

CANADA / JUDGMENT

Hotel Georgia Development Ltd. v. The Owners, Strata Plan EPS849

2021 BCSC 1236

COURT

Supreme Court of British Columbia

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2021 BCSC 1236 Hotel Georgia Development Ltd. v. The Owners, Strata Plan EPS849

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hotel Georgia Development Ltd. v. The Owners, Strata Plan EPS849,

2021 BCSC 1236

Date: 20210624

Docket: S208222

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 22, 2020

Between:

Hotel Georgia Development Ltd.

Petitioner

And

The Owners, Strata Plan EPS849

Respondent

Before: The Honourable Madam Justice MacNaughton

Reasons for Judgment

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Place and Date of Trial/Hearing:

Vancouver, B.C.

March 25-26, 2021

Place and Date of Judgment:

Vancouver, B.C.

June 24, 2021

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Introduction

- [1] Pursuant to s. 31 of the former Arbitration Act, R.S.B.C. 1996, c. 55 [AA], the petitioner, Hotel Georgia Development Ltd. ("HGD") seeks leave to appeal a May 22, 2020, arbitral award (the "Partial Final Award") of Arbitrator Murray Clemens, Q.C. (the "Arbitrator") on the basis that the Arbitrator committed certain errors of law.
- [2] Alternatively, pursuant to s. 30 of the AA, HGD seeks to set aside the Partial Final Award on the basis of an arbitral error, specifically, that the Arbitrator failed to observe the rules of natural justice.

The Background in the Partial Final Award

- [3] The underlying dispute involves the interpretation of a reciprocal easement agreement ("REA") and, in particular, the cost sharing arrangements under it. The REA was entered into between the owners of three parcels that, together, form the development known as the Hotel Georgia. Hotel Georgia is a 48-level luxury mixed-use hotel, commercial, and residential development (the "Development").
- [4] This disagreement arises over whether certain expenses are covered by the cost sharing provisions of the REA.

The Alleged Errors

- [5] In its petition, HGD framed the Arbitrator's legal errors as follows:
- (a) Did the Arbitrator err in applying an incorrect legal principle, or failing to apply a required legal principle, in finding that the costs comprising "Shared Costs" for the purposes of Article 8 and Schedule D of the REA did not include the costs HGD incurred to operate and maintain the Hotel Porte Cochere, the hotel recreational facilities, and the shared refuse

area, to the standard of a first-class residential/commercial development located in the City of Vancouver, contrary to the express provisions of the REA, namely s. 6.4(b), and the definition of "Repair" set out in Section 1.1(bbbb)(iv)?

- (b) Did the Arbitrator err in applying an incorrect legal principle, or failing to apply a required legal principle, in finding that property taxes were not "Shared Costs" contemplated by Schedule D of the REA, contrary to the express definition of "Shared Costs" set out in the REA?
- (c) Did the Arbitrator err in failing to apply the correct legal test to determine whether the calculation of property taxes attributable to shared areas had been determined in a fair and commercially reasonable manner?
- (d) Did the Arbitrator err in failing to apply the correct legal principle, or failing to apply a required legal principle, in not assessing damages for breach of contract?
- [6] If leave to appeal is granted, HGD seeks an order setting aside the Partial Final Award and an order that its underlying claim be allowed, with costs to it on a full indemnity basis.
- [7] In argument at the hearing, HGD combined the first two errors of law as follows:

The Arbitrator applied an incorrect legal principle or failed to apply a required legal principle when determining what costs comprise Shared Costs as that term is used in the REA, in that he failed to read the agreement as a whole and give meaning to all of its terms.

- [8] Although expressed slightly differently than in the petition, in essence HGD is arguing the same errors of law. In any event, the grounds of appeal are those set out in the petition, and I will consider this application on that basis.
- [9] The respondent, The Owners, Strata Plan EPS849 (the "Residential Strata"), opposes the granting of leave. It argues that the Partial Final Award is based on the Arbitrator's fact and context-specific interpretation of the REA which gives rise to non-appealable questions of mixed fact and law.

The Issues

- [10] The issue I have to address is whether HGD has met the statutory requirements in the AA for granting leave to appeal or whether the Arbitrator committed arbitral error by failing to observe the rules of natural justice.
- [11] For the reasons that follow, I have concluded that HGD's applications must be dismissed.

Factual Background

The Parties and the Development

- [12] In 2011, HGD undertook a significant renovation of the Hotel Georgia, located at 607 Howe Street, in downtown Vancouver. The renovation involved the construction of an adjacent 48-storey mixed-use tower. After the renovation, HGD was the owner/developer of the Development. The tower includes residential and commercial parcels, each with separate owners, and the hotel.
- [13] The Development is subject to a registered plan of subdivision creating two air space parcels and a remainder parcel. The air space parcels are a residential air space parcel (now the Residential Strata) and a commercial air space parcel ("Commercial ASP"). The remaining portion of the Development is the hotel and, in the parties' materials and documents, it is referred to as the "Remainder".
- [14] HGD is the legal owner of the Remainder, from which it operates the Rosewood Hotel Georgia.
- [15] The residences in the Residential Strata are commonly known as "The Private Residences at Hotel Georgia".
- [16] The owner or owners of the Commercial ASP were not a party to the arbitration.

The Reciprocal Easement Agreement

- [17] For the three parcels in the Development to function as an integrated development, the REA was registered against title to each parcel. The REA provides for access, egress and support between and among the parcels, and cost sharing in respect of the expenses related to the common services, areas, and facilities. The term "Shared Costs" is defined in the REA to refer to these expenses. As will become clear, its interpretation is the focal point of this litigation.
- [18] When the REA was signed, HGD controlled all three parcels.
- [19] Following registration of the REA, HGD caused the Residential Strata to be created. By operation of s. 223 of the Land Title Act, R.S.B.C. 1996, c. 250, once the strata plan was registered, the REA became registered as a charge against each individual strata lot in the Residential Strata.
- [20] Units in the Residential ASP were first occupied on January 13, 2013, and the strata council was formed at about that time.
- [21] Schedule D to the REA lists the shared areas, common services and facilities, and equipment and installation for which costs are to be shared among the owners of the parcels, and allocates each parcel's responsibility for its proportion of the costs.

- [22] Under the terms of the REA, HGD is responsible for operating the common areas, services, and facilities in the Development. It also administers the Shared Costs budget. It pays the Shared Costs in advance and, pursuant to the provisions of the REA, in an annual reconciliation process, charges back each parcel with its proportionate share of those costs.

The Dispute

- [23] The Residential Strata and HGD operated under the REA from 2013 until about 2017 without issue. On July 17, 2017, the shares of HGD were purchased by a new owner, Pacific Reach Properties. After the transfer of share ownership, a dispute arose over the Shared Costs under the REA and the Residential Strata's obligation to pay its proportionate share of the costs claimed by HGD.
- [24] On January 5, 2018, as required by the REA, under its new ownership, HGD issued an annual Shared Costs statement and a proposed budget for 2018. It increased the Residential Strata's share of costs by more than 200 percent from the prior year. The Residential Strata disputed the increase for 2017 and the proposed budget for 2018.
- [25] The Residential Strata hired Deloitte to assist them in assessing the increased costs, and sought accounting records from HGD to substantiate the costs it was claiming under the REA. The Residential Strata refused to pay the increased amounts.
- [26] During discussions between the Residential Strata and HGD, the Residential Strata learned that the increase in Shared Costs was not as a result of an increase in consumption by the Residential Strata, or new costs incurred by HGD. Rather, it was because HGD was proceeding on a different interpretation of the REA. Most significantly, it was claiming labour costs not claimed by the previous owner.
- [27] Financially, the most significant dispute between the parties concerned whether labour costs incurred by HGD in the Hotel Porte Cochere, the hotel recreational facilities, and the areas of the parkade related to the shared refuse room were properly considered "Shared Costs" pursuant to the terms of the REA. In this decision, I will refer to the Hotel Porte Cochere, the hotel recreational facilities, and the areas of the parkade related to the shared refuse room as the "Shared Areas".

The Arbitration

- [28] On March 22, 2019, pursuant to the agreement to arbitrate in the REA, HGD delivered a notice to arbitrate to the Residential Strata and to the British Columbia International Commercial Arbitration Centre ("BCICAC"). In its statement of claim, HGD alleged that the Residential Strata had breached the REA by refusing to pay its portion of the Shared Costs. HGD's claim was framed as a debt claim. Alternatively, HGD alleged that the Residential Strata had been unjustly enriched. It claimed \$921,153.78 as of February 22, 2019, with annual interest at 20 percent thereafter.

- [29] On April 23, 2019, the Residential Strata filed its response and counterclaim, seeking dismissal of HGD's claim and certain other relief. It said that HGD had improperly interpreted the meaning of Shared Costs under the REA and had improperly charged and collected amounts under the guise of Shared Costs. It also said that HGD had not provided adequate accounting records to establish that a debt was owed under the REA.
- [30] On April 4, 2019, the parties jointly appointed the Arbitrator.
- [31] An arbitration under the AA proceeded on February 24-28 and March 5, 2020. It dealt solely with the 2017 and 2018 Shared Costs as the 2019 reconciliation had not then been issued by HGD.
- [32] In a July 17, 2019, interim award ("Interim Award"), and pursuant to Article 10.3 of the REA, which requires payment of the amounts in dispute pending arbitration, the Arbitrator ordered the Residential Strata to pay the outstanding Shared Costs claimed by HGD in the amount of \$1,275,799.37 as of June 20, 2019, with per diem interest of \$757.89 for each day thereafter until payment was made.
- [33] Under protest, the Residential Strata paid the amount of the Interim Award.
- [34] On April 21, 2020, after the conclusion of the hearing, the Arbitrator wrote to counsel asking what options were available to him if he found that HGD had provided inadequate accounting records, or failed to prove individual Shared Costs, and whether he was permitted to assess damages on a quantum meruit basis. He invited additional submissions.
- [35] On April 30, 2020, the Residential Strata delivered its supplemental submissions. It argued that the Arbitrator could not assess damages. If HGD had not provided adequate accounting records, or not proved individual Shared Costs, then its claim should be dismissed.
- [36] On May 1, 2020, HGD delivered its supplemental submissions. HGD argued that, if the Arbitrator found that the respondent was required to pay its proportionate share of Shared Costs, but that the evidence in support of an individual item of Shared Costs was inadequate to establish the precise amount owed, the Arbitrator must assess damages for breach of contract and could not simply dismiss the claim.

The Partial Final Award

- [37] On May 22, 2020, the Arbitrator released his lengthy Partial Final Award and made the following orders concerning HGD's claim:
- (a) HGD's claim for Shared Costs was partially allowed, to the extent of approximately 23 percent of the amounts in dispute;
 - (b) the balance of HGD's claim for Shared Costs was disallowed;
 - (c) HGD was not entitled to have damages assessed for items where liability for payment from the Residential Strata was found, but the exact amount claimed had not been proven; and

(d) HGD was not entitled to damages for breach of contract.

[38] After the release of the Partial Final Award, HGD refunded the Residential Strata the difference between the amount claimed by it in its statement of claim, and which the Residential Strata paid pursuant to the Interim Award, and the amount HGD was entitled to under the Partial Final Award. The repayment was made without prejudice to its rights in respect of this appeal.

Summary of the Partial Final Award

[39] I will briefly summarize the Arbitrator's Partial Final Award. In doing so, I will set out the key provisions of the REA to which he referred. The same provisions are important to the issues on the leave to appeal application.

[40] After setting out the parties and the facts under which the REA was created, and relying on two of the recitals and Article 4.3 of the REA, the Arbitrator set out the intent and goals of entering into the REA and the long-term, and possibly evolving, relationship between the parties in the Development.

[41] The Arbitrator then set out the terms of the REA dealing with how certain costs were to be shared among HGD, the Residential Strata, and the Commercial ASP. In particular, he referred to the agreement to share the Shared Costs, as that term is defined in the REA, on the basis of percentage allocations set out in Schedule D to the REA, and to the procedures and provisions in Article 8: para. 6.

[42] The Arbitrator set out the REA definitions of Common Services and Facilities, and Shared Costs: para. 7.

[43] The Arbitrator described Schedule D to the REA. It includes a table listing each "Shared Area, Common Services and Facilities, Equipment and Installation", identifying which of the three owners is primarily responsible for each described area, and allocating, by percentage, each owner's share of the costs. Schedule D is prefaced with "Notes to Schedule D". The Arbitrator set out Note 2 and Note 3, which are of particular importance: paras. 8-9.

[44] The Arbitrator then dealt with the agreement to arbitrate disputes under the REA, the applicable arbitration rules, the procedural history, and the issues set out in the Statement of Claim and Defence: at paras. 12-24.

[45] The Arbitrator outlined the parties' positions, the background to the dispute, and the disclosure statements that accompanied the marketing and sales of strata units in the Development: at paras. 28-39.

[46] At Part X of the Partial Final Award, the Arbitrator set out the issues to be determined by him as follows:

1. What is meant by the phrase "necessary for such purposes" found in Note 2 of Schedule D?

2. Are the categories of disputed costs, described at para. 29, "Shared Costs", ones which the Residential Strata is obligated to pay under the terms of the REA?
 3. Have the costs claimed been proven?
 4. What is meant by the phrase "accurate accounting records" found in Article 8.10 of the REA?
 5. Has HGD maintained adequate accounting records for each Shared Cost, and claimed and provided them to the Residential Strata?
 6. If HGD has not kept adequate accounting records for each Shared Cost or has not provided them to the Residential Strata, does either failure disentitle the HGD from succeeding in those claims?
 7. Is HGD estopped from claiming some or all of the disputed Shared Costs?
 8. Is HGD entitled to advance a claim or alternative claim for contractual damages assessed on a quantum meruit basis?
 9. Is the Residential Strata entitled to declarations that: HGD is not entitled to allocate all or a portion of the Disputed Recreational Facility Amounts (as defined in para. 29 of its Statement of Defence) to the Residential Strata under the REA; and HGD is not entitled to charge the Residential Strata any amount under the REA that has not been substantiated with supporting records?
- [47] There does not appear to be an issue between the parties that the key issues to be determined by the Arbitrator were:
- a) the proper interpretation of "Shared Costs" in the REA;
 - b) whether certain costs and categories of costs fell within the definition of Shared Costs; and
 - c) whether HGD had proven that certain costs and categories of costs were owing by the Residential Strata under the REA.

[48] The Arbitrator set out the principles of contract interpretation, which were not disputed by the parties, referring to *Athwal v. Black Top Cabs Ltd.*, 2012 BCCA 107 at paras. 42-44, 46-47; *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 [Sattva] at paras. 57-60. He then turned to consider the issues he had outlined.

What is meant by the phrase "necessary for such purposes" found in Note 2 of Schedule D?

[49] The parties focused their submissions before the arbitrator on the words "necessary for such purposes" in Note 2 to Schedule D.

[50] The Arbitrator set out the parties' positions concerning the interpretation of the words "necessary for such purposes" in Note 2 of Schedule D, the issue that HGD's counsel described as the "crux" of the dispute between the parties.

- [51] He summarized HGD's position in its opening argument at paras. 44-55.
- [52] HGD's submission remains the same before me. It argues that the parties intended that Shared Costs were those necessary to maintain the Common Areas to the standard of a "first class residential/commercial development in Vancouver" (the "Standard"). HGD relied on the fact that the definition of Repair referred to the Standard, and that Article 6.4 of the REA under the heading "Obligation to Repair, Maintain and Provide" also referred to the Standard.
- [53] The Residential Strata contends that the expression "necessary for such purposes" evidenced the parties' intention that "Shared Costs" are those costs and expenses necessary for the purpose of operation, management and maintenance of the areas, services and facilities of the "Hotel and Tower" without reference to the Standard.
- [54] At para. 48, the Arbitrator wrote that:
- In substance the [Residential Strata] contends that by modifying "Shared Costs" with the words "necessary for such purposes" results in a purposeful determination on what is to be "included in the bucket of Shared Costs". If the costs are necessary for the purposes of any of the "management, operation, cleaning, maintenance, Repair, fixturing, furnishing, and replacement including the costs of all utilities, personnel, security, materials, supplies, insurance and administration" [that is] necessary for those purposes, they are "Shared Costs for the purposes of this Schedule D".
- [55] In response to a hypothetical question from the Arbitrator, the Residential Strata indicated that costs should only be shared if the residents derive a 50 percent benefit from those costs and if they are necessary for the operation of the shared space: para. 51.
- [56] In considering the REA as a whole, the Arbitrator rejected both parties' positions. Relying on the last antecedent rule, set out in a number of cases that he referred to at paras. 54-55 of the Partial Final Award, the Arbitrator concluded:
- [52] After considering the parties' submissions concerning the interpretation to be applied to the words "necessary for such purposes", I have concluded that neither party has identified the correct interpretation. In reading the REA as a whole, it is clear that the drafters of the Agreement intended that, to the extent possible, where references were made to other provisions of the Agreement they were either directly connected by an express reference to another provision in question or if not so stated, to preceding words and provisions in the particular provision in question. That approach leads me to find that the parties did not intend to reference "such purposes" located elsewhere in the Agreement, without an express reference such as "such purposes as included in this section, s. 1(iv) and s. 6.4". Rather, I find that "such purposes" are the purposes articulated in the preceding words of Note 2:

In the management, operation, cleaning, maintenance, Repair, fixturing, furnishing, and replacement thereof, including the costs of all utilities, personnel, security, materials, supplies, insurance and administration

- [53] I have found no textual support in the REA for the proposition that the expression "necessary for such purposes" includes an assessment of whether the Residents "derive a 50 percent proportionate benefit from them" [in the case of the Hotel Porte Cochere Guest Services Team]. It is unnecessary to infer such a term given that the parties have recognized the rights of each of the Owners to the common areas, facilities and services by way of express provisions governing access and enjoyment in respect of Shared Facilities. Conducting an assessment of the percentage proportionate benefit enjoyed by a party charged for a share of Shared Costs would be inconsistent with the whole structure of the REA which takes great care at establishing the allocations in Schedule D and mandating that the allocations cannot be challenged or changed in arbitration.
- [55] In this case, reading the provision and the REA as a whole I find that notwithstanding the absence of a comma preceding the words "for such purposes" the parties' intention was that " necessary for such purposes" would apply to the preceding series which I consider to be consistent with the authorities cited above on contractual interpretation
- [56] In this case the strict application of the last antecedent rule would limit the ambit of "such purposes" to the last antecedent noun "administration" and would be inconsistent with the fact that the drafters stated "such purposes" in the plural and not the singular, thereby disclosing an intention to modify the full series of verbs and nouns set out in Note 2.
- [57] Based on his interpretation, the Arbitrator addressed each of the disputed costs in issue and reviewed the evidence in support of the amounts claimed by HGD.
- [58] The Arbitrator concluded with a summary of his decisions in the Partial Final Award. He set out the various outcomes in the following table:

Disputed Shared Costs

Line Item

Ruling

Hotel Porte Cochere

1.

Guest Services Team

- a) Bell Persons
- b) Bell Persons
- c) Front Desk Manager

1. a) dismissed

1. b) dismissed

1. c) dismissed

2.

Porte Cochere Cleaning (Tricom)

2. allowed

3.

Porte Cochere Heaters

3. dismissed

4.

a) Housekeeping,

b) Engineering

c) Security

4. a) allowed

4. b) allowed

4. c) allowed

5.

Landscaping (Hotel Porte Cochere & pool/fitness centre)

5. allowed

Parkade

6.

a) Housekeeping

b) Security

6. a) dismissed

6. b) dismissed

Hotel Recreational Facilities (Pool & Fitness Centre)

7.

a) Spa Attendants

b) Spa Management

7. a) dismissed

7. b) allowed

8.

Daily Engineering Checks

8. allowed

9.

Laundry for Towels

9. dismissed

10.

Uniform Cleaning

10. allowed

11.

Hydro for Pool

11. not in dispute

Other

12.

Common Areas Hydro

12. dismissed

13.

Insurance

13. allowed

14.

Property Taxes

14. dismissed

15.

Emergency Generator

15. allowed

16.

5% Administration Fee

16. dismissed

17.

5% GST

17. subject to adjustment

Analysis

[59] I will first consider HGD's application to have the Partial Final Award set aside on the grounds of arbitral error. I will then consider HGD's application for leave to appeal.

Has HGD shown the Arbitrator committed arbitral error?

[60] Section 30 of the AA provides the court with discretion to set aside, or remit, an arbitrator's award if the arbitrator has committed an arbitral error:

Court may set aside award

30(1) If an arbitrator has committed an arbitral error, the court may

(a) set aside the award, or

(b) remit the award to the arbitrator for reconsideration.

(2) The court may refuse to set aside an award on the grounds of arbitral error if

(a) the error consists of a defect in form or a technical irregularity, and

(b) the refusal would not constitute a substantial wrong or miscarriage of justice.

(3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

[61] "Arbitral error" is defined in s. 1 of the AA. As relevant to this case, the definition provides:

"arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:

...

(d) failure to observe the rules of natural justice;

[62] The issue before me is HGD's submission that the Arbitrator failed to observe the rules of natural justice.

- [63] HGD argues that the Arbitrator did not consider its submission on contractual quantum meruit in issuing the Partial Final Award as the Partial Final Award is silent with respect to HGD's submission. It argues that this constitutes arbitral error pursuant to the AA, s. 30.
- [64] On an application to set aside an arbitral award for a breach of natural justice, the arbitrator is granted a high degree of deference, and courts should not be concerned with the fairness or correctness of the award itself. This is because the provisions for setting aside an award "deal with the procedural matters, not the legal correctness of the decision".
- [65] As explained in *Mungo v. Saverino*, [1995] O.J. No. 3021 at paras. 72-73, the courts will endeavour not to second-guess an arbitrator's decision on jurisdiction or procedural fairness grounds.
- [66] Justice Dickson, when a member of this Court, outlined the requirements of natural justice in the arbitral context, and the recognized breaches of natural justice, in *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834 at paras. 81-82. Natural justice requires an arbitrator to act with procedural fairness and may require processes tailored to meet a particular case.
- [67] The party alleging a breach of natural justice, in this case, HGD, bears the onus of establishing the facts necessary to prove the breach.
- [68] Where an arbitrator considers an approach to an issue that has not been raised by either party, natural justice requires the arbitrator to give the parties an opportunity to comment on the approach. The fact that a party does not make sufficient use, if any, of the opportunity given by the arbitrator is not a breach of natural justice and, accordingly, not a basis for setting aside an arbitral award.
- [69] In this case, the Arbitrator sought submissions on the issue of his ability to make a quantum meruit award.
- [70] An arbitrator is required to give comprehensible reasons, but such reasons need not recite every submission and outline why every submission was accepted or rejected.
- [71] As I have said, in this case, HGD consistently and repeatedly advanced a debt claim.
- [72] During the Residential Strata's closing submissions, counsel was asked what could be done if HGD's proof was inadequate, to which counsel responded that HGD had advanced a debt claim, and if it failed to prove the claim, it should be dismissed. Despite making reply submissions, counsel for HGD did not respond to this issue.
- [73] Nevertheless, before releasing the Partial Final Award, the Arbitrator sought written submissions on the issue from counsel. As he was considering an approach not advocated by the parties, natural justice required him to give the parties an opportunity to comment on such an approach. He did so, and both counsel made submissions. HGD proposed that the arbitrator assess common law damages in place of the debt claimed, while the Residential Strata maintained that approach would be prejudicial to it and the claim should be

dismissed.

[74] In the Partial Final Award, the Arbitrator addressed the issue and explained why he refused to accede to HGD's position. HGD had the benefit of the Residential Strata's submissions before it made its submissions. It did not address the Residential Strata's position that it would be prejudiced. The Arbitrator wrote, at para. 160 of the Partial Final Award:

As noted above [at paras. 29, 32 of the Partial Final Award], the suggestion was first made after the hearing completed and the parties had made their final submissions and only arose because of my question. It would be clearly unfair and prejudicial to the Respondent to have a new legal basis for recovery of common law damages at this stage and I exercise my discretion against pursuing that analysis.

[75] In the circumstances, there is no basis for setting aside the Partial Final Award on the basis of an arbitral error, based on a breach of natural justice.

The Application for Leave to Appeal

The Test for Leave

[76] This leave application is brought pursuant to s. 31 of the AA which, in relevant part, provides:

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

- (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.
- (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
- (4) On an appeal to the court, the court may
 - (a) confirm, amend or set aside the award, or
 - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

- [77] Recently, in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54 [MSI], the Court of Appeal explained the three distinct requirements that must be addressed before leave to appeal can be granted with respect to an arbitration award:
- (a) the appeal must be based on a question of law arising out of the award;
 - (b) the leave judge must be satisfied that one of the three circumstances identified in s. 31(2) of the Act exists; and
 - (c) the leave judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave "
- [78] In other words, before a court will exercise its discretion in favour of granting leave to appeal, an applicant must first satisfy the court that the appeal raises a question of law and that one or more of the subsections in s. 31(2) applies.
- [79] In this case, HGD relies on s. 31(2)(a).
- [80] What must be shown in respect of s. 31(2)(a) is discussed in *Sattva* at para. 68 and following. The court must be satisfied that the determination of that point of law on appeal may prevent a miscarriage of justice.
- [81] To rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a), an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case. Accordingly, a determination of a point of law "may prevent a miscarriage of justice" only where the appeal itself has some possibility of succeeding. An appeal with no chance of success will not meet the threshold of "may prevent a miscarriage of justice" because there would be no chance that the appeal outcome would result in a change in the final result of the case.
- [82] At the leave stage, it is not appropriate to consider the full merits of a case and make a final determination regarding whether an arbitrator made an error of law. Rather, some preliminary consideration of the question of law is necessary to determine whether an appeal has the potential of succeeding and, thereby, change the result in the case.
- [83] The appropriate threshold for assessing the legal question at issue under s. 31(2)(a) is whether it has arguable merit or a reasonable prospect of success. Assessing whether the issue raised by an application for leave to appeal has arguable merit must be done in light of the standard of review on which the merits of the appeal will be judged. This requires a preliminary assessment of the applicable standard of review. Except in rare cases (none of which apply here), reasonableness will almost always apply to commercial arbitrations conducted pursuant to the AA: *Sattva* at para. 75.
- [84] However, HGD argues that the applicable standard should be correctness because of the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 [Vavilov]. HGD submits that Vavilov established that where the legislature has mandated a statutory right of appeal, the appeal is subject to a correctness

standard of review in accordance with *Housen v. Nikolaisen*, 2002 SCC 33. As I have concluded that HGD has not established that the Arbitrator erred on a question of law, I need not address this argument.

- [85] Statutory limitations on the scope of appellate review of arbitration awards are "absolute," and the test for leave to appeal is not easily met: *Sattva* at para. 104. Statutory limitations reflect the policy objectives of only allowing limited judicial intervention in respect of arbitration decisions and the importance of judicial restraint in the review of arbitral awards, at least in the commercial context. A finding that the questions proposed by HGD on its leave application are not questions of law wholly disposes of the courts' jurisdiction to review those questions: see *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 42 [*Teal Cedar*].
- [86] In *Teal Cedar*, the Supreme Court of Canada clarified the approach to identifying a question of law for the purposes of granting leave under s. 31 of the AA. Justice Gascon (for the majority) wrote, at paras. 43-47:
- [43] The process for characterizing a question as one of three principal types -- legal, factual, or mixed -- is also well-established in the jurisprudence (*Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, at para. 35). [I]t is not disputed that legal questions are questions "about what the correct legal test is" (*Sattva*, at para. 49, quoting *Southam*, at para. 35); factual questions are questions "about what actually took place between the parties" (*Southam*, at para. 35; *Sattva*, at para. 58); and mixed questions are questions about "whether the facts satisfy the legal tests" or, in other words, they involve "applying a legal standard to a set of facts" (*Southam*, at para. 35; *Sattva*, at para. 49, quoting *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235).
- [44] That said, while the application of a legal test to a set of facts is a mixed question, if, in the course of that application, the underlying legal test may have been altered, then a legal question arises. For example, if a party alleges that a judge (or arbitrator) while applying a legal test failed to consider a required element of that test, that party alleges that the judge (or arbitrator), in effect, deleted that element from the test and thus altered the legal test. As the Court explained in *Southam*, at para. 39:

if a decision-maker says that the correct test requires him or her to consider A, B, C, and D, but in fact the decision-maker considers only A, B, and C, then the outcome is as if he or she had applied a law that required consideration of only A, B, and C. If the correct test requires him or her to consider D as well, then the decision-maker has in effect applied the wrong law, and so has made an error of law.

Such an allegation ultimately challenges whether the judge (or arbitrator) relied on the correct legal test, thus raising a question of law (*Sattva*, at para. 53; *Housen*, at paras. 31 and 34-35). Accordingly, such a legal question, if alleged in the context of a dispute under the Arbitration Act, and assuming the other jurisdictional requirements of that Act are met, is open to appellate review. These "extricable questions of law" are better understood as a covert form of legal

question -- where a judge's (or arbitrator's) legal test is implicit to their application of the test rather than explicit in their description of the test -- than as a fourth and distinct category of questions.

- [45] Courts should, however, exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. The motivations for counsel to strategically frame a mixed question as a legal question are transparent (*Sattva*, at para. 54; *Southam*, at para. 36). A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva*, at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).
- [46] From this standpoint, the characterization of a question on review as a mixed question rather than as a legal question has vastly different consequences in appeals from arbitration awards. The identification of a mixed question when appealing an arbitration award defeats a court's appellate review jurisdiction (*Arbitration Act*, s. 31; *Sattva*, at para. 104). . .
- [47] . . . characterizing the nature of the specific question before the court requires delicate consideration of the narrow issue actually in dispute. . . .
- [87] In this case, the parties agree that the threshold for granting leave to appeal an arbitrator's award is a high one, particularly as it relates to the interpretation of a contract between the parties: *Sattva* at paras. 38-40.
- [88] The Court's limited jurisdiction to hear arbitral appeals promotes efficiency and finality thereby furthering the central aims of commercial arbitration: *Teal Cedar* at para. 1.
- [89] Leave to appeal must only be granted with respect to questions of law. Questions of fact or mixed fact and law are not subject to review. Delineating a question of law "goes beyond the question of standard of review to the very jurisdiction of the court to embark on the review process": *MSI* at para. 62.
- [90] As explained in *Teal* at para. 43 and *Sattva* at para. 49, legal questions are questions about "what the correct legal test is". Factual questions are about "what took place between the parties". Questions of mixed fact and law are about "whether the facts satisfy the legal test", or, put another way, the application of a legal standard to a set of facts.
- [91] Questions of mixed fact and law are immune from appeal under s. 31 of the AA because they involve consideration of the factual matrix in which a contract was formed.

- [92] The Supreme Court of Canada determined, in *Sattva* at paras. 47-50 and in *Teal Cedar* at para. 47, that the evolution of the approach to contractual interpretation, means that, typically, issues of contractual interpretation involve application of legal principles to a set of facts which include the particular words of a contract, considered in light of the factual matrix.
- [93] However, both *Sattva* and *Teal Cedar* explained that the application of an incorrect legal principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor, may give rise to an extricable question of law: *Sattva* at para. 53 and *Teal Cedar* at paras. 63-64. If an arbitrator ignores a specific and relevant provision in construing a contract, that would be a question of law that would be extricable from a finding of mixed fact and law: *Sattva* at para. 64.
- [94] The errors alleged in HGD's petition track this language. However, as *Sattva* warns at paras. 53-55, in seeking leave to appeal, aggrieved parties often strain to frame alleged errors as questions of law. Extricable questions of law are rare, and reviewing courts should be wary of parties trying to frame a question of mixed fact and law as a question of law for the purposes of reaching the high threshold for leave to appeal. A similar warning was repeated in *Teal Cedar* at paras. 63-64.
- [95] I agree with the Residential Strata's position that the cases establish a process to ensure that the threshold question in the AA--identifying a question of law--is met first. To dive into the merits of an arbitrator's contractual analysis, and consider whether the standard of review is reasonableness or correctness, is to "put the cart before the horse". The analysis must first be characterized as raising a legal question for review: *Allard v. The University of British Columbia*, 2021 BCSC 60 at para. 39, citing *Teal Cedar* at para. 60. To the extent that a review of the evidence is required to make the argument that an error of law occurred, the error cannot be said to be on the face of the award.

Discussion and Analysis

Did the Arbitrator apply an incorrect legal principle, or fail to apply a required legal principle, in interpreting "Shared Costs"?

- [96] The modern approach to contractual interpretation involves the following key legal principles:
- (a) A contract must be construed and considered as a whole: *Sattva* at para. 63.
 - (b) Contractual interpretation must remain grounded in the text of the contract, and surrounding circumstances are considered but must never be allowed to overwhelm the words of the agreement so as to avoid effectively creating a new agreement between the parties: *Sattva* at para. 57, *Teal Cedar* at para. 63.

- (c) The words of one provision must not be read in isolation, but must be read in light of the entire contract: *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293 at para. 39; *Sattva* at para. 57.
- (d) Where there are apparent inconsistencies between the different terms of a contract, the court should attempt to find an interpretation which can reasonably give meaning to each of the terms in question. Only if an interpretation giving meaning to each of the terms in question cannot be found will the court rule one clause, or the other, ineffective: *BG Checo International Ltd. v. British Columbia Hydro and Power Authority*, [1993] 1 S.C.R. 12, at p. 24.

[97] To understand the Partial Final Award, it is necessary to understand how the REA operates and some of the defined terms in it. Common Services and Facilities and Shared Costs are defined in Article 1 as follows:

"Common Services and Facilities" means the Shared Loading Bay Area, the Shared Remainder/Commercial Garbage/Refuse Room, the Hotel Recreational Facilities, the Hotel Porte Cochere, together with all exterior landscaped and streetscaped areas and sidewalks, all of which are located within the Remainder, together with those parts of the Fire Protection and Life Safety Systems, Exterior Elements, Service Systems, Service Rooms, Equipment, Pedestrian Access Routes, Shared Fire Prevention Service Elevator, Vehicular Access Routes and Emergency Pedestrian Exit Routes and any other such facilities, systems or equipment that are located in or upon a Parcel but which are intended or are necessary for the common use and benefit pursuant to the Project Easements herein granted for all of the Owners or more than one of the Owners;

"Shared Costs" means, without duplication:

- i. the costs and expenses identified in Schedule "D";
- ii. to the extent not specifically included within Schedule "D", the costs and expenses specifically stated as being a Shared Cost pursuant to this Agreement;
- iii. to the extent not specifically included within Schedule "D", the costs and expenses incurred in accordance with this Agreement by the Owners of the Parcels with respect to the Repair of the Common Services and Facilities;
- iv. to the extent not specifically included in Schedule "D", the cost of the initial acquisition and subsequent replacement of the Equipment, any equipment and machinery located in the Hotel Recreational Facilities and any window washing equipment and machinery, and if any such equipment is at any time leased or otherwise financed, all payments required to be made pursuant to any leases or financing of any such equipment;
- v. the Property Taxes attributable to the Common Services and Facilities;
- vi. the Utility Costs;
- vii. Recreational Facilities Management Costs; and

viii. Remainder Management and Operation Costs;

[98] The cost-sharing arrangements are set out in Article 8. It establishes procedures for budgeting and invoicing Shared Costs. Of particular importance are subsections 8.1 and 8.2:

8.1 REIMBURSEMENT OF COSTS AND COST SHARING

Each of the Residential ASP Owner, the Commercial ASP Owner and the Remainder Owner covenant and agree with the Others to share the Shared Costs on the basis of the percentage allocations of Shared Costs as set out in Schedule D and pursuant to the procedures and provisions set out in this Article 8. If no percentage allocation for a particular item of Shared Costs appears in Schedule D, and the item does not involve a Shared Cost relating to Equipment to which Section 6.5 applies, then in such case the Owner of the Remainder shall determine, in an equitable and commercially reasonable manner, each Owner's percentage allocation of any such Shared Costs.

8.2 BASIS OF ALLOCATION OF SHARED COSTS

The Owners acknowledge and agree that, except for each Owner's portion of an item of Shared Costs which is not specified in Schedule D, if any, the allocations of costs and responsibilities set forth in Schedule D have been made by the initial Owners and are not based on any requirements of the City, and that the City will have no role or responsibility should any dispute relating to the matters set forth in Schedule D arise or develop. The Owners acknowledge and agree that their respective percentage share of the costs and the responsibilities set forth in Schedule D have been settled and agreed to by all of the Owners and may not be changed or altered, pursuant to arbitration hereunder, any other legal proceedings or otherwise, for any reason whatsoever, save and except by written agreement of all of the Owners.

[99] As explained in Article 8, Shared Costs will be apportioned among the parcels in accordance with the fixed percentages set out in Schedule D to the REA. To the extent that a Shared Cost is not apportioned in Schedule D, HGD is to determine, in an equitable and commercially reasonable manner, each owner's percentage allocation.

[100] Schedule D to the REA provides at Note 2 in the preamble:

2. The costs comprising Shared Costs for purposes of this Schedule "D" in respect of each item described below under the heading "Description of Applicable Shared Area, Common Services and Facilities, Equipment and Installation", includes all of the costs and expenses incurred by the applicable Owner in the management, operation, cleaning, maintenance, Repair, fixturing, furnishing, and replacement thereof, including the cost of all utilities, personnel, security, materials, supplies, insurance and administration necessary for such purposes. [Emphasis added.]

[101] As outlined, HGD took the position before the Arbitrator that the meaning of the phrase "necessary for such purposes" incorporated the Standard required for "Repairs" in the REA as set out in the definition of "Repair", found in s. 1.1 at (bbbb):

"Repair" means:

(iv) with respect to the Common Services and Facilities, in addition to the foregoing meanings of Repair, to operate, repair, maintain, service, replace and clean any portion of the Common Services and Facilities as required in order to ensure and permit the use and operation of the Developments on and within the Parcels as an integrated, first-class residential/commercial development located in the City;

[102] Section 6.4(b) of the REA also sets out the Standard to which the Hotel Porte Cochere, the hotel recreational facilities, and the areas of the parkade related to the shared refuse room, were required to be repaired and maintained by HGD. Section 6.4 provides:

6.4 OBLIGATION TO REPAIR, MAINTAIN AND PROVIDE

Each Owner hereby covenants and agrees with the Other Owners that:

(b) Without limiting the generality of Section 6.4(a), the Owner of the Remainder shall Repair, or cause to be Repaired, as and when required and so as to meet the standard of maintenance and repair typical of a first class residential/commercial development located in the City, the Hotel Porte Cochere, the Shared Loading Bay Area, the Shared Remainder/Commercial Garbage/Refuse Room and the Hotel Recreational Facilities, including, without limitation, all equipment, furniture, machinery, fixtures and improvements located therein, and the cost and expense of all such Repair shall be a Shared Cost and be allocated among the Owners pursuant to Article 8 hereof.

[103] Before the Arbitrator, and in submissions before me, HGD argued that the plain language of these REA provisions is clear. It submits that, when correctly applied, the proper legal principles of contractual interpretation lead to a conclusion that Note 2 of Schedule D to the REA confirms that all of the costs incurred by HGD in operating and maintaining the Common Areas, to the Standard, were Shared Costs to be allocated pursuant to Schedule D.

[104] HGD argues that the Arbitrator erred in two ways. First, he interpreted the word "includes" in Note 2 to Schedule D to be exclusive rather than inclusive. Second, even if his analytical framework was correct, he failed to follow it by ignoring the specific use of two defined terms--"Shared Costs" and "Repair"--both of which refer to the Standard. To be clear, the definition of "Shared Costs" does not explicitly reference the Standard, but HGD argues it is incorporated by reference to the term "Repair".

[105] HGD argues that when a factual matrix has not played a role in the interpretation process, the question is better characterized as one of law, not mixed fact and law. For that proposition, it relies on *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 [Ledcor].

[106] In *Ledcor*, the Supreme Court of Canada was dealing with a standard form contract such as those common in the insurance industry, and the Court found that, while contractual interpretation is generally a question of mixed fact and law, in situations involving standard

form contracts, in most circumstance, it is more appropriately classified as a question of law: at para. 34. The Court specifically noted that where interpretation of a standard form contract is at issue, the interpretation is of precedential value, and there is no meaningful factual matrix specific to the parties to assist in interpreting the contract, then the question is better treated as one of law: at para. 24. This allows appellate courts to ensure consistency of the law: para. 39.

- [107] In MSI at paras. 65-68, the Court of Appeal refers to Ledcor for the principle that precedential value is a factor in determining whether the interpretation of a particular contract is a question of law as opposed to a question of mixed fact and law. In most cases it should be sufficiently clear whether there is disagreement over a general proposition that might qualify as a principle of law, or over a particular set of circumstances that is not likely to be of much interest to judges and lawyers in the future: para. 63, citing to Southam.
- [108] In MSI at para. 72, the Court summarized the principles applicable to appeals from arbitration awards. These are helpful to determining whether the interpretation of a particular contract is a question of law as opposed to a question of mixed fact and law:
- (a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.
 - (b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).
 - (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the "question" is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.

- (d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

[109] In this case, the REA is not a standard form contract. It is tailored specifically to the unique interrelationship between three owners of a mixed-use, high-end Development, in which the three owners share facilities and their related costs. In respect of a non-standard contract, the factual matrix in which the REA was formed and operates is an important consideration in contractual interpretation, requiring reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances at the time of the formation of the contract: *Sattva* at paras. 46-47, 49.

[110] Reading the Arbitrator's Partial Final Award, that is exactly what he did. He considered the factual matrix in which the REA was formed and operates, he read the contract as a whole, and gave the terms their ordinary and grammatical meaning. Ultimately, I conclude that HGD is dissatisfied with the outcome in the Partial Final Award, as the Arbitrator did not accept its argument that Shared Costs included the labour required "to meet the standard of a first class residential/commercial development", but that is not a question of law. As expressed in *MSI*, the question raised is simply "too closely integrated with the particular contract at issue to have precedential value": at para. 79.

[111] There is no indication in the Partial Final Award that the Arbitrator ignored the use of the term "Repair" in interpreting "Shared Costs". The Arbitrator specifically noted HGD's argument on the defined term "Repair" in para. 45 of the Partial Final Award, and noted HGD's argument that the definition of "Repair" provided guidance in the interpretation of Note 2.

[112] The Partial Final Award does not suggest that the Arbitrator altered the applicable legal test by failing to consider the award as a whole. The Arbitrator rejected HGD's argument as not reflecting the parties' intention embodied in the contract when reviewed as a whole, as the parties would have specifically indicated if "such purposes" meant "necessary to operate as a first class residential/commercial development", rather than relying on such a standard to be imported through one subparagraph of the definition of "Repair". Despite HGD's submissions, when examined, it is clear that the definition of "Repair" cannot simply and coherently be inserted into Note 2, and this is not something that the Arbitrator clearly ought to have done.

[113] HGD also argues that the Arbitrator's interpretation of Note 2 renders Article 6.4(b) of the REA meaningless. Article 6.4(b) is titled "Obligation to Repair, Maintain and Provide", and it sets out the Owners' obligations to repair separately from the Shared Costs process and provisions. If an Owner wishes to recover some or part of the cost, it must do so in accordance with Article 8 - "Cost Sharing", which sets out further parameters for those costs.

[114] Ultimately, HGD does not explain how any of this would have changed the result in the Partial Final Award. "First class standard" is not the same as "first class hotel". The Residential Strata agreed at the arbitration that bell and door staff are necessary for a "first class hotel". There is no support in the REA for an interpretation which requires the Residential Strata to compensate HGD for "first class hotel" related costs.

[115] As an example, the Arbitrator explained at para. 100 of the Partial Final Award:

[100] In his written and oral testimony Mr. Al Bik [the Hotel Manager] emphasized part of the time charged related to the need for the Fitness Area attendants to be present every 20 minutes in order to maintain its rating as a

"Forbes 4 star spa so a big part of their job is to make sure that, you know, the standards are followed - the procedures are followed. A very good example about the Spa Attendants - one of the criteria in the spa audit is that each 20 minutes there are - like they must be present for - the Spa Attendant in the gym area every 20 minutes. So if an (Forbes) auditor goes there and spend, and they usually spend more than 20 minutes so to measure if we are meeting that criteria or not. If the Spa Attendant does not show up there and make sure that they look at the guests and they make sure that the guest does not need any help, then we're going to lose a point off that. So it's a requirement of the spa."

This allocation of personnel directed at securing and maintaining a "Forbes 4 star spa rating" may be consistent with the purposes of operating the pool and fitness facility to the level of a "First Class Residential/Commercial Development located in the City" but is not necessary for the purposes of operating the Pool and Fitness Facility as a Shared Area or Facility as between the Claimant and the Respondent. Costs associated with the maintenance of the Hotel's 4 star rating by Forbes magazine is uniquely a cost of the operation of the Hotel and is not an element of a Shared Cost. It is not necessary for the operation of the pool and exercise facility as a common service and facility.

[116] I have concluded that HGD has not established the first alleged error was an error of law.

[117] The parties made submissions on the other elements of s. 31, including whether or not the standard of review is correctness or reasonableness. I do not find it necessary to address those arguments since the petitioners have not established an extricable question of law.

Did the Arbitrator apply an incorrect legal principle, or fail to apply a required legal principle, in finding that property taxes were not "Shared Costs" contemplated by Schedule D of the REA? Did the Arbitrator fail to apply the correct legal test to determine whether the calculation of property taxes attributable to shared areas had been determined in a fair and reasonable manner?

[118] HGD submits that the Arbitrator did not consider the REA as a whole when he dismissed its claim that the Residential Strata should share in the property taxes for the Common Areas.

- [119] I have concluded that the Arbitrator did not make a determination that the Residential Strata was not required to share in the property taxes for the Common Areas and did not make an error in law.
- [120] The Arbitrator's analysis of the property tax issue is set out at paras. 111-123 of the Partial Final Award. He referred to the definition of Shared Costs in the REA which were defined to mean, "without duplication: (v) the Property Taxes attributable to the Common Services and Facilities". He set out the REA's definition of Common Services and Facilities, referred to above at para. 96.
- [121] The Arbitrator noted that "Shared Property Taxes" is not a defined term and it is not specifically referred to in Schedule D, which set out each owner's percentage allocation of Shared Costs.
- [122] The Arbitrator then noted that s. 8.1 of the REA provided that, if Schedule D did not set out an owner's percentage allocation for a particular item of Shared Costs, then the "Owner of the Remainder shall determine, in an equitable and commercially reasonable manner" each owner's percentage allocation.
- [123] The Arbitrator noted that between 2013 and 2016, HGD did not claim a share of the property taxes attributable to the Common Areas. As the president of the previous owner explained, they did not do so because they could not apportion them in a commercially reasonable or what they deemed as an equitable way.
- [124] The Residential Strata disputed liability on the basis that the allocation was not equitable or reasonable, or that HGD was estopped from claiming them due to its prior conduct.
- [125] At para. 117, the Arbitrator explained the process by which HGD had calculated the portion of the property taxes for which it invoiced the Residential Strata. In brief, it involved allocating the property taxes based on the relative square footage of each of the Shared Areas, compared to the square footage of the hotel as a whole, and then applying the apportionment percentages otherwise set out in Schedule D for the Hotel Porte Cochere, the swimming pool, fitness facility, and the shared areas of the parkade.
- [126] The Arbitrator found that HGD did not explain why the Schedule D allocations were applied. At paras. 119-123, the Arbitrator wrote:
119. Note 2 does not include a reference to "Property Taxes" or "Taxes" in its recitation of costs to be allocated, either directly or by inference and there was no evidence adduced on behalf of [HGD] to establish why the application of Schedule D allocations were "equitable and commercially reasonable" as required by Section 8.1 particularly when the parties to the REA decided to exclude the application of Schedule D to Property Taxes attributable to the Common Services and Facilities.

120. Both parties tendered expert evidence in respect of this issue. On behalf of the Respondents, John G. Parkes, designated and qualified as an appraiser by the Appraisal Institute of Canada, opines that strata units owned by the members of the [Residential Strata] are assessed for tax purposes at the market value of the property which includes consideration of the value of access to facilities shared with the hotel which Mr. Parkes suggests "generally have value and therefore are included in the assessment" although he is "not sure if [the Porte Cochere] would have any definitive value".
121. The [Residential Strata] argued that including a claim for a portion of the Property Taxes paid by the Hotel Owner in respect of the Common Services and Facilities have already been paid. I disagree. The parties to the REA would have been cognisant of this fact when they agreed to its terms. The expression by which liability for Property Taxes is identified is clear and unequivocal.
122. The evidence disclosed that Property Taxes are based on the value of the hotel property derived from its income earning ability. The [HGD] derives income from the Shared Areas indirectly, but the [Residential Strata] does not share in that revenue. This disparity in revenue source should be a factor in the analysis of an equitable and commercially reasonable manner in apportioning the property taxes in respect of Shared Areas, Common Services and Facilities and Equipment and Installations.
123. In the result the calculation and allocation of Property Taxes to the [Residential Strata] is contrary to the express provisions of the REA and have not been determined in an equitable and commercially reasonable manner. This portion of the claim is dismissed.
- [127] In its arguments before me, HGD submits that the Arbitrator had failed to apply the REA as a whole, had read Note 2 in isolation from the contract, and thereby created a new contract between the parties.
- [128] In the alternative, HGD argues that the Arbitrator made an error in law by failing to consider and apply *Bentall Properties Ltd. v. Zellers Inc.*, [1985] B.C.J. No. 929 (Co. Ct.) [Bentall], which it described as being "squarely on point". I accept that it would amount to an error in law to fail to consider a legally binding authority, but I do not agree that Bentall was such a case. It arose in very different factual circumstances: it involved a lease term, not a complex agreement like the REA, and proceeded without the benefit of expert evidence. What was found to be reasonable in the circumstance of the Bentall case was not binding on the Arbitrator.
- [129] In my view, HGD has not established that this question is a question of law. It is a question of mixed fact and law concerning how the Arbitrator, who was clearly aware of the correct legal test, and the nature and terms of the REA as a whole and how they inter-related, carried out an assessment of this item of Shared Costs based on the facts.

Did the Arbitrator apply an incorrect legal principle, or fail to apply a required legal principle, in declining to assess damages for breach of contract?

- [130] As I understand HGD's argument in this regard, it submits that the Arbitrator was required to determine the proper amount payable on a contractual quantum meruit basis due to his finding that there is a contractual obligation on the Residential Strata to pay certain Shared Costs, but that HGD had failed to prove the costs they had incurred as Shared Costs.
- [131] The issue arose as a result of the Arbitrator's request for further submissions after the hearing. The Arbitrator asked the parties whether he could make an award based on quantum meruit if he found that HGD had not proven the amount of the debt they were claiming.
- [132] The Residential Strata argues that the Arbitrator could not make an award based on quantum meruit because it would be unfair and prejudicial to it to allow HGD to advance a new basis for recovery, one that had not been explored by the parties in evidence or otherwise.
- [133] HGD submits that assessment on a quantum meruit basis was not necessary, but, if it was, the Arbitrator could make an award based on contractual quantum meruit.
- [134] Throughout the Arbitration, HGD characterized its claim as a debt claim. The record before me discloses that:
- (a) in its written argument, HGD states, at para. 22 of the legal basis section, "[t]his is a claim in debt to recover amounts owing by the [Residential Strata] under the REA";
 - (b) HGD's counsel's opening submission stated, "[f]rom [HGD]'s point of view, this is a straightforward debt claim for outstanding Shared Costs payments that are owed under the REA";
 - (c) HGD's counsel stated during the Arbitration that "[t]he dispute from my client's point of view is a straightforward debt claim It's either in or it's out"; and
 - (d) in closing, HGD's counsel stated that "to succeed, the claimant must prove the cost-sharing agreement and prove the amount of the debt."
- [135] The Arbitrator agreed with the Residential Strata's submissions. At para. 160 of the Partial Final Award, the Arbitrator wrote:
- It would be clearly unfair and prejudicial to the [Residential Strata] to have a new legal basis for recovery of common law damages at this stage and I exercise my discretion against pursuing that analysis.
- [136] The Arbitrator's exercise of discretion involved his assessment of the factual circumstances, which gave rise to the issue, and the positions taken by the parties in the proceedings before him, to determine how his discretion should be exercised. In my view, that is a question of mixed fact and law and is owed deference.

- [137] In this case, a late amendment to the pleading or a change in the basis for HGD's claim would have prejudiced the Residential Strata. The Residential Strata advanced a defence and proceeded on the basis that HGD was making a debt claim. The Residential Strata was entitled to rely on the explicit and repeated position taken by HGD's counsel that its claim was a simple debt claim under the REA. The evidence, and experts that the Residential Strata might have called, in response to a contractual quantum meruit claim would likely have been different than what it called in response to a debt claim.
- [138] In *Citifund Capital Corp. v. Happy Valley Resort Ltd.*, 2011 BCSC 18, an application was made to amend pleadings following the conclusion of a trial. A claim in contract had been dismissed, and the plaintiff sought to amend its pleading to claim relief under quantum meruit principles. The Court dismissed the application to amend.
- [139] The Court noted that while there may have been evidence from which damages could be calculated, there was no evidence as to similar services performed by others, any applicable custom with respect to the value of services, or any bargaining discussions. The evidence at trial had not been adduced in the context of quantum meruit; the case was pleaded in contract only; the issues of benefit and detriment arose incidentally to the contractual evidence; different evidence may have been led had a quantum meruit claim been advanced; and the Court was left to speculate on what evidence might have been helpful. That analysis applies in this case.
- [140] The REA establishes liability to pay for a variety of Shared Costs, but until the debt is actually proven (i.e., that particular expenses were actually incurred and fell within the scope of the Shared Cost recovery provisions in the REA), liability is theoretical.
- [141] The Arbitrator found that HGD had not proven that most of the amounts in dispute were properly owed as a debt from the Residential Strata pursuant to the REA or, in respect of some of the costs claimed by HGD, that they were actually incurred.
- [142] The analysis of whether a debt has been proven by the evidence requires an analysis of the evidence and the facts. It does not implicate an issue of law.
- [143] Even in the context of a quantum meruit claim, HGD still would have failed to establish liability and prove its loss based on the evidence it advanced before the Arbitrator.
- [144] At para. 47 of its petition, HGD provides what it says is the "closest example" supporting its argument, and at para. 49 of the petition, HGD states that "it was clear that the evidence before the Arbitrator established that at least one hour of labour was incurred." However, as the Arbitrator wrote at para. 154 of the Partial Final Award, "many of the hours of the employees described in the calculations represent nothing more than 'plug numbers' given the absence of accounting records evidencing how they were calculated."

[145] Even if I had found that this was a question of law, I would use my discretion and decline to hear the quantum meruit issue as it was a procedural decision, and an exercise of the Arbitrator's discretion with regards to procedural matters.

[146] In light of my finding that the issues raised by HGD involve mixed questions of fact and law, leave to appeal in this case is not granted.

Conclusion

[147] Given my conclusions that none of the four questions proposed by HGD is a question of law, I need not discuss whether HGD could, nevertheless, have demonstrated what is required under s. 31(2)(a) of the AA.

[148] HGD's application for leave to appeal is dismissed.

"MacNaughton J."

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