

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kingsgate Property Ltd. v. The Board of
Education of School District No. 39,*
2023 BCSC 1266

Date: 20230713
Docket: S221885
Registry: Vancouver

In the Matter of the *Arbitration Act*, R.S.B.C. 1996, c. 55

Between:

Kingsgate Property Ltd. and Beedie Development LP

Petitioners

And:

**The Board of Education of School District No.
39 (Vancouver), formerly known as The Board of School
Trustees of District No. 39 (Vancouver)**

Respondent

Before: The Honourable Justice Stephens

Oral Reasons for Judgment

In Chambers

Counsel for the Petitioners:

I.G. Nathanson, KC
J.K. Lockhart

Counsel for the Respondent:

J.K. McEwan, KC

Place and Date of Hearing:

Vancouver, B.C.
July 7, 2023

Place and Date of Judgment:

Vancouver, B.C.
July 13, 2023

[1] **THE COURT:** The petitioners and the respondent, Board of Education of School District No. 39 (Vancouver) ("VSB"), are engaged in a significant rent dispute in respect of commercial property. Their commercial arrangement is subject to a lease dated 1972 (the "Lease") which provides for the arbitration of certain disputes. The petitioners lease the property from the VSB. The premises are being used as a shopping mall.

[2] In an arbitration award dated January 19, 2022, an arbitration tribunal, by majority, declared the market value of the property effective for the five-year term from 2017 to 2022 to be \$116.5 million ("the Award"), considerably higher than the previous market value for the prior lease term.

[3] The rent payable under the lease is determined by a formula, and the market value is an input. The effect of the Award was, by operation of the lease formula, to raise the rent considerably. The evidence is that the amount of unpaid rent in dispute calculated pursuant to the Award from the commencement of the 2017 term to the time of this hearing plus interest and costs is approximately \$52.4 million (the "Disputed Amounts") and climbing with every passing month.

[4] In March 2022, the petitioners filed a petition seeking leave to appeal the Award to this Court under the *Arbitration Act* R.S.B.C. 1996 c. 55 (*Arbitration Act*). It has not in the interim paid VSB the increased rent calculated with a reference to the 2022 Award, but has instead paid a lower rent calculated with reference to the lower market value that it contends for.

[5] In reasons indexed as *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 560, dated April 12, 2023 ("RFJ"), I granted the petitioners leave to appeal the Award on the condition that security be provided on terms agreed by the parties or if no agreement was reached, determined by the court. I further ordered that the petitioners' notice of application for a stay which was heard at the same time as the petition for leave to appeal be adjourned generally:

[135] I therefore allow the petition, and make the following orders:

a) I grant leave to appeal from the Award dated January 19, 2022, pursuant to s. 31 of the *Arbitration Act* on the questions of law set out by the petitioner, subject to a condition pursuant to s. 31(3) that the petitioners post security for the appeal on terms satisfactory to the court prior to the hearing of any such appeal, such terms to be agreed to by the parties (and if so, the court should be advised by letter) or if agreement cannot be reached the parties have leave to come back before me for a determination of the appropriate security terms.

b) The petitioners' amended notice of application filed August 26, 2022, seeking a stay is adjourned generally, with liberty to the petitioners to reset that application, or any further amended notice of application.

[6] The parties did not come to agreement on the appropriate security and security terms.

[7] There has, however, also been a significant development in this dispute between the parties which occurred after the RFJ. On May 17, 2023, the VSB issued a notice of default under the Lease which, after 60 days triggers an asserted right of VSB's termination of the lease and right of re-entry. The Notice of Default was issued in reliance on the Award and said:

The Tenant is in default of its obligations under Section 29.03 and 29.09 of the Lease by reason of its failure to pay Basic Rent in accordance with the determination of the Arbitral Tribunal dated January 19, 2022 ...

The "determination of the Arbitral Tribunal dated January 19, 2022," referred to in the notice of default is the Award, about which leave to appeal was granted on April 12, 2023 in the RFJ.

[8] The notice of default further states that the tenant is in arrears of rent due plus GST for a total of \$49,883,770.06 and requires pursuant to the Lease that the tenant remedy the default, and failure to do so within 60 days entitles the landlord to terminate the Lease and re-enter and take possession of the premises without further notice.

[9] A VSB representative deposes that since May 17, 2023, it "has begun consideration of matters in light of the possible termination of the lease, including

timing of any re-entry, possible sale or redevelopment options, and commencing the process of applying for rezoning of the Property."

[10] The expiry of 60 days from the May 17, 2023 notice of default falls on July 16, 2023.

[11] The petitioners now apply for an order to determine the security terms further to the RFJ and for a stay of their obligations under the Award of in respect of the Award and the notice of default pending determination of their arbitration appeal. The petitioners rely on s. 31(3) of the *Arbitration Act*. The relief sought on this application is set out in Schedule A, which I have provided to counsel a handout which includes, for the record, para. 1 of the notice of application with an addition after the words "Leave Decision" adding the words "staying the obligations of the petitioners under the Award, including any rights or obligations under the Default Notice, pending determination of the appeal" and then continues on with the remainder of para. 1. Schedule A also includes para. 3 of the relief sought in the notice of application and para. 4.

[12] I have been referred to no case on point which articulates the principles to be considered when fixing conditions on the granting of leave to appeal under s. 31(3), nor whether the court has the power to grant a stay in respect of an arbitration award or notice of default (or any other ancillary relief) as part of the s. 31(3) conditions in an arbitration appeal proceeding.

[13] More generally, this application also addresses the question of what is a just condition for the appeal of an award which has significant financial consequences and leads to a dispute over a significant sum --- here, over \$50 million.

[14] The following issues arise on this application:

- 1) What is the nature of the court's powers to attach conditions to an order granting leave to appeal under s. 31(3) of the *Arbitration Act*?

- 2) Does the court have the jurisdiction to grant a stay in respect of the Award which is subject to appeal and notice of default issued in reliance on that Award?
- 3) Do the petitioners seek a form of mandatory injunction?
- 4) What security terms should be imposed as a condition pursuant to s. 31(3), and should a stay in respect of the 2022 Award and the notice of default be granted as part of the s. 31(3) condition?
- 5) Should the court decline to grant any of the relief sought in virtue of s. 17 of the *Court of Appeal Act*, S.B.C. 2021, c. 6?

Issue 1: What Is the Nature of the Court's Powers to Attach Conditions to an Order Granting Leave to Appeal Under s. 31(3) of the *Arbitration Act*?

[15] The VSB opposed this application arguing in part there was no jurisdiction under s. 31(3) of the *Arbitration Act* to grant the relief sought on the application. This calls for an interpretation of the nature and scope of the powers under s. 31(3).

[16] I do so with regard to the *Interpretation Act*, R.S.B.C. 1996, 238, which provides, among other things, that “Every enactment must be construed as being remedial and must be given such fair, large, and liberal construction and interpretation as best ensures the attainment of its objects.” Further, under the modern principle of interpretation, the words of an enactment are to be read in their entire context in their grammatical and ordinary sense harmoniously with the scheme of the *Act*, the object of the *Act*, and the intention of Parliament: *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 SCR 27, 1998 CanLII 837, at para. 21, citing Elmer Driedger, *Construction of Statutes*, 2nd ed (Toronto: Butterworths, 1983) at p. 87.

[17] Section 31(3) is cast in broad terms. It says: “If the court grants leave to appeal under subsection (2), it may attach conditions to the order granting leave that it considers just” (emphasis added).

[18] Section 31(3) must be considered in the context in which it exists within s. 31 of the *Arbitration Act*. Section 31(2)(a) requires the court to be satisfied that the

determination of a point of law on appeal "may prevent a miscarriage of justice" in order for it to grant leave to appeal under that sub-paragraph: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, at para. 68; see also Law Reform Commission of British Columbia, *Report on Arbitration* (1982) at p, 59.

[19] I find that s. 31(3) has as its purpose to work together with the leave to appeal and appeal provision of the act to prevent a potential miscarriage of justice.

[20] In the context of granting leave, I interpret the prevention of a miscarriage of justice referred to in section 31(3) as including the prevention of the legal and practical prejudicial consequences of an award which may turn out to be invalid from coming to fruition.

[21] Similarly, s. 31(3) empowers the court to prevent a potential miscarriage of justice, including by providing the court with the discretionary power to impose a condition preventing the legal and practical consequences of an award subject to appeal from coming to of fruition while the validity of that award is being determined in the appeal proceeding. (It may be that s. 31(3) serves other purposes and has other applications, but I need not decide this for the purposes of this application).

[22] In seeking to do justice between the parties and to prevent a miscarriage of justice, in the context of s. 31(3), the Court should look to the practical and legal realities which relate to an award, and look to substance not simply form. Here, although strictly speaking the Award determined market value and did not decide the amount of rent, the Award's market value determination is a driver for the calculation of rent under the Lease formula. The Award is at the heart of the parties' rent dispute. The Award is the main premise for the VSB's claim that the petitioners now owe it in excess of \$52 million, and for VSB's assertion that the petitioners are in breach of the Lease for non-payment and for the issuance of the notice of default.

[23] In a s. 31 proceeding to appeal the Award, which brings into question the premise of the VSB's position and the input to the mathematical calculation which leads to its position that approximately \$50 million is now owing, this Court can

consider granting a remedy on an interim basis to prevent the exertion of VSB's legal rights flowing from that Award.

[24] Accordingly, I find that the court has the power under s. 31(3) to grant a condition to do justice between the parties, including to prevent a potential miscarriage of justice, pending the determination of an appeal of an award.

[25] The court's power to attach conditions under s. 31(3) can be applied in a manner to be able address the circumstances relating to the arbitration appeal, in order to prevent a potential miscarriage of justice in respect of the award.

[26] The court's statutory power to prevent a miscarriage of justice includes the discretion, in an appropriate circumstance to grant a stay of an arbitration award, and legal obligations flowing from it, pending an appeal, in order to suspend the obligations of a petitioner which has obtained leave to appeal that award.

[27] Construing s. 31(3) in light of its text, its context and purpose, I conclude it is within the Court's discretion to grant the relief in the nature of a stay in respect of the Award that is the subject of an appeal proceeding.

[28] The respondent VSB argued that a s. 31(3) may only be granted against the petitioner and not against a respondent. But s. 31(3) is not so limited in its wording. Giving it a large and liberal interpretation, I find that s. 31(3) confers the power on the court to impose a condition that affects the legal rights of a respondent, not simply a petitioner.

[29] The respondent VSB also argued that the court is precluded from interfering with the parties' contractual bargain under the Lease, which the VSB submits contractually requires that the petitioner pay the outstanding rent calculated with reference to the determination of market value in the Award. The VSB contends that the Lease expressly requires the petitioners to, consequent on an award, pay the rent arrears and interest forthwith, notwithstanding an arbitration appeal. However, the Lease is subject to the *Arbitration Act* and the court's powers under that *Act*. RFJ para. 119.

[30] The contractual bargain between the parties includes the potential application of the *Arbitration Act*, including s. 31 and the court's powers under s. 31(3) to attach conditions upon the granting of leave to appeal an award made in respect of the Lease.

Issue 2: Does the Court Have the Jurisdiction to Grant a Stay In Respect of the Award Which Is Subject to Appeal and the Notice of Default Issued In Reliance On That Award?

[31] It follows from my determination on issue 1 that the answer is, yes. The Award has a direct connection to the calculation of rent under the Lease in the quantum the respondent asserts must be paid. Similarly, the notice of default was issued in reliance on the determination of market value in the Award.

[32] The Court has the power in an appropriate case to grant a stay in respect of the Award and the notice of default, if it is necessary to do justice between the parties and to prevent a potential miscarriage of justice pending the appeal of an arbitration award.

[33] The respondent, VSB, also argued that this Court is without the power to restrain an arbitration award, relying on s. 32 of the *Arbitration Act*. Section 32 of the *Arbitration Act* states that an arbitration award "must not be questioned, reviewed, or restrained... except to the extent provided in this Act". For the forgoing reasons, I have concluded that such a power to restrain an award and obligations flowing from it exist in s. 31(3), and so there is, for the purposes of s. 32, authority within the *Arbitration Act* to do so.

[34] Further, since I have concluded there exists authority to grant a stay as part of conditions on granting leave to appeal, it is unnecessary to consider if the court also has the authority to do so under s. 8 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 or the Court's inherent jurisdiction, and I express no opinion on those issues.

Issue 3: Do the Petitioners Seek a Mandatory Injunction?

[35] I find the petitioners do not seek a form of mandatory injunction.

[36] They seek a stay in the form of suspension of legal rights and obligations, which I find here is not a mandatory injunction order. For example, *RJR-MacDonald Inc. v. Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311, concerned an application to suspend the effect of regulations and prevent public authorities from enforcing them, and was not characterized by the court as a mandatory injunction (see paras. 1 and 37).

[37] The cases relied on by the VSB in this regard are distinguishable from the context and the relief sought before me: *Hongkong Bank of Canada v. Wheeler Holdings Ltd.*, [1993] 1 SCR 167, 1993 CanLII 148 (SCC); and *8640025 Canada Inc. v. TELUS Communications Company*, 2016 BCSC 2211; and *R. v. Canadian Broadcasting Corp.*, 2018 SCC 5.

[38] Where an injunction is sought to stop a termination in the context of an underlying dispute between the parties concerning whether and how much one party is indebted to the other, the relief sought has been described as of a prohibitory nature and not mandatory: *8640025 Canada Inc.* at paras. 35, 36 referring to *Look Communications Inc. v. Bell Canada*, 2007 CanLII 30476 (Ont. S.C.J.). I find that this more closely describes the context which arises on this application.

Issue 4: What Security Terms Should Be Imposed in This Case Pursuant to s. 31(3) and Should a Stay in Respect of the 2022 Award in the Notice of Default Be Granted as Part of the Conditions for Granting Leave to Appeal?

[39] I return to the issue of what are satisfactory security terms for the purposes of the condition imposed on the order granting leave to appeal: RFJ paragraph 135(a).

(a) Undertaking to not sell certain property, undertaking to pay disputed amount within 60 days of an unsuccessful appeal decision.

[40] The petitioner Beedie Development LP (“Beedie”) is a property developer which owns a number of commercial and industrial properties. As of December 2021, Beedie owned assets worth approximately \$970 million and carried debt totalling \$404 million to outside lenders and other Beedie Group lenders. Beedie's

principal business is buying, selling, owning, and operating industrial and residential real estate assets.

[41] As security for the Disputed Amounts, the petitioners propose to undertake to not sell or further encumber certain real property which has current equity of approximately \$88 million pending the appeal, and to pay the Disputed Amounts within 60 days if the petitioners' appeal of the Award is not successful.

[42] I do not accept the respondent VSB's position that this would not constitute security for the purposes of this appeal and for the purposes of my RFJ.

[43] The VSB contends that the appropriate security to condition the petitioners' leave to appeal is payment in full of their arrears (either in accordance with the Lease, or in trust to counsel, on appropriate undertakings), and "the requirement that the Petitioners comply with their obligations under the Lease" (application response paras. 6 and 42).

[44] Having considered the circumstances of this case, including the magnitude of the Disputed Amounts directly relating to the Award and the potential harm to the petitioners if that sum were paid now, and the approximately \$88 million in equity in the real property to which Beedie's proposed undertaking relates, I find that what the petitioners propose constitutes satisfactory security for this arbitration appeal, and is just in all the circumstances.

b) Stay of the Obligations of the Petitioners Under the Award, Including Any Rights or Obligations Under the Default Notice

[45] I turn to whether as part of the s. 31(3) condition, a stay in respect of the Award and notice of default should also be ordered.

[46] The petitioners contend that a stay is necessary since the respondent VSB has taken steps in reliance on the Award. They contend the Award upon which the respondent VSB relies to assert the existence of rent arrears, and for the notice of default, is subject to appeal. They argue that security will be put in place for the Disputed Amounts in the form of real property with equity in excess of \$80 million.

[47] The petitioners further contend that the VSB has not provided an undertaking to repay the Disputed Amounts, if they were paid it pending the appeal, in the event the petitioners' appeal was successful.

[48] The respondent VSB argues that the court has no jurisdiction to grant a stay or injunction, and in any event the test for an injunction has not been met.

[49] I apply the usual injunction test from *RJR* to consider whether a stay should be granted as part of the security terms pursuant to s. 31(3).

[50] There is a three-part test for an injunction: first, a preliminary assessment must be made of the merits of the case to ensure that there is a serious question to be tried; second, it must be determined whether the applicant would suffer irreparable harm if the application were refused; and third, an assessment must be made as to which of the parties would suffer the greater harm from the granting or refusal of the remedy pending a decision on the merits, known as the balance of convenience: *RJR-MacDonald Inc.* at para. 48; and *Este v. Esteghamat-Ardakani*, 2020 BCCA 202, at para. 35 (referring to, among other authority, *British Columbia (Attorney General) v. Wale* (1986), 1986 CanLII 171 (BC CA), 9 B.C.L.R. (2d) 333 (C.A.), aff'd, [1991] 1 S.C.R. 62, and *Vancouver Aquarium Marine Science Centre v. Charbonneau*, 2017 BCCA 395).

Is There a Fair Issue to be Tried?

[51] When determining if a fair issue to be tried exists for the purposes of considering whether a stay is appropriate in this context, the applicable proceeding to consider is the *Arbitration Act* appeal proceeding.

[52] In the RFJ, I found (e.g. at para. 116) that the petitioners' appeal of the Award has arguable merit. Therefore, I find the fair issue to be tried criterion has been met.

Have the Petitioners Demonstrated Irreparable Harm?

[53] Irreparable harm refers to the nature of the harm, not its magnitude. It is “harm which either cannot be quantified in monetary terms or which cannot be

cured, usually because one party cannot collect damages from the other”: *RJR* at para. 59.

[54] Clear proof of irreparable harm is not required. Doubt as to the adequacy of damages is sufficient: *Wale* at page 6; *Vancouver Aquarium Marine Science Centre* at para. 59.

[55] The representative of the petitioners deposes that if they were required to pay the Disputed Amounts now, it would materially and adversely affect their business, and it would require either (a) diverting a substantial amount of capital that would otherwise be required to fund ongoing developments or acquire new properties, (b) sell an asset; and/or (c) restructure existing debt. He deposes that these scenarios would negatively impact Beedie's business by, among other things, undermining its competitiveness, or creating a major shift in the risk profile of its business.

[56] The petitioners have demonstrated on a sufficiently sound evidentiary basis the existence of irreparable harm if a stay is not granted. I am satisfied that permitting the VSB to enforce its right for payment of rent on the basis of the Award, and its rights to terminate the Lease and re-entry for non-payment, while the appeal is pending, would be sufficiently disruptive to the petitioners' business to amount to irreparable harm: *Livent Inc. v. Deloitte & Touche*, 2016 ONCA 395, at para. 11.

[57] I do not accept that the petitioners' position simply amounts to wanting a situation that is "more commercially advantageous, pending an appeal." I find instead that the petitioners have established irreparable harm if a stay is not granted.

[58] Conversely, refusing to grant a stay would permit the VSB to actualize the legal and practical consequences of its Lease rights flowing directly from the Award prior to the validity of that Award being determined on appeal. These are circumstances in which a stay of such rights can be appropriate: *Evergreen Building Ltd. v. IBI Leaseholds Ltd.*, 2005 BCSC 1161, at para. 34.

Balance of Convenience

[59] The respondent VSB says that the balance is in its favour since it would stand to suffer irreparable harm being "loss of their contractual bargain," including their right to payment of the rent following arbitration, if a stay is granted. The VSB contends that the petitioners are admittedly in breach of the Lease by not paying the rent, calculated with a reference to the determination of market value in the award, and there is "no dispute but that [VSB is] presently owed \$52,000,000" (application response para. 105).

[60] The parties' contractual bargain, however, included the right of a party to seek to appeal an arbitration award which is a factual input for the rent calculation. The Award, which is the premise of the contractual rights that the respondent asserts for payment of the Disputed Amounts and now a notice of default, is the subject of an *Arbitration Act* appeal.

[61] The Award and the petitioners' legal obligation to pay \$52 million is disputed.

[62] There is merit to the petitioners' submission that, having put security in place for the Disputed Amounts, it would be unjust for the respondent VSB to nevertheless take steps under the Lease on the basis of the Award because of non-payment to it of the Disputed Amounts.

[63] At para. 93 of my RFJ, when considering whether to grant leave to appeal of the award, I stated that:

[93] Given the large monetary amount of rent consequent upon the determination of market value, which was the subject of the 2022 Award, I find that the importance of the result of the arbitration to the parties justifies the intervention of the Court and thus the requirement of s. 31(2)(a) is satisfied: *Sattva* at para. 41.

For similar reasons, I find the intervention of the court is justified to suspend VSB's ability to rely on the Award, and the corresponding spectre of termination of the Lease and re-entry, to the prejudice of the petitioners, pending the petitioners' appeal as to the Award's validity.

[64] I have considered the VSB's evidence that it has had to remit GST of approximately \$2.2 million in respect of the Disputed Amounts and that this has caused it considerable difficulty, including "cash flow issues." I have weighed this in the balance of convenience. Weighed against that is the prejudice to the petitioners from having to pay approximately \$50 million to the VSB now, causing what they anticipate to be material and adverse consequences to their business, and the spectre of termination of the Lease in light of the VSB issuing the notice of default before the validity of the Award has been decided on appeal.

[65] The VSB submits it has done nothing unlawful by asserting its contractual rights. But this does not necessarily lead to the conclusion that a stay should not be granted in the circumstances.

[66] The petitioners have also given an undertaking as to damages in support of the request for a stay.

[67] In all the circumstances, I find the balance of convenience weighs in favour of the petitioners.

[68] I refer to *Dixon v. Morgan*, 2020 BCCA 200, at para. 23, which I find by analogy has application here: "The court's power to grant a stay is discretionary and should be exercised only where necessary to preserve the subject matter of the litigation or to prevent irremediable damage or where there are other special circumstances". Further, the court, "may stay proceedings if satisfied that it is in the interest of justice to do so": para. 22, quoting *Gill v. Darbar*, 2003 BCCA 3 at para. 7. I find that a stay pending the outcome of the appeal is in the interests of justice.

[69] Further, "protection as a successful plaintiff is a precondition to granting a stay," *Dixon* at para. 22. I find the petitioners' undertaking to not sell or encumber real property with equity in it of \$88 million and their undertaking to pay the Award within 60 days if the appeal is dismissed (or at such other date as the court may require) is sufficient protection for the VSB.

[70] I do not accept the VSB's submission the petitioners simply seek a stay of certain obligations under the Lease or an injunction in respect of the Lease. In this

rent dispute, the Lease operates together with the determination of market value in the Award to determine rent, and the Award is under appeal and is the object of the relief for a stay. The court has the power under s. 31(3) to issue a stay which can have the effect of suspending rights and obligations under the Lease which relate to the appealed Award.

[71] To summarize, it could constitute a potential miscarriage of justice if the petitioners were required to pay the Disputed Amounts (currently in excess of \$50 million) to the VSB before the appeal is decided, or face termination of the Lease for the non-payment of this sum, while an appeal is pending as to the validity of the Award used to calculate the Disputed Amounts.

[72] It is just and appropriate to grant a condition pursuant to s. 31(3) in respect of security, which includes a stay of the legal effect of the Award and the notice of default.

Issue 5: Section 17 of the Court of Appeal Act

[73] The parties made brief submissions on this point. The petitioners submit this court is not precluded from entertaining the relief sought in this application due to s. 17 of the *Court of Appeal Act*.

[74] While it did not initially object to the relief initially sought in the notice of application on s. 17 grounds, the VSB subsequently argued at the hearing that the petitioners' revision of the relief sought made during the course of the hearing of the application, which has been underlined in the Schedule A to my reasons, which was the relief for a stay, then put the petitioners' application outside the court's April 12, 2023 order, thus engaging s. 17. The respondent VSB submits if the court were asked to make an order outside the scope of its April 12th, 2023 order, it would be a s. 17 "problem". I am satisfied this problem does not arise here.

[75] My RFJ stated that the leave to appeal was granted "subject to a condition pursuant to s. 31(3) that the petitioners post security for the appeal on terms satisfactory to the court prior to the hearing of any such appeal" and "if agreement

cannot be reached, the parties have leave to come back before me for a determination of the appropriate security terms": RFJ paragraph 135(a).

[76] The stay sought here is in respect of security and one of the security terms. Accordingly, the stay relief sought by the petitioners is within the ambit of the order I previously granted.

Conclusion and Order

[77] In these reasons I have determined the security terms pursuant to s. 31(3).

[78] I have found that in the circumstances of this case, the security terms should include a stay in respect of the Award and the notice of default pending the outcome of this arbitration appeal on the terms sought by the petitioners.

[79] I order that the para. 1 of the relief sought in Schedule A is granted pending the determination of the appeal or such further time period as may be ordered by the court.

[80] Paragraph 2 of the notice of application was not sought on the application at the time of the hearing.

[81] Paragraph 3 of the relief sought in the notice of application is substantially duplicative of the wording within para. 1 of Schedule A, with the exception of para. 3(d) which seeks that the respondent have leave to apply to court to vary or discharge the stay in the event of a material change in circumstances. I grant the relief in para. 3, including that set out in para. 3(d).

[82] In addition, further to the petitioners' request made at the hearing with respect to para. 1(b), I grant liberty to the petitioners to apply to the court in the event the registrar declines to provide a duplicate copy of the certificate of indefeasible title as that paragraph contemplates.

[83] Are there any submissions on costs?

(SUBMISSIONS)

[84] THE COURT: All right. I have heard your submissions, both your submissions. Thank you. Mr. Nathanson has asked for an additional term that the petitioners be given liberty to apply in respect of para. 1, and I am not satisfied that is an order I should give in the circumstances of this case. So, I decline to do so.

[85] With respect to costs, I have considered both parties' positions on costs. I am cognizant of the context of this matter, which is reflected in my reasons for judgment, and I find in all the circumstances an appropriate order is that costs of this application shall be in the cause.

“Stephens, J.”

Schedule A – Relief Sought by Petitioners on this Application

1. An order that the condition on the granting of leave referred to in the decision of Mr. Justice Stephens in *Kingsgate Property Ltd v Vancouver School District No. 39*, 2023 BCSC 560 (the “Leave Decision”) staying the obligations of the petitioners under the Award, including any rights or obligations under the Default Notice, pending determination of the appeal be on the following terms, or on such other terms as the court may impose:

(a) The petitioners will provide an undertaking not to sell or further encumber the property at 18890 22nd Avenue, Surrey, BC (the “Property”).

(b) The petitioners will apply for the duplicate indefeasible title for the Property from the registrar pursuant to the Land Title Act, R.S.B.C. 1996, c. 250, and, once obtained, provide the duplicate indefeasible title to Nathanson, Schachter & Thompson LLP (“NST”) to hold in trust.

(c) The undertaking in (a) will terminate, and the petitioners will return the duplicate indefeasible title for the Property to a land title office for cancellation, if this court sets aside the Award and orders that rent be determined based upon a market value of \$20M, or otherwise as the court may order or the parties may agree.

(d) In the event the petitioners’ appeal is dismissed, the petitioners undertake to pay the unpaid rent, costs and interest (the “Disputed Amount”) within 60 days, or at such other date as the court may require.

(e) The petitioners will provide an undertaking as to damages the respondent may suffer as a result of the stay.

...

3. An order staying the obligations of the petitioners under the Award, including any rights or obligations under the Default Notice, pending determination of the appeal, on the following terms:

(a) The petitioners will provide an undertaking not to sell or further encumber the Property.

(b) The petitioners will apply for the duplicate indefeasible title for the Property from the registrar pursuant to the Land Title Act, and, once obtained, provide the duplicate indefeasible title to NST to hold in trust.

(c) The undertaking in (a) will terminate, and the petitioners will return the duplicate indefeasible title for the Property to a land title office for cancellation, if this court sets aside the Award and orders that rent be determined based upon a market value of \$20M, or otherwise as the court may order or the parties may agree.

(d) The respondent will have leave to apply to court to vary or discharge the stay in the event of a material change in circumstances.

(e) In the event the petitioners' appeal is dismissed, the petitioners undertake to pay the Disputed Amount within 60 days, or at such other date as the court may require.

(f) The petitioners will provide an undertaking as to damages the respondent may suffer as a result of the stay.

4. Costs of this application.