
CANADA / JUDGMENT

Spirit Bay Developments v. Scala Developments

2020 BCSC 1839

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Supreme Court of British Columbia

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2020 BCSC 1839 Spirit Bay Developments v. Scala Developments

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Spirit Bay Developments v.

Scala Developments,

2020 BCSC 1839

Date: 20201126

Docket: S207097

Registry: Vancouver

Between:

Spirit Bay Developments Limited Partnership and

TSD General Partner Inc.

Petitioner

And:

Scala Developments Consultants Ltd.

Respondent

Before: The Honourable Mr. Justice Johnston

Reasons for Judgment

Counsel for Petitioner:

P.R. Senkpiel and

E. L. Hansen

Counsel for Respondent:

S. Hern Q.C. and

N.M. Vaartnou

Place and Date of Hearing:

Vancouver, B.C.

October 15, 16, and 21, 2020

Place and Date of Judgment:

Victoria, B.C.

November 26, 2020

- [1] N. Moses appeared for Beecher Bay Indian Band, but took no part in the proceedings
- [2] By this petition, Spirit Bay Developments Limited Partnership ("Spirit Bay") seeks an order pursuant to s. 30 of the Arbitration Act, R.S.B.C. 1996, c. 55 (the "Act") setting aside the award of an arbitrator or, in the alternative, remitting the award for reconsideration by another arbitrator, on the grounds that the arbitrator exceeded their jurisdiction and breached the rules of natural justice. In the further alternative, Spirit Bay seeks an order pursuant to s. 31 of the Act granting leave to appeal the award on the ground that the arbitrator erred in law.
- [3] I was informed that TSD General Partner Inc. no longer is involved, although there has been no amendment reflecting this.
- [4] Although the Act has been repealed and replaced by the Arbitration Act, S.B.C. 2020, c. 2, s. 70 of the new statute provides that the Act continues to apply to this petition because the arbitral proceeding took place before the new statute took effect.
- [5] The respondent Scala Development Consultants Ltd. ("Scala") brought its own petition in which it seeks to enforce the award. When it became clear that insufficient time had been reserved to deal with both petitions, Scala's was adjourned generally.
- [6] Spirit Bay was developing a multiple unit residential development on leased land that formed part of the lands reserved for the Beecher Bay (Scia'New) First Nation. Spirit Bay had contracted with a company called Cantech to build houses for it on leased lots, an interest in which Spirit Bay could sell to purchasers. When that contract ended, Spirit Bay and Scala entered into a written contract titled Housing Contract, dated November 20, 2015 by which Scala agreed to build houses, and Spirit Bay agreed to pay Scala for them. The contract provided that Scala would be the exclusive builder of houses called "Village Homes" on the leased lots, but allowed Spirit Bay to contract separately with people who wished to have

their own builders build their houses, referred to in the contract as "Custom Lots".

[7] The petitioners relied on these provisions as material portions of the Housing Contract:

C. AND WHEREAS, SPIRIT BAY intends the Development to include lots sold to individuals who will build their own dwellings ("Custom Lots") and lots upon which SPIRIT BAY will construct dwellings for sale with a lot as a package ("Village Homes").

D. AND WHEREAS, SPIRIT BAY has constituted SCALA as the exclusive contractor for the Village Homes component of the single family dwelling units to be located on the Development Parcel;

E. AND WHEREAS, SCALA has agreed to loan to SPIRIT BAY sufficient funds to allow SPIRIT BAY to repay Cantech Construction Ltd. for having built the Visitor Centre at Spirit Bay;

F. AND WHEREAS the parties have agreed to reduce their respective understandings in respect of these matters to writing as provided herein;

...

1. SCALA agrees to loan to SPIRIT BAY One Hundred and Forty Thousand Dollars (\$140,000) interest free, and due sixty (60) days after termination of this Agreement.

...

3. SPIRIT BAY does by this Agreement constitute SCALA as the exclusive contractor for the Village Homes as described in recital C and recital D herein; this appointment is irrevocable and is made in consideration of the loan made in recital E described in this Agreement; for clarity it is agreed that SCALA does not have an exclusive entitlement to build dwellings for the Custom Lots component of the Development.

4. It is agreed by the parties that SPIRIT BAY or SCALA may terminate this Agreement, on sixty (60) days notice, without penalty; If this relationship is terminated as provided in this section, SPIRIT BAY has the obligation on the termination date, as specified in the sixty (60) day notice, to repay SCALA the One Hundred and Forty Thousand Dollars (\$140,000) loan without interest or penalty; all references to days in this section refer to calendar days and not working days.

5. On any termination of this Agreement as provided in section 4, the parties will cooperate to conclude their relationship in a professional manner by payment of all moneys owed and by the mutual provision of such information as may be necessary to ensure a smooth transition to the next contracting entity.

6. The time schedule for commencement of construction of individual single family dwellings within the Development will be as established by the parties, having regard to sales performance within the Development, and the reasonable capacity of SCALA to construct single family dwellings on the Development, from time to time.

7. A fixed price will be provided by SCALA for the construction of each individual single family dwelling for the Development. SPIRIT BAY will authorize SCALA to proceed with each specific dwelling on the basis of the fixed price, if agreed, and will pay for the construction on a "draw" basis, based on the fixed price, according to the following schedule:

On commencement of construction 10% of fixed price

On lock-up of the dwelling 40% of fixed price

On completion of drywall 25% of fixed price

On substantial completion of the dwelling 25% of fixed price

8. If there is no agreement on a fixed price contract, then the parties agree to submit that or any other pricing dispute to the process agreed to in section 13.

...

10. Time shall be of the essence hereof.

13. In the event that any dispute arises as to the Interpretation of this Agreement or the amount of the fixed price contract or as to the responsibilities of the parties hereto, the parties shall first seek to resolve the dispute by a mediation process with a mediator agreed to by the parties and failing agreement by the parties, with a mediator agreed to by the solicitors to the parties, acting reasonably; if the mediation process does not resolve the dispute then the same shall be referred to the decision of a sole arbitrator appointed pursuant to the provisions of the Arbitration Act, R.S.B.C. 1996, and amendments thereto.

16. The provisions herein constitute the entire agreement between the parties hereto and supersede all previous expectations, understandings, communications, representations and agreements, whether verbal or written, between the parties with respect to the subject matter hereof.

17. That no amendment to this Agreement shall be enforceable unless the same is in writing and signed by the parties hereto.

- [8] The "draws" referred to in clause 7 became referred to as "milestones" by the parties and the arbitrator, and was a payment schedule over which the parties differed during the course of their dealings under the contract, and throughout the arbitration.

- [9] Spirit Bay gave notice of the termination of the contract on or about August 27, 2018, and immediately contracted with another builder, Farmer Construction Ltd., to carry on building houses for it. The arbitrator found as a fact that Spirit Bay terminated the contract effective immediately, rather than giving Scala the 60 days' notice required by the contract. In spite of the immediate termination, Scala continued to work on houses it was building until it stopped all work and left the job site on December 6, 2018. Scala claimed there was a new agreement governing this continuing work, which it called a work in progress

completion contract, the existence of which Spirit Bay denied.

- [10] Scala asserted that Spirit Bay owed it a considerable sum of money when it terminated the contract, and more money for the work it continued to do after receiving notice of the termination. Spirit Bay disagreed.
- [11] In April 2019, Scala delivered notice seeking arbitration of its dispute with Spirit Bay, which it particularized as Spirit Bay's failure to pay all amounts owing to Scala within sixty days of termination of their agreement, which Scala characterized as a breach of the agreement for which it sought damages. Scala delivered a document titled Statement of Claim, in which it identified the parties, set out its version of the background to the dispute, identified what it said was the legal basis for its claims, including arrears under the Housing Contract and a separate work in progress completion contract, repayment of a loan it said it had advanced to Spirit Bay, and claimed lost profit, general damages, and interest.
- [12] By amendment, Scala pleaded in the alternative that Spirit Bay had been enriched by its work, and it had suffered a corresponding detriment. Although there was no plea that the enrichment or benefit and corresponding deprivation were without juristic reason, the parties seem to have understood that this amendment raised a claim in unjust enrichment. Scala sought damages and, by amendment, restitution on a quantum meruit basis for the value of services it had provided to Spirit Bay, and costs and interest.
- [13] Spirit Bay delivered a document it called a statement of defence, divided into sections similar to those set out in Scala's statement of claim, and responding to Scala's assertions as well as stating its own version of events. These include allegations that Scala breached the agreement, not Spirit Bay. The statement of defence seems to acknowledge that Scala continued to do some work between the August termination and December 2018, claims that Scala owed money to Spirit Bay on account of overpayments, denies there was a work in progress completion contract as claimed by Scala, and asserts that the housing contract was void because Scala had not advanced the \$140,000 loan provided for in clause 1 of the agreement, and denies it owes anything to Scala.
- [14] Spirit Bay delivered a counterclaim in which it claimed compensation for making good alleged deficiencies in Scala's work, damages for loss in sales and damages to its reputation arising from Scala's misrepresentations to homeowners. Scala's defence to the counterclaim followed.
- [15] The arbitration proceeded over ten days in October, November and December, 2019. Evidence was led through written statements from witnesses, cross-examination of some witnesses, and documents.
- [16] In oral argument on this petition, Spirit Bay proceeded first on its application for leave to appeal under s. 31(1)(b) of the Act, which gives the jurisdiction to grant leave to appeal:

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

- (a) all of the parties to the arbitration consent, or
- (b) the court grants leave to appeal.

- [17] Scala does not consent to the appeal, so the first question to be decided is whether Spirit Bay has shown that its proposed appeal is on one or more questions of law, described as a "threshold requirement" in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paragraph 41.
- [18] At paragraph 49 of *Sattva*, the Court said: "Questions of law 'are questions about what the correct legal test is'", quoting from *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748 at para. 35. The Court then observed at para. 50: "Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix."
- [19] As to the difficulty inherent in identifying pure questions of law in cases of contractual interpretation, the Court in *Sattva* stated:
- [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor" (*King*, at para. 21)

Error of Law - Resort to Subsequent Conduct

- [20] As to whether there are extricable questions of law, as opposed to questions of mixed fact and law, arising out of the award, Spirit Bay argues that the arbitrator was wrong in law when he said at paragraph 171 that he could consider subsequent conduct of the parties to assist him in interpreting the contract without first finding that the contract was ambiguous. The arbitrator cited *Wade v. Duck*, 2018 BCCA 176 as supporting that proposition.
- [21] But *Wade* says at para. 28:

In contrast, evidence of subsequent conduct should only be admitted if the contract is found to be ambiguous after one has considered its text and the factual matrix surrounding the creation of the contract.

- [22] A major issue was the interpretation of clause 5 of the contract, particularly the phrase "by payment of all moneys owed". I repeat clause 5 for convenience:

5. On any termination of this Agreement as provided in section 4, the parties will cooperate to conclude their relationship in a professional manner by payment of all moneys owed and by the mutual provision of such information as may be necessary to ensure a smooth transition to the next contracting entity. [emphasis added]
- [23] Scala took the position that when it stopped work in December 2018, Spirit Bay owed it \$1,629,700.50 for labour and materials Scala had put into the houses it was building for Spirit Bay.
- [24] Spirit Bay took the position that Scala was only entitled to be paid for labour and materials that reached one of the milestones or stages of completion referred to as a "draw" in the contract at paragraph 7.
- [25] The parties devoted a great deal of energy before the arbitrator on whether, after the contract was formed, and during the time it remained in force, Scala had adopted a six stage or milestone schedule for invoicing Spirit Bay and whether Spirit Bay had adopted the schedules by which the lenders financing its purchasers were advancing funds to Spirit Bay that it relied on to pay Scala, and whether either had agreed to the other's schedule as a variation of the contract
- [26] Scala argued that the arbitrator never used subsequent conduct to aid in the interpretation of the contract. Arguably, the arbitrator's conclusion at paragraph 188 of the award "this post contract evidence [that Spirit Bay had not rejected a Scala invoice delivered on Scala's schedule of milestones] is strong evidence of acceptance by conduct", indicates that the arbitrator had resorted to subsequent conduct to interpret a term of the contract.
- [27] In oral argument, counsel for Scala said that while the arbitrator did not use the word ambiguity, he must have found it was present, and that the law does not require an express finding of ambiguity. This argument overlooks the clear, and clearly wrong, statement of the law flowing from Wade found at paragraph 171 of the award.
- [28] While it is not clear from the award whether or to what extent subsequent conduct informed the arbitrator's interpretation of the contract, it is not my task to decide on the merits of this argument. Adair J. addressed this, as well as the standard of review to be considered assessing the question of law, in *MSI Methylation Sciences, Inc. v. Quark Ventures Inc.*, 2019 BCSC 440 at para. 62:

The appropriate threshold for assessing the legal question at issue under s. 31(2) is whether it has arguable merit or a reasonable prospect of success.

Except in rare cases reasonableness will almost always apply to commercial arbitrations conducted pursuant to the Arbitration Act

- [29] There is an argument to be made that the arbitrator's misinterpretation of Wade - an error of law - has a reasonable prospect of success on appeal if leave is granted.

Error of Law - Reliance on Subjective View of a Party to the Contract

[30] The arbitrator concluded that Spirit Bay must pay Scala the amount it claimed to be owed for work and materials when it stopped all work in December 2018. Spirit Bay says that conclusion was based on a legally impermissible reliance on the subjective views of one of its principals who the arbitrator said had 'admitted' that Scala should be paid for the work it performed. Spirit Bay says the arbitrator relied on this so-called admission to dictate the meaning of clause 5 of the contract.

[31] I am not persuaded that this point has a reasonable prospect of success because Spirit Bay has not shown that the arbitrator used or relied on the so-called "admission" to interpret clause 5. The award, read as a whole, indicates otherwise. In particular, the arbitrator's finding that consideration of milestones for payment ceased to be a factor when Spirit Bay terminated the contract supports my conclusion.

Error of Law - Commercial Reasonableness or Avoidance of Commercial Absurdity

[32] Spirit Bay is on firmer ground with its argument that the arbitrator committed legal error in his interpretation and application of the law set out in *Toronto (City) v. W.H. Hotel Ltd.*, [1966] S.C.R. 434.

[33] The arbitrator said this at paragraph 168 of the award:

At the heart of this is that a contract must be interpreted objectively, in a commercially reasonable manner, with a consideration of the factual matrix:

citing *Toronto (City)*.

[34] What *Toronto (City)* says at para. 13 is:

I agree that this transaction being an ordinary commercial transaction it is the duty of the Court in interpreting that document to avoid such an interpretation as would result in commercial absurdity.

[35] Spirit Bay argues that there is a fundamental difference between interpreting to avoid commercial absurdity and interpreting in a commercially reasonable manner; the second approach can be an invitation for the arbitrator to insert his own views of commercial reasonableness on the parties rather than seeking the intention of the parties from the language of their agreement considered in light of the circumstances in which they reached their agreement.

[36] Scala responds that "[w]hile the Arbitrator's recitation of the legal principles in paragraphs 168 and 171 was imperfect", he did refer to the leading authorities on contract interpretation and the parties agreed on the applicable law. But the question remains whether the arbitrator understood and properly applied those leading authorities in arriving at his award.

- [37] That the arbitrator followed his own interpretation can be argued from paragraphs 194, 231, and 398 of the award: in the first, he refers to Spirit Bay's argument as to why it should not have to pay Scala's invoices as "an unreasonable position"; in the second, he dismisses Spirit Bay's argument on price increases because it would make "little commercial sense"; and in the third, the arbitrator dismisses Spirit Bay's argument that there was a maximum time for Scala to complete houses on the basis that "it makes no commercial sense".
- [38] I find arguable merit in Spirit Bay's assertion that the arbitrator erred in law in his interpretation and application of Toronto (City).

Error of Law - Finding Critical Facts Without Evidence, Contrary to Evidence, or Contrary to Other Facts Found

- [39] This argument was not well developed in the petition or in argument, in spite of a considerable amount of time being spent by both parties on evidence of different witnesses. Spirit Bay has not persuaded me that a fact found by the arbitrator had no evidentiary foundation, or that a fact found by the arbitrator was contrary to all of the evidence on that point, which would be required to elevate the matter above a question of fact or mixed fact and law. Spirit Bay has not pointed to an instance where the arbitrator found a critical fact directly contrary to another critical fact found.

Error of Law - Unjust Enrichment

- [40] Spirit Bay also argues that the arbitrator erred when he decided that Scala was entitled to be paid for the work it had done because to do otherwise would result in an unjust enrichment of Spirit Bay.
- [41] Unjust enrichment was introduced to the arbitration by way of an amendment to Scala's so-called Statement of Claim in these words:

Unjust Enrichment

52. Alternatively, Scala provided services to Spirit Bay and TSD in the form of construction work at the Site. Spirit Bay and TSD were enriched by the value of that work, and Scala has suffered a corresponding detriment in having provided its services without compensation.
- [42] This plea is arguably defective in that it omits any reference to the third prong of unjust enrichment, the absence of any juristic reason for the alleged enrichment and corresponding detriment. Spirit Bay argues here that the Housing Contract provided the juristic reason for any enrichment or deprivation asserted. It does not appear that the arbitrator considered whether there was a juristic reason disclosed by the evidence; perhaps he was misled by Scala's pleading. The arbitrator found at paragraph 201 of the award that Spirit Bay would be unjustly enriched if it were not required to pay for Scala's work and materials.

[43] There is arguable merit in Spirit Bay's submission that the arbitrator erred in law in his consideration of Scala's imperfect plea of unjust enrichment.

Error of Law - Counterclaim

[44] Spirit Bay argues that the arbitrator erred in law in his consideration of its counterclaim. The counterclaim was for damages for deficiencies in the work done by Scala for Spirit Bay.

[45] The error alleged is that the arbitrator held Spirit Bay to a different standard of proof for its counterclaim than he had applied to Scala in proving its claim.

[46] The findings of fact relating to Scala's proof of its claims were based on evidence the arbitrator found to be credible and reliable, putting those beyond the reach of any appeal. Spirit Bay's complaint that the arbitrator required expert opinion evidence to support its deficiencies counterclaim is misguided. The arbitrator merely observed that Spirit Bay had not had its personnel inspect Scala's work to assess state of completion or quality of work, that Spirit Bay's evidence of what it had been told by the replacement builder was hearsay, and that Spirit Bay could have led opinions from qualified witnesses like quantity surveyors, but had not done so.

[47] I do not find arguable merit in Spirit Bay's complaints about how the arbitrator dealt with its counterclaim, and therefore I do not grant Spirit Bay leave to appeal the portions of the award dealing with its counterclaim.

Section 31(2)(a) - Importance of Result and Prevention of Miscarriage of Justice

[48] It is not enough to identify one or more questions of law arising out of the award. To obtain leave to appeal, Spirit Bay must satisfy one of the requirements set out in s. 31(2) of the Act. Spirit Bay relies on s. 31(2)(a), which reads:

- (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,

[49] Section 31(2)(a) has two components: first, that the intervention of the court is justified by the importance of the result of the arbitration to the parties; and second, that the determination of the point of law raised by its application may prevent a miscarriage of justice.

Is Intervention of the Court Justified by the Importance of the Result?

[50] On the first component, Spirit Bay points to the size of the award against it - \$1,769,787.16 - and the dismissal of its counterclaim of \$1,491,074.15 plus further damages for loss of sales and damage to reputation. Scala concedes, and I agree, that the amounts involved make the result of this arbitration important to these parties.

Might Determination of the Point(s) of Law Prevent a Miscarriage of Justice?

[51] As to the second component, the Court in Sattva said at para. 70:

I am of the opinion that in order to rise to the level of a miscarriage of justice for the purposes of s. 31(2)(a) of the [Arbitration Act], an alleged legal error must pertain to a material issue in the dispute which, if decided differently, would affect the result of the case.

[52] Whether Spirit Bay owed Scala for labour and materials that had not reached one of the milestones argued under clause 5 of the Housing Contract ("all moneys owed") was a major, and material, issue in the arbitration. A subsidiary issue was whether, when Spirit Bay terminated the Housing Contract, the parties entered into an oral contract by which Scala was to carry on to completion houses it had started to build, in return for payment by Spirit Bay. The existence and terms of the alleged work in progress completion contract were in dispute throughout the arbitration.

[53] At paragraph 192 of the award, the arbitrator found:

Further, Spirit Bay is obliged to pay Scala for the amounts owing at the end of the contract. This is not the amount owing as the achievement of the last milestone. It is the amount owing for work performed and materials bestowed to the date Scala ceased work.

[54] In my view, determination of the following points of law might affect the result:

1. Did the arbitrator err in law by resorting to subsequent conduct without first finding ambiguity in the contract?
2. Did the arbitrator err in law by applying a commercial reasonableness test to interpretation of the contract?
3. Did the arbitrator err in law in his application of unjust enrichment?

[55] There is arguable merit in Spirit Bay's claim that application of the correct principles of contract interpretation could lead to a different result affecting the outcome of the above material issues.

Section 30 - Arbitral Error

[56] Spirit Bay argues that the award should be set aside and remitted to a new arbitrator on the grounds of arbitral error, defined in s. 1 of the Act to include exceeding the arbitrator's powers and failing to observe the rules of natural justice - the bases alleged by Spirit Bay here.

- [57] Spirit Bay argues that s. 30 of the Act requires the arbitrator to adjudicate by reference to the law unless the parties agree otherwise, that the parties here made no such agreement, and that by making the legal errors referred to above, the arbitrator failed to decide the matter according to law, but instead decided it according to what the arbitrator thought was fair or commercially reasonable.
- [58] Whether or not the arbitrator erred in law will be determined on the appeal. Additionally, the parties clothed the arbitrator with the power to decide their dispute, and that includes the power to be wrong in interpreting and applying the law. I do not accept this argument from Spirit Bay.
- [59] The natural justice argument is founded on Spirit Bay's assertion that the reasons for the award are "so legally and factually incomprehensible as to be insufficient" and thus in breach of the principles of natural justice.
- [60] The award, while lengthy, and at times confusing, is comprehensible, at least sufficiently so that I do not give effect to this argument by Spirit Bay.
- [61] Therefore, the relief sought under s. 30 of the Act is dismissed.
- [62] I expect costs of this petition should follow the event of the appeal, but I will hear counsel on costs, if either party disagrees. In that case, counsel should inform each other and the registry of any wish to speak to costs within two weeks.

"R.T.C. Johnston, J."

The Honourable Mr. Justice Johnston

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