
CANADA / JUDGMENT

MSI Methylation Sciences, Inc. v. Quark Venture Inc.

2019 BCCA 448

COURT

British Columbia Court of Appeal

DECIDED

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2019 BCCA 448 MSI Methylation Sciences, Inc. v. Quark Venture Inc.

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

MSI Methylation Sciences, Inc. v. Quark Venture Inc.,

2019 BCCA 448

Date: 20191206

Dockets: CA46010; CA46011

Docket: CA46010

Between:

MSI Methylation Sciences, Inc.

Respondent

(Petitioner)

And

Quark Venture Inc.

Appellant

(Respondent)

- and -

Docket: CA46011

Between:

Quark Venture Inc.

Appellant

(Petitioner)

And

MSI Methylation Sciences, Inc.

Respondent

(Respondent)

Before:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

The Honourable Mr. Justice Hunter

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

March 27, 2019 (MSI Methylation Sciences, Inc. v. Quark Venture Inc.,

2019 BCSC 440, Vancouver Dockets S188362 and S189143).

Counsel for the Appellant:

J.C. McArthur

J.A. Hutchinson

Counsel for the Respondent:

L.B. Herbst, Q.C.

B.D. Ryan

Place and Date of Hearing:

Vancouver, British Columbia

September 4, 2019

Place and Date of Judgment:

Vancouver, British Columbia

December 6, 2019

Written Reasons by:

The Honourable Mr. Justice Hunter

Concurred in by:

The Honourable Madam Justice Saunders

The Honourable Mr. Justice Harris

Summary:

The appellant seeks to appeal the decision of a chambers judge refusing leave to appeal a commercial arbitration award, and refusing to set the award aside for breach of the rules of natural justice. The appellant also appeals the order permitting enforcement of the award as a court order. Held: Appeals dismissed. The arbitrator did not breach natural justice by failing to give the appellant an opportunity to address the theory of damages he was to utilize. The proposed questions for appeal were either questions of mixed fact and law or do not arise out of the award. Accordingly, there was no jurisdiction to grant leave to appeal.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

- [1] In the fall of 2016, the parties to this appeal entered into a commercial agreement in which the appellant agreed to provide funding in the amount of US\$30 million for a clinical trial by the respondent of a pharmaceutical product, subject to terms and conditions set out in a detailed Investment Agreement. One of the terms of the agreement was that disputes arising under the agreement were to be resolved by arbitration under the Commercial Arbitration Act, R.S.B.C. 1996, c. 55, as amended from time to time. The parties agreed that the arbitrated resolution of the dispute was to be final and binding on them.
- [2] A dispute did arise under the agreement. The respondent asserted that the appellant had failed to make a scheduled payment in breach of the Investment Agreement. A notice of arbitration to resolve the dispute was delivered and an arbitrator appointed. After an eight-day hearing, the arbitrator concluded that the appellant had breached the agreement by failing to make the scheduled payment, and awarded damages of US\$20 million.
- [3] The appellant wishes to appeal the award of the arbitrator, or to have it set aside for breach of natural justice. Under the Arbitration Act, R.S.B.C. 1996, c. 55 (the re-named Commercial Arbitration Act), arbitration awards may be appealed only with leave of a judge of the Supreme Court of British Columbia, and only on a question of law arising out of the award. In addition to these limited appeal rights, a judge may set aside an arbitration award for a breach of natural justice.
- [4] The appellant invoked both of these jurisdictional bases. Three grounds of appeal were advanced as questions of law warranting appellate intervention. As well, the appellant alleged that the arbitrator had committed a breach of natural justice, justifying intervention independent of the court's appellate jurisdiction. The chambers judge, however, concluded that the three grounds advanced by the appellant were properly characterized as questions of mixed fact and law rather than questions of law alone, and dismissed the application of leave to appeal for want of jurisdiction. The judge also rejected the assertion that the

arbitrator had committed a breach of natural justice, and refused to set aside the arbitrator's award on that basis.

- [5] Having dismissed the appellant's application for appellate review of the arbitration award, the judge allowed the respondent's application to enforce the award as an order of the Court.
- [6] The appellant appeals to this Court, arguing that the chambers judge erred in both respects.
- [7] In my opinion, the chambers judge did not err in dismissing the appellant's application for appellate review of the arbitration award, or in granting the respondent's application to enforce the award. For the reasons that follow, I would dismiss the appeals.

Background

The Investment Agreement

- [8] The respondent MSI Methylation Sciences, Inc. ("MSI") is a pharmaceuticals company developing a proprietary formulation called MSI-195 which is intended to treat major depressive disorder.
- [9] In the spring of 2013, MSI-195 was clinically tested in Canada for safety and its pharmacokinetic properties in a phase I clinical study. Following the phase I clinical trial, MSI sought approval from the United States Food and Drug Administration to conduct a phase II clinical trial to demonstrate the efficacy of MSI-195 in treating major depressive disorder. FDA approval was given and a phase II clinical study, known as the HORIZON study, was conducted between November 2013 and September 2015.
- [10] The HORIZON study was not successful, in the sense that MSI-195 did not demonstrate efficacy over placebo for the primary endpoint. However, MSI concluded that the study provided support for clinically significant efficacy in a large subset of patients, and decided to continue development of MSI-195 by conducting an additional phase IIB clinical trial. MSI estimated the cost of the additional clinical trial at US\$27,600,000 and began the search for financing of US\$30 million.
- [11] The appellant Quark Venture Inc. ("Quark") is in the business of investing in life sciences companies. Beginning in around May of 2016, representatives of Quark and MSI began discussions about the possibility of Quark providing the financing for the phase IIB clinical trial. There was considerable dispute before the Arbitrator as to the nature of those discussions, and particularly the extent of disclosure about the result of the HORIZON study, but the Arbitrator concluded that MSI did not make any material misrepresentations to Quark concerning the HORIZON study or otherwise.

- [12] Following these discussions, Quark and MSI entered into an agreement dated September 30, 2016 (the "Investment Agreement") to provide financing for the phase IIB clinical trial. (Two individuals who were founders of MSI were also signatories to the Investment Agreement but are not parties to this appeal.) The Investment Agreement provided that Quark would subscribe for units of MSI comprised of preferred shares and warrants in four separate tranches totalling US\$30 million.
- [13] The first tranche was in the amount of US\$1 million. There were certain conditions precedent for the first tranche set out in the Investment Agreement. It was common ground that Quark paid the US\$1 million to MSI.
- [14] The second tranche was in the amount of US\$4 million. There were no conditions precedent for the payment of the second tranche, which was due to be paid on November 30, 2016. On November 23, 2016, Quark advised MSI that it would not be paying the second tranche, and would not be making any further investment in MSI. On November 30, 2016, MSI's corporate counsel attended the offices of Quark's solicitors to close the second tranche, but Quark did not make the US\$4 million payment. It was the failure to pay this tranche that led to the arbitration.
- [15] The third and fourth tranches amounted to US\$25 million. They were not paid.

The Arbitration Proceedings

- [16] The Investment Agreement contains an arbitration clause for the resolution of disputes in these terms:

6.6 Arbitration - In the event of a dispute hereunder which does not involve Party seeking a court injunction, that dispute shall be resolved by arbitration subject to the provisions of the Commercial Arbitration Act, R.S.B.C. 1996, c. 55 as amended from time to time. The arbitrated resolution of the dispute shall be final and binding on all Parties. The place of arbitration will be Vancouver, British Columbia.

- [17] On March 16, 2017, MSI delivered notice of arbitration to Quark pursuant to the Arbitration Act, R.S.B.C. 1996, c. 55 (reflecting a change of name of the arbitration statute). The basis of the claim was the failure of Quark to close the second tranche. The notice of arbitration contained the following provisions:

II. THE REMEDIES SOUGHT

The Claimant seeks specific performance of the Agreement by the Respondent, plus costs. In the alternative, the Claimant seeks compensatory damages for losses sustained as a direct and foreseeable consequence of the Respondent's breach, plus costs and interest.

III. VALUE OF THE CLAIM

The value of this claim is \$29 million (U.S. Dollars) being the loss of the investment or, in the alternative, the damages sustained by the Claimant as a result of the breach of the Agreement by the Respondent, plus interest and costs.

[Emphasis added.]

- [18] In response, Quark delivered a document styled as "Statement of Defence" as well as a counterclaim for the return of the US\$1 million paid by Quark as the first tranche of the Investment Agreement. Quark's theory was that MSI had both misrepresented and failed to make full disclosure of material facts, entitling Quark to decline to fund any further tranche and to recover funds previously paid. The misrepresentations and failure to disclose were alleged to have been intentional, or alternatively negligent. Quark also asserted as a matter of contract interpretation that it had "an untrammelled right" to decline to fund further tranches in any event.
- [19] On the question of damages asserted by MSI, Quark took the position in its amended "Statement of Defence" that "the claim of MSI, assessed at \$29 million USD is grossly bloated and overreaching." Quark asserted that MSI suffered no loss as a consequence of Quark's failure to fund, as it was required under the Investment Agreement to spend all of the funds provided on the clinical trial.
- [20] In May of 2017, the parties jointly appointed J. Kenneth McEwan, Q.C., as Arbitrator to hear and resolve MSI's claim.
- [21] During the summer and early fall of 2017, Arbitrator McEwan conducted various procedural hearings with the parties and scheduled at their request a hearing to address certain preliminary matters. One of the applications he heard and dismissed in September 2017 was an application by MSI to grant specific performance of the agreement as an interim award. The arbitration hearing was then scheduled to commence in April 2018.
- [22] On April 4, 2018, just before the arbitration hearing was to begin, MSI filed an amended Written Statement electing to claim damages in lieu of specific performance. At around the same time, Quark withdrew its allegations that the misrepresentations it alleged had been intentional. The arbitration proceeded over nine days in April 2018 and the Arbitrator released his award on June 21, 2018 (the "Award").

The Arbitration Award

- [23] The arbitration Award focused largely on Quark's allegation of non-disclosure or active misrepresentation of facts, primarily concerning the results of the HORIZON study. The Arbitrator made credibility findings adverse to Quark and concluded that MSI did not make misrepresentations to Quark as had been alleged. That finding had the effect of disposing of the counterclaim and the primary defence that Quark was relieved of its obligations to fund the second tranche by reason of MSI's misrepresentations. The Arbitrator then turned to the

interpretation of the Investment Agreement to determine whether the failure to pay the second tranche amounted to a breach of the agreement. The Arbitrator concluded that it did.

[24] The Arbitrator observed that unlike the third and fourth (and first) tranches, there were no conditions precedent to the funding of the second tranche. As a matter of contract interpretation, he rejected Quark's submission that it had an "untrammelled" right not to close at each stage of the transaction, and concluded that in failing to proceed with the second tranche of funding, Quark breached the Investment Agreement.

[25] The Arbitrator next addressed and rejected Quark's argument that under the terms of the Investment Agreement, the exclusive remedy for any failure to make a required payment was a conversion of preferred shares issued under the agreement. As MSI had elected damages instead of specific performance, the Arbitrator concluded that MSI was entitled to common law damages for the breach of contract. It is the approach taken by the Arbitrator to assessing the measure of damages that forms the basis of Quark's challenge to the Award, and appeal to this Court.

[26] The Arbitrator began his analysis of the measure of damages by setting out the principles of damages assessment in these terms:

114. The general rule is that a plaintiff is entitled to expectation damages for breach of contract:

The case is governed by the general rule applicable to all breaches of contract, and laid down as follows by Parke B. in *Robinson v. Harman* (1848) [1 Ex. 850, at p. 855].

The rule of the common law is, that where a party sustains a loss by reason of a breach of contract, he is, so far as money can do it, to be placed in the same situation, with respect to damages, as if the contract had been performed.

(*Haack v. Martin*, [1927] S.C.R. 413, per Rinfret J., at p. 416, quoted in *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43).

115. Expectation damages are assessed from the plaintiff's perspective. The court must determine the value of the promise to the plaintiff at the time the obligation was to have been performed (*Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43).

116. In this case, the value of the promise must be considered as at the date the second tranche payment was due (November 30, 2016). The promise that was given through the Investment Agreement was the opportunity to receive US\$30 million in exchange for an issuance of shares from treasury. As at the intended date of the second tranche payment (November 30, 2016), MSI had received US\$1 million and was unconditionally entitled to receive another US\$4 million.

117. The balance of the US\$29 million (i.e. US\$25 million) was not an amount to which MSI was unconditionally entitled. It was entitled only to the opportunity to receive that amount if, inter alia, certain milestones were met.
- [27] After referring to this Court's judgment in *Pacific Destination Properties Inc. v. Granville West Capital Corp.*, 1999 BCCA 115 at para. 55, the Arbitrator set out his analysis in this way:
119. In this case, MSI was to meet certain milestones prior to the third and fourth tranches coming due. Quark retained an entitlement not to proceed with the third and fourth tranches in the event of a material adverse change to the financial position, business, assets or prospects of MSI or its subsidiary, or dissatisfaction with legal documentation. Its rights in that regard, while expressly "in its sole discretion" were necessarily constrained. At minimum, its ability to rely on the existence of a material adverse change or defect in legal documentation were subject to its duty of honest performance, informed by good faith (*Bhasin v. Hrynew*, 2014 SCC 71 at para. 93).
120. Accordingly, while also taking into account the other contingencies potentially at play, the primary question is what the likelihood is that both of the following would have occurred:
- a. MSI would have met the milestones; and
 - b. Quark would not (in honest performance of its contractual obligations) have exercised its right to claim a material adverse change or defect in legal documentation.
121. Neither party led evidence or made substantive argument with respect to the appropriate discount to the value of MSI's opportunity on the basis of future contingencies.
122. As in *Pacific Destination Properties*, I consider the prospect that the milestones would have been met without any good faith exercise by Quark of its ability to claim a material adverse change or defect in legal documentation, or other condition precedent left unmet, to be "probable". As in *Pacific Destination Properties*, I nonetheless discount the likelihood of the third and fourth tranches being paid by approximately one-third (in this case 36%) to adjust for all uncertainties and negative contingencies.
123. Accordingly, I find that as at November 30, 2016, the value of the promise made to MSI was US\$4 million plus US\$16 million, or US\$20 million.
- [28] The Arbitrator addressed mitigation briefly and concluded that Quark had not met the burden of establishing that MSI had failed to take reasonable steps to avoid the loss caused by Quark's breach of contract. The Arbitrator referred to evidence that MSI had been unable to find alternative financing and concluded that the contract it entered into with Quark was not readily substituted, even on terms less favourable to MSI.
- [29] In the result, the Arbitrator issued his Award dismissing the counterclaim and allowing MSI's claim in the Canadian dollar equivalent of US\$20 million.

Review of the Arbitration Award

[30] Following the release of the Arbitrator's Award, each party brought proceedings in the Supreme Court of British Columbia to either enforce or challenge the Award. MSI sought leave under s. 29 of the Arbitration Act to enforce the Award in the same manner as a judgment or order of the Court. Quark sought orders in the following terms:

1. An Order pursuant to s. 30 of the Arbitration Act setting aside the Arbitration Award dated June 21, 2018 (the "Award") of J. Kenneth McEwan, Q.C. (the "Arbitrator"), or in the alternative remitting the Award to the Arbitrator for reconsideration, on the ground of arbitral error given the Arbitrator's failure to observe the rules of natural justice.
2. An Order pursuant to s. 31 of the Arbitration Act granting leave to appeal the Award on the ground that the Award is based on errors of law made by the Arbitrator in holding:
 - (a) that MSI's expectation damages for breach of contract should be assessed by reference to the amounts to be paid by Quark under the Investment Agreement rather than by reference to the loss to MSI of not obtaining the clinical study data that MSI would have obtained had the Investment Agreement been performed;
 - (b) that if damages were to be assessed as of November 30, 2016, for breach of Quark's failure to pay the Second Tranche (as defined below) (as held by the Arbitrator) those include damages for the Third and Fourth Tranches (as defined below) despite the Investment Agreement remaining open and requiring continuing performance by both parties; and
 - (c) that MSI's damages should be assessed without taking into account MSI's retention of the treasury shares that it would have been required to issue to Quark had the Investment Agreement been performed.

[31] Both applications came before a judge in chambers on November 22 and 23, 2018. On March 27, 2019, the chambers judge dismissed Quark's application and allowed MSI's application for leave to enforce the Award. She held that the Arbitrator had not committed arbitral error by failing to observe the rules of natural justice. She also held that the allegations of error sought to be raised on appeal were questions of mixed fact and law, not questions of law alone, and accordingly refused leave to appeal the Award.

Did the Arbitrator commit arbitral error?

[32] The basis for the application to set aside the Award due to arbitral error is s. 30 of the Arbitration Act, which reads in relevant part as follows:

30 (1) If an award has been improperly procured or 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.

- [33] The term "arbitral error" is defined in s. 1 of the Act as including "failure to observe the rules of natural justice".
- [34] The appellant's theory is that the Arbitrator failed to observe the rules of natural justice by awarding damages based on the loss of opportunity to receive the third and fourth tranches when that theory of damages had not been specifically advanced, and Quark had not had an opportunity to address it.
- [35] Quark relies on the principle set out by this Court in *Hawkeye Power Corporation v. Sigma Engineering Ltd.*, 2012 BCCA 414, that:
- [57] Natural justice requires that parties have notice of the case they are required to meet and the opportunity to adduce evidence and make submissions on that case.
- [36] In *0927613 B.C. Ltd. v. 0941187 B.C. Ltd.*, 2015 BCCA 457, D. Smith J.A. pointed out the case-specific elements of natural justice, in the arbitration context:
- [60] Natural justice will require an arbitrator to act with procedural fairness, the requirements of which will depend on the subject-matter of the dispute, the circumstances of each case, the nature of the inquiry, and the rules under which the parties have agreed to arbitrate their dispute. [citations omitted] The duty of fairness is not a "one size fits all" requirement but is molded by the circumstances of each case. Its most basic requirement is "simple fairness" or "fair play in action".
- [37] The principle of knowing the case a party has to meet is basic to the concept of natural justice, but as D. Smith J.A. points out, the application of that principle is highly case-specific. Here, Quark says that MSI advanced a theory of lost opportunity to complete the clinical trial, but not a lost opportunity to obtain the funds to complete the trial. The submission of arbitral error depends largely on whether this is a distinction of sufficient substance to render the proceedings unfair.
- [38] The chambers judge was of the view that the approach taken to the assessment of damages by the Arbitrator was within the parameters of the pleadings and the submissions made by MSI:
- [50] The record submitted on the applications before me make it clear that the Arbitrator, throughout his involvement, was sensitive to issues concerning procedural fairness. There can be no doubt that both sides were given a fair opportunity to present their respective cases.
- [51] I would not give effect to Quark's complaint that the Arbitrator based the Award on an approach to damages that was not advanced by the parties and on which the parties were not given the opportunity to make submissions. In my view, the opposite is true. The record before me supports the conclusion that MSI framed its submissions concerning damages based on an entitlement to receive the value of the Investment Agreement (namely, US\$29 million) paid in tranches, including compensation for the loss of the opportunity to receive

the Third and Fourth Tranches. MSI made submissions that Quark could not rely on its own behaviour (that is, the failure to close on the Second Tranche, thereby impairing MSI's ability to meet the Third and Fourth Tranche milestones) to limit MSI's damages. Quark provided authorities to the Arbitrator on loss of opportunity and addressed the point directly in its closing submissions. That Quark chose not to develop the point more fully in its closing submissions, and (for example) make submissions addressing more explicitly an appropriate contingency deduction in the context of loss of opportunity, does not create a breach of natural justice and arbitral error.

[Emphasis added.]

- [39] I can see no error in this analysis. From the outset of the arbitration, MSI had made it clear that it considered its compensable loss to be at least US\$29 million, namely the balance of the financing that Quark was to advance under the Investment Agreement, plus an unquantified additional amount for loss of time. The Arbitrator took the total loss of US\$29 million claimed by MSI and discounted it against the possibility that circumstances would have existed at the time of the third or fourth tranche that would have justified Quark in declining to advance those funds.
- [40] Quark relies on the judgment of the Ontario Court of Appeal in *Rodaro v. Royal Bank of Canada* (2002), 59 O.R. (3d) 74, for the proposition that it is procedurally unfair for an arbitrator or judge to adopt a new theory of liability or damages for the first time in an award:
- [61] By stepping outside of the pleadings and the case as developed by the parties to find liability, Spence J. denied RBC and Barbican the right to know the case they had to meet and the right to a fair opportunity to meet that case. The injection of a novel theory of liability into the case via the reasons for judgment was fundamentally unfair to RBC and Barbican.
- [41] In *Rodaro*, the plaintiff had claimed lost profits from a potentially profitable development proposal as the measure of damages for breach of contract, but the trial judge concluded that the true measure of damages was the loss of the opportunity to sell the plaintiff's interest in the project. Not only had this theory not been pleaded or argued, the Court of Appeal concluded that evidence would have been required to evaluate the theory:
- [66] Had Mr. Rodaro chosen to advance the lost opportunity theory eventually devised by Spence J., he would have had to lead evidence to show that the opportunity existed and that he would have taken advantage of that opportunity. The first inquiry is objective, but the second is directed to what Mr. Rodaro would have done. Had Mr. Rodaro led such evidence, Spence J. would have had to evaluate it and determine the likelihood of Mr. Rodaro taking the opportunity to negotiate had RBC not improperly disclosed the confidential information.
- [42] The case at bar seems to me to be quite different. First, it cannot be argued that the Arbitrator "stepped outside of the pleadings" to award damages based on the failure to advance the US\$29 million pursuant to the contract; from the outset MSI claimed as an

alternative to specific performance damages sustained by the claimant in the amount of US\$29 million. Second, this is not a case where the loss of opportunity to receive the US\$29 million would have required evidence, as in *Rodaro*. The basis for the claim was the primary obligation of Quark under the contract.

- [43] While it is true that the pleadings here are not very specific, they identify in my view the central claim that the breach of contract resulted in MSI not receiving the financing it bargained for. In *Wilson v. Alharayeri*, 2017 SCC 39, Côté J. for the Court dealt with a similar argument based on *Rodaro* in this way:
- [72] The pleadings here, albeit sparse, specifically alleged that all four defendants had acted in their personal interest to the detriment of the plaintiff. This is worlds apart from both *Rodaro* and *Budd*.
- [44] The pleadings here were also sparse, but in my view provide sufficient indication that MSI was identifying its loss from the breach as the loss of the US\$29 million. Quark should reasonably have concluded that if it failed on the misrepresentation defence, damages might be awarded based on the US\$29 million loss.
- [45] Finally, Quark relies on the expression of this principle of natural justice in *Zermalt Holdings S.A. v. Nu-Life Upholstery Repairs Ltd.*, [1985] 2 E.G.L.R. 14 at 15 by Bingham J. (as he then was) in the following passage:

Nevertheless, the rules of natural justice do require, even in an arbitration conducted by an expert, that matters which are likely to form the subject of decision, in so far as they are specific matters, should be exposed for the comments and submissions of the parties. If an arbitrator is impressed by a point that has never been raised by either side then it is his duty to put it to them so that they have an opportunity to comment. If he feels that the proper approach is one that has not been explored or advanced in evidence or submission then again it is his duty to give the parties a chance to comment. It is not right that a decision should be based on specific matters which the parties have never had the chance to deal with, nor is it right that a party should first learn of adverse points in the decision against him. That is contrary both to the substance of justice and to its appearance, and on the facts of this case I think that the landlords' case is made out.

- [46] The arbitration in *Zermalt* concerned a rent review in a commercial lease. Both parties adopted the same approach to the valuation, referred to as the "equated zone A" approach, and adduced evidence of properties said to be comparable to the subject property. As Bingham J. expressed it (at pp. 14-15):

broadly speaking, both parties adopted the equated zone A approach. The argument between them, based on the comparables which they adduced, was as to the proper sum in £s per sq. ft. of the equated zone A. There was, in their submissions to the arbitrator, no difference between them and no general challenge to the correctness of the equated zone A approach.

- [47] The arbitrator in Zermalt, however, found, based on his own site visit, that the value should be depressed to some extent on account of the premises' state. He also stated that mere extrapolation from the parties' comparables would give a false valuation, and that other criteria could also be relevant. These were matters not raised by either party, and appear to have been based on the arbitrator's own expertise as a chartered surveyor. Neither party had an opportunity to comment on these considerations.
- [48] This also seems to me quite different from the circumstances at bar. Here, the parties did not agree on the approach to damages. MSI sought US\$29 million, being the balance of the financing commitment, plus unquantified additional damages for lost time. Quark took the position that MSI had not suffered any loss at all.
- [49] In *Reliance Industries Ltd v. Union of India*, [2018] EWHC 822 (Comm), Bingham J.'s dictum in Zermalt was cited in support of a similar contention that the losing party had no opportunity to address in argument the reasoning which was fundamental to the award. In dismissing the argument, Popplewell J. pointed out:
32. It is commonplace in judicial decisions on points of construction that a judge may fashion his or her reasoning and analysis from the material upon which argument has been addressed without it necessarily being in terms which reflect those fully expressed by the winning party. There is not perceived to be, and is not, anything which is unfair in taking such a course. It is enough if the point is "in play" or "in the arena" in the proceedings, even if it is not precisely articulated.
- [50] In this arbitration, damages were always "in play" if the breach were established and Quark knew that MSI was asserting that the US\$29 million balance of the funds to be paid should be the basis of the damage award. The only element of the Arbitrator's Award that was new was the discounting in respect of the third and fourth tranches, and that approach was to Quark's benefit.
- [51] I would not give effect to this ground of appeal.

Did the chambers judge err in refusing leave to appeal?

- [52] The second ground for appeal is the decision of the chambers judge that the issues sought to be raised were not issues of law, but issues of mixed fact and law. It is clear under s. 31 of the Arbitration Act that leave may only be granted on a question of law arising out of the Award.

- [53] Section 31 of the Arbitration Act reads as follows:

Appeal to the court

31 (1) A party to an arbitration 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.
- (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.
- [54] Thus there are three distinct requirements that must be met before leave can be given to appeal 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 "
- [55] In this case, the leave judge dismissed the leave application on the first requirement, that the appeal be based on a question of law arising out of the Award. This determination is itself a question of law reviewable in this Court on a standard of correctness: *Greata Ranch Holding Corp. v. Concord Okanagan Developments Ltd.*, 2019 BCCA 304 at para. 45.
- [56] To consider the scope of the requirement in s. 31 that leave to appeal be restricted to questions of law arising out of the Award, it is useful to review the legislative evolution of the appeal provisions of the Arbitration Act.

The Basis of the Right to Appeal Arbitration Awards in British Columbia

- [57] Until 1982, there was no right in British Columbia to appeal an arbitration award on any basis. The foundation for arbitration legislation in British Columbia was the United Kingdom's Arbitration Act of 1889, 52 & 53 Vict., c. 49, which was introduced into British Columbia by the Arbitration Act, 1893, S.B.C. 1893, c. 1. The United Kingdom legislation did not provide for any appeals of arbitration awards, and the British Columbia statute followed

that approach. The only permissible challenge to an arbitration award was arbitrator misconduct.

- [58] In 1979, the United Kingdom enacted a new Arbitration Act in which for the first time limited appeal rights were provided to parties to an arbitration in the United Kingdom. Leave was required and the appeal was limited to questions of law.
- [59] In 1982, the Law Reform Commission of British Columbia published a Report on Arbitration in which the Commission reviewed the recent United Kingdom legislation and recommended that a modern arbitration statute be enacted in British Columbia that would include a right of appeal on questions of law, subject to leave being granted for the appeal and subject to some additional requirements to ensure that leave would be granted only for matters of consequence beyond the immediate interests of the parties. As the Law Reform Commission put it, the "general thrust of these criteria is to permit appeals where the determination of the point of law has ramifications beyond the immediate issue in dispute, either as between the parties or for the population at large": Report on Arbitration, p. 96.
- [60] This led to the enactment of the Commercial Arbitration Act, S.B.C. 1986, c. 3. This statute, since renamed the Arbitration Act, contained an appeal provision in s. 31 that was virtually identical to the appeal right recommended by the Law Reform Commission and that remains in substantially identical form in the present Act. It reflects "a policy decision by the Legislature to limit the jurisdiction of appellate review of commercial arbitration awards to extricable questions of law": *Richmont Mines Inc. v. Teck Resources Limited*, 2018 BCCA 452 at para. 15. The result is that "only a very small window for appellate review of arbitral decisions remains": *Greater Vancouver Sewerage and Drainage District v. Wastech Services Ltd.*, 2019 BCCA 66 at para. 4 per Newbury J.A.

Jurisprudence on the Scope of the Appeal Right

- [61] The classic distinction between questions of law, questions of fact and questions of mixed fact and law was set out by Justice Iacobucci for the Court in Canada (*Director of Investigation and Research v. Southam Inc.*, [1997] 1 S.C.R. 748:
- [35] questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. I recognize, however, that the distinction between law on the one hand and mixed law and fact on the other is difficult.
- [62] The difficult distinction between questions of law and questions of mixed fact and law has particular importance in the context of arbitral review in British Columbia because it goes beyond the question of standard of review to the very jurisdiction of the court to embark on the review process.

- [63] The Court in Southam went on to explain that one means of distinguishing between questions of law and questions of mixed fact and law is to consider the level of generality of the question at issue:
- [37] as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact. in most cases it should be sufficiently clear whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.
- [64] This issue was developed further by the Supreme Court in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53. In that judgment, the Court considered the term "question of law" in the specific context of s. 31 of the B.C. Arbitration Act. The court decided that the question before the arbitrator was a question of mixed fact and law, and in doing so drew on the level of generality explained in Southam:
- [51] One central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of appellate courts to cases where the results can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than in providing a new forum for parties to continue their private litigation.
- [65] The importance of precedential value in the identification of questions of law was reinforced by the Court's subsequent decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37. In the context of a contract made in a different milieu, the majority of the Court in Ledcor considered a standard form contract and the implications of the precedential value of the interpretation of such contracts:
- [24] ... In my view, where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.
- [66] Since Ledcor, the Supreme Court has reinforced the relevance of precedential value as a factor in determining whether the interpretation of a particular contract is a question of law or a question of mixed fact and law: see *Canada (Attorney General) v. Fontaine*, 2017 SCC 47 at para. 35; *Churchill Falls (Labrador) Corp. v. Hydro-Québec*, 2018 SCC 46 at para. 49; *J.W. v. Canada (Attorney General)*, 2019 SCC 20 at para. 110.
- [67] In the arbitration context, this Court discussed in Richmond the role of precedential value in distinguishing between questions of law arising from the interpretation of a contract, which may be appealed, and questions of mixed fact and law, which may not:

- [65] contractual interpretation generally gives rise only to questions of mixed fact and law, not extricable questions of law. Nonetheless, an error in contractual interpretation can give rise to an extricable question of law in limited circumstances. Such circumstances include where the question would have precedential value or where the initial decision-maker considered an incorrect principle.
- [67] This Court's jurisprudence demonstrates that post-Sattva, a distinguishing factor between questions of mixed fact and law and extricable questions of law is their precedential value. For example, the interpretation of standard form contracts in wide use within an industry are treated as pure questions of law that attract the correctness standard when the initial decision maker is a judge: [citations omitted]. The Supreme Court of Canada has adopted a similar approach to standard form contracts when "the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24. Similarly, in *MacDonald v. Chicago Title Insurance Co. of Canada*, 2015 ONCA 842, the Ontario Court of Appeal stated that "[t]he distinguishing factor between questions of law and mixed fact and law on appeal is the precedential value of the appellate court's intervention" (at para. 37).
- [68] As pointed out in this passage in *Richmont*, the limited circumstances in which extricable questions of law may arise from contractual interpretation are not necessarily confined to standard form contracts. For example, there may be industry-specific terms in specialty contracts that give rise to questions of law in their interpretation that are independent of the particular factual circumstances arising in an individual case. In each case, however, the precedential value of an appellate court's interpretation of the question will be highly relevant to the determination whether the jurisdiction under s. 31 of the Arbitration Act to grant leave to appeal may be exercised.
- [69] The Supreme Court's most recent consideration of s. 31 of the Arbitration Act is found in *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, a decision cited extensively by the chambers judge. In *Teal Cedar*, Gascon J. for the majority explained that implicit questions of law can arise in the application of the law to the facts if the arbitrator fails to consider a required element of the legal test:
- [44] 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.

[70] Justice Gascon added a caution, however, in approaching the extrication of implicit questions of law from questions of mixed fact and law, since mixed questions of fact and law by definition involve aspects of law:

[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 -- for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments -- 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).

[Emphasis added.]

[71] Finally, Gascon J. emphasized the importance of the distinction when applied to appeals from arbitration awards as opposed to judicial decisions where the relevance of the distinction is limited to the standard of review:

[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 and civil litigation judgments. 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). In contrast, the identification of a mixed question when appealing a civil litigation judgment merely raises the standard of review (Housen, at para. 36).

[Emphasis added.]

[72] From these authorities, and having in mind the legislative evolution of s. 31 of the Arbitration Act, I draw the following principles in relation to appeals from arbitration awards:

- (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.

[73] With these principles in mind, I turn to Quark's proposed questions of law.

The Proposed Questions of Law

[74] The position of Quark before the chambers judge was that three questions of law arise from the Arbitrator's Award:

- (a) whether MSI's expectation damages for breach of contract should be assessed by reference to the amounts to be paid by Quark under the Investment Agreement rather than by reference to the loss to MSI of not obtaining the clinical study data that MSI would have obtained had the Investment Agreement been performed;

- (b) whether if damages were to be assessed as of November 30, 2016, for breach of Quark's failure to pay the Second Tranche damages should include compensation for the Third and Fourth Tranches despite the Investment Agreement remaining open and requiring continuing performance by both parties; and
 - (c) whether MSI's damages should be assessed without taking into account MSI's retention of the treasury shares that it would have been required to issue to Quark had the Investment Agreement been performed.
- [75] The chambers judge decided that none of these proposed questions were questions of law arising out of the Award, but rather questions of mixed fact and law.

The First Question: Whether the Arbitrator applied the Incorrect Test for Assessing Damages

- [76] Quark accepts that the Arbitrator stated the correct test for assessing damages for breach of contract, but says that he did not apply the test that he stated. Thus Quark argues that the Arbitrator committed an error of law that was implicit, rather than explicit in the Award. This is an assertion of the "covert" form of legal question identified by Gascon J. in *Teal Cedar*. The question then is whether the Arbitrator altered the test for assessing expectation damages when he applied it.
- [77] The objective of the damage assessment was to measure the value which MSI would have received if the contract had been performed: *Bank of America Canada v. Mutual Trust Co.*, 2002 SCC 43 at para. 25. The Arbitrator assessed this value in this way:
116. In this case, the value of the promise must be considered as at the date the second tranche payment was due (November 30, 2016). The promise that was given through the Investment Agreement was the opportunity to receive US\$30 million in exchange for an issuance of shares from treasury. As at the intended date of the second tranche payment (November 30, 2016), MSI had received US\$1 million and was unconditionally entitled to receive another US\$4 million.
117. The balance of the US\$29 million (i.e. US\$25 million) was not an amount to which MSI was unconditionally entitled. It was entitled only to the opportunity to receive that amount if, inter alia, certain milestones were met.
- [78] The amount to be assessed for loss of opportunity represents an exercise of judgment based on the particular facts of the case: *Papageorgiou v. Seyl* (1990), 45 B.C.L.R. (2d) 319 at 326 (C.A.). The implicit error alleged by Quark is the failure to consider the fact that MSI would have been required under the contract to spend the funds on the clinical trial. In my view, the question raised by Quark is too closely tied to the particular facts of the case to be characterized as an extricable error of law. This is not the type of case referred to in *Southam* where "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." Here the

Arbitrator correctly stated that the test was to assess damages so that MSI would be in the same position so far as money can do it, as if the contract had been performed. If the contract had been performed on November 30, 2016, MSI would have had the US\$4 million represented by the second tranche and an opportunity to earn the additional US\$25 million in the third and fourth tranches. That was the basis of the Arbitrator's Award. The fact that the effect of the breach was to withhold from MSI the funds necessary to conduct the clinical trial required by the contract does not detract from MSI's loss, but rather illustrates it.

[79] The chambers judge was of the view that the first question represented a question of mixed fact and law and I agree with that assessment. The answer to the question framed by Quark is too closely integrated with the particular contract at issue to have precedential value. Quark's objection is more accurately characterized as an argument that the application of the damages assessment test should have resulted in a different outcome, than an argument that the Arbitrator altered the legal test when applying it.

[80] In my opinion, the proposed question is a question of mixed fact and law. The chambers judge was correct to decline to grant leave on the question.

The Second Question: Whether the Arbitrator Incorrectly Assessed Damages as if there had been an Accepted Repudiation

[81] The theory underlying the second question is that by failing to accept the initial repudiation of the contract by Quark, and instead affirming the contract by suing for specific performance, MSI could not be awarded damages based on an unaccepted repudiation. The theory is set out in Quark's factum in this way:

An election to ignore the defendant's repudiation and insist on performance is final and irrevocable. That is because the election is one between inconsistent rights, as opposed to inconsistent remedies. As noted by this Court previously, "[e]ither the contract is still there and the rights are under it, or the contract is rescinded because of an accepted repudiation and very different rights have come into being." If a party affirms a contract, then it cannot, later on, re-elect and choose to instead accept the repudiation.

[82] To assess this submission, it may be useful to review the significance in contract terms of the sequence of events. On November 23, 2016, Quark advised MSI that it would not pay the second tranche, due on November 30, 2016, or make any further payments under the Investment Agreement. In contract terms, this was a repudiation of the contract entitling MSI to elect either to accept the repudiation as an anticipatory breach bringing the contract to an end or to reject the repudiation and insist on performance. MSI did not accept the repudiation but instead attended at Quark's office to receive payment of the second tranche. In contract terms, this was a rejection of the repudiation. Having not been accepted, the November 23 repudiation had no legal effect. It was, in the oft-cited words of Lord Justice Asquith, "a thing writ in water and of no value to anybody."

- [83] As a result, on November 30, 2016, the contract was still alive. MSI sought performance by Quark but Quark failed to provide the funds. This was an actual breach. Again, MSI had an election, but with slightly different consequences. They could have accepted the breach as bringing the contract to an end and sued for damages. Instead, they sued for specific performance of the contract, with damages as an alternative remedy. The effect of this decision was explained by Levine J.A. in *Inmet Mining Corp. v. Homestake Canada Inc.*, 2003 BCCA 610:
- [203] The law is clear that an innocent party to a breach of contract may accept the breach, treat the contract at an end and sue for damages, or not accept the breach, keep the contract open and sue for specific performance, or in the alternative, damages in lieu thereof. It is also clear that the innocent party may claim all of these remedies in the alternative and is not required to elect among them until judgment
- [212] Suing for specific performance does not result in the disappearance of the breach; it provides a means for the defendant to resolve the breach by performing the contract.
- [84] It is of no moment that the date of breach for damages assessment purposes can be many months or even years prior to the date of the election that treats the breach as bringing the contract to an end. A claim for specific performance has the effect of postponing the date of the consequences of the breach: *Inmet* at para. 213.
- [85] In this case, until April 24, 2018, it was open to Quark to perform the contract by closing the second tranche. Once MSI elected damages in lieu of specific performance, the contract was at an end. MSI was entitled to sue for damages for breach of contract, the breach having occurred on November 30, 2016. The Arbitrator found that the date of breach was November 30, 2016, and he assessed damages as of that date. Had he assessed damages as of November 23, 2016 based on the unaccepted repudiation, the question Quark asserts could be said to arise out of the Award. In this case, however, the Arbitrator did not assess damages based on the unaccepted repudiation of November 23, but on the actual breach occurring on November 30, based on the subsequent election of MSI to sue for damages.
- [86] Whether damages can be assessed based on an unaccepted repudiation is a question of law, but it is not one that arises out of the Award because that is not the basis on which the Arbitrator assessed damages.
- [87] I agree with the comments of the chambers judge at para. 77 of her reasons that this proposed question "misinterprets how the Arbitrator assessed damages, and is not a question that arises out of the Award." I also agree with her analysis of the distinction between the concept of unaccepted repudiation and actual breach:
- [78] The Arbitrator assessed MSI's damages arising out of the breach of contract (the failure to pay the Second Tranche) to include loss of the opportunity to receive the Third and Fourth Tranches. MSI was entitled to a remedy in damages for the breach of the Investment Agreement found by the Arbitrator. The failure by Quark to proceed with the Second

Tranche of funding was not merely an anticipatory breach; it was an actual breach of the parties' contract. Contrary to how the second proposed question is framed, damages were not assessed to "include damages" for the Third and Fourth Tranches. Rather, damages were assessed based on the loss of the opportunity to receive the Third and Fourth Tranches, arising from the actual breach.

[Emphasis in original.]

[88] As the proposed question does not arise out of the Award, there was no jurisdiction to grant leave on this question, and the chambers judge was correct in declining to do so.

The Third Question: Whether the Arbitrator incorrectly held that Treasury Shares are Valueless

[89] Quark took the position that the finding of the Arbitrator concerning the value of MSI's treasury shares was an explicit error of law. The question for the chambers judge and for this Court is whether the proposed question accurately expresses what the Arbitrator held.

[90] The structure of the Investment Agreement was that as Quark made investments in MSI to pay for the clinical trial, it would receive shares in the capital stock of MSI. The proposed question of law arises from the position of Quark that when assessing the loss to MSI from the breach of contract by Quark, the Arbitrator should have taken into account the benefit to MSI of not having to issue treasury shares to Quark.

[91] The Arbitrator addressed this issue in this way:

124. I recognize that the proper measure of contractual damages is what the plaintiff was entitled to from the defendant, less whatever the plaintiff has retained as a result of the breach that it would not have retained if the contract had been carried out.

125. In this case, the value of what MSI has retained (shares in treasury), while potentially significant to others, is zero to the company itself. Share in treasury are not an asset of the corporation. They are ownership pieces of the corporation. They represent value to potential shareholders and, when issued, can impact value to existing shareholders. But to the company, they do not have value.

126. Accordingly, the value of MSI's damages is not properly discounted by the fact that it has not been required to issue shares as it would have been if the Investment Agreement had been carried through.

[Emphasis added.]

[92] The chambers judge treated this as essentially a finding of fact that for MSI, the retention of treasury shares had no value. This is consistent with the Arbitrator's finding that the Investment Agreement could not be readily substituted, even on terms less favourable to MSI. I agree that this finding is a question of fact.

[93] What the Arbitrator has done is to accurately state a principle of law and apply it to a factual finding. There is no suggestion that the principle of law has been altered in applying it; the challenge is to the finding of fact that "in this case" treasury shares had no value to MSI. The application of the principle of law to the fact found by the Arbitrator raises a question of mixed fact and law. As such, it cannot be the basis for an appeal under s. 31.

[94] I would not give effect to this ground of appeal.

Enforcement of the Arbitration Award

[95] Quark's second appeal was from the order made by the chambers judge pursuant to s. 29 of the Arbitration Act granting leave to MSI to enforce the Award in the same manner as an order of the court. The judge noted that no grounds had been established for refusing such an order, once Quark's application for leave to appeal and for an order setting aside the Award based on arbitral error had been dismissed.

[96] In this Court also, Quark based its appeal from the s. 29 order on its appeal challenging the Award itself. It follows from the dismissal of that appeal that Quark's appeal from the s. 29 order must also be dismissed.

Conclusion

[97] For the foregoing reasons, I would dismiss the appeals.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Harris"

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