2013 CarswellBC 2798, 2013 BCSC 1708

Strata Plan BCS 3165 v. 1100 Georgia Partnership

The Owners, Strata Plan BCS 3165, Plaintiff and 1100 Georgia Partnership, Peterson Investment (Georgia) Limited Partnership, Peterson Investment (Georgia) Inc., Westbank Georgia Holdings Ltd., LJV Georgia Investments LP, LJV Georgia Investments Inc., No. 274 Cathedral Ventures Ltd., KBK No. 11 Ventures Ltd., Benjamin Yeung, Ian Gillespie, Rodney R. Neys, William Fox, Avtar Bains, Dodwell Realty Ltd., 1111 Alberni Hotel Inc., and Kornfeld LLP, Defendants

British Columbia Supreme Court

Warren J.

Heard: July 8, 2013; July 9, 2013; July 10, 2013; July 18, 2013
Judgment: September 17, 2013
Docket: Vancouver S133107

Counsel: D.J. Taylor, M. Cameron (A/S), for Plaintiff

D. Parlow, S. Coblin, for Defendants, 1100 Georgia Partnership, Peterson Investment (Georgia) Limited Partnership, Peterson Investment (Georgia) Inc., Westbank Georgia Holdings Ltd., LJV Georgia Investments LP, LJV Georgia Investments Inc., No. 274 Cathedral Ventures Ltd., KBK No. 11 Ventures Ltd., Benjamin Yeung, Ian Gillespie, Rodney R. Neys, William Fox, Avtar Bains, Dodwell Realty Ltd., 1111 Alberni Hotel Inc.

J.M. Webster, Q.C., P. Arvisais, for Defendant, Kornfeld LLP

Subject: Civil Practice and Procedure; Property; Public

Alternative dispute resolution

Civil practice and procedure

Real property

Remedies

Cases considered by *Warren J.*:

ABOP LLC v. Qtrade Canada Inc. (2006), 2006 CarswellBC 3442, 2006 BCSC 2025, 34 B.L.R. (4th) 70 (B.C. S.C. [In Chambers]) — considered

ABOP LLC v. Qtrade Canada Inc. (2007), 242 B.C.A.C. 311, 400 W.A.C. 311, 2007 CarswellBC 1082, 2007 BCCA 290, 34 B.L.R. (4th) 77, 284 D.L.R. (4th) 171, 72 B.C.L.R. (4th) 34 (B.C. C.A.) — referred to

Boart Sweden AB v. NYA Stromnes AB (1988), 1988 CarswellOnt 125, 41 B.L.R. 295 (Ont. H.C.) — considered

Bott v. Sorley (1998), 1998 CarswellBC 1847 (B.C. S.C. [In Chambers]) — considered

Boxer Capital Corp. v. Marine Land Development Ltd. (2012), 2012 BCSC 684, 2012 CarswellBC 1373 (B.C. S.C. [In Chambers]) — considered

Cut & Run Holdings Ltd. v. Booze Brothers Holdings Inc. (2005), 2005 BCSC 167, 2005 CarswellBC 252, 2 B.L.R. (4th) 14, [2005] 6 W.W.R. 708, 39 B.C.L.R. (4th) 218 (B.C. S.C.) — considered

Deluce Holdings Inc. v. Air Canada (1992), 8 B.L.R. (2d) 294, 12 O.R. (3d) 131, 98 D.L.R. (4th) 509, 13 C.P.C. (3d) 72, 1992 CarswellOnt 154 (Ont. Gen. Div. [Commercial List]) — considered

Foreman v. Niven (2009), 2009 BCSC 1476, 2009 CarswellBC 2901 (B.C. S.C.) — referred to

Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd. (1992), *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 66 B.C.L.R. (2d) 113, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 22 W.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Inc.)* 11 B.C.A.C. 145, *(*sub nom. *Gulf Canada Resources Ltd. v. Arochem International Ltd.)* 43 C.P.R. (3d) 390, 1992 CarswellBC 95 (B.C. C.A.) — considered

Hayes Forest Services Ltd. v. Teal Cedar Products Ltd. (2008), [2008] 11 W.W.R. 612, 257 B.C.A.C. 105, 432 W.A.C. 105, 2008 CarswellBC 1325, 2008 BCCA 283, 82 B.C.L.R. (4th) 110 (B.C. C.A.) — referred to

James v. Thow (2005), 5 B.L.R. (4th) 315, 2005 BCSC 809, 2005 CarswellBC 1405 (B.C. S.C.) — considered

McQueen's Boat Works Ltd. v. Lanikai Holdings Ltd. (1996), 82 B.C.A.C. 32, 133 W.A.C. 32, 24 B.C.L.R. (3d) 201, [1997] 1 W.W.R. 366, 1996 CarswellBC 2074 (B.C. C.A.) — followed

Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.) (2011), 2011 BCSC 1664, 2011 CarswellBC 3472, 97 B.L.R. (4th) 92 (B.C. S.C.) — considered

Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.) (2012), 2012 CarswellBC 592, 2012 BCSC 322 (B.C. S.C.) — considered

New World Expedition Yachts, LLC v. F.C. Yachts Ltd. (2011), 2011 BCSC 78, 2011 CarswellBC 98 (B.C. S.C.) — followed

Prince George (City) v. McElhanney Engineering Services Ltd. (1995), 9 B.C.L.R. (3d) 368, [1995] 9 W.W.R. 503, 23 C.L.R. (2d) 253, *(*sub nom. *Prince George (City) v. Sims (A.L.) & Sons Ltd.)* 61 B.C.A.C. 254, *(*sub nom. *Prince George (City) v. Sims (A.L.) & Sons Ltd.)* 100 W.A.C. 254, 1995 CarswellBC 365 (B.C. C.A.) — considered

Seidel v. Telus Communications Inc. (2011), [2011] 6 W.W.R. 229, 16 B.C.L.R. (5th) 1, *(*sub nom. *Seidel v.*

TELUS Communications Inc.) 329 D.L.R. (4th) 577, 82 B.L.R. (4th) 1, 301 B.C.A.C. 1, 510 W.A.C. 1, [2011] 1 S.C.R. 531, 412 N.R. 195, 1 C.P.C. (7th) 221, 2011 CarswellBC 553, 2011 CarswellBC 554, 2011 SCC 15 (S.C.C.) — referred to

St. Pierre v. Chriscan Enterprises Ltd. (2011), 97 C.L.R. (3d) 12, 80 B.L.R. (4th) 163, 302 B.C.A.C. 62, 511 W.A.C. 62, 15 B.C.L.R. (5th) 315, 2011 CarswellBC 416, 2011 BCCA 97 (B.C. C.A.) — considered

Traff v. Evancic (1995), 15 B.C.L.R. (3d) 85, 1995 CarswellBC 1003 (B.C. C.A.) — considered

Statutes considered:

Arbitration Act, R.S.B.C. 1996, c. 55

Generally — referred to

s. 1 "arbitration agreement" — considered

s. 15 — considered

s. 15(1) — considered

s. 15(2) — considered

s. 15(3)(a) — considered

s. 15(3)(a)-15(3)(c) — referred to

s. 15(3)(b) — considered

s. 15(3)(c) — considered

s. 15(3)(i) — considered

s. 15(3)(j) — considered

s. 16 — considered

s. 16(3) — considered

s. 22(1) — considered

s. 29 — considered

Canada Business Corporations Act, R.S.C. 1985, c. C-44

Generally — referred to

Land Title Act, R.S.B.C. 1996, c. 250

s. 27 — considered

Property Law Act, R.S.B.C. 1996, c. 377

Generally — referred to

s. 18 — referred to

s. 35 — considered

Real Estate Development Marketing Act, S.B.C. 2004, c. 41

Generally — referred to

s. 22 — considered

Strata Property Act, S.B.C. 1998, c. 43

Generally — referred to

s. 2 — referred to

s. 5 — considered

s. 6 — referred to

Trustee Act, R.S.B.C. 1996, c. 464

Generally — referred to

***Warren J.*:**

Introduction

1 There are several applications before the court:

a) the plaintiff, The Owners, Strata Plan BSC 3165 (the "Strata"), applies for orders revoking the authority of the arbitrator in arbitration proceedings between the Strata and one of the defendants, KBK No. 11 Ventures Ltd. ("KBK"), (the "Arbitration") and/or staying the Arbitration pending final disposition of this action;

b) the defendants other than Kornfeld LLP apply for an order staying this action pending final disposition of the Arbitration; and

c) the defendant, Kornfeld LLP ("Kornfeld"), applies for an order severing and staying the claims against it in this action pending final disposition of the Arbitration or the claims against the other defendants in this action, whichever is first, or until further order of this court.

2 The dispute has its origins in the cost-sharing arrangements among the owners of the Shangri-La, a mixed use residential, hotel, and commercial tower located at 1111 Alberni Street in Vancouver (the "Development").

3 The Shangri-La was developed by the use of three stacked air space parcels and one remainder parcel (collectively, the "Parcels"). The Strata represents the second highest of the air space parcels referred to as the "Live/Work Parcel". Above it is another air space parcel with a separate strata plan and **strata corporation** (which is not a party to this action or the Arbitration) known as the "Residential Parcel". The third air space parcel, which is occupied by the Shangri-La Hotel, is known as the "Hotel Parcel". The remainder parcel (on the ground), which is occupied by a variety of commercial and retail entities, is known as the "Remainder Parcel".

4 KBK was the initial registered owner of the Development site and continues to hold legal title to the Hotel Parcel and the Remainder Parcel.

5 As explained in more detail below, a legal structure of easements and other agreements was implemented to facilitate the shared use of various facilities and provide for the sharing of costs among the owners of the Parcels. A dispute arose between the Strata and KBK over the share of the costs allocated to the Strata. On July 9, 2012, KBK commenced the Arbitration pursuant to an arbitration clause in the master agreement governing the easement and cost-sharing structure.

6 KBK and the Strata appointed Gary Snarch as arbitrator.

7 Soon after the Arbitration commenced, the Strata took the position that the matter was unsuitable for arbitration and ought to be brought by way of action in this court. Nevertheless, over the next ten months or so, various pre-hearing steps were taken in the Arbitration and the hearing has been held. Oral closing arguments are to be heard on October 24 and 25, 2013.

8 The Strata commenced this action on April 30, 2013, and filed its Notice of Application on May 7, 2013. The defendants filed their applications on May 16, 2013. The applications were heard over four days between July 8 and 18, 2013.

Background

The Parties

9 The Development was built between 2001 and 2008 by the defendant, 1100 Georgia Partnership (the "Partnership"). All the other defendants except Kornfeld are related, in some way, to the Partnership.

10 The partners in the Partnership are:

a) the defendant Peterson Investment (Georgia) Limited Partnership, with the defendant Peterson Investment (Georgia) Inc. as its general partner;

b) the defendant Westbank Georgia Holdings Ltd.;

c) the defendant LJV Georgia Investments LP, with the defendant LJV Georgia Investments Inc. as its general partner; and

d) the defendant No. 274 Cathedral Ventures Ltd.

11 Each of the personally named defendants, Benjamin Yeung, Ian Gillespie, Rodney R. Neys, William Fox, and Avtar Bains, is associated in some manner with one of the partners in the Partnership, and each was a

director in relation to the Development for the purposes of the *Real Estate Development Marketing Act*, S.B.C. 2004, c. 41 [*REDMA*].

12 William Fox, Benjamin Yeung, and Ian Gillespie are also directors of KBK.

13 1111 Alberni Hotel Inc. ("Alberni") is a subsidiary of the Partnership.

14 Dodwell Realty Ltd. ("Dodwell") is alleged by the Strata to be "associated with the Developer and its constituent members". Dodwell was the initial property manager for the Development.

15 From the inception of the Development and at all material times thereafter, Kornfeld acted as solicitors for the Partnership and KBK in relation to the Development. Kornfeld has also acted and continues to act as counsel for KBK in the Arbitration.

16 In its Notice of Civil Claim in this action, the Strata refers to the defendants other than Alberni, Dodwell, and Kornfeld collectively as the "Developer", and I will use that term to refer to that same group of defendants.

17 The Strata alleges that at all material times, KBK acted as agent and nominee for all members of the Developer, including as "Owner-Developer" under the *Strata Property Act*, S.B.C. 1998, c. 43 [*SPA*], and that all members of the Developer are jointly and severally liable for all acts or omissions of KBK.

Completion of the Development

18 Between August 26, 2004 and March 10, 2006, as is required by *REDMA*, the Developer issued disclosure statements (the "Disclosure Statements") to purchasers and prospective purchasers of individual condominium units in the Development.

19 The Development was completed in or about October 2008.

20 As noted above, a legal structure of easements and other agreements was required so the Development could operate in an integrated manner. To this end, on October 23, 2008, KBK caused the following instruments to be filed in the Land Title Office:

a) a Master Easement Agreement (the "MEA") among the owners of all the Parcels providing for easements among the Parcels and containing provisions for sharing the costs common to the operation of the Development;

b) two facility area easements (the "Facility Area Easements") pertaining to facilities such as a health club and function rooms which operate on the Strata's common property; and

c) certain options to lease (the "Lease Options") providing for the leasing of those areas of common property that house the facilities that are the subject of the Facility Area Easements.

21 In the Arbitration, both parties referred to the MEA as the "Reciprocal Easement Agreement" or "REA", but in its Notice of Civil Claim in this action the Strata used the term Master Easement Agreement or "MEA". Nothing turns on the difference in label and I note it simply to avoid any confusion about whether the MEA and the REA are the same agreement. They are. The term "MEA" is used in these reasons.

22 The cost-sharing provisions in the MEA relate to the easements specifically covered by the MEA and

also those covered by the Facility Area Easements and the property subject to the Lease Options.

23 Also on October 23, 2008, after filing the MEA, the Facility Area Easements and the Lease Options, KBK deposited the strata plan in the Land Title Office as required to establish the Strata and stratify the Live/Work Parcel. Pursuant to the *SPA*, from the time the strata plan was deposited in the Land Title Office, the Strata acquired the power and capacity of a natural person of full capacity (*SPA*, s. 2). From the time the Strata was established until a council could be elected at the first annual general meeting (which occurred on February 3, 2009), the Owner-Developer (KBK) was required to exercise the powers and perform the duties of the council (*SPA*, s. 5).

24 On October 24, 2008, KBK executed the Lease Options pursuant to which the property that is the subject of them was leased to Alberni (as agent for the Developer).

25 On November 5, 2008, KBK, as both prior owner of the Live/Work Parcel and as Owner-Developer exercising the powers of the Strata's council under the *SPA*, caused the Strata to enter into an agreement pursuant to which the benefit of the MEA was assigned to the Strata and the Strata assumed the obligations of the Live/Work Parcel under the MEA (the "Assignment & Assumption Agreement").

26 On November 6, 2008, the first conveyance of a strata lot to a purchaser was completed.

27 On February 3, 2009, the first annual general meeting of the Strata convened and control of the Strata moved from KBK to the owners of the Strata and their elected council.

Origin of the Dispute

28 Subsequent to the first annual general meeting the Strata sought to better understand the easement and cost-sharing structure, including the basis of various charges, the calculation of percentages, and the determination of costs.

29 Kaaizer D. Sethna, the President of the Strata, deposed in his affidavit that it was discovered that the Hotel Parcel, the legal title to which was held by KBK, was interfering with the Strata's use of its common property and its access rights regarding certain function rooms. Mr. Sethna said this discovery made the "cost sharing allocations particularly important."

30 Mr. Sethna also said that in October 2009, the Strata was "made aware by Dodwell of the exact easement and lease structure" pursuant to which the hotel was presuming to interfere with the Strata's access rights in a manner that had not been disclosed in the Disclosure Statements.

31 The Strata alleges that its efforts to have its concerns addressed were deliberately impeded and frustrated by the Developer and its agent Dodwell. As a result, the Strata replaced Dodwell with a new property manager, AWM Alliance Real Estate Group Ltd. ("AWM") in April 2010.

32 Between May 2010 and May 2012, AWM sought answers from the Developer and Dodwell to a number of questions involving the cost-sharing allocations, cost-sharing items, invoicing, and allegedly unauthorized charges. The Strata says these efforts were most often met with stonewalling.

33 On or about May 1, 2012, KBK demanded payment of outstanding costs allocated to the Strata pursuant to the MEA. The Strata responded by making a without prejudice payment under protest and reiterating its con-

cerns about the accuracy of the apportionment of costs as performed by KBK.

The Arbitration

34 Section 10.1 of the MEA provides as follows:

> 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]

35 By letter dated May 15, 2012, counsel for KBK advised counsel for the Strata that KBK intended to commence arbitration in accordance with section 10.1 of the MEA in relation to the costs alleged to be owed by the Strata.

36 By early June 2012, the parties agreed to engage Gary Snarch as the arbitrator.

37 On July 9, 2012, KBK served its Notice of Claim in the Arbitration, seeking an award against the Strata for outstanding costs owing under the MEA and other consequential relief. In the Notice of Claim, KBK alleged that KBK, acting pursuant to s. 5 of the *SPA*, caused the Strata to enter into the Assignment & Assumption Agreement and, pursuant to the Assignment & Assumption Agreement, the Strata undertook assignment of the MEA and agreed to be bound by it. KBK subsequently delivered an Amended Notice of Claim in the Arbitration in which it quantified its claim at approximately $1.2 million.

38 On or about August 3, 2012, the Strata filed a Response and Counterclaim in the Arbitration, which were subsequently amended twice. In its Response (as subsequently particularized), the Strata seeks dismissal of KBK's claim. The Strata says the MEA was entered into improperly by KBK and does not bind the Strata. In any event, the Strata also says the MEA contains unenforceable and invalid provisions, because, among other things:

- KBK purported to enter into the MEA as owner of all the Parcels, thereby contracting with itself contrary to s. 18 of the *Property Law Act*, R.S.B.C. 1996, c. 377 [*PLA*];

- KBK purported to bind the Strata while performing the duties of the Strata's council under s. 5 of the *SPA* and, in so doing, breached duties it owed to the Strata under s. 6 of the *SPA*;

- there was no valid assumption and assignment of the MEA from KBK to the Strata and the Assignment & Assumption Agreement is unenforceable as KBK was not authorized to bind the Strata to it and, in any event, it was an improvident arrangement and KBK breached fiduciary duties owed to the Strata by purporting to bind the Strata to it; and

- KBK was in breach of representations made in the Disclosure Statements to the effect that costs would be allocated among the Parcels on a fair and equitable basis or on the basis of consumption and use.

39 The Strata's Response in the Arbitration also states that the Strata "does not waive its right to seek remedies against KBK in the British Columbia Supreme Court, which remedies are beyond the scope and jurisdiction of an arbitration brought pursuant to the [MEA] and which remedies will impact on the adjudication of the

claims of KBK and those herein."

40 In its Counterclaim in the Arbitration, the Strata repeats the positions advanced in its Response. In substance, the Counterclaim alleges that:

(a) KBK made representations in the Disclosure Statements about cost-sharing and owed the Strata duties under the *SPA* and *REDMA*, fiduciary duties, common law duties, and contractual duties; and

(b) KBK breached the representations in the Disclosure Statements and the duties it owed to the Strata by:

- entering into contracts and arrangements without authority;
- entering into improvident and imprudent contracts, including the MEA, on behalf of the Strata;
- failing to allocate costs on a fair and equitable basis;
- failing to account or provide cost reconciliations;
- knowingly receiving substantial overpayments from the Strata which constitute a debt, and/or resulting trust, and/or unjust enrichment; and
- causing damage to common property.

41 In the Counterclaim, the Strata seeks a "stay of the Arbitration pending resolution of Supreme Court proceedings to challenge and set aside a number of provisions of the [MEA]." In this regard, the Strata asserts that the Strata's Response and Counterclaim "invokes a jurisdiction which extends beyond that found in the [MEA] - the proper forum for the dispute is the Supreme Court as the Strata is challenging the validity of the arbitration clause along with other articles in the [MEA]."

42 The alternative relief sought by the Strata in the Counterclaim includes an accounting, an order that the operating systems and cost-sharing items be metered or monitored, judgment for amounts found to be overpaid to KBK, mandatory orders regarding certain operations, damages, interest, and costs.

43 The essence of the Strata's complaint reflected in its Response and Counterclaim in the Arbitration is that the easement and cost-sharing structure was to be rational, fair, and equitable among the owners of the Parcels but instead was allegedly structured by KBK to prefer the interests of KBK (on behalf of the Developer) as owner of the Hotel Parcel and Remainder Parcel.

44 Notwithstanding the Strata's view that the Arbitration was an inappropriate forum for the resolution of this complaint, the Strata fully participated in the Arbitration and the Arbitration is now substantially advanced.

45 Pleadings in the Arbitration have been amended more than once, and particulars provided.

46 The Arbitration hearing was originally scheduled for seven days starting November 19, 2012. In September 2012, it was adjourned to two weeks starting February 28, 2013, and later it was adjourned again to April 6, 2013. On March 25, 2013, it was adjourned to May 6, 2013, to permit some applications to be heard during the week of April 8, 2013. On April 30, 2013, the same day this action was commenced, it was adjourned again on the application of the Strata. At that time, the arbitrator ordered that it proceed on June 3, 2013, if the Strata filed an expert report or on May 6, 2013, if the Strata did not.

47 Document production has been ongoing in the Arbitration since October 2012. KBK produced six lists of documents between October 31, 2012, and April 16, 2013. The Strata produced four lists of documents between October 15, 2012, and April 24, 2013.

48 The parties participated in a mediation in December 2012, which was unsuccessful, and therefore examinations for discovery proceeded in January 2013. The Strata has conducted examinations for discovery of three representatives of KBK. KBK has conducted examinations for discovery of two representatives of the Strata.

49 There have been several contested applications in the Arbitration:

(a) on September 4, 2012, the Strata was ordered to provide particulars;

(b) on November 16, 2012, the Strata was given leave to amend its pleadings and was ordered to provide further particulars;

(c) on January 30, 2013, KBK was given leave to amend its pleadings;

(d) 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

(e) on April 11, 2013, KBK's application for summary determination of the validity of the MEA was dismissed, the Strata was given leave to conduct an additional examination for discovery, the Strata's application to terminate the Arbitration based on KBK's failure to provide adequate discovery was dismissed, the Strata's application to terminate the Arbitration based on its jurisdictional challenge was adjourned generally, and KBK was ordered to provide some additional information.

50 Ultimately, the Arbitration hearing commenced on June 3, 2013. Fifteen witnesses testified over 15 days. At the time the applications in this action were heard in July 2013, three additional days of evidence had been scheduled for August 7 to 9, 2013 for up to three more witnesses. The arbitrator ordered written arguments to be delivered by both parties on August 23, 2013, and oral closing arguments are scheduled for October 24 and 25, 2013.

51 Although the Strata raised its jurisdictional concerns at the outset of the Arbitration, that issue has not yet been addressed definitively by the arbitrator, and the arbitrator has advised that he intends to address the jurisdictional issues following completion of the hearing on the merits.

52 KBK has incurred costs of approximately $300,000 in relation to the Arbitration.

The Action

53 The Strata commenced this action on April 30, 2013. In addition to KBK, it named as defendants all the other members of the Developer, plus Dodwell, Alberni, and Kornfeld.

54 As noted above, in the Notice of Civil Claim in this action, the Strata refers to the defendants other than Alberni, Dodwell, and Kornfeld collectively as the "Developer", and asserts claims against the Developer collectively. In paragraph 6 of the Notice of Civil Claim, it is alleged that KBK acted as agent and nominee for the other members of the Developer. In paragraph 8, it is alleged that the members of the Developer are "jointly and/or severally liable at common law, in equity, and pursuant to the *SPA* and/or *REDMA* for any and all acts or

omissions committed on their behalf by their agent KBK." As a result, it is practical and instructive to consider the claims advanced against the Developer separately from those advanced against each of Dodwell, Alberni, and Kornfeld.

55 The claim against the Developer is as follows:

(a) Paragraphs 12 - 14 of the Notice of Civil Claim set out the duties the Strata alleges were owed by the Developer under *REDMA*, the *SPA*, and the common law.

(b) Paragraphs 15 - 19 set out representations (express and implied) that the Strata alleges were made by the Developer in, or arising out of, the Disclosure Statements, all or nearly all of which relate to the anticipated reciprocal easements and cost-sharing arrangements required for the integration of the Development.

(c) It is alleged in paragraph 20 that the owners of the Strata relied on those representations and in paragraphs 21 and 22 that trust obligations arose as a result of the representations.

(d) In paragraphs 23 - 39, 41 - 47, and 65 - 67, it is alleged that the representations were made fraudulently or negligently and that the Developer acted contrary to those representations; in breach of its duties to the Strata under *REDMA*, the *SPA* and the *Trustee Act*, R.S.B.C. 1996, c. 464; and in breach of its fiduciary duties. The essence of the complaint is that the easement and cost-sharing structure that was implemented was structured to prefer the interests of the Developer as beneficial owner of the Hotel Parcel and Remainder Parcel and thus departed markedly from that represented in the Disclosure Statements. In the result, it is alleged that the MEA, the Facility Area Easements, and the Lease Options are void.

(e) In paragraphs 49 - 52, it is alleged that KBK breached the duties it owed to the Strata under the *SPA* by purporting to enter into the Assignment & Assumption Agreement on behalf of the Strata and, as a result, the Assignment & Assumption Agreement is unenforceable.

56 The claim against Kornfeld is as follows:

(a) In paragraph 40, it is alleged that Kornfeld acted as solicitors for KBK while KBK was exercising the powers and performing the duties of the Strata's council under s. 5 of the *SPA*, and in doing so, owed fiduciary, professional, and other duties to the Strata.

(b) In paragraphs 48 and 53, it is alleged that to the extent Kornfeld drafted or facilitated the execution and filing of instruments and/or the Assignment & Assumption Agreement in a manner that did not accord with the Developer's duties to the Strata, Kornfeld acted in a conflict of interest and breached duties it owed to the Strata.

57 The claim against Dodwell is set out in paragraphs 61 - 62 of the Notice of Civil Claim and amounts to an allegation that, as agent for the Developer, Dodwell failed to discharge certain reporting, budgeting and reconciliation requirements mandated by the MEA.

58 The claim against Alberni is set out in paragraphs 34(d)(ii) and 44 of the Notice of Civil Claim and appears to amount to an allegation that the Lease Options, pursuant to which Alberni, as agent for the Developer, holds leases over certain facility areas in the Development, are invalid and unenforceable.

59 The Notice of Civil Claim seeks compensatory and punitive damages against each member of the De-

veloper. Among other things, the Strata relies upon s. 22 of *REDMA*, which it says gives it a right of damages as against each member of the Developer for misrepresentations in the Disclosure Statements. As already noted, it alleges that all members of the Developer are liable for the acts of their agent, KBK.

60 The Notice of Claim also seeks:

(a) damages as against Kornfeld;

(b) declarations that the MEA and the Facility Easements are void and that they be modified pursuant to s. 35 of the *PLA* to reflect such declarations;

(c) declarations that the Lease Options and the Assignment & Assumption Agreement are void;

(d) an accounting of profits and compensation from the Developer and Dodwell and Alberni as agents of the Developer;

(e) injunctions restraining the Developer, and Dodwell and Alberni as agents of the developer, from interfering with the Strata's interests in the easement areas and taking control of any easement or common area;

(f) a determination of fair and equitable cost-sharing allocations;

(g) compensation from the Developer for cost overcharges;

(h) interest;

(i) indemnity from all the defendants for legal, accounting, and property management expenses; and

(j) costs.

61 Leaving aside the claim against Kornfeld, the essence of the Strata's claim in the action is substantially the same as the essence of the Strata's Response and Counterclaim in the Arbitration. The fundamental complaint is that the easement and cost-sharing structure that was implemented departed markedly from that represented in the Disclosure Statements in that it was structured to prefer the interests of the Developer as beneficial owner of the Hotel Parcel and Remainder Parcel. The difference between the two proceedings, again leaving aside the claim against Kornfeld, is primarily in the remedies sought. In particular, in the action, the Strata seeks damages not only as against KBK but against all the members of the Developer as well, and declarations of invalidity regarding not only the MEA and the Assignment & Assumption Agreement but the Facility Area Easements and Lease Options as well.

Issues

62 The following questions arise:

1. Should the arbitrator's authority be revoked pursuant to s. 16 of the *Arbitration Act* and/or should the Arbitration be stayed pending the final disposition of this action?

2. Should this action be stayed pursuant to s. 15 of the *Arbitration Act* pending final disposition of the Arbitration?

3. Should the claims against Kornfeld in the action be severed and stayed pending final disposition of the Arbitration or the claims against the other defendants in this action, whichever is first?

Analysis

The scope of the arbitration agreement in the MEA

63 Central to the analysis as a whole is the extent to which the issues in dispute in the action and the Arbitration fall within the scope of the arbitration clause in the MEA. Accordingly, I will address the scope of section 10.1 of the MEA before addressing the specific questions raised.

64 Section 10.1 of the MEA provides in material part as follows:

> ... 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 ... 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.*]

65 In *St. Pierre v. Chriscan Enterprises Ltd.*, 2011 BCCA 97 (B.C. C.A.) [*St. Pierre*], Levine J.A. summarized the approach to be taken to determining the scope of an arbitration agreement at para. 21:

> What is clear from all the cases is that the question of whether a disagreement falls within the scope of an arbitration agreement must be determined by an analysis 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. This analysis describes the process of interpretation of a contract.

66 The nature of the disagreement from the defendants' perspective is straightforward: KBK, on behalf of the Developer, asserts that the Strata has breached obligations imposed on it by the MEA (through the Assignment & Assumption Agreement) to pay its share of the costs.

67 The nature of the disagreement from the Strata's perspective is more complex. Leaving aside the claim against Kornfeld, the essence of the Strata's complaint, as explained above, is the same in the action and the Arbitration, with the differences really lying in the relief sought in each of the proceedings. The Strata's complaint is that the Disclosure Statements, expressly or by implication, contained representations concerning the nature of the easement and cost-sharing structure to be implemented and that KBK, as agent for the other members of the Developer, acted contrary to those representations, in breach of *REDMA*, the *SPA*, the *PLA* and the *Trustee Act*, and in breach of fiduciary duties owed to the Strata, by implementing an easement and cost sharing structure that preferred the interests of the Developer as beneficial owner of the Hotel Parcel and Remainder Parcel over the interests of the Strata, with the result that the MEA, the Facility Area Easements, the Lease Options and the Assignment & Assumption Agreement are invalid or void.

68 Again, leaving aside the Strata's claim against Kornfeld, the facts asserted by the Strata as supporting its position are the same in the action and the Arbitration. The same series of Disclosure Statements are in issue in the action and the Arbitration, and the same conduct of KBK is alleged to constitute the breaches of statutory and fiduciary duties. There are no allegations of independent wrongdoing by other members of the Developer (or any other defendant in the action at all) that are said to affect the validity of the MEA or the other instruments.

As such, even though the Strata has named as defendants in the action parties who are not also parties to the Arbitration, the factual inquiry required to determine the substance of the dispute is the same in both proceedings as it involves the same instruments, the same series of Disclosure Statements, and the same conduct of KBK.

69 Over time, certain words have come to be used repeatedly in arbitration agreements and jurisprudence has developed about certain wording. It is well accepted that the words "arising out of" or "in respect of" when used in an arbitration clause are given a broad and expansive meaning. In *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration* (Aurora, Ont: Canada Law Book, 2011), the authors J. Kenneth McEwan and Ludmila B. Herbst discuss the interpretation given to these words (ch. 2 at 36):

> **"With respect to"**
>
> Where the arbitration agreement provides for arbitration of "any dispute ... with respect to any matter in relation to this Agreement", the arbitration clause is not restricted to breach of contract claims or claims based on a specific term of the contract but extends to, among other things, other claims where the contract existence is relevant to the claim or to the defense.
>
> Arguably, a clause which requires arbitration "with respect to" the interpretation and/or performance of the provisions of an agreement may be "broad enough to cover a claim that the relationship established between the parties is such that it includes fiduciary duties. A contract may be interpreted to impose fiduciary duties without a specific provision to that effect being included in the contract."
>
> **"In respect of", "with regard to"**
>
> It has been found that the phrases "in respect of" and "with regard to" extend to disputes with respect to whether or not one side has breached the agreement or whether there are circumstances by which one or both parties have been discharged from future performance. The phrase "in respect of" may extend to disputes about repudiation. It may also relate to disputes about frustration. Rectification may fall as well within the words "in respect of". The issue of whether or not a contract contains an implied term as well as the existence of a collateral contract likewise falls within "in respect of". Repudiation as well as frustration fall within the phrase "with regard to". In a different context, the Supreme Court of Canada described the words "in respect of" as being "words of the widest possible scope", importing "such meanings as 'in relation to', 'with reference to' or 'in connection with'", and being "probably the widest of any expression intended to convey some connection between two related subject-matters".

70 The scope of an arbitration clause has been considered in several cases where one party seeks to prosecute court proceedings alleging wrongdoing such as fraud, breach of trust, breach of fiduciary duty, or conspiracy in the context of an agreement containing an arbitration clause, and where the other party applies to stay the court proceedings in favour of arbitration.

71 In *James v. Thow*, 2005 BCSC 809 (B.C. S.C.) [*Thow*], the arbitration clause in a partnership agreement provided for arbitration of "any dispute ... concerning the interpretation of this Agreement or the rights or liabilities of the Partners" (para. 25). Wedge J. held that allegations of fraudulent misrepresentation, breach of trust, breach of fiduciary duty, and fraud that pre-dated the execution of the partnership agreement and involved persons who were not parties to the partnership agreement, in a court proceeding seeking rescission of the partnership agreement, damages, and punitive damages among other things, arose in the context of the partnership agreement and as such arguably fell within the scope of the arbitration clause.

72 In *Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)*, 2011 BCSC 1664 (B.C. S.C.) [*Mercer #1*], the arbitration clause in issue was in an option agreement and applied to "all questions or matters in dispute with respect to this Agreement" (para. 26). Greyell J. held that allegations of fraudulent and/or negligent misrepresentations made by a person alleged to be an agent of one of the parties to the option agreement fell within the scope of the arbitration clause. He cited with approval the decision of Wedge J. in *Thow* and then held at para. 67:

> In *Thow* there were allegations of fraud and breach of trust that were in some respects tangential to the actual agreement. Due to the broad scope of the arbitration clause, those matters were within the jurisdiction of the arbitrator. The same is true in this case. The allegations of wrongdoing here (including the allegations that Pierce and Mercer Nevada were engaging in a pump and dump scheme and fraudulently induced Jivraj and Mercer BC to enter the Agreement, and the allegation that Jivraj was attempting to usurp a corporate opportunity) are not strictly covered by the Agreement. Nevertheless, they are substantially based on the rights and obligations of the parties under the Agreement. To be more specific, the alleged fraudulent and inequitable behaviour arise out of the execution of the Agreement to develop the Property and the relationship that developed between the parties as a result of that agreement. Consequently, the reasoning in *Thow* applies to bring the allegations within the parameters of the broad arbitration clause.

73 In *New World Expedition Yachts, LLC v. F.C. Yachts Ltd.*, 2011 BCSC 78 (B.C. S.C.) [*New World*], Myers J. rejected the argument that a claim seeking to avoid a contract on the ground of fraud was beyond the scope of an arbitration clause that applied to "any dispute arising out from [*sic*] this Agreement" (para. 4).

74 In *St. Pierre*, the arbitration clause was narrower than those in issue in *Thow*, *Mercer*, and *New World*. It was contained in a contract to manage the construction of a residence and applied to "any disagreement ... as to the interpretation of [the] contract" (para. 6). The question was whether allegations of breach of fiduciary duties and taking secret profits fell within the agreement to arbitrate. Levine J.A., for the court, noted that these allegations would clearly fall within the scope of an "all disputes or differences" arbitration clause. The difficulty was that in *St. Pierre* the clause was limited to disputes as to the interpretation of the contract. Nevertheless, Levine J.A. found that it was necessary to interpret the contract in order to discern the legal nature of the relationship between the parties and determine whether the allegations had merit. In the result, she concluded that it was arguable that the disagreement was as to the interpretation of the contract and therefore within the scope of the arbitration clause.

75 For ease of reference, the arbitration clause in the MEA provides for arbitration of "any dispute or disagreement ... 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 ...". During oral submissions, all parties agreed that this language was broad and amounted to an "all disputes or differences" clause. However, counsel for the Strata later submitted that this language is not as broad as the arbitration clauses in issue in *Thow* and *Mercer* because the words "in respect of any matter that is the subject of this Agreement" are narrower than the words "concerning the rights and liabilities of the Partners" (as in *Thow*) or "in respect of this agreement" (as in *Mercer*).

76 While the clause in the MEA refers to disputes "in respect of any matter that is the subject of [MEA]", like the clauses in *Thow*, *Mercer* and *New World* and unlike that in *St. Pierre* it is not, in my view, limited to disputes concerning the interpretation or application of the provisions of the MEA. The inclusion of the words "or the *interpretation* of any provision ... *including* any dispute with respect to any cost sharing provision"

(emphasis added) must be construed as reflecting an intention that the clause encompass more than disputes about specific cost-sharing provisions or disputes about the interpretation of the MEA, otherwise the words "any matter that is the subject of this Agreement" would be rendered meaningless.

77 As in *Thow*, *Mercer*, and*New World*, it is my view that the words "in respect of any matter that is the subject of this Agreement" in section 10.1 of the MEA reflect an intention that the clause not be restricted to breach of contract claims but extend to disputes of a wider scope provided they are with reference to or connected with the rights and obligations of the parties that are the subject of the MEA. As such, it is my view that section 10.1 of the MEA is broad enough to encompass all of the Strata's allegations of misrepresentation, fraud, and breach of statutory and fiduciary duties against KBK which are related to the easement and cost-sharing structure, because those allegations are in reference to or connected with matters that are the subject of the MEA.

78 Notwithstanding the decisions of *Thow*, *Mercer*, and *New World*, the Strata relied on *Traff v. Evancic*, [1995] B.C.J. No. 2296 (B.C. C.A.) [*Traff*] for the proposition that fraud allegations can never be found to fall within the scope of an arbitration agreement. In my view, the Court of Appeal's decision in *Traff* does not go that far. The arbitration clause in that case provided for arbitration of disputes "as to the interpretation or application of any terms of the agreement" (para. 12) and as such was narrower than those considered in *Thow*, *Mercer* , and *New World*, and narrower than that in issue in this case.

79 By virtue of s. 22(1) of the *Arbitration Act*, the Domestic Commercial Arbitration Rules of Procedure apply to the Arbitration. Those Rules provide the arbitrator with the general power to determine his own jurisdiction:

> 20 (1) The arbitration tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement.
>
> (2) A decision by the arbitration tribunal that the contract is null and void shall not entail the invalidity of the arbitration clause unless specifically found to be so by the arbitration tribunal.

80 In my view, it is clear from Rule 20 and from the broad language of section 10.1 of the MEA, that the arbitrator also has the jurisdiction to determine the validity of the MEA. As counsel for the Strata acknowledged in oral submissions, the instruments as a whole (i.e. the MEA, the Facility Area Easements, the Lease Options, and the Assignment & Assumption Agreement) amount to a layering of interrelated obligations, and the validity of each of the Facility Area Easements, the Lease Options, and the Assignment & Assumption Agreement is related to the validity of the MEA and/or KBK's ability to enforce the cost-sharing provisions of the MEA against the Strata. As such, in my view, it is at least arguable that a dispute over the validity of the Facility Area Easements, the Lease Options, and the Assignment & Assumption Agreement is a dispute that is with reference to or connected with the easement and cost-sharing structure that is the subject of the MEA and therefore within the scope of section 10.1.

81 Counsel for the Strata submitted that a declaration that the various instruments are invalid or void would be insufficient. As noted above, in the action, the Strata also seeks orders pursuant to s. 35 of the *PLA* that the MEA and Facility Area Easements be modified. Section 35 of the *PLA* permits a person interested in land to apply to the British Columbia Supreme Court for an order to modify or cancel certain charges or interests registered against land in certain circumstances, including where the court is satisfied that the registered instru-

ment is invalid. Counsel for the Strata submitted that, because the legislation vests this jurisdiction expressly in the court, the arbitrator would not have the jurisdiction to make such orders in the Arbitration.

82 In my view, it is not necessary for me to decide on these applications whether the arbitrator has the jurisdiction to directly grant an order pursuant to s. 35 of the *PLA*. Pursuant to s. 29 of the *Arbitration Act*, with leave of the court the arbitrator's award can be enforced as a court order. As such, it is my view that the arbitrator could include in his award an order as contemplated by s. 35 of the *PLA* and if that alone was insufficient to perfect the relief sought by the Strata under that provision, any deficiency could be remedied by the court in the course of granting leave under s. 29 of the *Arbitration Act*.

83 Counsel for the Strata submitted that irrespective of the scope of the arbitration agreement, the claims advanced by it in the action against the defendants other than KBK cannot be dealt with in the Arbitration. This includes the claims advanced against Kornfeld. I agree with that submission. The other defendants are not parties to the arbitration agreement and as such the arbitrator has no jurisdiction to make orders against them.

84 In summary, it is my view that some aspects of the disagreement in this case clearly fall within the scope of section 10.1 of the MEA. These include KBK's claim against the Strata as currently advanced in the Arbitration, the Strata's claims against KBK based on allegations of misrepresentation, fraud, and breach of statutory and fiduciary duties related to the easement and cost-sharing structure, and ultimately the validity of the MEA. In addition, some aspects of the disagreement arguably fall within the scope of section 10.1 of the MEA. These include the validity of the Facility Area Easements, the Lease Options, and the Assignment & Assumption Agreement. Finally, some aspects of the disagreement clearly fall beyond the scope of section 10.1 of the MEA. These include the claim for damages and/or an accounting of profits as against the defendants other than KBK, the claim for injunctions against the members of the Developer other than KBK, and the claim against Kornfeld.

Should the arbitrator's authority be revoked and/or the Arbitration stayed?

Section 16 of the Arbitration Act

85 The Strata seeks an order revoking the authority of the arbitrator pursuant to s. 16 of the *Arbitration Act*. It also seeks an order staying and/or adjourning the Arbitration pending final disposition of this action.

86 Section 16 of the *Arbitration Act* provides:

> (1) Subject to an agreement referred to in section 3 (3), the parties may not revoke the authority of an arbitrator, except by leave of the court under subsection (2).
>
> (2) A party to an arbitration may apply to the court for an order revoking the authority of an arbitrator.
>
> (3) In considering whether to revoke the authority of an arbitrator, the court must consider the factors referred to in section 15 (3) (a) to (c), (i) and (j).
>
> (4) If, after a dispute arises under an arbitration agreement that names a person as an arbitrator, a party to that agreement applies to the court
>
> (a) for an order revoking the authority of the arbitrator, or
>
> (b) for an order in any other proceeding whether the party seeks on grounds of apprehended bias, to

revoke the arbitrator's authority or restrain the arbitration from proceeding,

the court must not refuse the order on the ground that the applicant knew or ought to have known that the arbitrator may not be capable of acting impartially because of the arbitrator's relationship to

(c) another party to the arbitration agreement, or

(d) the subject matter of the dispute.

87 Section 16(3) requires the court to consider the factors referred to in s. 15(3)(a) to (c), (i) and (j). Those subsections were found in an earlier version of the *Arbitration Act* but are not contained in the current version. In *McQueen's Boat Works Ltd. v. Lanikai Holdings Ltd.*, [1996] B.C.J. No. 2063 (B.C. C.A.) it was held that the court must consider the factors set out in s. 15(3)(a) to (c), (i) and (j) of the prior version of the legislation, which were as follows:

(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;

(i) potential bias on the part of the intended arbitrator; and

(j) whether fraud has been alleged.

88 The Strata relies on the factors referred to in (a), (b), (c) and (j).

89 First, the Strata submitted that in this case it cannot be said the arbitration agreement was freely made because it is contained in the MEA which KBK signed on behalf of all parties and registered against title before the Strata even existed. However, the MEA 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 MEA 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 MEA. Further, there is nothing inherently unfair about the Strata being bound to an arbitration clause. The strong public policy reflected in the deference given to arbitration clauses, even arbitration clauses in contracts of adhesion, suggests the contrary: *Seidel v. Telus Communications Inc.*, 2011 SCC 15 (S.C.C.) [*Seidel*], at paras. 2 and 42.

90 Second, while counsel for the Strata made clear he was not suggesting that Mr. Snarch personally lacked the appropriate qualifications, the Strata submitted that factors (b) and (c) must be read together in determining the suitability of the case for arbitration before any arbitrator. The Strata's submission in this regard appeared to be that the overwhelming substance of the dispute does not fall within the scope of the arbitration clause and is extremely complex from a factual and legal standpoint. I cannot accede to this position. For the reasons set out above, it is my view that to a very substantial extent the dispute falls, or at least arguably falls, within the scope of the arbitration clause. Further, it cannot be said, in my view, that a dispute involving allegations of misrepresentation, breach of statutory duties and breach of fiduciary duties is materially more complex (factually or legally) than the kinds of disputes routinely resolved through arbitration under the *Arbitration Act*.

91 Third, the Strata relies on the fact that fraud is alleged. However, as is clear from *Thow*, *Mercer*, *New World*, and *St. Pierre*, provided the scope of the arbitration clause is broad enough, allegations of fraud are appropriately dealt with through arbitration.

92 Having considered the factors urged by the Strata, in my view, it would not be appropriate to revoke the arbitrator's authority under s. 16 of the *Arbitration Act* and I decline to do so. The Arbitration is not materially different, in complexity or subject matter, from the kinds of disputes resolved routinely under the *Arbitration Act*. In my view, revoking the arbitrator's authority under s. 16 in this case would set the bar far too low and would be inconsistent with the deferential approach to an arbitrator's jurisdiction emphasized in many of the authorities relied upon by the parties on these applications.

Injunction

93 The Strata's application was not grounded in s. 16 of the *Arbitration Act* alone. The Strata also relied on the court's jurisdiction to grant injunctive relief in seeking an order staying or adjourning the Arbitration pending final disposition of the action.

94 In *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitration*, McEwan and Herbst note that the court has an inherent jurisdiction to stay arbitration proceedings and will do so on the same basis upon which an injunction will be granted(ch. 3 at 96-97):

> Historically, and more generally, it has been said that the court has an inherent jurisdiction to enjoin arbitration proceedings where such an injunction is required to protect a legal or equitable right. ... In the exercise of its discretion, the court will consider factors typical to the exercise of such a jurisdiction including delay and hardship. The existence of other court proceedings will not of itself entitle a party to an injunction restraining the arbitration, even if the issues in dispute over which the tribunal has substantive jurisdiction are not as extensive as those sought to be raised in the court proceedings. An injunction will not be granted to a person who has participated in the arbitration. [Footnotes omitted.]

95 McEwan and Herbst also quote from the decision of Blair J. in *Deluce Holdings Inc. v. Air Canada* (1992), 98 D.L.R. (4th) 509 (Ont. Gen. Div. [Commercial List]) who said in part at 528: "[t]he applicant for the stay must persuade the court that the continuance of the arbitration would be oppressive or vexatious or an abuse of the process of the court."

96 As already noted, courts afford great deference to arbitration clauses. In *Mercer*, Greyell J. refused to stay the arbitration, holding as follows at para. 72:

> In my view, [granting a stay of the arbitration] would be inconsistent with the broad language used by the parties in the arbitration clause. The parties clearly intended to have all disputes in respect of the Agreement be dealt with through arbitration. It is incumbent upon this Court to respect that wish.

97 Similarly, in *Prince George (City) v. McElhanney Engineering Services Ltd.* (1995), 9 B.C.L.R. (3d) 368 (B.C. C.A.) [*McElhanney*], the Court of Appeal, at para. 36, quoted with approval from *Boart Sweden AB v. NYA Stromnes AB* (1988), 41 B.L.R. 295 (Ont. H.C.):

> Public policy carries me to the consideration which I conclude is paramount having regard to the facts of this case, and that is the very strong public policy of this jurisdiction that where parties have agreed by con-

> tract that they will have the arbitrators decide their claims, instead of resorting to the Courts, the parties should be held to their contract.
>
> . . .
>
> To deal with all these matters in a single proceeding in Ontario instead of deferring to the arbitral process in respect of part of the action and temporarily staying the other parts of the action, would violate that strong public policy.

98 The mere fact that some defendants are not bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause in relation to claims that do fall within its scope: *Hayes Forest Services Ltd. v. Teal Cedar Products Ltd.*, 2008 BCCA 283 (B.C. C.A.) at para. 65.

99 It is clear from the foregoing that the burden on the Strata is a heavy one. In my view, in order to succeed the Strata must persuade the court that the continuance of the Arbitration would result in such significant prejudice to the Strata as to be oppressive or vexatious or amount to an abuse of process, and that the balance of convenience favours a stay of the Arbitration. The fact that the Strata wishes to prosecute an action that raises issues and involves parties that go beyond the scope of the Arbitration is not enough, and any delay in applying for a stay and any participation by the Strata in the Arbitration will weigh heavily against granting a stay.

100 While counsel for the Strata submitted the Strata would be prejudiced by the continuation of the Arbitration, the nature of the prejudice alleged was somewhat vague. In some respects the Strata's submissions seemed to be directed more at opposing the defence application to stay the action than at supporting the Strata's application to stay the Arbitration.

101 For example, citing *Bott v. Sorley*, [1998] B.C.J. No. 2023 (B.C. S.C. [In Chambers]), the Strata submitted that a party is not precluded from maintaining an action simply because an arbitration on similar issues has been commenced. While true, I do not consider this to support the Strata's application for a stay of the Arbitration.

102 Similarly, citing *Cut & Run Holdings Ltd. v. Booze Brothers Holdings Inc.*, 2005 BCSC 167 (B.C. S.C.) [*Cut & Run*], the Strata submitted that because the dispute is based on the relationship of the parties as derived from statutory rights and common law duties and not as derived from the MEA, the Arbitration should be stayed. But *Cut & Run* was a case considering an application to stay a court proceeding in the face of arbitration. Given the deferential approach taken by the courts to any challenge to an arbitrator's jurisdiction, cases concerning an application to stay court proceedings in the face of an arbitration cannot in my view simply be applied in reverse to an application to stay an arbitration in the face of a court proceeding. In other words, where court proceedings and arbitral proceedings have both been commenced, the fact that a court has declined to stay the court proceedings does not, in and of itself, suggest that the court should or would stay the arbitration. Indeed, in *Cut & Run*, one party had commenced a petition in court and the other had commenced an arbitration, and while the court refused to stay the petition it did not suggest that it would stay the arbitration.

103 The Strata submitted that the Arbitration should be stayed because the arbitrator cannot deal with all the matters in issue in the action and cannot grant all the relief sought in the action. As already noted, it is my view that the substance of the Strata's complaint does, at least arguably, fall within the scope of the arbitration agreement. In any event, the fact that some claims are beyond the scope of an arbitration clause or some defendants

are not bound by an arbitration clause is not, of itself, a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause in relation to claims that do fall within its scope. In my view, no prejudice arises from the fact that the arbitrator cannot grant all the relief sought by the Strata in the action (e.g. damages against the defendants other than KBK) so long as the Strata is not precluded from eventually seeking that other relief in court.

104 The Strata submitted that permitting the Arbitration to proceed would result in duplication and waste because a finding by the arbitrator regarding the validity of the MEA (and perhaps the other instruments as well) based on the conduct of KBK would not preclude the court from revisiting the issue as against the other members of the Developer. I do not agree that this prospect would justify staying the Arbitration. KBK acted as agent for all the members of the Developer and no independent conduct of any defendant other than KBK is relied upon by the Strata as invalidating the MEA or any of the other instruments. The same series of Disclosure Statements are in issue and the same conduct of KBK is alleged to constitute the breaches that give rise to the relief sought. As such, there is no risk of the arbitrator deciding the validity questions without regard for some of the impugned conduct. All of the impugned conduct is in issue in the Arbitration. Further, without deciding the question, it is my view that any finding by the arbitrator on the issue of the validity of the MEA and the other instruments would likely bind the other members of the Developer under the doctrine of issue estoppel, as a principal and an agent may be privies for the purpose of application of that doctrine: *Foreman v. Niven*, [2009] B.C.J. No. 2148 (B.C. S.C.). If this becomes an issue, it would have to be determined by the trial judge in the action. Even if it was ultimately held that the test for issue estoppel was not met, given the very advanced state of the Arbitration, little time or effort would be wasted by permitting the Arbitration to complete even if the question of the validity of the instruments had to be relitigated in the action.

105 The Strata suggested that it was prejudiced in its ability to obtain document discovery in the Arbitration because it could not obtain orders for document production against the other defendants. However, it is clear from the evidence that document production has proceeded in the Arbitration without regard for whether the documents were technically in the possession of KBK or one of the other related parties. For example, in a Notice of Application dated February 8, 2013, the Strata applied for production of documents including specific documents "from any member of the Plaintiff [KBK] or its principals". Counsel for KBK advised that document production has been resisted in the Arbitration only on the basis of relevance and not on the basis that the documents sought are in the possession and/or control of one of the other defendants.

106 At the time these applications were heard, the Arbitration was very substantially advanced. In my view, the Strata has failed to demonstrate that permitting the Arbitration to continue and complete would result in any prejudice to the Strata, let alone prejudice so significant as to justify the extraordinary remedy of a stay of the Arbitration. As such, it is not, in my view, necessary to consider the balance of convenience. However, given the time spent by counsel in oral submissions on the question of delay, I will do so briefly.

107 Counsel for the Strata emphasized that the Arbitration has proceeded expeditiously and that there has been little delay. However, the pace of the Arbitration itself is not relevant. What is relevant is the Strata's delay in applying to stay the Arbitration.

108 The Strata defended the Arbitration on the merits, advanced a counterclaim, and, despite advising KBK and the arbitrator that it intended to challenge the arbitrator's jurisdiction, it fully participated in the Arbitration for nearly a year before bringing on this application. The Strata has provided no satisfactory answer to the question of why it proceeded so far with the Arbitration before commencing this action and bringing on the present

application.

109 Counsel for the Strata submitted the Strata needed formal approval from its members to commence the action and apply to stay the Arbitration which it only obtained at its April 4, 2013, annual general meeting. However, as is clear from the Strata's original pleadings in the Arbitration, by August 2012, it had formed the intention to challenge the arbitrator's jurisdiction and commence the action. The Strata could have pressed the arbitrator to decide the jurisdiction question at the outset of the Arbitration without obtaining any further approval from its members. If the arbitrator declined to do so, the Strata could have immediately sought the approval required to commence the action at an earlier meeting called for that purpose.

110 Perhaps in an attempt to explain the delay, Mr. Sethna deposed that in the course of the Arbitration, between January and April 2013, the Strata began to "gain much greater insight into the immense disconnect between the representations made by a number of parties as contained in the Disclosure Statements in 2004-2006 and the actual cost sharing, title and easement obligations which the **Strata corporation** purportedly inherited in 2009." But, as is clear from the Strata's original Response and Counterclaim filed in the Arbitration, enough was known by August 2012 for the Strata to have decided to challenge the arbitrator's jurisdiction and to have formed the intention to bring this action. Further, Mr. Sethna also deposed that the Strata:

> ... concluded very early on that arbitration was not the appropriate forum for these proceedings given the issues involved and the fact that these involved not only the Plaintiff and KBK but a number of other parties and, moreover, the Plaintiff's position was crystallizing such that it was clear that it would challenge the validity of a number of documents and instruments over which, from the Plaintiff's perspective, the Arbitrator had no jurisdiction. The Plaintiff would be challenging the very document which gave the Arbitrator any jurisdiction at all - the [MEA] and the Assignment and Assumption Agreement.
>
> [Emphasis added.]

111 Indeed, Mr. Sethna deposed that efforts to determine the basis for certain cost sharing allocations and specific cost items were being made as early as February 2009, and that around the same time it was discovered that the Hotel Parcel owned by KBK was interfering with the Strata's use of its common property or its access rights regarding the certain function rooms and this made the "cost sharing allocations particularly important". He also said by October of 2009 the Strata was "made aware by Dodwell of the exact easement and lease structure".

112 Counsel for the Strata advised counsel for KBK and the arbitrator on several occasions that he thought the matter unsuitable for arbitration and that he intended to apply to court to stay the Arbitration. In a Notice of Application dated February 8, 2013, the Strata sought orders for document production and also for "directions re: jurisdiction for the purposes of the Arbitration hearing". However, the arbitrator's reasons on the document production aspect of the appellation state that he was not asked to decide on the jurisdiction question "at this time".

113 On April 10, 2013, the Strata brought on applications for additional discovery and to terminate the Arbitration on the basis of KBK's failure to provide adequate discovery and on the basis of the jurisdictional challenge. The jurisdictional challenge application was adjourned generally. There is a dispute between the parties as to what exactly happened on April 10, 2013, in that regard. The Strata says the arbitrator had already said he would decide the jurisdictional issues following the hearing on the merits, and that when the Strata commenced its submissions regarding jurisdiction on April 10, 2013, the arbitrator noted that it would make more sense for

the court to hear the application. KBK disputes that version of events and says that prior to April 10, 2013, the arbitrator said several times that he is capable of determining his own jurisdiction and that on April 10, 2013, the jurisdictional aspects of the Strata's application were adjourned generally with the arbitrator noting the Arbitration would continue unless and until it was stayed by the court. On either version, it is clear that the arbitrator is aware of the jurisdictional challenge and prepared to address it following the hearing on the merits. In any event, none of this explains why the Strata did not press the issue before the arbitrator at the outset and, if not satisfied with how the arbitrator intended to deal with the jurisdiction question, why the Strata did not immediately commence the action and bring on its application.

114 As noted above, the Arbitration is at the eleventh hour. There has been substantial document production, several days of examinations for discovery, many contested applications, and more than 15 days of evidence heard. The Strata has participated fully in the Arbitration and, in my view, has not provided any satisfactory explanation for its delay in applying for the stay it now seeks. KBK has spent approximately $300,000 in legal fees and disbursements in the Arbitration, and would suffer significant duplicated costs and inconvenience if the Arbitration was stayed in favour of the action. In these circumstances the balance of convenience clearly weighs against granting the stay sought by the Strata.

115 In summary, I conclude that the Strata has not demonstrated it would be prejudiced by the continuation of the Arbitration. 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. For these reasons, the Strata's application is dismissed.

Should the action be stayed?

116 The defendants other than Kornfeld seek an order staying this action pending final disposition of the Arbitration. Their application is made pursuant to s. 15 of the *Arbitration Act*, which provides as follows:

> (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.

117 Section 1 of the *Arbitration Act* defines "arbitration agreement" as follows:

> "arbitration agreement" means a written or oral term of an agreement between 2 or more persons to submit present or future disputes between them to arbitration, whether or not an arbitrator is named, but does not include an agreement to which the *International Commercial Arbitration Act* applies.

118 In applying s. 15 the following questions arise:

a) Does the action concern matters that fall within the scope of the arbitration clause in the MEA?

b) If so, can it be determined that the arbitration clause is void, inoperative or incapable of being performed?

c) If not, should the action be stayed in its entirety or partially?

119 As already determined above, the action concerns matters that fall within the scope of the arbitration clause in the MEA. These include the legitimacy of the costs allocated to the Strata under the MEA, the Strata's allegations of misrepresentation, fraud and breach of statutory and fiduciary duties against KBK which are related to the easement and cost sharing structure, and ultimately the validity of the MEA. As such, the first question is answered in the affirmative.

120 The next question is whether I have determined that the arbitration clause is void, inoperative, or incapable of being performed. Although the Strata's position in the action and the Arbitration is that the MEA is invalid, I was not asked to decide the merits of that position, and indeed am not in a position to do so on these applications. Even if I was in a position to determine the validity of the MEA, the "doctrine of separability" as reflected in the definition of "arbitration agreement" and in s. 15 of the *Arbitration Act* would require that I find section 10.1 of the MEA itself to be void, inoperative, or incapable of being performed: *Thow*, paras. 77-99. I was not asked to make that determination and am not in a position to do so on the material before me. As such, it has not been determined that the arbitration agreement is void, inoperative, or incapable of being performed.

121 The third question is whether the action should be stayed in its entirety or partially. As discussed above, while the action concerns matters that fall within the scope of the arbitration clause, it also concerns matters that arguably fall within the scope of the arbitration clause and matters that fall beyond the scope of the arbitration clause. Counsel for the Strata relied on *Gulf Canada Resources Ltd./Ressources Gulf Canada Ltée v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (B.C. C.A.) [*Gulf Canada*] for the proposition that a court continues to have a residual discretion to refuse an application to stay proceedings pursuant to s. 15 of the *Arbitration Act*, despite the mandatory language of s. 15(2), where one of the parties named in the legal proceedings is not a party to the arbitration agreement, or the entire dispute does not come within the terms of the arbitration agreement. However, in my view, that is a misreading of the decision in *Gulf Canada*.

122 In *Gulf Canada*, the action commenced by Gulf against two defendants was stayed, in respect of both defendants, in favour of the arbitration even though one of the defendants took the position that it was not a party to the arbitration agreement. As stated by Cumming J.A. in *McElhanney* at para. 54, nothing in *Gulf Canada* supports the view that if any of the parties to the court proceedings is "not party to the arbitration agreement, the one who is must be denied the right to invoke the arbitration clause in the agreement to which it is a party".

123 In my view, s. 15 of the *Arbitration Act* clearly renders a stay of the action mandatory in respect of matters that fall within the scope of the arbitration clause. Even where it is only arguable that a dispute falls within the scope of an arbitration agreement, court proceedings will be stayed and the scope of the arbitration left to be determined at first instance by the arbitrator: *Seidel* at para. 29; and *St. Pierre*. However, given that the action in this case also raises matters that are beyond the scope of the arbitration clause, the question arises as to whether the action should be stayed only partially.

124 In *Thow*, the parties to the arbitration agreement were companies owned by Donald James and Ian Thow. A counterclaim was advanced by Mr. James and his company against Mr. Thow and his company, and that counterclaim was stayed pursuant to s. 15 of the *Arbitration Act*. Mr. James had also commenced a separate action against Mr. Thow, and a question arose as to whether that action should also be stayed given it did not involve any party to the arbitration agreement. Wedge J. concluded, at para. 105, that the separate action should be stayed as well because the issues were intertwined with those that would be the subject of the arbitration.

125 In *ABOP LLC v. Qtrade Canada Inc.*, 2006 BCSC 2025 (B.C. S.C. [In Chambers]), a petition seeking relief pursuant to the oppression provisions of the *Canada Business Corporations Act*, R.S.C. 1985, c. 44 was stayed pending the outcome of arbitration even though the arbitrator did not have jurisdiction to make a finding of oppression and appoint a receiver. The chambers judge concluded that the entire petition should be stayed and then "[o]nce the arbitrator has done his work, if there is still a dispute between the parties which requires the additional relief requested in the petition ... then that matter can be pursued in the Courts at that time" (para. 24). This conclusion was upheld on appeal: *ABOP LLC v. Qtrade Canada Inc.*, 2007 BCCA 290 (B.C. C.A.).

126 In *Mercer Gold Corp. (Nevada) v. Mercer Gold Corp. (B.C.)*, 2012 BCSC 322 (B.C. S.C.) (*Mercer #2)*, Greyell J. considered whether to strike portions of a claim against third parties after referring the main action to arbitration (in *Mercer*). Greyell J. decided against striking the remaining claim and instead concluded the proceedings should be adjourned pending the arbitrator's decision. He noted that the extent of the action against other parties would depend on the outcome of the arbitration.

127 In *Boxer Capital Corp. v. Marine Land Development Ltd.*, 2012 BCSC 684 (B.C. S.C. [In Chambers]), it was conceded that some of the claims in the action at least arguably fell within the scope of the arbitration clause and as such partial stay was mandatory. However, the plaintiff's position was the balance of the action which involved parties who were not parties to the arbitration agreement should proceed. Savage J. concluded that the entire action should be stayed because the claims advanced in the action could change as a result of the findings made in the arbitration.

128 In my view the same considerations apply here and as a result the entire action should be stayed pending the outcome of the Arbitration. First, as noted above, some of the matters in issue are only arguably within the scope of the arbitration clause and whether they are in fact within or beyond its scope is still to be determined by the arbitrator. There may be issues the arbitrator concludes are not within the scope of his jurisdiction and which will remain to be decided in the action, but that determination is one for him to make. It is not practical for the action to proceed before the arbitrator has determined the scope of the Arbitration because that determination will directly affect the scope of the action.

129 Further, the matters in issue in the action that are beyond the scope of the Arbitration are intertwined with and could be affected by the outcome of the Arbitration. For example, as already noted, the Strata's claims in the action for damages and other relief against the other members of the Developer is based on the same conduct of KBK that is relied upon in Arbitration as supporting a declaration that the MEA is void. As such, those claims will be affected by the outcome of the Arbitration.

130 For these reasons, the action is stayed in its entirety pending final disposition of the Arbitration.

Should the claims against Kornfeld in the action be severed?

131 Kornfeld applies for an order severing and staying the claims against it in this action pending final disposition of the Arbitration or the claims against the other defendants in this action, whichever is first, or until further order of this court.

132 The entire action has been stayed pending final disposition of the Arbitration and as such it is not necessary to decide Kornfeld's application at this time. As discussed above, the action may change significantly as a result of the outcome of the Arbitration, and it is my view that the question of whether the claims against Kornfeld should be severed should be decided once it is known how the action will ultimately proceed. Accord-

ingly, Kornfeld's application is adjourned generally without prejudice to it being rescheduled following final disposition of the Arbitration.

133 The costs of these applications will be costs in the cause.

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