

CANADA / JUDGMENT

Grewal v. Mann

2021 BCSC 220

COURT

Supreme Court of British Columbia

DECIDED

18 January 2021

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2021 BCSC 220 Grewal v. Mann

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Grewal v. Mann,

2021 BCSC 220

Date: 20210118

Docket: S207009

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 May 15, 2020

Between:

Sukhwinder Grewal

Petitioner

And

Amarjit Mann and Navtej Bains

Respondents

Before: The Honourable Mr. Justice Edelman

Oral Reasons for Judgment

Counsel for the Petitioner, via teleconference:

R. Cooper

Counsel for the Respondents, via teleconference:

N. Muirhead

Place and Date of Hearing:

Vancouver, B.C.

January 18, 2021

Place and Date of Judgment:

Vancouver, B.C.

January 18, 2021

- [1] This is an application brought pursuant to s. 31 of the Arbitration Act, R.S.B.C. 1996, c. 55 for leave to appeal an arbitration decision issued by arbitrator Wally Oppal, Q.C. on May 15, 2020.
- [2] The decision addressed the entitlement of the respective parties to approximately \$1.4 million in the context of a settlement agreement.
- [3] The parties are former business partners. One of the joint properties owned by the parties during their business association was a property located in Gibsons that was purchased in 2008, which the parties co-owned with several other individuals.
- [4] After several years as business partners, irreconcilable differences developed between Mr. Grewal on the one hand and Mr. Mann and Mr. Bains on the other. On or about May 27, 2014, the parties entered into an agreement that outlined a process for the parties to separate all their business and financial affairs through mediation and arbitration, with Mr. Oppal acting as a mediator and, if necessary, arbitrator.
- [5] On October 30, 2015, the parties entered into a binding settlement agreement recorded in an email exchange between counsel. The Agreement required Mr. Mann and Mr. Bains to pay Mr. Grewal \$18.6 million in instalments and transfer to him their interests in the Gibsons Property. Clause 4 of the agreement addressed the Gibson's property in the following terms:
 - 4. All Mann and Bains' interest in Gibsons transferred to Sukhi. Mann and Bains will quit claim their interests in the property and their shares in the bare trustee will be redeemed for \$1. An appraisal of the value of the parties interest in the land will be conducted within 30 days by an appraiser appointed by the mediator [sic]/arbitrator. If the value of the interest of the parties in the land is less than \$2,000,000, the difference between \$2,000,000 and that lesser value will be added to the payment in paragraph 2 above. If the value of the interest of the parties in the land is greater than \$2,000,000, the difference between \$2,000,000 and that greater value will be deducted from the payment in paragraph 2 above.

- [6] In March 2016, the Arbitrator appointed Eugene Steckley to conduct an independent appraisal of the Gibsons Property. The instruction email sent to Mr. Steckley directed him to provide an opinion on the market value of the Gibsons Property as at October 30, 2015. In an appraisal report dated April 11, 2016, Mr. Steckley concluded that the value of the Gibsons Property as of October 30, 2015 was \$4,040,000.
- [7] The parties' collective interest in the Gibsons Property at the time of settlement was 43.3%. The valuation of \$4,040,000 corresponded to a collective interest as of the date of settlement of \$1,750,666.66. Pursuant to paragraph 4 of the Agreement, as the value of the parties' collective share of the Gibsons Property was less than \$2 million, Mr. Grewal took the position that the difference (being \$249,333.34) ought to have been added to the outstanding instalment payment owing to him. Due to a misunderstanding that the parties' interest was in fact 50%, Mr. Mann and Mr. Bains sought credit for \$20,000 based on the amount set out in the Steckley valuation.
- [8] By June 2017, Mr. Mann and Mr. Bains had still not signed quit claims of their beneficial interests in the Gibsons Property, and would not allow the sale to complete unless Mr. Grewal signed a direction to hold 50% of the proceeds in trust. Mr. Grewal acceded to the condition, reserving his rights to the proceeds based on the terms of the settlement. The Gibsons Property was sold on June 23, 2017 for \$7,980,000.
- [9] On July 5, 2018, Mr. Mann and Mr. Bains advanced a claim in the arbitration seeking to obtain the proceeds in excess of \$2 million held in trust. It was this claim that was addressed in the decision subject to this application for leave to appeal.
- [10] Mr. Mann and Mr. Bains relied on a "technical review" report authored by Deal Doolan citing a number of alleged deficiencies in the Steckley valuation. Mr. Mann and Mr. Bains argued that the Steckley valuation should be ignored and the parties' interest in the Gibsons Property instead be valued based on the sale price in June 2017, with the result that Mr. Mann and Mr. Bains would be entitled to the funds in excess of the \$2 million payable to Mr. Grewal.
- [11] In response to Mr. Mann and Mr. Bains' application, Mr. Grewal tendered a report authored by Sandra Cawley, which concluded that Mr. Steckley did not undervalue the Gibsons Property as at October 30, 2015. Ms. Cawley also concluded that there was a 70% increase in the market value from October 2015 to June 2017.
- [12] The parties held a one-day hearing before the Arbitrator on December 2, 2019. The Arbitrator issued a decision on May 15, 2020. The decision consists of some 13 paragraphs, concluding with the following "Analysis and Conclusion":
11. The starting point in any discussion on this point is that Mann and Bains were to pay Grewal a total sum of \$20.6 million in property and cash. Of that sum, \$18.6 million was to be paid in 3 installments. The remaining \$2.0 million was to come from the sale of the Gibsons Property. That much is clear from the wording of paragraph 4. The \$2.0 million was clearly a

part of the \$20.6 million. It was never the intention of the parties to transfer the property to Grewal unconditionally. The Gibsons transfer to Grewal was not a stand-alone transaction. In fact the parties carefully considering the wording that went into paragraph 4. The formula is not complicated. If the value was less than \$2.0 million then Mann and Bains would be required to make up the shortfall through an additional payment. However, if it was in excess of \$2.0 million it would be deducted from the total purchase price stated in paragraph 2. If I were to accede to Grewal's argument, the total purchase price would exceed \$20.6 million. That clearly was not the intention of the parties.

12. I pause here to note that much has been said about the value of the property. With respect, Mr. Steckley's appraisal seems to be somewhat suspect in light of the questions raised by Mr. Doolan and of course the eventual sale price. In any event as stated above, the intentions of the parties was to pay Grewal \$20.6 million. Of that amount, \$18.6 billion [sic] was to be paid in installments, the remaining \$2.0 million was to come from the sale of the Gibsons Property.
14. In reaching my decision the overall consideration must be the intent of the parties which is embodied in paragraph 4 of the settlement agreement. In summary it is not in dispute that the total purchase price was \$20.6 million. As well there is no dispute that \$18.6 million was to be paid in installments. Accordingly there will be an order that of the monies that are held in trust with McQuarrie Hunter, \$2.0 million ought to be paid to Grewal while her [sic] remaining funds will be paid to Mann and Bains.

Analysis

[13] The arbitration was conducted in accordance with the provisions of the Arbitration Act, R.S.B.C. 1996, c. 55. Pursuant to s. 31 of the Arbitration Act, a party to an arbitration may appeal to the court on any question of law arising out of an award if the Supreme Court grants leave. Pursuant to ss. 31(2), the court may grant leave on a question of law if:

- (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.

[14] As Mr. Justice Hunter noted in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448, there are three distinct requirements that must be met before leave can be given to appeal an arbitration award:

- (1) the appeal must be based on a question of law arising out of the award;

- (2) the leave judge must be satisfied that one of the three circumstances identified ins. 31(2) of the Arbitration Act exists; and
- (3) the leave judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave".

[15] In my view, the present application turns primarily on the first question.

Is the Appeal based on a Question of Law

[16] The Petitioner alleges three errors by the Arbitrator which he frames as questions of law:

- (1) the Arbitrator disregarded the valuation process for the Gibsons Property provided in paragraph 4 of the Agreement and created instead a new valuation process for the Gibsons Property not provided in the Agreement, effectively creating a new agreement between the parties;
- (2) the Arbitrator failed to apply the correct legal test to the respondents' challenge to the Steckley Valuation that was commissioned by Mr. Oppal, Q.C. in accordance with paragraph 4 of the Agreement; and
- (3) the Arbitrator ignored, forgot or misconceived the evidence concerning the timing of the respondents' challenge to the Steckley Valuation.

[17] I will address each of the issues in turn.

[18] The first issue is grounded in the interpretation of the contract, and the allegation that the arbitrator allowed his focus on the overall factual matrix to overwhelm the words of the contract. This framing is clearly grounded in the language used by the Supreme Court of Canada in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 which addressed the question of when contractual interpretation raises an extricable question of law rather than a question of mixed fact and law. As the Court said at paragraph 63:

[63] In *Sattva*, this Court accepted that, in rare circumstances, the application of an incorrect principle or the failure to apply a principle could give rise to an extricable question of law (paras. 53 and 62-64; see also *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 21, citing *Housen*, at para. 36). As the Court recognized in *Sattva*, the use of the factual matrix in contractual interpretation is limited by the legal principle that contractual interpretation must remain grounded in the text of the contract so as to avoid effectively creating a new agreement between the parties.

[19] I am satisfied the petitioner has raised an arguable case that the Arbitrator allowed the factual matrix to overwhelm the text of the contract and has therefore raised an extricable question of law for the purposes of leave. In particular, I note that clause 4 of the contract on its face appears to require the transfer of the Gibsons property to the petitioner, and not simply the transfer of \$2 million. Not only does the Arbitrator's decision fail to engage with this aspect of the contractual text, but selects a valuation method directly at odds with the

Petitioner's ownership of the property. I am unable to discern any engagement or justification in the decision for a valuation date of July 2017, if the Petitioner was to be the owner of the property as of October 2015. I note that my comments are based on a preliminary review of the materials before me at the leave stage and should not be taken as binding on a judge ultimately hearing the case.

- [20] The second issue frames the application before the Arbitrator as a challenge to the Steckley valuation. This issue is arguably related to the question of the choice of valuation, and it is less clear to me that on its own it raises an extricable question of law that is decisive, as it relies on the premise that the Steckley valuation was completed in accordance with the contract. I am, however, satisfied that there is an arguable case the approach set out in *Legal & General Life of Australia Ltd. v. A. Hudson Pty. Ltd.* (1985), 1 NSWLR 314 would apply and this is an issue that should be left to the appeal judge in the circumstances.
- [21] The third issue is one of misapprehension of the evidence. The Respondents do not appear to take issue with the allegation that the Arbitrator erred in finding that the Respondents "immediately questioned the validity of the [Steckley] appraisal". On the record before me, it would appear there was no evidence before the Arbitrator that the Respondents challenged the Steckley appraisal until sometime after the sale of the Gibsons property in 2017. In the intervening period, far from questioning the validity of the appraisal, it would appear that the Respondents sought to rely on the Steckley appraisal in the allocation of credit between the parties.
- [22] The Court of Appeal noted in *Aubrey v. Teck Highland Valley Copper Partnership*, 2017 BCCA 144 that it is "well-established that it is an error of law to make a finding of fact for which there is no evidence" (see also the comments of the Supreme Court of Canada in *R. v. J.M.H.*, 2011 SCC 45 at para. 25). I am satisfied on the record before me that the alleged failure to consider the evidence would constitute an error of law. I am also satisfied there is an arguable case that the error could have had a material effect on the Arbitrator's assessment of the appropriate valuation method to be used in the circumstances.

Justification for leave under s.31(2)

- [23] The Respondent relies on s.31(2)(a):
- (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
- [24] I am satisfied, in particular given the amount of money involved, that the importance of the result to the parties justifies the intervention of the court. I am also satisfied given the nature of the alleged errors set out above that the determination of the points of law may prevent a miscarriage of justice.

[25] Without commenting on the ultimate merits of the appeal, in my view, the issues raised by the Petitioner are far from frivolous and I am satisfied that I should exercise my discretion to grant leave.

[26] Leave is granted in accordance with these reasons.

[27] Costs will be in the cause.

"Edelmann J."

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