the respondents will argue that the proposed appeal raises a settled point of law, not one of public importance requiring attention of this Court. In addition, the respondents submit leave should not be granted as the arbitrator found that the debt would survive bankruptcy on two independent bases, neither of which the applicant seeks to challenge on appeal; namely: (1) that he is estopped from relying on the release provisions of the BIA because he promised to repay the respondent after he was discharged from bankruptcy, and the respondent relied on this promise to his detriment by taking no steps to enforce the debt until after the discharge; and (2) that he promised to pay the respondent after his discharge from bankruptcy, thereby reaffirming the debt. In these circumstances, the respondents submit there is no risk of a miscarriage of justice because, even if the arbitrator erred in law in his articulation or application of s. 178(1)(e) of the BIA, the outcome would be the same.
- [5] I make no comment on the merits of the leave application or the respective positions of the parties to be advanced therein.
- [6] Importantly, for present purposes, the respondents object to the hearing of the application for leave to appeal at this time, arguing that it is premature.
- [7] I invited the parties to address this preliminary point first in oral argument.
- [8] Having done so, I agree with the respondents that the application for leave to appeal is premature and should be adjourned to await conclusion of the arbitration. I have come to this conclusion for the following reasons.
- [9] The agreement from which the debt arises contains an arbitration clause. It provides that, "[all] disputes, controversies and differences which may arise under this Agreement between the Parties which cannot be resolved between them shall be settled by arbitration".
- [10] The arbitration has not been concluded. The arbitrator has issued what amounts to an interim award, although it does finally dispose of some of the issues raised in the arbitration. Having filed the notice of application for leave to appeal within time pursuant to s. 60(1) of the AA, the applicant's right to bring on the leave application (or an expanded leave application premised on an additional award) is preserved. I do not see that he will be unduly prejudiced by the time that will pass between now and the conclusion of the arbitration. Indeed, the applicant makes no claim to prejudice flowing from adjournment of the leave application to the conclusion of the arbitration.
- [11] To be clear, I accept that I have the discretion to entertain the leave application at this time. I know of no hard and fast rule that a court will not hear an application for leave to appeal from an interim arbitral award. There may well be cases where the demands of justice and efficiency will weigh in favour of early intervention by a court in these circumstances.

- [12] But the policy of the law and the general rule is against it, in both civil and criminal proceedings: see, for example, the discussion in *ICBC v. Yuan*, 2009 BCCA 279, addressing prematurity in the context of a judicial review. In my view, the policy of the law and the general rule apply equally in this context.
- [13] There are a number of ways in which the public interest commends the general rule that cautions against entertaining appeals at an interlocutory stage of the proceedings. Some are evident in the circumstances of this case.
- [14] First, early judicial intervention will interrupt and fragment continuation of the arbitration. Granting leave at this stage would, therefore, interfere with the conclusion of a process the parties agreed to.
- [15] Second, it is not obvious to me that the delivery of submissions on the quantification of the debt would entail such a large expenditure of resources that the interests of justice, viewed in their totality, can be said to clearly favour allowing the leave application to go forward at this stage. I am aware of no other circumstances that suggest it would be desirable in the interests of justice to entertain the leave application now.
- [16] Third, it may be that the applicant's interest in pursuing leave will be diminished depending on the outcome of the arbitration as it relates to quantification of the debt. That, of course, cannot be known at this stage.
- [17] Fourth, I reiterate the absence of demonstrated prejudice to the applicant in holding his leave application in abeyance until the arbitration is concluded.
- [18] Fifth, entertaining the application at this time raises the spectre of more than one application for leave to appeal arising out of the same matter. The practice of litigating in slices should be avoided, as should the unnecessary expenditure of judicial resources that would flow from hearing one leave application now and, potentially, a second application upon conclusion of the arbitration. Although decided in a different context, the comments of Justice Newbury in *Desert Properties Inc. v. G&T Martini Holdings Ltd.*, 2024 BCCA 24 at paras. 22-24 are instructive on this point.
- [19] Finally, the concern is not confined to this case. It is not unusual for arbitrations to be concluded following the issuance of one or more interim awards. Both judicial economy and the public interest in avoiding a multiplicity of proceedings suggest to me that I should exercise my discretion to adjourn this leave application to the conclusion of the arbitration.
- [20] For the foregoing reasons, the application is adjourned pending conclusion of the arbitration. "The Honourable Mr. Justice Fitch"

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