

CANADA / JUDGMENT

## Clayworth v. Octaform Systems Inc.

2020 BCCA 117

COURT

British Columbia Court of Appeal

DECIDED

23 April 2020

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2020 BCCA 117 Clayworth v. Octaform Systems Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Clayworth v. Octaform Systems Inc.,

2020 BCCA 117

Date: 20200423

Docket: CA46131

Between:

Lisa Clayworth

Appellant

(Defendant)

And

Octaform Systems Inc. and Octaform Inc.

Respondents

(Plaintiffs)

Before:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Hunter

The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated May 7, 2019  
(Octaform Systems Inc. v. Clayworth, 2019 BCSC 711,

Vancouver Docket S188499).

Counsel for the Appellant:

J.A. Menten

Counsel for the Respondent:

M.J. Hewitt

N. Virk, Articled Student

Place and Date of Hearing:

Vancouver, British Columbia

December 10, 2019

Place and Date of Judgment:

Vancouver, British Columbia

April 23, 2020

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Mr. Justice Butler

Summary:

The appellant and respondent were parties to an employment agreement that included a dispute resolution clause. After the employment ended, a dispute arose as to whether the appellant had breached her employment agreement. After initially invoking the dispute resolution provisions of the agreement, the respondent commenced a civil action claiming various remedies, including damages and an injunction. The application by the appellant to stay the civil proceedings in favour of arbitration was dismissed. The appellant appeals. Held: Appeal allowed. There is an arguable case that the dispute concerns matters that fall within the arbitration clause. The chambers judge erred in determining the jurisdictional issue rather than referring it to the arbitrator.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] From November 2013 to July 2016, the appellant was employed by the respondent pursuant to an employment contract. One of the provisions of the employment agreement was that certain disputes were to be resolved through a staged mediation-arbitration process rather than through litigation.

- [2] After the appellant left her employment, a dispute arose concerning whether she had breached her agreement by the improper use of confidential information or trade secrets belonging to her employer.
- [3] At first, Octaform initiated proceedings under the mediation-arbitration clause provided for in the employment agreement. However, on August 2, 2018, the respondent filed a Notice of Civil Claim against the appellant alleging that she was wrongfully using confidential information and trade secrets acquired through her employment with Octaform, and claiming damages, an accounting of profits, an injunction to restrain further use of the information and an order for delivery of all documents in her possession.
- [4] The appellant applied for an order staying the civil proceedings, other than the application for an injunction, pursuant to s. 15 of the Arbitration Act. The basis for the application was that the matters raised in the action were matters that had been agreed to be referred to arbitration. The chambers judge, however, dismissed the application, holding that the dispute identified in the civil action was not a dispute covered by the arbitration clause. The question on this appeal is whether the chambers judge erred in this conclusion.
- [5] The position of the appellant is that the chambers judge erred by applying the wrong test in addressing the stay application, causing him to decide an issue that should have been referred to the arbitrator for an initial determination of jurisdiction.
- [6] For the reasons that follow, it is my view that the chambers judge did apply the incorrect test for a stay application under s. 15. The only question before the chambers judge was whether it was arguable that the matters raised in the civil action (other than the injunction) fell within the arbitration clause. If so, the determination of the scope of the clause should have been referred to arbitration. In this case, it was at least arguable that the dispute was within the scope of the arbitration clause. The proper disposition is to stay the civil proceedings (other than the injunction) in favour of resolution by the parties' chosen dispute resolution procedure.

## Background

- [7] In November 2013, the appellant Ms. Clayworth began working for the respondent Octaform Systems Inc. ("Octaform") in the position of Sales Process Coordinator. The parties signed an employment agreement prepared by Octaform. The employment agreement set out various obligations of the employee, including maintaining confidential information in strictest confidence and trust during the existence of the agreement as well as after the termination of the agreement.
  - [8] The employment agreement also contained a dispute resolution clause as follows:
17. Dispute Resolution

In the event of a dispute arising out of or in connection with this Agreement or the termination thereof, or in respect of any legal relationship associated with it or from it, which does not involve the Company seeking a court injunction or other relief relating to protection or enforcement of the Company's intellectual property, confidential information or restrictive covenants as provided in the Agreement, that dispute will be resolved confidentially as follows:

- (a) Amicable Negotiation - The Parties agree that, both during and after the performance of their responsibilities under this Agreement, each of them will make bona fide efforts to resolve any disputes arising between them by amicable negotiations;
  - (b) Mediation - If the Parties are unable to negotiate resolution of a dispute, either Party may refer the dispute to mediation by providing written notice to the other Party. If the Parties cannot agree on a mediator within thirty (30) days of receipt of the notice to mediate, then either Party may make application to the British Columbia Mediator Roster Society to have one appointed. The mediation will be held in Vancouver, B.C., in accordance with the British Columbia International Commercial Arbitration Centre's (the "BCICAC") under its Commercial Mediation Rules, and each Party will bear its own costs, including one-half share of the mediator's fees.
  - (c) Arbitration - If, after mediation, the Parties have been unable to resolve a dispute and the mediator has been inactive for more than 90 days, or such other period agreed to in writing by the Parties, either Party may refer the dispute for final and binding arbitration by providing written notice to the other Party. If the Parties cannot agree on an arbitrator within thirty (30) days of receipt of the notice to arbitrate, then either Party may make application to the British Columbia Arbitration & Mediation Institute to appoint one. The arbitration will be held in Vancouver, B.C., in accordance with the BCICAC's Shorter Rules for Domestic Commercial Arbitration, and each Party will bear its own costs, including one-half share of the arbitrator's fees.
  - (d) You expressly acknowledge that it is reasonable for any disputes under this dispute resolution paragraph to be mediated and/or arbitrated in Vancouver, British Columbia, given the Company's agreement to employ you remotely in Ontario.
- [9] Ms. Clayworth resigned from her employment with Octaform on June 22, 2016, and ceased working with the company on July 22, 2016.
- [10] On September 27, 2017, the solicitor for Octaform wrote to Ms. Clayworth alleging various breaches of her employment agreement. The letter began in this way:

It has come to Octaform's attention that you have been assisting and continue to assist one or more of Mr. Johnson, Huajun, Mr. Wang, and/or H-PAC in connection with their use of Octaform property, confidential information and intellectual property, and their efforts to compete with Octaform and solicit its customers. Your conduct in this regard is in breach of your employment and your post-employment obligations to Octaform pursuant to your employment agreement with Octaform

[Emphasis added.]

[11] The solicitor's letter referred to parts of the agreement under section 3, "Obligations of Employment", section 4 "Confidential Information" and section 5, "Restrictive Covenants".

[12] The letter then continued:

Given your involvement with Mr. Johnson, Huajun, Mr. Wang, and/or H-PAC, both before and after you ended your employment relationship with Octaform, you are in breach of the numerous terms of your employment agreement. Pursuant to section 17 of your Agreement, Octaform invites you to negotiate a resolution that will address your various breaches of your Agreement.

In the event that you do not wish to negotiate a resolution, then pursuant to section 17(b) of your Agreement, Octaform hereby provides you with notice to initiate mediation pursuant to said section, which reads as follows:

Mediation - If the Parties are unable to negotiate resolution of a dispute, either Party may refer the dispute to mediation by providing written notice to the other Party. If the Parties cannot agree on a mediator within thirty (30) days of receipt of the notice to mediate, then either Party may make application to the British Columbia Mediator Roster Society to have one appointed. The mediation will be held in Vancouver, B.C., in accordance with the British Columbia International Commercial Arbitration Centre's (the "BCICAC") under its Commercial Mediation Rules, and each Party will bear its own costs, including one-half share of the mediator's fees.

If you choose not to engage in good faith negotiations to resolve your various breaches of your Agreement, pursuant to section 17(b) of your Agreement, we suggest the following mediators to assist you and Octaform resolve your breaches of your Agreement:

[13] The procedure proposed by Octaform tracks the dispute resolution process set out in the employment agreement.

[14] On October 13, 2017, the solicitor for Ms. Clayworth responded and asked for "further information regarding these alleged breaches that you seek to amicably resolve with our clients". The solicitor for Octaform responded by letter on November 14, 2017 with several pages of particulars of which the most salient are the following:

Octaform alleges that Ms. Clayworth is liable to Octaform Systems for:

- (a) Breach of contract: Ms. Clayworth's conduct, as set out in paragraphs 4 to 6, constitutes a breach of her employment and post-employment obligations to Octaform Systems pursuant to sections 3, 4, and 5 of the Clayworth Agreement [the employment agreement] and at common law.
- (b) Breach of duty of loyalty: Ms. Clayworth owed Octaform Systems a duty of loyalty, which required them to maintain, in good faith, Octaform Systems; best interests over anyone else's interests. She breached this duty of loyalty.

- (c) Conspiracy: Ms. Clayworth, in conjunction with one or more of Mr. Westlake, Mr. Ehrenpreis, Mr. Johnston, Ms. Johnston-Lozano, Mr. Wang, H-PAC, and/or Huajun, acted in concert, by agreement, understanding, or with a meeting of the minds, whether explicit or by tacit agreement, to commit unlawful acts for the purpose of harming Octaform Systems.

Please note that the above particulars consist of the actions of Ms. Clayworth that Octaform Systems is aware of. It is likely in the circumstances that Ms. Clayworth has committed various other breaches of her duties and covenants to Octaform Systems, including her restrictive covenants. If unable to settle its claims against Ms. Clayworth, Octaform Systems will be seeking to uncover more of Ms. Clayworth's wrongdoing during the course of discovery.

- [15] The solicitors for the parties exchanged further correspondence concerning the mediation through the first half of 2018, but on August 2, 2018, Octaform filed a Notice of Civil Action against Ms. Clayworth in the Supreme Court of British Columbia. The civil claim set out the same section 4, "Confidential Information", that had been relied on in Octaform's September 27, 2017 letter, and alleged that Ms. Clayworth had "made use of the confidential information or trade secrets and has unlawfully made or will make profits for herself".
- [16] Under the heading "Unlawful Use of Trade Secrets", the Notice of Civil Claim alleged that Ms. Clayworth "conspired with" various individuals "to unlawfully utilize confidential information and trade secrets, the Property of the Plaintiff, to operate a separate business interest or interests for their personal profit." Further allegations were made of acts "in furtherance of the said conspiracy".
- [17] In Part 2 of the Notice of Civil Claim, Octaform claimed as follows:
1. The Plaintiff claims an injunction to restrain the Defendant from using the confidential information or trade secrets of the Plaintiff, or any part thereof, of the Plaintiff, or otherwise exploiting the confidential information or trade secrets or any part thereof. The Plaintiff claims an order for delivery up to the Plaintiff of all documents in the possession of the Defendant as may offend the injunction sought above.
  2. The Plaintiff claims an account of all monies, profits and benefits made and received by the Defendant for and on account of the Plaintiff.
  3. The Plaintiff claims payment of the amount found to be due to the Plaintiff on taking the account.
  4. The Plaintiff claims damages.
  5. The Plaintiff claims interest pursuant to the Court Order Interest Act, R.S.B.C. 1996, c. 79.
  6. The Plaintiff claims costs.
- [18] In Part 3 of the claim, Octaform made clear that the basis of the damage claim was the alleged "acts in furtherance of the conspiracy".

[19] Ms. Clayworth took the position that the claims advanced in the Notice of Civil Claim were claims that were required to be (and had been) referred to mediation and arbitration pursuant to section 17 of the employment agreement, and called on Octaform to remove all but paragraphs 1, 5 and 6 of Part 2 of the Notice of Civil Claim. When that was not done, Ms. Clayworth filed an application to stay the civil action, other than in respect of the injunction, pursuant to s. 15 of the Arbitration Act, R.S.B.C. 1996, c. 55.

#### The General Rule on Stay Applications under the Arbitration Act

[20] Section 15 of the Arbitration Act reads as follows:

#### Stay of proceedings

15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.

- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
- (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.
- (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

[21] The general rule in British Columbia on a stay application under s. 15 is that the court proceedings should be stayed whenever the applicant makes out an arguable case that the parties have agreed that the dispute is one that is to be resolved by arbitration.

[22] The legislative history of s. 15 indicates a legislative intention to limit the power of the courts to intervene where the parties have agreed that a matter should be submitted to arbitration. When the British Columbia Legislature modernized the Arbitration Act in 1986 (Commercial Arbitration Act, S.B.C. 1986, c. 3), courts were given a broad jurisdiction to refuse to stay civil proceedings in favour of arbitration. Two years later, s. 15 was amended by S.B.C. 1988, c. 46, s. 11 to limit the grounds upon which a court could refuse to grant a stay of proceedings: see the joint dissenting judgment of Justices LeBel and Deschamps in *Seidel v. TELUS Communications Inc.*, 2011 SCC 15, at paras. 104-107.

[23] In *Gulf Canada Resources v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), this Court considered the role of a court on a stay application under s. 8 of the International Commercial Arbitration Act, S.B.C. 1986, c. 14, the wording of which is virtually identical to the amended s. 15 of the current Arbitration Act. Justice Hinkson explained that if there was an arguable case that the dispute fell within the arbitration clause, it should be referred to the arbitrator for determination of the scope of the clause:

it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.

Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

[Emphasis added.]

[24] The effect of this approach is to confirm the "competence-competence" principle whereby jurisdictional issues relating to the scope of the arbitration agreement are to be resolved in the first instance by the arbitrator. This principle was described by Newbury J.A. as "long-standing in Canada" in *McMillan v. McMillan*, 2016 BCCA 441 at para. 27 and was endorsed by both the majority (at para. 28) and minority (at para. 114) judgments in *Seidel*.

[25] The arguable case test from *Gulf Canada Resources* was applied by this Court in *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 ("If it is arguable whether the prerequisites have been met, then the stay should be granted and the issue can be resolved in the arbitration"), in *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at paras. 24-30 and in *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at para. 35.

[26] The Supreme Court of Canada considered the role of the court on a stay application in *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34. After reviewing what she described as "two schools of thought" concerning the question whether the courts or the arbitrator should determine the scope of the arbitrator's jurisdiction, Justice Deschamps for the majority concluded that challenges to the arbitrator's jurisdiction should be resolved in the first instance by the arbitrator, unless the challenge is based on a question of law:

[84] First of all, I would lay down a general rule that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law.

[85] If the challenge requires the production and review of factual evidence, the court should normally refer the case to arbitration, as arbitrators have, for this purpose, the same resources and expertise as courts. Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.

[Emphasis added.]

[27] The dissenting judges, Bastarache and LeBel JJ., also accepted the principle of judicial deference set out by Deschamps J., but differed on their application to the case:

[165] It is relatively well accepted that the competence-competence principle applies to the jurisdictional challenges regarding the applicability of the arbitration agreement. In any challenge to arbitral jurisdiction alleging that the dispute does not fall within the scope of the arbitration clause, it has been established that courts ought to send the matter to arbitration and allow the arbitrator to decide the question, unless it is obvious that the dispute is not within the arbitrator's jurisdiction. However, whether courts ought to generally send the matter to arbitration when the validity of the arbitration agreement itself is challenged, is more controversial.

[Emphasis in original; citations omitted.]

[28] Because Dell addressed the Quebec Civil Code in considerable detail, there was initially some uncertainty as to whether these principles applied to the British Columbia legislation. That uncertainty was laid to rest by this Court's judgment in *MacKinnon v. National Money Mart Company*, 2009 BCCA 103, and by the Supreme Court of Canada's judgment in *Seidel*. In *MacKinnon*, Newbury J.A. conducted a careful examination of the two legislative regimes and concluded at para. 69 that the "legislative direction given to courts of law to defer to arbitral jurisdiction under s. 15(2) is just as mandatory as the counterpart provision of the Code of Civil Procedure of Quebec".

[29] In *Dell*, the standard for assessing the applicability of an arbitration clause to a particular dispute was characterized as a "prima facie analysis" test, whereby disputes are to be referred to arbitration if they prima facie fall within the arbitration clause. *Gulf Canada Resources* was cited as an example where the prima facie analysis was extended to cases concerning the applicability of an arbitration clause: *Dell* at para. 82; see also *MacKinnon*, where *Gulf Canada Resources* was described at para. 49 as "an early version of the 'prima facie' analysis" test.

[30] As suggested in Dell, I do not consider there to be a difference in substance between the arguable case test articulated in Gulf Canada Resources or the prima facie test expressed by Deschamps J. The significance of both standards is that there is room for a judge to dismiss a stay application when there is no nexus between the claims and the matters reserved for arbitration, while referring to the arbitrator any legitimate question of the scope of the arbitration jurisdiction. This avoids duplication and respects the competence-competence principle. I will follow the guidance of this Court's judgments in Gulf Canada Resources and Sum Trade and refer to the test as the "arguable case" test.

### The Question of Law Exception

[31] As stated in Dell (and reiterated in Seidel), a court may resolve the jurisdictional question if the challenge to the arbitrator's jurisdiction is based on a question of law (or, as expressed in Seidel, a pure question of law). Justice Deschamps provided an illustration of the "question of law" exception in these terms, relating specifically to provisions in the Quebec Civil Code:

[87] As for the exception under which a court may rule first on questions of law relating to the arbitrator's jurisdiction, this power is provided for in art. 940.1 C.C.P., which in fact recognizes that a court can itself find that the agreement is null rather than referring this issue to arbitration.

[Emphasis added.]

[32] The analogue to this example in the B.C. Arbitration Act is s. 15(2), which provides that "the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed" (emphasis added).

[33] In Seidel, the Court provided another example of the limited circumstance in which a stay application might raise a question of law for a court to properly decide:

[29] I agree with my colleagues LeBel and Deschamps JJ. (at para. 114) that in these circumstances, absent legislated exception, any challenge to an arbitrator's jurisdiction over Ms. Seidel's dispute with TELUS should first be determined by the arbitrator, unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record" (Dell, at para. 85). See also, Unifund Assurance Co. v. Insurance Corp. of British Columbia, 2003 SCC 40, [2003] 2 S.C.R. 63, at paras. 37-38.

[30] Whether or not s. 172 of the BPCPA has the legal effect claimed for it by Ms. Seidel was a question of law to be determined on undisputed facts. Accordingly, it was properly entertained by the Supreme Court of British Columbia in the first instance. The competence-competence principle was not violated.

[Emphasis added.]

- [34] If the challenge is one of mixed fact and law, a judge may resolve it if a question of law can be extracted with only a superficial consideration of the record in the case.
- [35] With that review of the applicable legal principles, I turn to the chambers judgment.

### The Chambers Judgment

- [36] In his review of the principles applicable to the stay application at bar, the chambers judge referred to the arguable case test set out in *Gulf Canada Resources* and the "question of law" exception stated in *Dell* and restated in *Seidel* as a "pure question of law". The judge then characterized the issue before him in these terms:
- [28] Whether the plaintiffs' claims fall within the exception to dispute resolution under the Agreement is a question of law. It involves interpreting the pleadings in relation to the Agreement. The issue, therefore, is whether there is an arguable case that the plaintiffs' claims in this action fall within the matters agreed to be submitted to arbitration. If so, the action must be stayed.
- [37] Ms. Clayworth submits that the first sentence of the judge's statement of issue is wrong; the third sentence is a correct statement of the issue, but is not the question the chambers judge addressed.
- [38] The judge's analysis is contained in these paragraphs of his judgment:
- [33] In the Notice of Civil Claim, the plaintiffs allege breaches of trust and confidence with the use of confidential information. On a review of the language of the definitions contained in the Agreement set forth above, the plaintiff's claims in the Notice of Civil Claim are not precluded by paragraph 16 nor paragraph 17 of the Agreement. Based on the plain meaning of paragraph 17, I find that plaintiffs' claims are claims for "other relief relating to the protection or enforcement of the Company's intellectual property, confidential information or restrictive covenants" as provided for in the Agreement." They claim damages on the basis of the defendant's alleged misuse, contrary to her obligations under the Agreement, of Octaform System's confidential information and intellectual property. The action seeks to enforce the contractual rights of Octaform Systems. The language in the exception in paragraph 17 is broad enough to capture these claims.
- [34] The defendant seeks a stay of proceedings or the striking of certain paragraphs from the Notice of Civil Claim, in particular, paragraphs 2, 3 and 4 of Part 2 of the Notice of Civil Claim. The stay of proceedings sought suggests that the remedies available to the plaintiff are limited to an injunction. That limitation is contrary to a plain reading of the provisions of the Agreement, noted above. On that basis, a stay of proceedings in this action is not available to the defendant.

[35] With respect to striking out paragraphs 2, 3, and 4 of Part 2 of the Notice of Civil Claim, only in clear and obvious cases should a court consider the striking of pleadings. In the case at bar, the broad nature of the inclusion of remedies provided in the paragraphs 16 and 17 of the Agreement do not appear to limit the Notice of Civil Claim in the manner argued by the defendant, and as a result this is not a clear and obvious case where these parts of the pleading should be struck.

## Conclusion

[36] On a plain reading of the Agreement, the claims made in the plaintiffs' Notice of Civil Claim are clearly not matters agreed to be submitted to arbitration. Those claims are captured by the exception in paragraph 17 of the Agreement. As a result, the application of the defendant for a stay of proceedings and for the striking of paragraphs 2, 3 and 4 of Part 2 of the Notice of Civil Claim are dismissed.

[Emphasis added.]

[39] The judge did not analyse the correspondence between the parties initiated by Octaform concerning the dispute that Octaform referred to the mediation-arbitration process.

[40] The issue for this appeal is whether the chambers judge applied the correct test for assessing an application for a stay of proceedings under s. 15 of the Arbitration Act.

## Analysis

Was the question before the chambers judge a question of law?

[41] The appellant submits that the chambers judge committed an error of law when he stated in para. 28 that:

Whether the plaintiffs' claims fall within the exception to dispute resolution under the Agreement is a question of law.

[42] The appellant points out that the interpretation of a contract (other than a standard form contract) is generally a question of mixed fact and law, citing *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32. In answer to this ground of appeal, Octaform submits that even if the judge was in error in characterizing the task before him as a question of law, his reasons illustrate an appreciation of the fact that his decision involved a question of mixed fact and law.

[43] I agree with the appellant that a disagreement as to whether a particular dispute falls within an arbitration clause is not a question of law. To the extent that the chambers judge treated the issue before him as a question of law, and therefore exempt from the general rule in *Dell* that in any case involving an arbitration clause a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator, the judge was in error.

- [44] Characterizing the question as one of mixed fact and law does not establish that the judge applied the correct test. I agree that the interpretation of the scope of the arbitration clause is a question of mixed fact and law. It requires an analysis of the nature of the dispute and an interpretation of the arbitration clause, considered with the terms of the contract as a whole in their factual context: *St. Pierre* at para. 21. The question before the chambers judge was who should undertake this analysis, the application judge or the arbitrator.
- [45] The consistent answer since *Gulf Canada Resources* is that if an arguable case is made out, it is not for the court on an application for a stay of proceedings to reach a final determination as to the scope of the arbitration agreement; the dispute should be referred to the arbitrator.

Did the Judge apply the Arguable Case Test?

- [46] Octaform submits that further along in para. 28 of the judge's reasons, the judge correctly stated the question as "whether there is an arguable case that the plaintiffs' claims in this action fall within the matters agreed to be submitted to arbitration".
- [47] In my opinion, while the chambers judge did state the correct test in the part of para. 28 of his judgment that Octaform relies on, his analysis does not support the conclusion that he applied the test he had stated. He did not assess the question whether there was an arguable case that the dispute fell within the arbitration clause, but instead made a final determination as to the scope of the exception to the arbitration clause, contrary to *Gulf Canada Resources*. Where a judge states the test correctly but fails to apply that test, the judge commits an error of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 44.
- [48] Applying the arguable case test leads to the conclusion that the stay should be granted. The dispute concerned an allegation of breach of contract, which is "a dispute arising out of or in connection with this Agreement" within the terms of s. 17. The gravamen of the complaint is that the appellant failed to abide by her obligations concerning Octaform's confidential information, a central term of the employment agreement. The fact that the civil action concerns what appear to be the same allegations of misconduct that the respondent had already referred to the s. 17 mediation-arbitration process supports the conclusion that it is at least arguable that this dispute was one that the parties had agreed would be resolved through their agreed upon dispute resolution procedure.

## The Claim for Equitable Remedies

- [49] The respondent has also argued that the equitable remedies claimed in the civil action support the correctness of the chambers judge's decision. The argument is based in part on a provision of the employment agreement that directly precedes the mediation-arbitration clause:

### 16. Equitable Remedies

You hereby acknowledge and agree that a breach of your obligations under this Agreement would result in damages to the Company [i.e., Octaform Systems] that could not be adequately compensated for by monetary award. Accordingly, in the event of any such breach by you, in addition to all other remedies available to the Company at law or in equity, the Company will be entitled as a matter of right to apply to a Court of competent jurisdiction for such relief by way of restraining order, injunction, degree or otherwise, as may be appropriate to ensure compliance with the provisions of this Agreement.

- [50] Octaform submits that this reference to equitable remedies reinforces its assertion that the exception to arbitration in s. 17 was intended to exclude all claims for equitable remedies, leaving them to be determined by the courts. Octaform also submits that s. 23 of the Arbitration Act does not permit arbitrators to grant equitable relief, and accordingly the parties must have intended that they could apply to court for equitable remedies such as damages for breach of confidence, and an accounting of profits wrongfully made, as claimed in the civil action.
- [51] Octaform reinforces this argument by pointing out that the parties agreed in their employment agreement to utilize in their arbitration the BCICAC's Shorter Rules for Domestic Commercial Arbitration which do not include any express authority for the arbitrator to grant equitable relief.
- [52] Octaform accepts that on this analysis, a breach of contract claim may have to be resolved in two separate forums, before an arbitrator for legal remedies and before the courts for equitable remedies, but says that this is implicit in the structure of the dispute resolution clause chosen by the parties.
- [53] I am unable to accept this submission. The development of the s. 15 jurisprudence has been predicated on the undesirability of the same dispute being adjudicated in two separate dispute resolution forums. As long as there is an arguable case that the arbitration clause applies, it is the arbitrator who should determine whether the dispute is one that has been agreed to be referred to arbitration for resolution. The courts maintain a measure of supervisory jurisdiction over this decision through ss. 30 and 31 of the Arbitration Act. The fact that the parties have carved out injunctions for court proceedings in both ss. 16 and 17 of the employment agreement is consistent with the longstanding jurisdiction of courts to make interim orders in aid of arbitration, as reflected in s. 15(4) of the Arbitration Act. It may also be arguable that the exception in s. 17 goes further than the traditional exclusion of injunction proceedings, but that is a question of the scope of the clause that is reserved to the arbitrator at first instance. If both positions are arguable, the dispute should be referred to arbitration.
- [54] As to the argument concerning the arbitrator's limited jurisdiction to grant equitable relief, I agree that there is authority to support the argument that an arbitrator in British Columbia acting under the Arbitration Act lacks this authority, although I do not consider the issue to be definitively resolved. It is unnecessary to do so in this appeal. If the parties agreed that

the disputes arising under the employment agreement were to be resolved by arbitration, with whatever limitations apply to arbitral jurisdiction under the Arbitration Act and the Shorter Arbitration Rules, it is no answer to say that the courts should be invoked to fill the gaps. The parties should be held to the dispute resolution mechanism they chose. As the Supreme Court of Canada has recently pointed out in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19:

- [55] The policy that parties to a valid arbitration agreement should abide by their agreement goes hand in hand with the principle of limited court intervention in arbitration matters. This latter principle has been described as a "fundamental principle underlying modern arbitration law"
- [56] In my view, the fact that Octaform has chosen to seek equitable remedies in their civil action has no relevance to the issue that was before the chambers judge. The question on the stay application was whether there was an arguable case that the dispute between the parties was one that the parties had agreed should be decided by arbitration. In my view, there was such an arguable case and the stay should have been granted.

Should paragraphs 2, 3 and 4 of the Relief Sought be struck?

- [56] Before the chambers judge, the appellant sought an order striking paragraphs 2, 3 and 4 of the Relief Sought in the civil action. These are the paragraphs seeking remedies other than the injunction and the order for delivery up of documents. The chambers judge dismissed this part of the application on the ground that it was not clear and obvious that these pleadings should be struck.
- [57] Although I am of the view that a stay of proceedings other than the claim for an injunction and delivery up of confidential information should be granted, I would not interfere with the order of the chambers judge leaving the pleadings intact. A stay is not a dismissal; it simply holds the proceedings in abeyance until the arbitrator does the work that the parties agreed should be arbitrated: *Houm Services Inc. v. Lettuce Eatery Development Inc.*, 2020 BCSC 430 at para. 50. If the arbitrator determines the dispute is not one that has been agreed to be referred to arbitration for resolution, or there are matters that remain unresolved after the dispute resolution procedures chosen by the parties have run their course, it is open to the respondents to apply to lift the stay. Whether that is appropriate can be determined based on circumstances as they exist at that time.

## Disposition

- [58] For these reasons, I would allow the appeal and stay the civil action, except for the remedies sought in paragraph 1 of Part 2 of the Notice of Civil Claim. The appellant is entitled to her costs of the appeal and of the application in the Supreme Court of British Columbia.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Mr. Justice Butler"

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Prepared on 28 October 2026 · Esheria