
CANADA / JUDGMENT

McMillan v. McMillan

2016 BCCA 441

COURT

British Columbia Court of Appeal

DECIDED

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2016 BCSC 441 McMillan v. McMillan

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

McMillan v. McMillan,

2016 BCCA 441

Date: 20161109

Docket: CA43329

Between:

Bruce Edwin McMillan

Appellant

(Petitioner)

And

Milena Maria McMillan

Respondent

(Respondent)

Before:

The Honourable Mr. Justice Donald

The Honourable Madam Justice Newbury

The Honourable Mr. Justice Savage

On appeal from: An order of the Supreme Court of British Columbia,

dated November 26, 2015 (McMillan v. McMillan, 2015 BCSC 2177,
Vancouver Registry Docket No. S149961).

Counsel for the Appellant:

M.L. Smith

Counsel for the Respondent:

T.L. Jackson

Place and Date of Hearing:

Vancouver, British Columbia

October 17 & 18, 2016

Place and Date of Judgment:

Vancouver, British Columbia

November 9, 2016

Written Reasons by:

The Honourable Madam Justice Newbury

Concurred in by:

The Honourable Mr. Justice Donald

The Honourable Mr. Justice Savage

Summary:

The court below dismissed appeal from arbitrator's decision in a family law appeal. Appellant argued in this court that the respondent's application to a chambers judge for certain orders, prior to the arbitration, had constituted a breach of the arbitration agreement, and that the court below "ignored" that fact. Appellant also contended that the arbitrator had erred in failing to award damages against the respondent for this "breach". The appellant had sought and obtained a stay of the respondent's application.

Held: Appeal dismissed. The arbitrator had not erred in "ignoring" the court application; he found that the appellant, not the respondent, had breached the agreement. As the court below had ruled, no reviewable error was shown in the arbitrator's decision.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This is the first appeal to reach this court involving the decision of an arbitrator to which the Family Law Act, S.B.C. 2011, c. 25 ("FLA") and concomitant amendments to the Arbitration Act, S.B.C. 1996, c. 55 apply. It is also the first appeal in which the applicability of the Supreme Court of Canada's decision in *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC

53 concerning contractual interpretation has been raised in the family law arbitration context. Perhaps predictably, the parties disagree as to the nature of the issues raised by the appeal - fact, law or mixed fact and law? - and have called into aid the seminal case on standards of review applied to the judicial review of administrative tribunals, *Dunsmuir v. New Brunswick* 2008 SCC 9; and the seminal case on appellate review of judicial decisions, *Housen v. Nikolaisen* 2002 SCC 33.

- [2] As I view this appeal, however, it turns essentially on one issue - whether a judge of the Supreme Court of British Columbia found in January 2014 that the respondent Ms. McMillan (the "wife") had breached an arbitration agreement between her and her ex-husband (the "husband") when she applied to the Court for certain relief. This is not a question of contractual interpretation, but of the meaning and effect of the chambers judge's reasons - in my opinion a question of law, and one that is fairly easily answered.

Factual Background

- [3] The facts of the case are rather complicated. The judge below did an admirable job of describing them in considerable detail and I will not attempt to recount them here, limiting myself to the most salient facts relevant to the issues raised in this court.
- [4] The parties separated in late 2007 after 21 years of marriage. They had three children, a son born in December 1992 and a twin boy and girl born in March 1994.
- [5] The wife commenced a family law proceeding shortly after the separation. The trial of that proceeding began in January 2010, but ultimately the parties agreed on extensive Minutes of Settlement ("MOS") that were incorporated into a consent order of the Court filed in July 2010.
- [6] The MOS was effectively an arbitration agreement with interim provisions to be complied with until the arbitration was completed and mutual releases were executed. For purposes of this appeal, the relevant provisions of the MOS were as follows:
- a. Para. 23 - the parties agreed to sell their property on Crabapple Drive in Whistler, B.C. and for that purpose to use their best efforts to list it immediately.
 - b. Para. 25 - the parties would share all expenses related to the Crabapple Drive property equally, including "all payments to maintain and preserve the property, including but not limited to, the mortgage, the property taxes, property insurance, utilities, with liberty to either Party to apply if the Parties are unable to agree with respect to these expenses." (My emphasis.) The mortgage payment on the Crabapple Drive property was just under \$20,000 per month.

- c. Para. 56 - the parties would use their best efforts to calculate the so-called "Financial Equalization Payment", or "FEP", by August 1, 2010 in order to divide equally various Advances, Financial Assets and Shared Liabilities (as defined). If agreement was not reached by August 1, 2010, the husband was to pay to the wife, on account of the FEP, \$2.5 million "to be adjusted upon the resolution of the amount of the Financial Equalization Payment."
 - d. Para. 57 - neither party would be required to produce documents relating to their Financial Assets "save and except for the purpose of effecting the equal division of the Financial Assets, Shared Liabilities and Advances", and for the purposes of reconciling certain other expenses.
 - e. Para. 82 - each party was to appoint an accountant "to work with the other party's accountant with a view to resolving the calculations for the ... Financial Equalization Payment".
 - f. Para. 83 - if the parties or their accountants could not agree "on any issue except for paragraphs herein which reference 'liberty to apply'", the parties would refer the dispute to binding arbitration, appointing one of three named persons as arbitrator. It was agreed that the arbitrator would "hold such hearings as are necessary and render a decision within 7 days of any issue being submitted for resolution."
 - g. Para. 88 - the parties would "do all things necessary and execute all documentation as may be required to carry out the provisions" of the MOS. [Emphasis by underlining added.]
- [7] The MOS provisions that gave "liberty to apply" (i.e., permitted either party to seek the resolution of an issue in a court of law as opposed to before the arbitrator) were paras. 24, 40 and 68. The second is relevant; it provided:
40. The Parties shall account for and share equally all reasonable expenses incurred to repair, maintain or preserve the following properties from December 13, 2007 until the date of disposal/transfer of each of the following properties, with liberty to apply if the parties are unable to agree upon the expenses:
- [Crabapple Drive property] .
- [8] Counsel for the wife provided counsel for the husband with some documentation as early as July 29, 2010 to be used in the determination of the FEP, but the August 1, 2010 deadline for the completion of the "FEP process" proved to be wildly optimistic. On August 1, 2010, the husband paid the wife the \$2.5 million required by para. 56 of the MOS.
- [9] Over the next few years, the parties' counsel and their accountants corresponded about the FEP and the documents required to calculate same. There were various starts and stops, some beyond the parties' control, some not. Eventually, in October 2013, the wife applied to the Supreme Court of British Columbia for orders as follows:
1. The Respondent [husband] shall pay to the Claimant [wife] \$456,635.00 in full satisfaction of the [Financial] Equalization Payment, including section 7 expenses incurred to July 31, 2010.

2. The Respondent shall pay to the Claimant \$70,863.59 in full satisfaction of his proportionate share of the Children's special and extraordinary expenses incurred by the Claimant from July 1, 2010 to July 31, 2013.
3. The Respondent shall be solely responsible to pay for the Crabapple Property Mortgage from August 1, 2010 onwards.
4. The Respondent shall pay to the Claimant \$353,941.92 and the amount the Claimant paid thereafter for the Crabapple Mortgage Expenses to the date of the hearing of the within application as reimbursement for the Crabapple Mortgage Expenses paid by the Claimant to July 31, 2013 as a result of the Respondent's delay in finalizing the Equalization Payment.
5. Costs.

A few months later, on January 9, 2014, the husband applied to the Court for a stay of Ms. McMillan's application. Counsel for the husband argued that there was an arbitration agreement that covered all of the matters raised in the legal proceeding (Ms. McMillan conceded that the matters other than the mortgage were indeed covered) and that even if there was any doubt about the point, the "competence principle" required that the arbitrator determine the matter.

[10] The chambers judge, Mr. Justice Kelleher, gave oral reasons for judgment on January 9, 2014 granting a stay. He reasoned in part:

Section 83 [of the MOS] calls for arbitration of all disputes except those which arise from provisions where there is liberty to apply, and in that case it is the Court that has the power to hear the dispute.

The governing principle was stated by Madam Justice Warren in the Owners Strata Plan BCS 3165 v. 1100 Georgia Partnership, 2013 BCSC 1708 at para. 123:

In my view, s. 15 of the Arbitration Act clearly renders a stay of the action mandatory in respect of matters that fall within the scope of the arbitration clause. Even where it is only arguable that a dispute falls within the scope of an arbitration agreement, court proceedings will be stayed and the scope of the arbitration left to be determined at first instance by the arbitrator.

In *St. Pierre v. Chriscan Enterprises*, 2011 BCCA 97, the Court of Appeal cited at para. 25 the following paragraph from *Gulf Canada Resources Ltd. v. Arochem International Ltd.*, (1992) 66 B.C.L.R (2d) 113, at para. 39 with approval:

... in my opinion, 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. (Emphasis in original.)

That governs the situation before me. It is not at all clear that what is sought in section 4 of the application [the mortgage payments] is outside the terms of the arbitration agreement; that is, it does not arise from any liberty to apply provision. So it may prima facie be a matter for arbitration. I express no view. [At paras. 11-14; emphasis added.]

- [11] After one false start (on the first day of the scheduled arbitration when the husband delivered voluminous new documents to the wife), the parties were finally ready to proceed with the arbitration in mid-2014. They attended before the arbitrator, Mr. Germaine, on various dates between May and August of that year. As noted in the wife's factum, the husband did not raise the argument that he is raising in this appeal to the effect that Kelleher J. had in fact determined that by applying to the Court, Ms. McMillan had breached the arbitration agreement; nor did the husband contend that the arbitrator was bound by any determination to that effect.
- [12] On October 28, 2014, the arbitrator issued his award. His reasons were lengthy and thorough, and again, I do not intend to recount them in any detail here. He resolved various issues and addressed many arguments, including the wife's claim that the husband had delayed the 'FEP Process' contemplated by the MOS. He had thereby prevented the operation of paragraph 28 thereof, under which he was required to assume the mortgage on the Crabapple Drive property following the completion of "the accounting" and the execution of mutual releases. The wife had been required to pay almost \$10,000 per month, as agreed at para. 25 of the MOS, over the many months of delay. She argued that these payments on her part had given the husband the benefit of "a significant and unintended reapportionment of the family assets in his favour."
- [13] After reviewing in detail the exchanges between the parties between 2010 and 2014 and acknowledging the principles of contractual interpretation, the arbitrator found inter alia that:
- a. the MOS was not ambiguous in its provisions with respect to the payment of the mortgage on the Crabapple Drive property;
 - b. the duty to act in good faith was an implied term of the contract and that duty had extended to an obligation on the parties to use their best efforts to complete the FEP; and
 - c. the husband had failed to "act in good faith or, at least, fail[ed] to do all things necessary to carry out the terms of the MOS and use his best efforts to conclude the calculation of FEP in a timely fashion".

With respect to a submission by Mr. McMillan that the wife had waived her right to complain of his delaying conduct, the arbitrator stated:

The final consideration is that, far from waiving any contractual rights, the Respondent opted to pursue those rights in a different forum. And the choice of the BCSC was based on respectable legal analysis. By 2013, this mortgage payment reimbursement aspect of the dispute had gathered quantum. But the claim was arguably a dispute over expenses related to 6805 Crabapple Drive

and, if so, it was subject to the "liberty to apply" language in paragraph 25 of the MOS. As such, it would not be arbitrable under paragraph 83 and, to avoid a proliferation of proceedings, it was logical to wrap the entire dispute into an application to the Supreme Court. Kelleher J. did not agree; he held the claim did "not arise from any liberty to apply provision" (paragraph 14). The arbitration agreement was thus enforced, but I am not prepared to second guess the reasoning which placed the issue before the BCSC. [At para. 214; emphasis added.]

[14] The arbitrator summarized his conclusion regarding the husband's breaches thus:

For all of the foregoing reasons, I find the Claimant [husband] breached the MOS by refusing to do all things necessary to carry out the provisions of the MOS and by failing to use his best efforts to calculate the FEP. In addition, on my view that the MOS includes an implied term imposing a duty to act in good faith, the Claimant also breached the MOS by not acting in good faith to achieve the equalization objectives of the MOS. Further, the fact the Claimant was the party who initiated these proceedings in 2014 does not alter the nature and effect of his conduct from 2010 to 2013. [At para. 215.]

[15] The arbitrator then turned to the question of "remedy", noting the general principle expressed in *CivicLife.com Inc. v. Canada (Attorney General)* (2006) 215 O.A.C. 43 that damages for breach of contract should place the complaining party, "insofar as can be done by money in the same position as if the contract had been performed". He reasoned:

The question, then, is whether the parties would have progressed to the point that paragraph 28 would have been triggered by August 1, 2010. The trigger language in the provision, it will be recalled, is: "Commencing on the first day of the month following exchange of mutual releases evidencing completion of the accounting", the Claimant will assume exclusive responsibility for the mortgage.

It is clear the parties were not going to resolve all of the equalization processes in the MOS and related differences by July 31, 2010. The letter of July 29, 2010 from counsel for the Respondent acknowledged as much. The Claimant was therefore never in danger of being responsible for the mortgage from August 1, 2010.

The further analysis is necessarily speculative to a degree. But I am satisfied that, even with both parties doing all things, using their best efforts and acting good faith, it would have taken several weeks and perhaps a few months for the Respondent to accept that the Claimant was entitled to insist on the engagement of accountants so that the paragraph 82 process could be followed. It is also unlikely the parties, even with the utmost of good faith, would have been able to resolve all of the issues by agreement. The FEP probably could have been calculated and the expense claims would have been smaller. But the issues surrounding basic child support and section 7 expenses would not have been any less divisive. Given the parties' propensity for conflict in these areas in particular, I am persuaded some form of third-party dispute resolution would have been needed to conclude all of the accounting. I conclude that, had the MOS been performed by the parties in the manner intended, it is likely that it would have taken about a year to trigger paragraph 28. Accordingly, the Respondent is entitled to be compensated for the loss she has incurred since

August 1, 2011.

To place the Respondent in the position she would have been had the Claimant performed his contractual responsibilities, the damages must compensate her for the continuing monthly loss until and including October 2014. [At paras. 216-9; emphasis added.]

[16] Accordingly, the arbitrator awarded the wife the sum of \$383,437.08, representing damages for her payment of one-half of the mortgage payments over 39 months, together with interest under the Court Order Interest Act. All subsequent mortgage payments from November 2014 were ordered to be paid by the husband. The award was stated to be "final as to all matters except costs."

[17] The husband appealed to the Supreme Court of British Columbia and the appeal was heard in August 2015 before Mr. Justice Punnett in chambers. It is from his reasons, dated November 26, 2015, that this appeal is taken.

Chambers Judge's Reasons on First Appeal

[18] The husband advanced the following grounds of appeal before Punnett J.:

- a) Ground 1: The arbitrator failed to follow the rule of contract law that damages cannot be recovered in respect of any part of a loss that could have been avoided by taking reasonable action.
- b) Ground 2: The arbitrator failed to follow the rule of causation in contract law.
- c) Ground 3: The arbitrator failed to construe the MOS as a whole.
- d) Ground 4: The arbitrator impermissibly rectified the contract to override the provisions of paragraph 25 of the MOS.
- e) Ground 5: The decision of the arbitrator was patently unreasonable.

[19] At paras. 19-45 of his reasons, the chambers judge considered the standard of review to be applied on a review of an arbitration award in a family law dispute. He quoted extensively from *Boxer Capital Corporation v. JEL Investments Ltd.* 2015 BCCA 24, where this court had discussed *Sattva* and had observed:

Sattva held that questions of contractual interpretation should almost always be regarded as questions of mixed fact and law (at para. 50). (Historically they were seen as questions of law.) This means that, after *Sattva*, leave will rarely be granted to appeal an arbitral award on a question of contractual interpretation. (If *Sattva* had been decided earlier, leave arguably would not have been granted to appeal the parties' initial arbitral award and this lengthy saga would have been avoided.)

When leave is granted to appeal an arbitral award, the reviewing court is bound by the arbitrator's factual findings (*Sattva* at para. 104). The normal "palpable and overriding error" standard does not apply; the arbitrator's factual findings simply cannot be disturbed. The

standard of review on the question of law under appeal will "almost always" be reasonableness (at para. 75). Here the Dunsmuir framework does apply (at para. 106), so the standard would be correctness if, for example, the question was both centrally important to the legal system as a whole and outside the arbitrator's area of expertise (see Dunsmuir at para. 60; *Toronto (City) v. C.U.P.E.*, 2003 SCC 63 at para. 6).

Finally, when leave is granted to appeal an arbitral award, it is important for the reviewing court to strictly honour the boundaries of the question or questions of law on which leave was granted. The appeal is not one at large. The reviewing court must constantly remind itself of the narrow question or questions before it, lest it improperly expand its search for error into areas that go beyond those questions, let alone areas that go beyond the scope of the dispute referred by the parties to the arbitrator. [At paras. 9-11.]

[20] The chambers judge reproduced in his reasons the relevant provisions of the FLA and the Arbitration Act (formerly the Commercial Arbitration Act, R.S.B.C. 1996, c. 55), including s. 31:

Appeal to the court

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

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

(3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.

- (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. [Emphasis added.]

[21] The husband argued that an appeal from an arbitrator's award in a family law case imports the same standard of review as an appeal from a lower court, but the chambers judge did not agree. He noted the deferential standard found in *Sattva* to be applicable to commercial arbitrations, and reasoned that the Legislature could not have intended a less deferential approach to be applied to family law appeals. In his analysis:

It cannot have been intended that previous jurisprudence and interpretation of the Arbitration Act is to be ignored. If that were the case presumably a "Family Arbitration Act" providing a clean slate would have been enacted. By incorporating family arbitrations into the Arbitration Act surely the intention was to retain the benefits of arbitration. Those benefits include not only the presumed savings in legal fees by avoiding a full trial but the aftermath of arbitration as well, including any appeal. To be otherwise would undermine the whole purpose of alternate dispute resolution, one of which is finality. As noted it should not simply be one more step in the litigation process.

If the appeal questions are characterized as questions of fact is there a review at all? The amendments to the Arbitration Act amend s. 31 of the Arbitration Act to provide that while a commercial arbitration decision may be appealed on a question of law with leave a family arbitration may be appealed on a question of law or a question of mixed law and fact without leave. In *Sattva* the Supreme Court of Canada noted at para. 104 that the Arbitration Act "forbids review of an arbitrator's factual findings".

A review on a question of mixed fact and law does not permit review of the arbitrator's factual findings. Rather it permits a review of mixed fact and law on the standard of reasonableness, not correctness. [At paras. 42-44; emphasis added.]

[22] At paras. 49-53, the chambers judge instructed himself on the content of the "reasonableness" standard, as discussed in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, *Dunsmuir*, and *Sattva*. He then formulated what he regarded as the correct approach:

As a result in considering this appeal it is not open to the court to substitute its own findings of fact for those of the arbitrator. In considering any questions of mixed fact and law and whether the arbitrator applied a particular legal standard or test it is to the facts as he found them. In doing so the court must consider whether the arbitrator's conclusions fall within an acceptable range with due deference to the arbitrator's reasoning. [At para. 54.]

[23] The chambers judge next carried out an examination of the facts relating to the grounds of appeal, each of which he characterized as a question of mixed fact and law and therefore subject to the reasonableness standard. He rejected the first three grounds, ruling that the arbitrator's findings were reasonable. With respect to the fourth ground - that the arbitrator had impermissibly rectified the contract to override the provisions of the MOS - he ruled that this characterization of the arbitrator's decision was erroneous and in particular that the award of damages was not a "refund" but a calculation of damages caused by the husband's breach. In the Court's words:

The award of damages was not a "refund" but rather a calculation of damages caused by the appellant's breach. In doing so the arbitrator found that but for the breach the parties would have proceeded to arbitration by August 1, 2011. He therefore calculated her damages as the total mortgage payments made by the respondent after August 1, 2011. That is her damages were the difference between the payments she did make up to the date of the arbitration award and the lesser sum she would have paid if there had been no breach and the arbitration had occurred in 2011.

In doing so the arbitrator was drawing from the facts the necessary inferences to determine what would have occurred but for the breach of contract and the resulting damages awarded. [At paras. 94-5.]

Since no "rectification" had taken place, the Court declined to address this argument further.

[24] With respect to ground five - that the arbitrator's decision had been "patently unreasonable" - the husband argued that there had been no "rational basis" for the award on the mortgage issue given that the arbitrator had found arbitration had been inevitable and had then ordered the husband to pay damages for the time it took to complete the arbitration. The chambers judge rejected this and related arguments on the basis that the arbitrator had not considered irrelevant factors or failed to consider relevant factors.

[25] Punnett J. dismissed the husband's appeal and awarded costs of the appeal to Ms. McMillan.

Appeal to This Court

[26] The husband appeals to this court, raising the following issues in his factum:

- 1) Did the Respondent breach the arbitration agreement?
- 2) Was breach of the arbitration agreement a question of fact?
- 3) Was breach of the arbitration agreement a relevant factor in respect of causation?
- 4) Was breach of the arbitration agreement a relevant factor in respect of the duty to mitigate?
- 5) Was breach of the arbitration agreement a relevant factor in respect of reading the contract as a whole?
- 6) Did the arbitrator err in law in shifting the duty to mitigate on to the Appellant?

It will be noted that five of the six grounds relate directly to an alleged breach of the arbitration agreement by the wife; the final ground of appeal also depends indirectly on a breach having occurred which caused the chambers judge to "shift" the duty to mitigate to the husband. All the grounds of appeal depend, then, on the notion that the wife breached the MOS by applying to the Supreme Court in October 2013; and that Kelleher J. found she had done so. Indeed it is said that the arbitrator "failed to accept the legal determination by Justice Kelleher that the [wife] breached the arbitration agreement by bringing arbitral claims in litigation."

[27] I am unable to accept this basic premise. As we have already seen, Kelleher J. applied what counsel described as the "competence principle" - that where there is a disagreement about the scope of issues to be arbitrated, it is the arbitrator who first decides that question. This principle, usually called the "competence-competence principle", is of long-standing in Canada, and is described in Halsbury's Laws of Canada (2014, online ed.), Alternative Dispute Resolution at para. HRD-53:

This concept is fundamental. This "competence-competence" principle was endorsed by the Supreme Court of Canada in the context of its interpretation of Québec legislation and has been applied in courts across Canada. Under the competence-competence principle, contests about the arbitrator's jurisdiction should first be resolved by the arbitrator. The principle is not an absolute rule of referral and admits of a few exceptions. A contest about the arbitrator's jurisdiction should first be resolved by the arbitrator unless the challenge is based solely on a question of law, or, if a question of mixed fact and law, the question of fact requires only a superficial consideration of the documentary evidence on the record. [footnotes omitted.]

[28] The principle was confirmed by the Supreme Court of Canada in *Dell Computer Corp. v. Union des consommateurs* 2007 SCC 34 and again in *Seidel v. TELUS Communications Inc.* 2011 SCC 15, where Binnie J. for the majority stated:

British Columbia has adopted the competence-competence principle through the combined operation of s. 22 of the [Commercial Arbitration Act] and Rule 20(2) of the BCICAC Rules which in turn reflect the provisions of the New York Convention and Model law. As such, "[t]he jurisdiction to determine jurisdiction is given to the arbitral tribunal by statute, as well as by the rules of arbitration used by most institutions": see J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at p. 147.

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. [At paras. 28-29.]

(Section 22 of the former Commercial Arbitration Act is now s. 22 of the Arbitration Act and presumptively applies the rules of the British Columbia International Commercial Arbitration Centre for the conduct of domestic commercial arbitrations.) See also *MacKinnon v. National Money Mart Co.* 2009 BCCA 103 at paras. 27-30 and 62-72.

- [29] There can be no doubt that Kelleher J. applied the competence-competence principle. As has been seen, he expressly declined to "express a view" as to whether the orders sought by the wife concerning the mortgage came within the MOS and he granted a stay under s. 15 of the statute to permit the arbitrator to rule on jurisdiction and, assuming jurisdiction, to determine the substantive issues before him.
- [30] The husband also relies on an English case, *Doleman & Sons v. Ossett Corporation* [1912] 3 K.B. 257 (C.A.). In that instance, the parties had entered into a contract that contained an arbitration clause under which any disputes were to be decided by the defendants' engineer. The plaintiffs brought an action in court against the defendants for sums allegedly due under the contract and the defendants did not seek a stay. The engineer, without giving notice to the parties and without the knowledge or consent of the plaintiffs, then made an award purporting to decide the matters in dispute. The defendants pleaded his award as a bar to the plaintiffs' court action. The issue, then, was whether, in the words of Fletcher Moulton L.J., "an arbitration can still go on notwithstanding the pendency of the action in respect of the same matter, and an award made in it can be pleaded in the action in bar to the claim." (At 266.)
- [31] At the time, s. 4 of the Arbitration Act, 1889 permitted a court to stay court proceedings if it was satisfied there were "no sufficient reason" why the matter should not be "referred" (to the arbitrator) and that the applicant (for the stay) was and is "ready and willing to do all things necessary to the proper conduct of the arbitration". This may be contrasted with s. 15 of the Arbitration Act in this province, which requires the court to grant a stay unless it determines the agreement is "void, inoperative or incapable of being performed." As was explained by LeBel and Deschamps JJ. in their dissenting reasons in *Seidel*:

Canadian courts, both in Quebec and in the common law jurisdictions, have endorsed the use of arbitration as a dispute resolution mechanism and now encourage its use (*Desputeaux v. Éditions Chouette* (1987) inc., 2003 SCC 17, [2003] 1 S.C.R. 178, at para. 38). This was not always the case, however, as the courts originally displayed overt hostility to arbitration, effectively treating it as a second-class method of dispute resolution. As J. B. Casey and J. Mills observe in *Arbitration Law of Canada: Practice and Procedure* (2005):

Judicial hostility to "lesser" tribunals, and the lack of a modern legislative framework, inhibited the growth of arbitration in Canada, particularly relative to European countries. Until the 1990's, commercial arbitration in Canada was not regarded as a real substitute for the courts and the provinces were slow to recognize any distinction between domestic arbitration and international arbitration. [pp. 2-3]

(J. B. Casey and J. Mills, *Arbitration Law of Canada: Practice and Procedure* (2005), at pp. 2-3)

This hostility originated in the English common law (see, e.g., *Horton v. Sayer* (1859), 4 H. & N. 643, 157 E.R. 993; *Lee v. Page* (1861), 30 L.J. Ch. (N.S.) 857; *Edwards v. Aberayon Mutual Ship Insurance Society Ltd.* (1876), 1 Q.B.D. 563; *Doleman & Sons v. Ossett Corp.*, [1912] 3 K.B. 257). [At para. 89; emphasis added.]

[32] Each of the judges in *Doleman* gave separate reasons that reflect attitudes to arbitration that differ from those taken today by Canadian courts. Fletcher Moulton L.J. was of the view that once the plaintiff had commenced an action and it had not been stayed, the "private tribunal" was *functus officio* unless the parties agreed *de novo* that the dispute should be tried by arbitration. In his words:

There cannot be two tribunals each with the jurisdiction to insist on deciding the rights of the parties and to compel them to accept its decision. To my mind this is clearly involved in the proposition that the Courts will not allow their jurisdiction to be ousted. Their jurisdiction is to hear and decide the matters of the action, and for a private tribunal to take that decision out of their hands, and decide the questions itself, is a clear ouster of jurisdiction. Therefore to hold that the private tribunal is still effective after the dispute has come before the Court would be to say that, in all cases in which s. 4 of the Arbitration Act, 1889, applies, the defendant may still force on an arbitration and, by obtaining an award from the arbitrators, oust the jurisdiction of the Courts to decide the question they have in hand. If this were good law, there would in every case be the race between the public and private tribunals which I have described, and the decision of the speediest would prevail. This would be ousting the jurisdiction of the Court in a most ignominious way.

There is nothing strange in the conclusion that the Court has sole seisin of the dispute where it has allowed the action to proceed. [At 269; emphasis added.]

[33] His Lordship went on to note that common law courts did not normally compel the specific performance of contracts; thus applications for specific performance had to be made to Chancery. However, Chancery would grant specific performance only of certain types of contract, not including contracts referring to arbitration. As was explained by Laskin J. (as he then was) in *Deuterium of Canada Ltd. v. Burns and Roe, Inc.* [1975] 2 S.C.R. 124, prior to the enactment of the Common Law Procedure Act of 1854 and the Arbitration Act, 1889, a promise to arbitrate was not enforceable to compel arbitration, and thus although breach of "the obligation" was itself actionable, an action taken "in defiance of an arbitration clause" would not be stayed. (At 143, citing *Doleman*.)

[34] Fletcher Moulton L.J. continued in *Doleman*:

Hence a party to a contract containing an arbitration clause might refuse to perform it, and the sole remedy of the other party was an action for damages for the breach. The bringing of an action in respect of a dispute under the contract is such a breach, and the sole remedy under the common law was an action for damages, and it would still be so were it not for the provisions of s. 4 of the Arbitration Act, 1889. If for any reason the action is not stayed by the Court, the dispute must be decided by it. There were two competent tribunals, the Court and the arbitrator. The

plaintiff contracted to choose the latter. He has in fact taken the former, and must pay the damages, if any, caused by his breach of contract. But that does not affect the fact that the dispute is before the Court and that it can and must decide it. [At 270; emphasis added.]

His Lordship thus concluded:

so soon as an action is brought in respect of a difference to which an arbitration clause applies, there is a complete breach of that clause so far as that particular dispute is concerned, and the only right which arises directly therefrom is a claim for damages for breach of contract. The defendant may, however, apply to stay the action under the provisions of s. 4 of the Arbitration Act, 1889, but if he neglects so to do, or if the Court refuses to stay the action, the Court has the sole and exclusive jurisdiction to decide the dispute. [At 271; emphasis added.]

[35] Farwell L.J. viewed the question before the Court as one of construction of s. 4 of the Arbitration Act, 1889. He reasoned that:

The preliminary question of law referred by the judge in chambers to be determined is whether this is a good plea. I am of the opinion that it is not. The plaintiffs cannot be deprived of their right to have recourse to the Court when the agreement is a mere agreement to refer, unless the Court makes an order to that effect under s. 4 of the Arbitration Act. They can, of course, deprive themselves of such right by their own act after writ, as for example by going on with the arbitration and obtaining an award; but, when nothing has been done by them since writ, and the only matter relied upon is an award made since writ without their knowledge or consent, under an agreement antecedent to the action, the plea is in fact and in truth a plea of the agreement, because there is no act of the plaintiffs subsequent to the writ on which reliance can be placed, and is bad. It is not a question of revoking the submission; it is a question of the construction of s. 4 of the Act. The King's Courts do not compete with arbitrators, or permit their own proceedings to be interfered with in any way by them; when the defendant has submitted to the jurisdiction, he cannot withdraw without the leave of the Court, or the consent of his opponent. If this is not so, what would happen if the action and the arbitration go on together, and the plaintiff succeeds in his action, but the arbitrator makes his award on the same day in favour of the defendant? Is one to be set off against the other, or which is to prevail? [At 273-4.]

[36] Vaughan Williams L.J. in his dissent reached the same practical result as the other members of the Court, but employed a different mode of reasoning. He could find nothing in the Common Law Procedure Act of 1854 or the Arbitration Act, 1889 suggesting a stay of the agreed arbitration on the ground that there was an action pending that had not been stayed. Vaughan Williams L.J. wrote:

In my opinion the object of the Legislature under the Act of 1854 was to enable effect to be given to the arbitration agreement before the action was tried, and the method of achieving this was to provide for a stay of the pending action by an order of a judge at chambers made in the exercise of his discretion. This order did not oust the jurisdiction of the Court, but was based on an exercise of that jurisdiction, and I do not think that the refusal of an order to stay the action operated as a stay of the arbitration proceedings. The whole object of the Legislature was to give

efficacy to the intention of the parties in making the agreement of reference by staying the action pending the arbitration proceedings; and the only effect of failing to obtain the order to stay the action was to leave the parties in the same position in which they were before the passing of the 11th section of the Common Law Procedure Act, 1854, i.e., in the position that the jurisdiction of the Courts was not ousted, and that the Court ignored the pendency of the arbitration, and therefore held a plea of pendency of an arbitration in the same matter to be bad, but allowed the plea of an executed award to be good, and I think allowed it to be good even if the award was executed after action brought. [At 263-4.]

[37] As this court observed in *Boutsakis v. Kakavelakis* 2008 BCCA 13, Doleman is usually cited today for the proposition that where a defendant (who is party to an arbitration agreement) neglects to apply for a stay until after the pleadings have been delivered or other steps have taken in the court proceedings, the stay will generally be refused. (See para. 14, citing *Bott v. Sorley* [1998] B.C.J. No. 2023 at paras. 19-20 (S.C.)) No modern case was brought to our attention, however, in which a court has taken the view that the commencement of an action by a party "in defiance of an arbitration clause" automatically constitutes a breach of the arbitration agreement, with all the consequences that might involve. This is a sequence of events that happens not infrequently, and it would be inconsistent with the modern judicial deference to arbitration agreements if courts were to rule that their jurisdiction must not be "ousted" by arbitrations or that legal proceedings must be protected to avoid a "race" between public and private tribunals. The modern view, stated in *MacKinnon* at para. 70, is instead that a valid arbitration agreement removes the dispute from the court's purview, provided the arbitration process is invoked within the applicable time limit.

[38] I would not accede, then, to the notion that by applying to the Supreme Court in October 2013, the wife breached the arbitration agreement or that she was found to have done so. Today, Canadian courts, as exemplified by *Kelleher J.* in this instance, respect the fact that arbitrators are competent to determine questions of their own jurisdiction, subject to review by courts where permitted by the Arbitration Act.

[39] This brings us finally to the husband's submission that by bringing the application in Supreme Court, Ms. McMillan delayed the arbitration process and that the arbitrator failed to consider or give effect to this fact in his assessment of damages. Again, I cannot agree. The arbitrator considered this argument in some detail in his reasons. In part, he stated:

The argument is less formidable than it appears. First, the issue for determination here is not whether the [wife's] tactics in this dispute were invariably astute. Rather, it is whether the [husband] observed his contractual obligations to do all things necessary, use his best efforts and act in good faith to ensure the equalization objectives of the MOS were achieved. The [wife's] application to the BCSC was made three years and two months after the August 1, 2010 target date for resolution of the FEP in paragraph 56 of the MOS. Had the [husband] complied in good faith with paragraphs [56] and 88 of the MOS in the meantime, the equalization processes prescribed in the MOS would have been concluded long before October 2013. It was, by then, too late for the [husband] to escape liability for the breach of his contractual obligations.

Second, the opportunity to arbitrate was equally the [husband's]. He also declined to refer the dispute to a binding determination at the time, despite the statement in counsel's March 29, 2012 letter that in the absence of a reply "by return" the [husband] would apply to the BCSC "to facilitate directions respecting this matter".

The final consideration is that, far from waiving any contractual rights, the [wife] opted to pursue those rights in a different forum. And the choice of the BCSC was based on respectable legal analysis. By 2013, this mortgage payment reimbursement aspect of the dispute had gathered quantum. But the claim was arguably a dispute over expenses related to 6805 Crabapple Drive and, if so, it was subject to the "liberty to apply" language in paragraph 25 of the MOS. As such, it would not be arbitrable under paragraph 83 and, to avoid a proliferation of proceedings, it was logical to wrap the entire dispute into an application to the Supreme Court. Kelleher J. did not agree; he held the claim did "not arise from any liberty to apply provision" (paragraph 14). The arbitration agreement was thus enforced, but I am not prepared to second guess the reasoning which placed the issue before the BCSC. [At paras. 212–4; emphasis added.]

[40] Again, in my view, Kelleher J. did not find that a breach of the arbitration agreement occurred in October 2013; nor was the arbitrator himself prepared to 'second guess' the wife's reasoning in applying for relief in the Supreme Court. He found that it was instead the husband who had breached the MOS "by refusing to do all things necessary to carry out the provisions of the MOS and by failing to use his best efforts to calculate the FEP" and by failing to act in good faith to "achieve the equalization objectives of the MOS." (At para. 215.) It has not been shown the arbitrator's findings in this regard were unreasonable; nor did the chambers judge find that they were.

[41] It follows that the six grounds of appeal advanced by the husband must fail. I would therefore dismiss the appeal.

"The Honourable Madam Justice Newbury"

I AGREE:

"The Honourable Mr. Justice Donald"

I AGREE:

"The Honourable Mr. Justice Savage"

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