
CANADA / JUDGMENT

Russell Breweries Inc. v. Patrola

2014 BCSC 800

COURT

Supreme Court of British Columbia

DECIDED

7 May 2014

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2014 BCSC 800 Russell Breweries Inc. v. Patrola

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Russell Breweries Inc. v. Patrola,

2014 BCSC 800

Date: 20140507

Docket: S140985

Registry: Vancouver

Between:

Russell Breweries Inc.

Plaintiff

And

Perpindervir (Perpinder) Singh Patrola and

Patrola Law Corporation

Defendants

Before: The Honourable Mr. Justice McEwan

Reasons for Judgment

Counsel for the Plaintiff:

L.A. Novakowski

Counsel for the Defendants:

T.R. Thomas

Place and Date of Hearing:

Vancouver, B.C.

April 25, 2014

Place and Date of Judgment:

Vancouver, B.C.

May 7, 2014

- [1] The defendants apply for a stay of this action pursuant to s. 15 of the Commercial Arbitration Act, R.S.B.C. 1996, c. 55, on the basis that the plaintiff's claims involve disputes which the parties have agreed to submit to arbitration.
- [2] The plaintiff, Russell Breweries Inc. ("Russell"), makes beer.
- [3] The defendant, Perpindervir Patrola, is a practicing lawyer and the principal of the law corporation also named as a defendant.
- [4] Mr. Patrola was a director of Russell from November 26, 2012 until his resignation from the board on July 28, 2013. He also provided legal services (through his corporation) to Russell, starting in about February 2010. At the time Mr. Patrola became a director of Russell the other two directors were Brian Harris and Andrew Harris.
- [5] Mr. Patrola acted for Russell in relation to a non-brokered private placement for units in the company comprised of shares and warrants to buy shares. FVI Capital Inc. subscribed a substantial block of units and negotiated the right to designate two members of the board, one of which would be appointed to the audit committee. On May 15, 2013 Benjamin Li Yu and Derek Donbing Ma were appointed and became members of the audit and compensation committees. The compensation committee was responsible for approving executive compensation.
- [6] In February and March 2013, while Brian Harris, Andrew Harris, and Mr. Patrola were the members of the board, Mr. Patrola says Brian Harris asked him to "update" his and Andrew Harris' contracts, and the contract of the chief financial officer. In turn, Mr. Patrola says they met with him on March 24, 2013 to discuss his employment contract. He says they orally agreed:
 - (a) the term of the agreement would be 36 months commencing April 1, 2013;
 - (b) Patrola Law would be paid a retainer of \$12,500 per month from April 1, 2013 to March 31, 2014 (\$150,000/year); \$13,333 per month from April 1, 2014 to March 31, 2015 (\$159,996/year); and \$14,166 per month from April 1, 2015 to March 31, 2016 (\$169,992/year); and

- (c) upon termination without just cause, Russell would make a lump-sum payment to Patrola Law equal to the total compensation remaining under the term of the agreement.
- [7] In May of 2013 Patrola Law Corporation issued four invoices to Russell for services going back, in some cases, years. The total exceeded \$80,000. That same month \$75,000 of those invoices was offset by an agreement that Patrola would make a \$75,000 investment in the private issue.
- [8] Mr. Patrola says that on May 14, 2013 he emailed Brian and Andrew Harris and Gary Liu, the chief financial officer, respecting the terms of the compensation packages they had discussed. He has attached a copy of an email to his affidavit which is marked "Redacted for Privilege" and which does not include the attachment the email refers to. It nevertheless suggests that the compensation agreements had similar three-year terms:

Please see the attached severance terms for Brian and form of compensation agreement for Andrew, Gary, and Perpinder.

The terms for both agreements are as we discussed. Brian, if anything is missed in the severance terms, please let me know. You will be entitled to receiving your regular pay, and all accrued compensation up until the date you resign, in addition to the severance package.

Re the compensation agreement, I used the form of the earlier agreements but revised as per our discussions.

The attached compensation agreement is specific to me; however, it will be the same for Andrew and Gary - only the job details and pay will be changing, i.e. For Gary and Perpinder, it is \$150,000, \$160,000, \$170,000 over three years; for Andrew it is \$180,000, \$190,000, \$200,000 over three years.

There is one part that I have highlighted yellow and need your feedback on how best to do this.

Please review the agreement carefully and advise if any revisions required.

Andrew - I have your old agreement and can cut and paste your job details from there.

Gary - I don't have an agreement for you, please provide and I will cut and paste your job details from there - or you can email the job details yourself and I will add to your contract.

Also, please confirm the dates on which your agreements are starting. Mine started April 1, 2013.

Note: the only real difference between my agreement and that of Gary and Andrew will be that I have removed the non-competition provision from my agreement - it makes no sense as I am providing legal advice and am not an officer. Please note, with respect to my agreement, I am in a conflict of interest and so am not providing any legal advice on behalf of Russell, and you should seek independent legal advice with respect to my agreement, and the other agreements as well.

- [9] On July 3, 2013 there was a board meeting at which Mr. Patrola advised that:

- (a) there was an oral agreement that was entered into in late March 2013, which provided that Mr. Patrola had been hired as legal counsel to Russell, and the main terms of the agreement included: a three-year term; a salary of \$150,000 during the first year, \$160,000 during the second year, and \$170,000 during the third year; and a termination provision that included a payout of salary owing for the remaining term of the contract if Mr. Patrola was terminated without cause prior to the expiration of the term (the "Oral Agreement");
 - (b) the written contract setting out the terms of the Oral Agreement had not been finalized until recently; and
 - (c) the written contract was signed on June 2, 2013 (the "Legal Services Agreement").
- [10] At the meeting, Mr. Patrola was asked if he had a business relationship with Brian Harris outside of the company. Mr. Patrola acknowledged that he had recently incorporated a company in which he and Mr. Harris were shareholders.
- [11] The status of Brian Harris was a subject of the meeting. Ultimately, a committee was formed to negotiate a severance arrangement:

ON MOTION duly made, IT WAS UNANIMOUSLY RESOLVED that the motion to form a special committee and to appoint (Benjamin) Li Yu and Gary Liu to such special committee to negotiate a severance arrangement (through its legal counsel, Dentons Canada LLP) with legal counsel to Brian Harris and to recommend an appropriate severance package to the board of directors of the Company, be approved.

- [12] On July 5, 2013, Mr. Patrola produced a "Legal Services Agreement" said to be "effective April 1, 2013" and purportedly executed by Brian Harris, on behalf of Russell, not on June 2, 2013 but on July 3, 2013, the day of the meeting that appointed a committee to negotiate a severance arrangement with Mr. Harris. This is the agreement that includes the arbitration clause the defendant law corporation seeks to invoke. Mr. Patrola produced the Legal Services Agreement after Mr. Yu had advised, on July 4, 2013, that he and Mr. Ma took the position that there was insufficient evidence to prove the existence of an oral agreement.
- [13] Russell says that as of July 4, 2013 the law corporation ceased to provide legal services to the company.
- [14] Mr. Patrola issued invoices to Russell on July 26, 2013 and September 6, 2013 for "Legal Services Agreement - Payment" without specifying any work performed on behalf of Russell.
- [15] These invoices were not paid, and on September 12, 2013, according to Mr. Patrola, Russell terminated the agreement.
- [16] On January 10, 2014, Patrola Law Corporation filed a domestic commercial arbitration notice pursuant to the Commercial Arbitration Act.
- [17] On February 7, 2014, Russell filed a defence primarily objecting to the jurisdiction of the arbitration tribunal. On the same day, Russell commenced this proceeding.

[18] The defendants have brought this application under s. 15 of the Commercial Arbitration Act. It reads:

Stay of proceedings

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

(2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[19] The arbitration clause in the Legal Services Agreement reads:

11. ARBITRATION

(i) In the event that there shall be a dispute (a "Dispute") among the parties arising out of or relating to this Agreement, or the breach thereof, the parties agree that such dispute shall be resolved by final and binding arbitration before a single arbitrator in Vancouver, Canada. The arbitrator's decision shall be final and binding upon the parties, and may be entered and enforced in any court of competent jurisdiction by either of the parties. The arbitrator shall have the power to grant temporary, preliminary and permanent relief, including without limitation, injunctive relief and specific performance.

(ii) The Company will pay the direct costs and expenses of the arbitration, including arbitration and arbitrator fees. Except as otherwise provided by statute, Service Provider and the Company are responsible for their respective attorneys' fees incurred in connection with enforcing this Agreement. Service Provider and the Company agree that, to the extent permitted by law, the arbitrator may, in his or her discretion, award reasonable attorneys' fees to the prevailing party.

[20] The relief sought in this legal proceeding, which is the subject of the defendants' stay applications is set out as follows in the notice of civil claim:

53. Russell seeks the following relief against Mr. Patrola and Patrola Law, and each of them:

- (a) a declaration that there is no effective or enforceable oral agreement, written agreement or otherwise between Russell and Patrola Law or Russell and Mr. Patrola on the terms purportedly set out in the Legal Services Agreement;
- (b) in the alternative, rescission of the Oral Agreement and a declaration that the Oral Agreement is void or unenforceable by reason that when Patrola Law entered into the Oral Agreement Mr. Patrola was acting in breach of his fiduciary duties to Russell;

- (c) in the alternative, rescission of the Legal Services Agreement and a declaration that the Legal Services Agreement is void or unenforceable against Russell by reason that when Patrola Law entered into the Legal Services Agreement Mr. Patrola was acting in breach of his fiduciary duties to Russell;
 - (d) a declaration that the invoices issued by Patrola Law under the Legal Services Agreement are void or unenforceable;
 - (e) damages for breach of fiduciary duty, including recovery of any overpayment made by Russell to Patrola Law in relation to invoices rendered by same;
 - (f) an order pursuant to Section 70(11) of the Legal Profession Act for a review of the Invoices issued by Patrola Law to Russell, including but not limited to any invoice issued between December 13, 2012 and September 6, 2013.
- [21] The defendants' legal submission starts with the proposition that courts are deferential to arbitration agreements and to the jurisdiction of arbitrators. They submit that "courts will generally give effect to the terms of a commercial contract freely entered into" (see: *Seidel v. Telus Communications Inc.*, 2011 SCC 15; *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34; *Rogers Wireless v. Muroff*, 2007 SCC 35).
- [22] The defendants submit, on the basis of the same line of authorities, that any challenges to the arbitrator's jurisdiction should first be determined by the arbitrator. In the present case, however, the arbitrator has already taken the view that the court should make the determination. In a letter dated March 14, 2014, Arbitrator Joseph A. Boskovich advised the parties as follows:

Pursuant to our pre-arbitration conference call on March 13, 2014, I confirm that after hearing counsel, and a review of the pleadings in this arbitration, as well as the Notice of Civil Claim filed by the Respondent against the Claimant, I find that in these circumstances it would not be in the best interest of justice or the parties to have concurrent proceedings in the Supreme Court and by arbitration.

I adjourn this arbitration proceeding to see if the Court orders a stay of proceeding pursuant to Section 15 of the Arbitration Act or makes any other order regarding the issues raised.

- [23] The question for the court is "whether these proceedings are "in respect of a matter agreed to be submitted to arbitration" as that phrase is used in the leading case, *Prince George (City) v. McElhanney Engineering Services Ltd.*, 9 B.C.L.R. (3d) 368, at para. 22:
- (a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
 - (b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and

- (c) the application must be brought timely, i.e. before the applicant takes a step in the proceeding. (*Gulf Canada Resources Ltd. v. Arochem International Ltd.*, *supra*, at 119-120).
- [24] There is no issue as to timeliness. There is an issue with respect to parties. While the defendants dispose of this issue in submission by saying "the sole parties to these legal proceedings are the Plaintiff and the Defendants," they overlook the fact that the defendant party to the Legal Services Agreement is Patrola Law Corporation, but not Mr. Patrola. Russell has included in its civil claim an allegation that when the agreement was entered into, Mr. Patrola, not the Law Corporation, was acting in breach of his fiduciary duties as a director.
- [25] The defendants' position on the validity of the Legal Services Agreement is straightforward. They submit that the agreement was negotiated and executed while Brian Harris had authority to contract on behalf of Russell and that the arrangement is binding in Russell.
- [26] The plaintiff raises a number of objections to this. They suggest that the facts are highly suspicious. There is an allegation of an oral contract for which there appears to be no evidence in the corporate record. The minutes of the meeting of July 3, 2013, record Mr. Patrola as saying that the Legal Services Agreement was executed on June 2, 2013. When the agreement was produced on June 5, 2013, it was dated July 3, 2013. By that date it was clear that Mr. Harris was on the way out of the company. It is also clear that Mr. Yu and Mr. Ma had not been apprised of these developments, despite becoming directors on May 15, 2013 (one day after the email discussing Brian Harris' "severance terms" and "compensation agreements" for Andrew Harris, Gary Liu, and "Perpinder" (Mr. Patrola), and being named to the audit and compensation committees. It is clear from the email that the arrangements it refers to were, at best, works-in-progress and not completed arrangements. One interpretation of the circumstances is that the defendants' expectation was not that Patrola Law Corporation would continue for almost three more years as legal advisor to a newly constituted board, but that the agreement was a form of "exit strategy" for Patrola. There is no evidence that Patrola Law Corporation had the confidence of the board after the July 3, 2013 meeting. Mr. Patrola remained a director until July 26, 2013, however. He was a director of the company throughout the time he says the Legal Services Agreement was negotiated and executed with Patrola Law Corporation.
- [27] The plaintiff's submission is that these circumstances give rise to a number of legal consequences.
- [28] The first is that there was no arbitration clause under the "oral" agreement. Russell denies that there was an oral agreement. The terms of the oral agreement had clearly not been settled by May 14, 2013. Russell submits that because the Legal Services Agreement purports to finalize the oral agreement, it is incumbent upon the defendants to prove the terms of that oral agreement, that is, that the formal agreement accurately reflects the terms of the oral agreement. Russell submits that the burden rests upon the defendants to show this, inasmuch as the Legal Services Agreement is a form of solicitors' retainer. The authority for

this proposition is *Bergman v. Williams* (1980), 22 B.C.L.R. 317 (S.C.), per Esson J. at para. 41:

- [41] where an issue arises as to the scope of a solicitor's retainer and the retainer was not reduced to writing, the onus of proof lies upon the solicitor and, if there is doubt at the end of the hearing, that doubt must be resolved against the solicitor.
- [29] Russell submits that because the Legal Services Agreement cannot be shown to accurately reflect the oral agreement, there is no agreement to arbitrate, that is, that the first part of the test set out in *Prince George* has not been met.
- [30] The next legal consequence Russell submits is that, in any event, the issues raised in this proceeding "do not arise out of or [relate] to [the Legal Services Agreement], or a breach thereof."
- [31] The defendants rely on a number of cases of which *James v. Thow*, 2005 BCSC 809, is representative. In that case the plaintiff argued that because the issues in the legal proceeding included breach of trust, breach of fiduciary duty, and fraud based on events before the agreement containing the arbitration clause was executed, the agreement was induced by fraud and therefore void and inoperative.
- [32] In that case this court, per Wedge J., made the following observation at para. 65:
- [65] I accept that the merits of the allegations brought by the James parties against the Thow parties cannot be tested in these stay applications. The only question is whether the allegations are such that they fall, or arguably fall, within the scope of the arbitration clause. In *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368, 61 B.C.A.C. 254 [leave to appeal refused, [1995] S.C.C.A. No. 467], the court observed that the merits of the claim advanced in the action are irrelevant to the question that must be answered in the context of s. 15(1), which is whether the action raises a dispute that falls within the scope of the arbitration agreement.
- [33] The court went on to make the following further observations:
- [92] The court also held that an allegation of fraud does not put the matter outside an arbitration agreement if the allegation does not directly impeach the arbitration agreement itself. The doctrine of separability requires that the arbitration clause be analyzed as a separate contract. That being the case, the allegation of fraud must relate directly and specifically to the arbitration agreement rather than to the contract as a whole.
- [93] While I hesitate to cite lengthy excerpts from the judgement in *Harbour Assurance*, passages from the reasons of Hoffman L.J. at pp. 468-69 provide such a helpful overview of the development of the separability doctrine in the law of commercial contracts, and such a clear explanation of its importance, that I will reproduce those passages here:

[Counsel] submits, however, that the separability doctrine cannot apply to any rule which prevents the contract from coming into existence or makes it void ab initio. In particular, it does not apply to a statute or other rule of law which makes the contract void for illegality.

It seems to me impossible to accept so sweeping a proposition. There will obviously be cases in which a claim that no contract came into existence necessarily entails a denial that there was any agreement to arbitrate. Cases of non est factum or denial that there was a concluded agreement, or mistake as to the identity of the other contracting party suggest themselves as examples. But there is no reason why every case of initial invalidity should have this consequence .

In every case it seems to me that the logical question is not whether the issue goes to the validity of the contract but whether it goes to the validity of the arbitration clause. The one may entail the other but, as we have seen, it may not. When one comes to voidness for illegality, it is particularly necessary to have regard to the purpose and policy of the rule which invalidates the contract and to ask, as the House of Lords did in *Heyman v. Darwins Ltd.*, whether the rule strikes down the arbitration clause as well. There may be cases in which the policy of the rule is such that it would be liable to be defeated by allowing the issue to be determined by a tribunal chosen by the parties. This may be especially true of *contrats d'adhesion* in which the arbitrator is in practice the choice of the dominant party. Thus saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be.

As Lord Justice Ralph Gibson has pointed out the same is true of allegations of fraud.

In deciding whether or not the rule of illegality also strikes down the arbitration clause, it is necessary to bear in mind the powerful commercial reasons for upholding arbitration clauses unless it is clear that this would offend the policy of the illegality rule. These are, first, the desirability of giving effect to the right of the parties to choose a tribunal to resolve their disputes and secondly, the practical advantages of one-stop adjudication, or in other words, the inconvenience of having one issue resolved by the Court and then, contingently on the outcome of that decision, further issues decided by the arbitrator.

As the German Federal Supreme Court (*Bundesgerichtshof*) said in its landmark decision of Feb. 27, 1970:

There is every reason to presume that reasonable parties will wish to have the relationships created by their contract and the claims arising therefrom, irrespective of whether their contract is effective or not, decided by the same tribunal and not by two different tribunals . Experience shows that as soon as a dispute of any kind arises from a contract, objections are very often also raised against its validity.

(emphasis added)

[94] The development of the law as a result of *Harbour Assurance* and other English authorities was noted by Russell on Arbitration (2003, 22nd edition) at p. 11 para. 1-024:

After a long period of uncertainty the English courts extended the doctrine so that the arbitration clause also survives the invalidity of the substantive agreement, and an attack on that agreement, even if successful, will no longer vitiate the jurisdiction of the tribunal if the arbitration agreement is not impugned.

[95] The comment of the German court, cited by Hoffman L.J. in *Harbour Assurance*, is particularly apposite: When disputes arise between contracting parties, the validity of the contract itself is often placed in issue. For that reason, in my view, the legislature of this Province has endeavoured in the Act and the Rules of Procedure to make clear that the validity or existence of the contract, even where it is alleged that the contract was induced by fraud, is for the arbitrator to determine.

[96] The legislative history of s. 15 of the Act supports this view. Section 15, as noted earlier, mirrors s. 8 of the International Commercial Arbitration Act. That was not always the case. Until 1988, the legislation permitted this court to consider a broad range of factors when deciding whether to stay an action in favour of arbitration. Before the repeal and replacement of s. 15 by the Miscellaneous Statutes Amendment Act (No. 2) 1988, c. 46, s. 15(3) provided as follows:

- (3) In an application under subsection (1), the court shall stay the court proceeding unless the party opposing the stay shows a good reason why the court proceedings should continue in place of the arbitration, and, in determining whether good reason exists, the court may consider
- (a) whether the commercial arbitration agreement was freely made,
 - (b) whether the matters in dispute are factually or legally complex,
 - (c) whether the intended arbitrator is qualified to settle the factual and legal matters in dispute,
 - (d) the comparative expense and delay as between the court proceedings and the arbitration under the agreement,
 - (e) the wishes of other parties to the commercial arbitration agreement who have been joined in the action,
 - (f) whether there are other parties to the court proceedings who are not parties to the commercial arbitration agreement,
 - (g) the stage of the court proceedings,
 - (h) the extent to which the applicant has participated in the court proceedings by delivering pleadings or taking other steps,
 - (i) potential bias on the part of the intended arbitrator,
 - (j) whether fraud has been alleged by a party to the court proceedings,

- (k) whether the applicant, at the time the court proceedings were commenced and at the date of the hearing, remains ready and willing to do all things necessary for the proper conduct of the arbitration, and
- (l) any other matter the court considers significant.

(emphasis added)

- [97] The broad range of factors the court was entitled to consider under the former s. 15 has been entirely removed from the Act, including circumstances where fraud has been alleged by a party to the court proceedings. In my view, the marked legislative change reflects the development of the law concerning arbitration of disputes arising from commercial contracts as described by Hoffman L.J. in *Harbour Assurance*. The court's discretion is now confined to circumstances in which it is clear that the arbitration agreement, as distinct from the contract containing it, is "void, inoperative or incapable of being performed".
- [34] This is all simply to say that many contractual disputes can be characterized by one party or the other as invalid or void or vitiated, on the basis of a retrospective view of how the parties arrived at their impasse. Many arbitration clauses could be rendered ineffective if all that were required to avoid arbitration was to start an action alleging such circumstances. That is why the legislation is worded as strongly as it is.
- [35] Still, as Hoffman L.J. said in *Harbour Assurance*, in the passage quoted above "saying that arbitration clauses, because separable, are never affected by the illegality of the principal contract is as much a case of false logic as saying that they must be".
- [36] Closer to home, this Court in *Cut and Run Holdings v. Booze Bros. Holdings et al.*, 2005 BCSC 167, observed, per Davies J., at para. 24 that "it is well settled law that parties to an agreement containing an arbitration clause cannot be presumed to have agreed to submit all matters which may arise between them to arbitration."
- [37] Russell's position is that a proper consideration of "the nature of the disagreement, the words of the arbitration clause, and the terms of the contract as a whole in their factual context" (see *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 at para. 22) will lead to the conclusion that this dispute falls outside the terms of the arbitration clause.
- [38] Russell begins by submitting that a director is in a fiduciary relationship with a corporation, and a lawyer is in a fiduciary relationship with a client. They quote the Code of Professional Conduct, Chapter 1, Canon 3(2):

A lawyer should disclose to the client all the circumstances of the lawyer's relations to the parties and interest in or connection with the controversy, if any, which might influence whether the client selects or continues to retain the lawyer. A lawyer shall not act where there is a conflict of interests between the lawyer and a client or between clients.

- [39] Russell also quotes from Chapter 1, Canon 3.4:

Independent legal advice

3.4-27 In rules 3.4-27 to 3.4-43, when a client is required or advised to obtain independent legal advice concerning a matter, that advice may only be obtained by retaining a lawyer who has no conflicting interest in the matter.

3.4-27.1 A lawyer giving independent legal advice under this section must:

- (a) advise the client that the client has the right to independent legal representation;
- (b) explain the legal aspects of the matter to the client, who appears to understand the advice given; and
- (c) inform the client of the availability of qualified advisers in other fields who would be in a position to advise the client on the matter from a business point of view.

3.4-28 Subject to this rule, a lawyer must not enter into a transaction with a client unless the transaction is fair and reasonable to the client, the client consents to the transaction and the client has independent legal representation with respect to the transaction.

[40] Russell submits that in contrast to the fiduciary relationships alleged in the *St. Pierre and James v. Thow* cases, the existence of which were in issue, the present case is one of pre-existing fiduciary relationships, Mr. Patrola as a director of Russell, and Mr. Patrola and/or Patrola Law Corporation as a solicitor to Russell, that are entirely independent of the Legal Services Agreement, which was entered into while these fiduciary obligations were ongoing. Russell's allegations include claims that the defendants and each of them in each capacity breached their fiduciary duties to Russell by putting their own personal monetary interests ahead of the interests of the company, by partnering with Brian Harris in a new enterprise without disclosing it to Russell, and (it appears) by failing to notify the directors in charge of compensation of the proposed terms of the agreement. As such, Russell submits that the formation of the agreement is a feature of the breaches of these obligations and that the issue does not, in any sense, "arise out of" or relate to the Legal Services Agreement.

[41] Russell further submits that it is seeking an order pursuant to s. 70(11) of the Legal Profession Act, S.B.C. 1998, c. 9, for a review of the invoices issued by Patrola Law Corporation to Russell, including, but not limited to any invoices issued between December 13, 2012 and September 6, 2013. This is relief which falls within the jurisdiction of the court. It is also relief the arbitrator would be addressing if it upheld the Legal Services Agreement without necessarily applying the particular standards that registrars have developed in relation to such hearings. For this reason as well, Russell submits that because the issues between the parties involve consideration of breaches of the Legal Profession Act and of failure to adhere to the Code of Professional Conduct, they also fall outside the ambit of the arbitration.

[42] Lastly, Russell submits that the arbitration agreement is null and void. On this ground, I simply reproduce their submission.

19. Once an applicant has shown the existence of an arbitration agreement, the burden shifts to the party who has brought legal proceedings to show that the arbitration agreement is null and void, inoperative or incapable of being performed.
20. Russell submits that the Oral Agreement and subsequent Legal Services Agreement, inclusive of the arbitration agreement, are null and void by reason that when Patrola Law entered into the Oral Agreement and Legal Services Agreement Patrola Law, Mr. Patrola, and each of them were acting in breach of their fiduciary duties to Russell by, inter alia:
 - (a) failing to ensure that Russell was fully informed and had competent independent legal advice regarding the purported Legal Services Agreement;
 - (b) in the alternative, by entering into the purported Legal Services Agreement with Brian Harris when Mr. Patrola, Patrola Law, and each of them knew or ought to have known that Russell did not receive adequate independent legal advice regarding the Oral Agreement; and
 - (c) in addition, or in the alternative, by enter into the purported Legal Services Agreement with Brian Harris when the Defendants knew or ought to have known that the Board intended to terminate the employment of Brian Harris.
21. Moreover, the arbitration clause is an agreement that Patrola Law entered into in breach of its obligations to Russell under the Code of Professional Conduct.
- [43] I do not think I need to address the last issue. I think the case falls to be decided on the question of whether this civil action relates to a matter "agreed to be submitted to arbitration," as s. 15 of the Commercial Arbitration Act, and the prerequisites for a stay set out in Prince George (City), require.
- [44] I take full account of the case law and the strong preference evident in the legislation that matters submitted to arbitration be arbitrated, and that the characterization of arbitrable disputes as failures of consideration, or fraudulent inducements, will generally fail where the substance of the relationship is defined in the arbitrable agreement.
- [45] The distinction I see in the present case is that the parties had prior and ongoing fiduciary relationships, and the substance of this civil action is whether those relationships were betrayed by, among other things, the terms of the Legal Services Agreement, and the manner in which it was negotiated and executed. The circumstances outlined in the materials show these things to be live and pre-existing issues, and not, properly speaking, matters arising under or in connection with the Legal Services Agreement.
- [46] Accordingly, in the circumstances of this case, I dismiss the defendants' application for a stay with costs to the plaintiff.

"McEwan J."

The Honourable Mr. Justice McEwan

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