# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *The Owners, Strata Plan BCS 3165 v. KBK No. 11 Ventures Ltd.,* 2014 BCSC 2276

Date: 20141204
Docket: S142292
Registry: Vancouver

Between:

**The Owners, Strata Plan BCS 3165**

Petitioner

And

**KBK No. 11 Ventures Ltd.**

Respondent

- and -

Docket: S144852
Registry: Vancouver

Between:

**The Owners, Strata Plan BCS 3165**

Petitioner

And

**KBK No. 11 Ventures Ltd.**

Respondent

- and -

Docket: S145071
Registry: Vancouver

Between:

**KBK No. 11 Ventures Ltd.**

Petitioner

And

**The Owners, Strata Plan BCS 3165**

Respondent

Before: The Honourable Mr. Justice Kelleher

# Reasons for Judgment

**In Chambers**

| | |
|---|---|
| Counsel for the Petitioner in S142292 & S144852 and the Respondent in S145071: | R.J. Kaardal<br>C.E. Hunter |
| Counsel for the Respondent in S142292 & S144852 and the Petitioner in S145071: | S.D. Coblin<br>D.P. Lucas |
| Place and Dates of Hearing: | Vancouver, B.C.<br>August 6-8, 2014<br>September 3, 2014 |
| Place and Date of Judgment: | Vancouver, B.C.<br>December 4, 2014 |

**Introduction**

[1] There are three petitions before the Court. The first petition, S142292, was filed March 24, 2014. The Owners, Strata Plan BCS 3165 (the "Strata Corporation") apply pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 for leave to appeal an arbitration award dated January 10, 2014. The petition contains as well an application pursuant to s. 30 of the *Arbitration Act* to set aside the award on the basis of arbitral error.

[2] The second petition, S144852, was filed June 23, 2014 and amended July 24, 2014. The Strata Corporation applies for leave to appeal two supplementary arbitration awards dated April 24, 2014 and June 25, 2014 respectively, and to set them aside for arbitral error.

[3] The third petition, S145071, was filed by KBK No. 11 Ventures Ltd. ("KBK") on July 2, 2014. In that petition, KBK seeks an order recognizing and enforcing the arbitration award and two supplementary awards by:

(a) granting judgment to KBK in the terms of the arbitral award;

(b) declaring that the arbitral award is enforceable in the same manner as a judgment or order of the court; and

(c) making an order that the respondents pay to the petitioner $1,006,174.72, plus interest.

[4] In this judgment, I will first address petitions S142292 and S144852. I will then address KBK's petition S145071.

[5] The Owners Strata Plan BCS 3165 is a strata corporation comprising the owners of certain condominiums in the Shangri La building. The building is a 61-storey mixed use building at 1111 Alberni Street in downtown Vancouver.

[6] The Strata Corporation's owners comprise the Live/Work parcel, one of three "air-space parcel" entities within the building. The other two air-space parcels are the residential estates parcel (the "Residential Estates"), and the hotel air-space

parcel (the "Hotel"). Finally there is a fourth, remainder parcel (the "Remainder"), which consists of commercial space. The Live/Work units are zoned to permit both residential use and home offices.

[7] KBK was the owner/developer of the project (or its nominee) and continues to own two of the four parcels, the Hotel and the Remainder.

[8] The dispute is about cost sharing arrangements between the Hotel and the Strata Corporation and between the Remainder and the Strata Corporation. The Residential Estates are not party to the dispute.

[9] The Live/Work suites were sold before they were constructed. The *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41, required a disclosure statement to be provided to each purchaser and potential purchaser. The pre-sales occurred between August 2004 and March 2006. The development was completed in October 2008.

[10] Arrangements were necessary to permit the development to operate in an integrated manner. To that end, a number of easements and agreements were created. These arrangements enabled the shared use of facilities and provided for cost sharing among the various parcels. On October 23, 2008, KBK filed the following instruments in the Land Title Office:

1. the Reciprocal Easement Agreement ("REA"), an agreement among the owners of all parcels providing for easements among the parcels and containing provisions for sharing the costs common to the operation of the development;
2. two facility area easements pertaining to facilities such as the health club and function rooms which operate on the Strata Corporation common property; and
3. options to lease providing for the leasing of those areas of common property that house the facilities that are the subject of the facility area easements.

[11] On the same day, KBK deposited the strata plan in the Land Title Office. That had the effect of establishing the Strata Corporation which then has the capacity of a natural person: *Strata Property Act*, S.B.C. 1998, c. 43, s. 2.

[12] Between the time of the establishment of the strata and the election of a council (which occurred at the first annual general meeting on February 3, 2009), KBK was required to exercise the powers and perform the duties of the council: *SPA*, s. 5.

[13] During that period, KBK was under certain duties. Section 6(1) of the *SPA* requires:

> 6(1) In exercising the powers and performing the duties of a council, the owner developer must
>
> (a) act honestly and in good faith with a view to the best interests of the strata corporation, and
>
> (b) exercise the care, diligence and skill of a reasonably prudent person in comparable circumstances.

[14] On November 5, 2008, KBK caused the Strata Corporation to enter into an agreement. Pursuant to this agreement, the benefits of the REA were assigned to the Strata Corporation and the Strata Corporation assumed the obligations of the Live/Work parcel under the REA. The parties referred to this as the "Assignment & Assumption Agreement".

[15] On February 3, 2009 the control of the Strata Corporation moved from KBK to the owners of the Strata Corporation and their newly-elected council.

[16] Kaaizer Sethna is the president and co-treasurer of the Strata Corporation. He deposed that after the first annual general meeting, the Strata Corporation sought to understand the easement and cost sharing structure, the basis of various charges, the calculation of percentages, and the determination of costs.

[17] Mr. Sethna said that the Strata Corporation became concerned because the amounts being claimed for shared costs had increased greatly since a draft budget had been disclosed to the owners. There were as well specific concerns about the

Hotel parcel's interference with the Live/Work parcel's use of its common property and access rights.

[18] The Strata Corporation was not satisfied with the answers it was receiving. Between May 2010 and May 2012, the Strata Corporation sought answers from the developer to a number of questions involving cost sharing, invoicing, and allegedly unauthorized charges.

[19] On May 1, 2012, KBK demanded payment of outstanding costs that had been allocated to the Strata Corporation pursuant to the REA. The Strata Corporation made a "without prejudice" payment under protest, and reiterated its concern about the accuracy of the apportionment of costs.

[20] On May 15, 2012, counsel for KBK advised counsel for the strata that KBK intended to commence arbitration. This was in accordance with section 10.1 of the REA. The claim related to costs that KBK alleged were owing by the Strata Corporation.

[21] Section 10.1 of the REA provides as follows:

> 10.1 Subject to Section 8.11 above, in the event of any dispute or disagreement between the Owners in respect of any matter that is the subject of this Agreement or the interpretation of any provision of this Agreement including any dispute with respect to any cost sharing provision including the allocation of any Shared Costs between the Owners which are not specifically allocated on Schedule D, the Owners agree that such dispute or disagreement shall be submitted to and finally settled by a single arbitrator pursuant to the *British Columbia Commercial Arbitration Act*.

[22] The parties agreed to engage Mr. Gary Snarch as the arbitrator.

[23] On July 9, 2012, KBK served its notice of claim in the arbitration. KBK sought an award against the Strata Corporation for outstanding costs owing under the REA in the amount of $405,521.39 for the Remainder and $201,718.11 for the Hotel.

[24] KBK subsequently delivered an amended notice of claim in which it quantified the Hotel portion of the claim at $859,365.74.

[25] On August 3, 2012 the Strata Corporation filed a response and counterclaim, seeking dismissal of KBK's claim, pleading that the arbitration clause was not binding against the strata, and challenging the amount KBK claimed.

[26] The parties to the arbitration took several steps before the actual hearing began. In January 2013, there were examinations for discovery of three representatives of KBK and two representatives of the Strata Corporation. Additionally, the arbitrator heard and decided several contested applications:

1. On September 4, 2012, the Strata Corporation was ordered to provide particulars;
2. On November 16, 2012, the Strata Corporation obtained leave to amend its pleadings and was ordered to provide further particulars;
3. On January 30, 2013, KBC was given leave to amend its pleadings;
4. On February 18, 2013, KBK was ordered to produce documents related to meter readings, and each party was given leave to conduct additional examinations for discovery; and
5. On April 11, 2013, KBK's application for summary determination of the validity of the REA was dismissed; the Strata Corporation was given leave to conduct an additional examination for discovery; the Strata Corporation's application to terminate the arbitration based on KBK's failure to provide adequate discovery was dismissed; the Strata Corporation's application to terminate the arbitration based on a jurisdictional challenge was adjourned generally; and KBK was ordered to provide some additional information.

[27] After the arbitration commenced, the Strata Corporation took the position that the matter was not suitable for arbitration and ought to have been brought by way of an action in this Court. Nevertheless, it participated in the various pre-hearing steps described above.

[28] On April 30, 2013, the Strata Corporation commenced an action in this Court and on May 7, 2013, filed an application seeking orders revoking the authority of the arbitrator.

[29] The arbitration hearing commenced June 3, 2013. It was heard over 23 days and concluded on November 1, 2013.

[30] The Strata Corporation's application in this Court was heard by Madam Justice Warren over four days in July 2013. A decision was rendered September 17, 2013: *The Owners, Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708.

[31] The nature of the Strata Corporation's claim in the action was substantially the same as its response and counterclaim in the arbitration. Its complaint was that the easement and cost-sharing arrangements that were implemented differed markedly from what was represented in the disclosure statements. The Strata Corporation alleged that it was structured to prefer the interests of KBK.

[32] There were three issues put before the Court:

1. Whether the arbitrator's authority should be revoked pursuant to s. 16 of the *Arbitration Act* and/or whether the arbitration should be stayed pending the final disposition of the action;

2. Whether the action should be stayed pursuant to s. 15 of the *Arbitration Act* pending final disposition of the arbitration; and

3. Whether certain claims made against the law firm representing the respondent in the action should be severed and stayed.

[33] Madam Justice Warren held that, based on s. 10.1 of the REA, the arbitrator had the jurisdiction to determine the validity of the REA. These included the KBK claim against the Strata Corporation as currently advanced in the arbitration, the Strata Corporation's claims against KBK based on allegations of misrepresentation,

fraud, and breach of statutory or fiduciary duties related to the easement and the cost-sharing structure.

[34] Second, the Court held that some aspects of the issues were "arguably" within the scope of s. 10.1 of the REA: the validity of the Facility Area Easements, the Lease Options, and the Assignment & Assumption Agreement.

[35] Madam Justice Warren also determined that some aspects of the issues before her were beyond the scope of s. 10.1 of the REA: the claim for damages and/or an accounting of profits against the defendants other than KBK; the claim for injunctions against members of the developer other than KBK; and the claim by the Strata Corporation against KBK's law firm.

[36] The Court declined to revoke the arbitrator's authority under s. 16 of the *Arbitration Act*. Madam Justice Warren held that the arbitration was not materially different, in complexity or subject matter, from the kinds of disputes routinely adjudicated under the *Arbitration Act*.

[37] The Court declined as well the application for injunctive relief staying or adjourning the arbitration. Her Ladyship concluded that the petitioner had not demonstrated it would be prejudiced by the continuation of the Arbitration. She went on:

> In any event, the extent of its participation in the Arbitration and its delay in seeking a stay of the Arbitration would also preclude such a stay.
>
> (At para. 115.)

[38] She went on to determine that the action should be stayed pending the outcome of the arbitration. Finally, she held that because she had ordered the stay of the action it was not necessary to decide the application by the defendant law firm to sever that aspect of the claim.

[39] The arbitration concluded on November 1, 2013. The decision was published by the arbitrator on January 10, 2014. It is 289 paragraphs in length. Arbitrator Snarch reached these conclusions:

1. KBK had proved its full claim against the Strata Corporation for monies owing to the Remainder;

2. KBK made out its alternate claim against the Strata Corporation for monies owed to the Hotel;

3. The counterclaim of the Strata Corporation was dismissed;

4. Interest was awarded at the Royal Bank of Canada prime rate plus 10%.



[40] Two supplementary awards were issued on April 24 and June 25, 2014. Those fixed the dollar amount and interest payable pursuant to the first award. It included amounts owing by the Strata Corporation for shared costs up to January 10, 2014 at $1,006,174.72.

[41] The petitioner seeks leave to appeal these three awards pursuant to s. 31 of the *Arbitration Act*:

> 31(1) A party to an arbitration, other than an arbitration in respect of a family law dispute, may appeal to the court on any question of law arising out of the award if
>
> (a) all of the parties to the arbitration consent, or
>
> (b) the court grants leave to appeal.
>
> (2) In an application for leave under subsection (1) (b), the court may grant leave if it determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.
>
> (3) If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just.
>
> (3.1) A party to an arbitration in respect of a family law dispute may appeal to the court on any question of law, or on any question of mixed law and fact, arising out of the award.
>
> (4) On an appeal to the court, the court may
>
> (a) confirm, amend or set aside the award, or

> (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the appeal.

[42] The petitioner also seeks orders setting aside the awards under s. 30 of the Act on the basis of arbitral error:

> 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.
>
> (2) The court may refuse to set aside an award on the grounds of arbitral error if
>
> (a) the error consists of a defect in form or a technical irregularity, and
>
> (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
>
> (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.
>
> (4) Nothing in this section restricts or prevents a court from changing, suspending or terminating all or part of an award, in respect of a family law dispute, for any reason for which an order could be changed, suspended or terminated under the *Family Law Act*.

[43] Such an appeal does not require leave of the court. This application under s. 30 was not argued before me. Rather, if necessary, a hearing will be scheduled.

[44] Section 31 was the subject of recent consideration by the Supreme Court of Canada. In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court took the opportunity to examine the concept of leave to appeal in some depth.

[45] The Court pointed out that there are three requirements before granting leave: first, the application must be based on a question of law; second, it must come within one of the three circumstances in s. 31(2); and third, there remains in the court a discretion to refuse a leave application even though the first two requirements have been met. This judgment will address the two petitions under these three headings.

### i. Is the leave application based on a question of law?

[46] The Court stated that under s. 31(1), the issue upon which leave is sought must be a question of law. The first issue, then, is whether the matter decided by the arbitrator is a question of law, fact, or mixed law and fact.

[47] In *Sattva*, the Court adverted to the "historical approach" whereby determining the rights and obligations of the parties under a written contract was considered a question of law. The Court stated at para. 50:

> With respect for the contrary view, I am of the opinion that the historical approach should be abandoned. 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.

[48] The Court went on to say there may be cases where a question of law can be extricated from the process (at para. 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). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[49] But the Court noted at paras. 54-55:

> However, courts should be cautious in identifying extricable questions of law in disputes over contractual interpretation. Given the statutory requirement to identify a question of law in a leave application pursuant to s. 31(2) of the *AA*, the applicant for leave and its counsel will seek to frame any alleged errors as questions of law. The legislature has sought to restrict such appeals, however, and courts must be careful to ensure that the proposed ground of appeal has been properly characterized. The warning expressed in *Housen* to exercise caution in attempting to extricate a question of law is relevant here:
>
> > Appellate courts must be cautious, however, in finding that a trial judge erred in law in his or her determination of negligence, as it is often difficult to extricate the legal questions from the factual. It is for this reason that these matters are referred to as questions of "mixed law and fact".

> Where the legal principle is not readily extricable, then the matter is one of "mixed law and fact" ... . [para. 36]
>
> Although that caution was expressed in the context of a negligence case, it applies, in my opinion, to contractual interpretation as well. As mentioned above, the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare. In the absence of a legal error of the type described above, no appeal lies under the *AA* from an arbitrator's interpretation of a contract.



[50] With these principles in mind, I turn to the Strata Corporation's petitions. The petitioner argues that leave to appeal from the arbitrator's awards should be granted on the following questions:

a. Did the Arbitrator err in failing to find that the Reciprocal Easement Agreement dated October 23, 2008 (the "REA") require delivery of a budget, an annual reconciliation and an opportunity to claim a re-adjustment in respect of shared costs which are either improper, inappropriate or based on error of allocation, as a precondition to the determination that any debts are owed for past periods by:

   i. Applying an incorrect burden of proof; or

   ii. Failing to apply relevant principles of contractual interpretation in interpreting the terms "reasonable budget" and "reasonable detail" in Article 8 of the REA?

b. Did the Arbitrator err by failing to apply relevant principles of contractual interpretation in interpreting Schedule D of the REA?

c. Did the Arbitrator err in finding that any breach of fiduciary duty in determining the cost-sharing formula and budgeting process may be met by adequate disclosure?

[51] The petitioner argues in the alternative that if the arbitrator did not err in interpreting these provisions of the REA, the provisions should be void *ab initio* because they are fundamentally unfair to the Strata Corporation and result from the breach of fiduciary duty owed by the developer to the Strata Corporation.

## The Agreements

[52] The REA defines "shared costs" as follows:

(fff) "Shared Costs" means, without duplication:

(i) the costs and expenses identified in Schedule D;

(ii) to the extent not included within Schedule D, the costs and expenses incurred in accordance with this Agreement by the Owners of the Parcels with respect to the provision of the Building Services and Repair of the Common Areas and Facilities;

(iii) the Property Taxes applicable to the Common Areas and Facilities;

(iv) the Utility Costs;

(v) the insurance described in Section 7.6(a) for Common Areas and Facilities;

(vi) to the extent not included within the individual municipal property tax bills for each of the Parcels or the Strata Lots created as a result of the subdivision of a Parcel, the Public Art Endowment Fee;

(vii) Management Costs; and

(viii) Remainder Management Costs

[53] Schedule D to the REA is entitled "Living Shangri-La Allocation of Shared Costs". Its opening paragraph provides as follows:

> The costs and expenses for the management, operation, maintenance, repair, and replacement of common facilities and services will be allocated as follows:

[54] The REA then includes several provisions in relation to cost-sharing:

> 8.1 Cost Sharing
>
> The Owners of the Parcels covenant and agree to share the Shared Costs on the basis of the percentage allocation of the Shared Costs set forth in Schedule D and pursuant to the procedures set forth in this Article 8. If no percentage allocation for a particular item of Shared Costs appears in Schedule D, then in such case the Owner of the Remainder shall determine in an equitable manner each Owner's percentage allocation of any such Shared Costs.
>
> 8.2 Shared Costs Budget
>
> The Owner of the Remainder shall cause to be prepared a reasonable budget of the Shared Costs that the Owner of the Remainder reasonably anticipates will be incurred for each calendar year including a reserve contingency of 5%, and which budget shall include adequate capital reserves for capital repairs and replacements to items compromising or included within the Shared Costs. The Owner of the Remainder shall deliver a consolidated budget for the Shared Costs to each Owner no later than ninety (90) days before the beginning of the calendar year for which such budget has been prepared. The budget of the Shared Costs shall identify:

(a) each item of the Shared Costs in reasonable detail, including at a minimum, the Shared Costs identified in Schedule D;

(b) the percentage increase in Shared Costs for each item of Shared Costs for the next calendar year from the budget for Shared Costs for the current calendar year; and

(c) the monthly amounts payable by each Owner of a Parcel on account of Shared Costs for the next calendar year, based on the percentage allocation of Shared Costs set forth in Schedule D.

8.3 Monthly Payments

Each of the Owners of the Parcels shall pay their respective monthly Shared Cost Payments as identified pursuant to Section 8.2(c) to the Owner of the Remainder on a monthly basis, within five (5) days following the beginning of each calendar month. If requested by the Owner of the Remainder, each Owner of a Parcel shall execute and deliver whatever documentation as may be required to permit the automatic debit from such Parcel Owner's bank account of such Parcel Owner's Shared Cost Payments.

…

8.5 Annual Reconciliation

Within one hundred twenty (120) days following the end of each calendar year, the Owner of the Remainder shall make or cause to be made a final determination of the actual Shared Costs for such preceding calendar year and shall deliver an Annual Shared Costs Statement to each of the Owners or their respective property managers, showing the particulars of the actual Shared Costs for such year in reasonable detail. If the Annual Shared Costs Statement shows that Shared Costs for the preceding calendar year are due and owing from any of the Owners of the Parcels, then the applicable Owners, in each case shall pay the amounts due and owing by them to the Owner of the Remainder within ten (10) days following receipt of the Annual Shared Costs Statement. If the Annual Shared Cost Statement shows that the Owner of the Remainder has over-collected Shared Costs from one or more Owners of the Parcels for the preceding calendar year, then the Owner of the Remainder shall credit the amount of such over-collection against such Owners' portion of Annual Shared Costs due and payable by such Owners in respect of future month(s).

8.6 Interest Payable

Interest shall accrue on the amount of any Shared Costs Payments payable to the Owner of the Remainder hereunder from the due date of payment thereof, at the Prime Rate plus ten percent (10%) per annum until paid in full. The Owners of the Parcels acknowledge and agree that the foregoing interest payable on outstanding Shared Costs Payments represents their mutual assessment of the risks to the Owners of the Parcels associated with any inability of the Owner of the Remainder to make payments on account of the Shared Costs and does not constitute a penalty.

8.7 Accounting Records and Audit

The Owner of the Remainder shall cause to be kept accurate accounting records of all Shared Costs at a location within the City, which records shall

> be available at reasonable times for inspection or audits by the Owners of the Parcels upon five (5) days prior written notice and such records shall be kept for a period of six (6) years following the end of each calendar year.
>
> 8.8 Expiry of Re-Adjustment Period
>
> No Owner of a Parcel may claim from any of the Other Owners a re-adjustment in respect of any Shared Costs, whether paid or payable in monthly instalments or otherwise, if based on any error of estimation, allocation, calculation or computation thereof, unless claimed in writing prior to the expiration of eighteen clear months from the delivery of the Annual Shared Costs Statement referred to in Section 8.5 respect of which such Shared Costs were incurred.
>
> 8.9 Failure to Agree
>
> If any Owner of a Parcel claims a re-adjustment of Shared Costs pursuant to Section 8.8 and such Owner and the Other Owners are unable to agree on the disputed issue within sixty (60) days following the date of a written claim made by the Owner of a Parcel pursuant to Section 8.8, then the matter shall be submitted to arbitration as provided for in Section 10.1.
>
> …
>
> 8.11 Basis of Allocation of Shared Costs
>
> The Owners of the Parcels acknowledge and agree that except for each Owner of a Parcel's portion of the cost of Building Shell Insurance, and except for each Owner of a Parcel's portion of an item of Shared Costs which is not specified in Schedule D, if any, their respective percentage share of Shared Costs set forth in Part 1 of Schedule D has been settled and agreed to by all of the Owners of the Parcels and may not be changed or altered, pursuant to arbitration hereunder, any other legal proceedings or otherwise, for any reason whatsoever, save and except by written agreement of all of the Owners of the Parcels.

[55] There are also costs outside Schedule D. These are shared operational costs incurred by the Remainder in managing the Development.

[56] The arbitration clause in the REA is found in Section 10.1:

> Subject to Section 8.11 above, in the event of any dispute or disagreement between the Owners in respect of any matter that is the subject of this Agreement or the interpretation of any provision of this Agreement including any dispute with respect to any cost sharing provision including the allocation of any Shared Costs between the Owners which are not specifically allocated on Schedule D, the Owners agree that such dispute or disagreement shall be submitted to and finally settled by a single arbitrator pursuant to the *British Columbia Commercial Arbitration Act*. [Now the *Arbitration Act*, R.S.B.C. 1996, c. 55.]

[57] I turn to the questions of law on which leave to appeal is sought:

***a. Did the Arbitrator err in applying the reciprocal easement agreement by (i) applying an incorrect burden of proof or (ii) failing to apply relevant principles of contractual interpretation in interpreting the terms "reasonable budget", "reasonable detail" and Section 8 of the REA?***

[58] This issue was captured in paras. 147 and 148 of the Arbitrator's decision:

> [147] Lastly, counsel for the Live/Work Strata argues that, given the definition of shared cost budget under Section 8.2 of the REA, budgets must be objectively reasonable and made in consultation with the other air parcels. The relevant portion of Section 8.2 relied upon by the Live/Work Strata reads in part:
>
> > The Owner of the Remainder shall cause to be prepared a reasonable budget of the Shared Costs that the Owner of the Remainder reasonably anticipates will be incurred for each calendar year.
>
> [148] Dealing with this latter issue first, I do not agree with counsel's interpretation of Section 8.2. In my view, the Remainder must prepare a budget that includes all matters that could be reasonably anticipated. The use of the words "reasonable" and "reasonably" in the same sentence is rather confusing. However, I do not think it means that a consultation is required among the air parcels to objectively determine a budget that is reasonable. The budget purely deals with forecasting and, in any event, it is contemplated that it is to be reconciled after the end of the calendar year.

[59] The difference between the parties was this: KBK's position is that the budget is a forecasting tool. The Strata Corporation asserted that it was more than that: that Section 8.2(a) imposed a standard of objective reasonableness of the items included in the shared costs budget.

[60] The Strata Corporation argued that the Arbitrator should have applied the doctrine of *contra proferentem*:

> While the plain meaning of the words "reasonable budget" suggest a requirement of objective reasonableness, if the Arbitrator's conclusion that the inclusion of "reasonable" and "reasonably" in the same sentence is "rather confusing" was intended to convey that he found in them ambiguity, the Arbitrator should then have gone on to consider the principle that a commercial absurdity be avoided and the doctrine of *contra proferentem.* The application of either doctrine compels a construction in favour of the Strata.

[61] I am not persuaded that the Arbitrator's interpretation creates a commercial absurdity. The doctrine of *contra proferentem* was explained in Fridman, *The Law of Contract*, 5th ed, (Toronto, Canada: Thomson Carswell 2006) at 458:

> In cases of doubt, as the last resort, language should always be construed against the grantor or promisor under the contract; *verba fortius accipiuntur contra proferentem*.
>
> In the words of Sir Montague Smith in *McConnell v. Murphy*:
>
> > Where a stipulation is capable of two meanings equally consistent with the language employed, that shall be taken which is most against the stipulator and in favour of the other party.
>
> Or, as Abella J.A. said, dissenting, in Arthur Andersen Inc. v. Toronto Dominion Bank, where the majority of the Ontario Court of Appeal, reversing the trial judge, held that an agreement between a group of companies and the bank, whereby the parties undertook a "mirror system of accounting", was not ambiguous,
>
> > If it is a rule meant to relieve the non authorial party to a contract from an interpretation that party could not clearly discern from a plain reading of the document. This prevents the party who did drafted and understand the contract from springing a hidden contractual burden on an unexpected signator.

[62] However, as Professor Fridman goes on to point out, there must be an ambiguity in the contract before the rule can be applied. Here the Arbitrator said the use of the word "reasonable" and "reasonably" in the same sentence was confusing. This is not a finding of ambiguity.

[63] I conclude the interpretation of the Arbitrator was a finding of mixed fact and law and not grounds for leave to appeal.

[64] I agree with KBK that what the Strata Corporation is asserting here is that the Arbitrator should have implied into the contract a term that the actual expenses were objectively reasonable. The definition of shared costs provides in part, as follows:

> (ffff). "Shared Costs" means, without duplication:
>
> (i) the cost and expenses identified in Schedule D;
>
> (ii) to the extent not included within Schedule D, the cost and expenses incurred in accordance with this Agreement by the Owners of the Parcels with respect to the provision of Building Services and Repairs of the Common Areas and Facilities.

[65] This provision defines shared costs as the costs that are actually incurred. It's not limited to costs that are "objectively reasonable". As KBK argues, the costs are what they are.

[66] In any event, implying a term into a contract is a question of fact or mixed law and fact: see *Able Fabric Wholesale Inc. v. Li*, 2012 BCSC 1295 at paras. 29 and 30.

[67] The Strata Corporation's argument respecting the burden of proof was stated by the Strata Corporation as follows:

> The Arbitrator's error in construing the REA not to require that reconciliation be to a reasonable budget led him to apply an incorrect burden of proof, effectively shifting the burden to the defendants Strata to disprove that the charges imposed were appropriate rather than requiring that KBK establish that a reasonable budget had been presented, that the amounts included as Schedule D items were reasonable and properly included within Schedule D, and that a reconciliation of the accounts had been performed as required by the REA.

[68] I agree with KBK that it bore the burden of proving whether or not the cost was actually incurred during the course of the operations and management of the shared areas. It then was up to the defendant to challenge any specific cost item to demonstrate that the cost claimed was somehow fraudulent or unconscionable. Whatever that standard is, it was the petitioner that had to establish that as a positive defence.

***b. Did the Arbitrator err by failing to apply relevant principles of contractual interpretation in interpreting Schedule D of the REA?***

[69] I am unable to find a question of law under this heading. Although the Arbitrator was required to consider the meaning of "lower lobby" in Schedule D in particular, he found, as KBK argued, that the Schedule D allocations for the lower lobby included the costs of labour. As well the Strata Corporation complains that the Arbitrator did not require KBK to prove that the expenses were properly allocated to Schedule D. This, it is said, effectively shifted the burden of proof to the Strata Corporation. The Arbitrator took the same approach to the burden of proof for Schedule D matters as it did for applying Article 8. KBK had the obligation to prove its case.

[70] I note that Section 8.1 of the REA requires the Owner of the Remainder to make certain determinations in "an equitable" manner". Section 8.1 provides:

> 8.1 Cost Sharing
>
> The Owners of the Parcels covenant and agree to share the Shared Costs on the basis of the percentage allocation of Shared Costs set forth in Schedule D and pursuant to the procedures set forth in this Article 8. If no percentage allocation for a particular item of Shared Costs appears in Schedule D, then in such case the Owner of the Remainder shall determine in an equitable manner each Owner's percentage allocation of any such Shared Costs.
>
> (emphasis added)



[71] This is clearly a limitation on the discretion of the owner of the Remainder. But there is no finding by the Arbitrator that the determinations were inequitable.

***c. Did the Arbitrator err in finding that any breach of fiduciary duty may be met by adequate disclosure?***

[72] The Strata Corporation's position at the arbitration was that the REA was not valid or binding upon it because by entering into it the respondent allegedly breached its fiduciary duty to the petitioner. The REA was entered into and registered on title to the Live/Work parcel before the Strata Corporation came into existence.

[73] This argument is considered by the Arbitrator in paragraphs 78 to 92 of the award. He found that the notice provided to prospective purchasers in the disclosure statement included notice of a cost sharing agreement.

[74] The Arbitrator then pointed to a decision of Madam Justice Gerow in *The Owners, Strata Plan VIS 2968 v. K.R.C. Enterprises Inc.*, 2007 BCSC 774, rev'd other grounds, 2009 BCCA 36. That decision contains a review of the authorities dealing with an owners/developers' fiduciary duty to prospective purchasers. Gerow J. said at para. 29:

> [29] The cases in which courts have found that the developer has been in breach of its fiduciary duty, regardless of notice, are cases in which the limitation has not been included in the disclosure statements nor registered against the title to the property so that the prospective purchaser can

> determine the extent of any restrictions on the common property by searching the title.

[75] After considering relatively recent Ontario Court of Appeal authority, the arbitrator concluded:

> [91] In the result, I believe that the test is whether KBK, through a combination of the Disclosure Statements and the aforementioned registered documents, gave sufficient notice to prospective purchasers. I take from the case law that, if the consumer is protected with required disclosure, the owners/developers has fulfilled its duty.

[76] He then cited remarks by Madam Justice Warren at para. 89 of her decision:

> …[T]he [REA] was registered against title before any of the individual owners purchased units and pursuant to s. 27 of the *Land Title Act*, R.S.B.C. 1996, c. 250, the registration of the [REA] is deemed to give notice of its contents to subsequent purchasers. The individual owners chose to purchase their units in these circumstances and as such, in my view, it cannot be said that they did not freely accept the terms of the [REA].

[77] The arbitrator reached this conclusion:

> [92] I conclude based on the aforementioned test, and what I consider the sufficient notice given to prospective purchasers to both the Disclosure Statements and the charges registered on title, that KBK has not breached any fiduciary duty as alleged.

[78] Whether in the circumstances of this case, there was a breach of fiduciary duty is a question of fact or a mixed law and fact. It is not an extricable question of law. On the other hand, the nature of the relationship between a developer and pre-sale purchasers does raise a question of law. The question of law is whether the owner/developer has fulfilled its fiduciary duty by adequate disclosure.

[79] To summarize, I find that the questions in paras. a. and b. do not raise pure questions of law and leave to appeal must be denied on that basis.

[80] As for para. c., a question of law is raised by the conclusion of the arbitrator in paragraph 91 of his award:

> I take it from the case law that, if the consumer is protected with required disclosure, the owner/developer has fulfilled its duty.

### *d. The Petitioner's Alternative Position*

[81] The petitioner's alternative argument is set out at paragraph 51, above. The Strata Corporation argues that the provisions of the REA should be *void ab initio* because they are fundamentally unfair to the Strata Corporation and result from the breach of fiduciary duty owed by the Strata Corporation.

[82] This does not raise a question of law. It is dependent on the factual context. Whether provisions are unfair to the Strata Corporation raise at best issues of mixed fact and law and therefore do not provide grounds for leave to appeal.



### ii. Does the application meet the requirements of Section 31(2)?

[83] The Supreme Court of Canada discussed s. 31(2) in *Sattva*. The court held that the threshold for assessing the legal question under s. 31(2) is whether it has "arguable merit". This, the court said, is a phrase whose meaning has been expressed in various ways: "sufficient merit", "a reasonable prospect of success", "some hope of success", and "credible argument": see *Sattva* at para. 74. The Court went on to say that this question must be answered in light of the standard of review. The standard will usually be one of reasonableness. Generally, the only exception is where there is a constitutional question or a question of law of importance to the legal community as a whole that is outside the arbitrator's expertise: *Sattva*, at para. 75.

[84] The question, then, is whether the Strata Corporation's argument with respect to fiduciary duty has arguable merit. That is, does the argument have a reasonable prospect of success, some hope of success, or is of sufficient merit? In my view, the position of the Strata Corporation does not meet this test.

[85] The standard of review is reasonableness. I do not consider there is an arguable case that the arbitrator's decision was unreasonable. It is based on a considered analysis of law in British Columbia and an analysis of cases relied upon by the Strata Corporation. As well, he conducted an analysis of recent Ontario decisions. There is no basis for granting leave to appeal on this issue.

**iii. If I am wrong on the first two issues, should I exercise my discretion in any event to deny leave?**

[86] The Court in *Sattva* said this about the residual discretion to deny leave, at para. 87:

> In exercising its statutorily conferred discretion to deny leave to appeal pursuant to s. 31(2)(a), a court should have regard to the traditional bases for refusing discretionary relief: the parties' conduct, the existence of alternative remedies, and any undue delay (Immeubles Port Louis Ltée v. Lafontaine (Village), [1991] 1 S.C.R. 326, at pp. 364-67). Balance of convenience considerations are also involved in determining whether to deny discretionary relief (MiningWatch Canada v. Canada (Fisheries and Oceans), 2010 SCC 2, [2010] 1 S.C.R. 6, at para. 52). This would include the urgent need for a final answer.

[87] KBK argues that even if a question of law has been raised and there is an arguable case the arbitrator acted unreasonably, the court should exercise its discretion to deny leave. There are two bases for this submission. First, there is an urgent need for a final answer. Second, the conduct of the Strata Corporation before, during, and after the arbitration provides grounds to deny leave.

[88] The urgency is based on the financial exigencies of KBK. It does not have the cash flow to enable it to carry on in this manner. KBK is funding the shared expenses while the residents of the Live/Work Strata Corporation enjoy the benefits. The affidavit of Theodore Ong, an agent of KBK, is instructive in this regard. He deposed on July 28, 2014:

> 7. The Petitioner is still refusing to pay its share of expenses for the common areas and facilities as required by the Reciprocal Easement Agreement ("REA"). As of the swearing of this affidavit, in addition to $1,006,174.72 owing pursuant to the Arbitration Award, the Petitioner is indebted to the Respondent in the further amount of $380,569.17, in respect of expenses incurred so far in 2014, not including interest. There is also an amount owing for the period from June 2013 to December 31, 2013, which was not covered by the Arbitration Award.

[89] According to Mr. Ong, the refusal by the Strata Corporation is causing significant hardship to KBK which does not have the cash flow to carry unpaid contributions to ongoing expenses. He explains that the equipment, facilities and services cannot be suspended without negatively impacting the remaining parcels in the overall development.

[90] KBK submits that the Strata Corporation has engaged in delay:

> 126 The Petitioner has done everything in its power to delay and derail this Arbitration, including, on the eve of the Arbitration, commencing proceedings in the Supreme Court of British Columbia and taking the outrageous step of naming the Respondent's law firm as a defendant in a veiled attempt to put it in a conflict such that the Respondent would have to find new counsel to represent it on the Arbitration, which was set to begin a few days later. Madam Justice Warren had no hesitation in staying that claim.
>
> 127 She addressed the fact that the Petitioner had had more than a year to raise matters before the courts, but that it chose to leave it to the eve of the Arbitration. She considered this as one of the factors that supported her decision to dismiss the Petitioner's application.
>
> 128 The Delay continues. As can be seen from the Supplementary Award and the Second Supplementary Award, despite the fact that the Arbitrator has given the parties clear direction on how to calculate the quantum of the award, the Petitioner steadfastly refused to cooperate, to the point that additional submissions and an additional hearing were both necessary.

[91] I would exercise my discretion to deny leave in this case. Consider what has taken place: the Strata Corporation has refused to make payments under the REA. The owner of the Remainder and the Hotel did what it was required to do: submit the matter to Arbitration. This was done in May 2012. Two and one-half years have passed. In that time, there have been examinations for discovery, pre-hearing applications and decisions, then a 23-day hearing.

[92] The Arbitration was long. The Strata Corporation raised what the Arbitrator referred to as a "myriad" of issues. They were virtually all resolved in favour of KBK and were not the subject of appeal. These issues included:

(1) The salary and cost sharing for the engineering and maintenance manager;

(2) The staffing levels for the Remainder technicians;

(3) Uniforms;

(4) The Remainder management fee;

(5) Hotel lower lobby staffing;

(6) Glass elevators;

(7) Duplication of charges;

(8) The parkade;

(9) Hotel/Residential area residence and dock;

(10) Service contracts;

(11) Access to 6th floor function rooms;

(12) Access to 6th floor amenity rooms;

(13) Elevator access to the 6th floor;

(14) Lower lobby Life/Work Strata elevator bank;

(15) Swing stage and hoist cable.

[93] In addition, the Strata Corporation commenced an action. Four days were spent on an application in that action. An appeal of Madam Justice Warren's decision was commenced and later abandoned. There were then subsequent hearings of the Arbitrator.

[94] There has been a four-day hearing on a leave to appeal application. As outlined above, Mr. Ong has deposed that the Remainder and Hotel owners must continue to provide these services but have no means to generate cash flow to pay for them. The urgency of the matter dictates that the discretion of court be exercised by not permitting this application for leave to proceed.

**The Petition of KBK**

[95] I turn to KBK's petition. KBK seeks leave of the court to enforce the award. Section 29(1) of the *Arbitration Act* provides:

> (1) With leave of the court, an award may be enforced in the same manner as a judgment or order of the court to the same effect, and judgment may be entered in the terms of the award.

As the Court of Appeal stated in *Bekar v. TD Evergreen*, 2006 BCCA 266 "…the fact that leave is required makes it clear that an award is not entitled to automatic status as a judgment of the court." Rather, the court must "… exercise its supervisory power in determining whether it is appropriate to permit an award to be enforced as a judgment of the court.

[96] Before an award can be enforced, the award must be perfected and the terms of the award must be clear and unambiguous. An application may be premature when there are outstanding issues between the parties that the arbitrator has indicated he or she will address: *Hassall v. Children's Women's Health Centre of British Columbia,* 2001 BCSC 1399.

[97] Costs have not yet been addressed by the Arbitrator. The learned Arbitrator stated at para. 286 of the award:

> Counsel have both indicated a request to speak to the matter of costs.

[98] In *Hassall*, the chambers judge said at para. 1:

> In oral reasons for judgment pronounced April 25, 2001, I concluded that the application to [pursuant to s. 29 of the *Commercial Arbitration Act*] was premature as there were a number of outstanding issues remaining between the parties. I noted that the arbitrator had stated expressly that he would address any outstanding issues if it were necessary. As a result, I adjourned the matter generally to allow the parties to return to the arbitrator to resolve outstanding matters.

[99] That is the appropriate approach here. KBK's petition is adjourned generally to permit the parties to speak to the matter of costs and to obtain the decision of the Arbitrator in that regard.

## Summary

[100] In the result, the petitions of the Strata Corporation are dismissed. Leave to appeal is denied. KBK's application to enforce the award is adjourned pending the Arbitrator's decision as to costs.

[101] Costs will be addressed if there are further proceedings concerning the enforcement petition. If not, costs may be spoken to.

"S.F. Kelleher J."

The Honourable Mr. Justice Kelleher