COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Petty v. Niantic Inc.,*
2023 BCCA 315

Date: 20230804
Docket: CA48408

Between:

Sharise Petty and David Stasch

Appellants
(Plaintiff)

And

Niantic Inc., Warner Bros Entertainment Inc., Warner Bros Entertainment Canada Inc., and Warner Bros Home Entertainment Inc.

Respondents
(Defendants)

Corrected Judgment: The name of counsel on the cover page of the judgment was corrected on August 11, 2023.

Before: The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch
The Honourable Madam Justice DeWitt-Van Oosten

On appeal from: An order of the Supreme Court of British Columbia, dated June 27, 2022 (*Petty v. Niantic Inc.*, 2022 BCSC 1077, Vancouver Docket S213723)

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Place and Date of Hearing:	Vancouver, British Columbia January 27, 2023
Place and Date of Judgment:	Vancouver, British Columbia August 4, 2023

Written Reasons by:
The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:
The Honourable Madam Justice Saunders
The Honourable Mr. Justice Fitch

Summary:

*This is a companion case to Williams v. Amazon**,** 2023 BCCA 314. The appellants appeal from a partial stay of proceedings that was entered because of an arbitration agreement. They say the judge who granted the stay erred in declining to find the arbitration agreement unconscionable and contrary to public policy. HELD: appeal dismissed. The appellants have not established palpable and overriding error that would justify overturning the judge's conclusions in the particular context of this case.*

Table of Contents	Paragraph Range

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] This appeal seeks to overturn a stay of proceedings that was entered in favour of arbitration.

[2] In April 2021, the appellants, Sharise Petty and David Stasch, filed a proposed class action against the respondents, Niantic Inc., Warner Bros Entertainment Inc., Warner Bros Entertainment Canada Inc., and Warner Bros Home Entertainment Inc. The corporate respondents develop, produce and distribute on-line video games, including Pokémon Go and Harry Potter: Wizards Unite.

[3] The appellants seek remedies for alleged statutory breaches, illegal gaming and other wrongs. The respondents have not yet filed a response to these claims.

[4] The respondents dispute the jurisdiction of the British Columbia Supreme Court to hear the proposed class action. In October 2021, they also filed an application for a stay of proceedings under the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*International Commercial Arbitration Act*].

[5] The jurisdictional objections have not been heard. The application for a stay has proceeded and was successful. The judge stayed all claims brought by the appellants, other than ones under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 [*Consumer Protection Act*]. The partial stay was granted because of an agreement to arbitrate.

[6] The appeal from the stay was heard the same week as an appeal in *Williams v. Amazon,* [2023 BCCA 314] [*Amazon*], and by the same division of the Court. The two appeals raise similar issues. As a result, they have been decided as “companion cases”. Consequently, these reasons must be read in conjunction with the judgment in *Amazon.* The legal principles discussed and applied in *Amazon* have been followed here.

[7] On the stay application, the appellants argued that the parties' arbitration agreement is unconscionable and contrary to public policy and should not be enforced. The judge rejected their submission. On appeal, they say the judge erred in reaching his conclusion.

[8] For the reasons that follow, I would dismiss the appeal.

[9] The judge's unconscionability and public policy analyses attract a deferential standard of review: *Amazon* at paras. 51–60. The appellants have not established palpable and overriding error that would justify setting aside the stay.

Background

[10] The reasons for judgment of the Court below are indexed as 2022 BCSC 1077.

[11] The factual background to the parties' dispute is succinctly summarized:

> [1] In this application the defendants Niantic Inc., Warner Bros Entertainment Inc., Warner Bros Entertainment Canada Inc. and Warner Bros Home Entertainment Inc. seek an order staying this class proceeding, other than in respect of the relief sought by the plaintiff Sharise Petty under the *Business Practices and Consumer Protection Act,* S.B.C. 2004, c. 2 [*BPCPA*].
>
> [2] This class proceeding is brought by the representative plaintiffs, Ms. Petty and David Stasch on behalf of, respectively, residents of British Columbia and Alberta who were customers of the defendants that purchased or otherwise paid directly or indirectly for "loot boxes" in the defendants' video games. A loot box is described by the plaintiffs as a game of chance inside a video game in which a player pays for the chance to win virtual awards, which in some cases can be sold. The plaintiffs allege that the loot boxes within the games are an unlicensed, illegal gaming system under Canadian law.
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> [3] The plaintiffs seek damages against the defendants for, amongst other things, unjust enrichment and those arising from breaches of the *Competition Act,* R.S.C. 1985, c. C-34, the *BPCPA*, Alberta *Consumer Protection Act,* R.S.A. 2000, c. C-26.3 [*ACPA*], and the *Infants Act,* R.S.B.C. 1996, c. 223.
>
> [4] Warner Bros Entertainment Inc. is a Delaware company that produces and commercializes content, including game content through its subsidiaries and affiliates. Warner Bros Entertainment Canada Inc. is an Ontario company that markets and distributes physical games in Canada. Warner Bros Home Entertainment Inc. is a subsidiary of Warner Bros Entertainment Inc. and its home entertainment distribution division. Through its subsidiary WB Games

> Inc., Warner Bros Home Entertainment Inc. develops, publishes and distributes games. The Warner Bros defendants are referred to collectively in these reasons as the "Warner Defendants".
>
> [5] Niantic Inc. ("Niantic") is a Delaware company that develops and publishes interactive games that can be played on mobile phones. Niantic is the developer and publisher of a game called Pokémon Go. Niantic and the Warner Defendants are the co-developers of the game Harry Potter: Wizards Unite, and Niantic is the publisher of record for this game.
>
> [6] Ms. Petty, a British Columbia resident, alleges that between July 2018 and the present she paid approximately $450 to purchase Pokécoins in order to purchase loot boxes and other items in the game Pokémon Go. David Stasch, an Alberta resident, alleges that between July 2016 and the present he paid approximately $2,115.77 to purchase Pokécoins for the same purpose.

[12] To access the impugned video games, the appellants agreed to Terms of Service. The judge found that the Terms of Service "apply to all aspects of a user's gaming experience … including use of mobile game applications, purchase of merchandise and use of other products and services": at para. 8.

[13] The Terms of Service include an arbitration agreement, with a choice of law clause (United States) and a class action waiver (at para. 10):

> **13. Dispute Resolution**
>
> **YOU AGREE THAT DISPUTES BETWEEN YOU AND NIANTIC WILL BE RESOLVED BY BINDING, INDIVIDUAL ARBITRATION, AND YOU ARE WAIVING YOUR RIGHT TO A TRIAL BY JURY OR TO PARTICIPATE AS A PLAINTIFF OR CLASS MEMBER IN ANY PURPORTED CLASS ACTION OR REPRESENTATIVE PROCEEDING.**
>
> […]
>
> *13.1 Arbitration*
>
> If you live in the US or another jurisdiction which allows you to agree to arbitration, you and Niantic agree that any disputes will be settled by binding arbitration, except that each party retains the right: (a) to bring an individual action in small claims court and (b) to seek injunctive or other equitable relief in a court of competent jurisdiction to prevent the actual or threatened infringement, misappropriation, or violation of a party's copyrights, trademarks, trade secrets, patents or other intellectual property rights […]
>
> Without limiting the preceding paragraph, you will also have the right to litigate any other dispute if you provide Niantic with written notice of your desire to do … within thirty (30) days following the date you first accept these Terms (Such notice, an "Arbitration Opt-out Notice").

> […] The arbitrator, and not any court or agency, shall have exclusive authority to (a) determine the scope and enforceability of this arbitration agreement and (b) resolve any dispute related to its interpretation, applicability, enforceability, or formation including any claim that all or any part of it is void or voidable.
>
> […]
>
> *13.4 Arbitration Location and Procedure*
>
> Unless you and Niantic otherwise agree, the arbitration will be conducted in a confidential manner, in the country where you reside. If your claim does not exceed $10,000, then the arbitration will be conducted solely on the basis of the documents that you and Niantic submit to the arbitrator, and there will be no other discovery conducted (such as depositions), unless the arbitrator determines that a hearing is necessary. …
>
> [Bold in original; underlining added.]

[14] There are additional provisions in the Terms of Service that the judge found relevant to his unconscionability and public policy analyses (at para. 11):

> a. Section 13.2 provides that arbitration is administered by the American Arbitration Association ("AAA") under its commercial arbitration rules, with certain modifications;
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> b. Section 13.5 provides that Niantic has agreed to waive its rights for attorney fees if it prevails in an arbitration but if the game user prevails, they are entitled to their attorney's fees;
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> c. Section 13.6 provides that the Terms of Service are governed by California law and that to the extent the Terms of Service permit a party to initiate litigation in a court, other than for small claims actions, the parties agree to the exclusive jurisdiction of the courts located in the Northern District of California; and
>
> d. Section 13.7 provides that if a game user's claim for damages does not exceed $75,000 that Niantic will pay any filing, administrative or arbitrator fees — unless the arbitrator finds that a claim was frivolous, or brought for an improper purpose.
>
> [Emphasis added.]

[15] The arbitration filing fee is USD $200.

[16] As noted in the factual summary excerpted above, the amounts of the appellants' claims are "relatively modest": at para. 72. Ms. Petty's claim is valued at CDN $450. Mr. Stasch's claim is valued at CDN $2,115.77.

[17] The proposed class action seeks more than one form of relief against the respondents, including (but not limited to): an accounting and restitution of benefits; disgorgement; damages under the *Competition Act*, R.S.C., 1985, c. C-34 [*Competition Act*]; declarations under consumer protection legislation in both British Columbia and Alberta; a declaration and compensation under the *Infants Act*, R.S.B.C. 1996, c. 223; and a statutory injunction.

Statutory Framework

[18] The application for a stay was filed under the *International Commercial Arbitration Act*. Section 8 governs:

> 8(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, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the 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 null and void, inoperative or incapable of being performed.
>
> …
>
> [Emphasis added.]

[19] The wording of these provisions is substantively similar to the *Arbitration Act*, R.S.B.C. 1996, c. 55 [*Arbitration Act*], the statute that was under consideration in *Amazon.* What was then s. 15 of the *Arbitration Act* (now s. 7 of S.B.C. 2020, c.2), also provided for a mandatory stay of proceedings in the absence of a finding that an arbitration agreement is void, inoperative or incapable of being performed. See para. 18 of *Amazon*.

[20] Under s. 8(1) of the *International Commercial Arbitration Act*, the respondents bore the onus of establishing that they met the pre-requisites for a stay. An "arguable case" standard applies: *Gulf Canada Resources Limited v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.), 1992 CanLII 4033 at p. 12; *Isagenix International LLC v. Harris*, 2023 BCCA 96 at paras. 19–25 [*Isagenix*].

[21] However, it was the appellants who bore the onus under s. 8(2). Once the pre-requisites for a stay were met, the appellants could only avoid a stay by showing that the arbitration agreement was void, inoperative or incapable of being performed: 2022 BCSC 1077 at para. 77.

[22] Similar to the *Arbitration Act*, ss. 8(1) and (2) of the *International Commercial Arbitration Act* manifest a legislative intention to give precedence to valid arbitration agreements. In support of this objective, the statute purposefully restricts the availability of judicial intervention (see also s. 5 of the *Act*). As explained in *Clayworth v. Octaform Systems Inc.*, 2020 BCCA 117 [*Octaform*], the "effect of this approach is to confirm the "competence-competence" principle whereby jurisdictional issues relating to the scope of [an] arbitration agreement are to be resolved in the first instance by the arbitrator": at para. 24.

[23] The appellants sought to bring their proposed class action on behalf of residents of British Columbia and Alberta (Mr. Stasch resides in Alberta). Both provinces have consumer protection legislation. Alberta's legislation, the *Consumer Protection Act*, R.S.A. 2000, c. C-26.3 [*Alberta's CPA*], prohibits the inclusion of arbitration clauses in consumer contracts. However, there are exceptions:

> 16(1) Subject to subsection (3), a supplier shall not enforce an arbitration clause in a consumer transaction or an arbitration agreement with a consumer.
>
> (2) Subject to subsection (3), an arbitration clause in a consumer transaction or an arbitration agreement with a consumer is void and unenforceable.
>
> (3) Subsections (1) and (2) do not apply in respect of
>
> (a) an arbitration agreement voluntarily entered into between a supplier and a consumer after a dispute has arisen, or
>
> (b) an arbitration agreement or an arbitration clause in a consumer transaction if the agreement or clause allows the consumer to decide, after a dispute has arisen, whether the consumer will use arbitration or an action in court to resolve the dispute.
>
> [Emphasis added.]

[24] British Columbia does not have a similar provision in its *Consumer Protection Act*.

Chambers Judgment

[25] In the Court below, the parties agreed that the respondents met the pre-requisites for a stay: at para. 18.

[26] They also agreed that because of the Supreme Court of Canada's decision in *Seidel v. Telus Communications Inc*, 2011 SCC 15 [*Seidel*], claims under British Columbia's *Consumer Protection Act* must be exempted from any such stay: at para. 19. (See paras. 19–20 of *Amazon*.)

[27] This left the judge with three issues to resolve (at para. 20):

> a. [Whether] s. 16 of the *ACPA* invalidates or prohibits the Arbitration Agreement applying to the claim advanced by Mr. Stasch and other Albertans;
>
> b. [Whether] the Arbitration Agreement is null, void, inoperative or incapable of being performed for reasons of public policy and unconscionable pursuant to the decision of the Supreme Court of Canada in *Uber Technologies Inc. v. Heller,* 2020 SCC 16 [*Uber*]; and
>
> c. [Whether] under the Terms of Service containing the Arbitration Agreement, an arbitrator lacks jurisdiction to determine the claims brought under the *Competition Act*.

[28] As was the case in *Amazon*, the respondents did not challenge the authority of the judge to determine whether the arbitration agreement was void on grounds that doing so required more than a superficial review of the record, or otherwise (see *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [*Uber*] at paras. 31–36, 122; *Octaform* at paras. 31–35). Instead, they were content to address the invalidity arguments advanced by the appellants on the merits. As I did in *Amazon,* I infer from the respondents' position that they agreed the judge could reach the "necessary legal conclusions" on the arbitrator's jurisdiction under s. 8(2) of the *International Commercial Arbitration Act* based on facts that were "either evident on the face of the record or undisputed by the parties": *Uber* at para. 36.

[29] On the first of the three issues to be resolved by the judge, he found that Alberta's legislation did not invalidate or prohibit application of the arbitration

agreement to claims advanced by Mr. Stasch and other residents of Alberta: at paras. 21–36. This finding is not under appeal.

[30] The judge also ruled against the appellants on the third issue. He found that the claims alleging one or more contraventions of the *Competition Act* were arbitrable: at paras. 101–112. This determination is also not under appeal.

[31] It is the second of the three issues that forms the subject matter of the appeal. The appellants alleged that the arbitration agreement is void on grounds that it is both unconscionable and contrary to public policy. In advancing these submissions, the appellants relied primarily on the Supreme Court of Canada's decision in *Uber*, and this Court's decision in *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 [*Pearce*]. The latter case did not involve an arbitration agreement. Rather, *Pearce* focused on the enforceability of a stand-alone class action waiver. (See paras. 82–94 of *Amazon*.)

[32] After reviewing *Uber* and *Pearce*, the judge made a number of findings. The most salient of the findings are set out here:

- the judge was not satisfied there is inequality of bargaining power between the parties "justifying a finding that the arbitration clause is unconscionable": at para. 59;
- there is no evidence that use of the video games or the ability to purchase "loot boxes" within the games "are important elements of everyday life which make the [appellants] particularly dependent or vulnerable in terms of their need to access the game platforms": at para. 60;
- there is "no evidence of a special relationship of trust …": at para. 62;
- the "costs of arbitration and arbitration procedure are sufficiently described" in the arbitration agreement and there is no indication the appellants were unable to understand the arbitration agreement: at para. 63;
- the arbitration agreement is not an improvident bargain: at para. 64;

- the up-front filing fee for commencing arbitration is “relatively modest”: at para. 72;
- the legal costs of advancing a claim through arbitration or in small claims court “would almost certainly exceed the amount of the [appellants’] claims …”: at para. 73;
- however, the “costs disadvantage is mitigated” by provisions that provide for reimbursement of filing and arbitrator fees, and legal costs, where the consumer prevails: at para. 74;
- the arbitration agreement also provides that if a claim does not succeed, the respondents will not seek their legal fees unless the claim is found by an arbitrator to be frivolous or improperly motivated: at para. 74;
- there is no evidence that reimbursement of filing and arbitrator fees would not be made in a timely way: at para. 75;
- an arbitration can be conducted in writing and the arbitrator has explicit jurisdiction to order “further discovery”, even for claims under $10,000: at para. 76;
- the arbitrator is required under the applicable rules to make decisions in a timely manner: at para. 76;
- the agreement identifies a website where a claimant can access those rules: at para. 78;
- customers may “opt-out of the Arbitration Agreement within 30 days of agreeing to the Terms of Service when they download a game – which provides the customer with some time to decide whether to advance a claim in superior court …”: at para. 79;
- if they do not opt-out, they still have a “choice to proceed with a small claims court action” rather than arbitration: at para. 79;
- the arbitration agreement “does not present an insurmountable economic or procedural barrier to the [appellants]”: at para. 89; and,
- despite “the relative cost of proceeding to arbitration or small claims court on an individual basis compared to the amount of the claims at issue, accessible arbitration remains a viable method of resolving the [appellants’] individual disputes”: at para. 90.

[33] With these findings, the judge concluded that the arbitration agreement is neither unconscionable nor contrary to public policy: at para. 113.

[34] Consequently, he stayed the proposed class action for all claims other than those advanced under British Columbia's *Consumer Protection Act.*

Issues on Appeal

[35] The appellants allege two errors on appeal. They say the judge erred in failing to find: (1) that the arbitration agreement is unconscionable; and (2) that it is contrary to public policy.

[36] The appellants ask that the stay be set aside and that all claims in the proposed class action be allowed to continue in the British Columbia Supreme Court.

Standard of Review

[37] Similar to *Amazon*, the parties disagree on the standard of review that governs the unconscionability and public policy assessments.

[38] The appellants say a correctness standard applies. The respondents argue that the appellants' grounds of appeal raise questions of mixed fact and law. As such, a palpable and overriding error standard applies.

[39] For the reasons provided in *Amazon*, I agree with the respondents. Unconscionability and public policy analyses are inherently contextual and informed by the factual matrix surrounding entry into the arbitration agreement and the nature of the parties' contractual relationship, including their level of sophistication and respective bargaining power. See paras. 51–60, 73, 81, 129 of *Amazon.* A deferential standard of review applies.

Discussion

[40] The legal principles that govern an unconscionability and public policy assessment in the arbitration context were discussed at length in *Amazon.* It is not necessary to repeat them all here. See paras. 57–59, 66–94, 129–130 of that decision.

[41] For present purposes, it will suffice to note that to meet the test for unconscionability, the appellants bore the burden of establishing inequality of bargaining power and a resultant improvident bargain: *Uber* at para. 79. To justify judicial intervention on grounds of public policy, the appellants bore the burden of establishing that the arbitration agreement's limitation on "legally determined dispute resolution imposes undue hardship": *Uber* at para. 131. A contract that "denies one party the right to enforce its terms [because of undue hardship] undermines both the rule of law and commercial certainty": *Uber* at para. 112.

[42] As directed by *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 [*Peace River*], the appellants' burdens were to be measured on a balance of probabilities: at para. 88. In *Peace River*, the Court emphasized that where the "invalidity or unenforceability of [an] arbitration agreement is not clear (but merely arguable)", disputes that fall subject to the agreement should go before the arbitrator in accordance with the terms of the contract: at para. 89, emphasis added. (See the discussion at paras. 61–63 of *Amazon*.)

[43] *Peace River* was decided in the context of the *Arbitration Act*. However, there is no principled reason for taking a different approach in the case before us. Both the *Arbitration Act* and the *International Commercial Arbitration Act* give effect to the long-standing principle that a court should generally refer disputes over the applicability and validity of an arbitration agreement to the arbitrator for consideration:

> [41] … it is well established in Canada that a challenge to an arbitrator's jurisdiction should generally be decided at first instance by the arbitrator … This reflects the presumption that arbitrators have fact-finding expertise comparable to that of courts, and that the parties intended an arbitrator to determine the validity and scope of their agreement …
>
> [*Peace River*, internal references omitted.]

See also *Isagenix* at paras. 21–22.

[44] The appellants argue that a proper application of the unconscionability and public policy doctrines invariably leads to the conclusion that the arbitration agreement embedded in the Terms of Service is void and unenforceable, and

therefore allows for judicial intervention as an exception to the competence-competence principle. They say this is especially so given that the agreement is housed in a standard form contract and applied in the consumer context.

[45] The respondents disagree and say this arbitration agreement is qualitatively different from the one declared void in *Uber*, and there is no proper appellate basis on which to interfere with the decision to grant a stay.

[46] In resolving this question, I will set out the specifics of the parties' positions and then discuss both grounds of appeal together.

Appellants' Position

[47] The appellants submit the judge erred in his assessment of equality of bargaining power. Among other things, he gave "undue weight to the lack of necessity or hardship inducing the [appellants] to enter the contract, to the exclusion of the non-necessity factors informing the inequality of bargaining power analysis": appellants' factum at para. 57. He should have paid greater attention to the fact that this was a contract of adhesion involving an unsophisticated consumer, with no room to negotiate the terms of the contract, and, on the other side, a sophisticated corporate party.

[48] The appellants also allege the judge erred in finding that the arbitration agreement did not confer an undue advantage on the respondents. They contend that this finding is irreconcilable with a factual conclusion reached by him that it is unlikely the appellants' claim will be resolved at arbitration because of economic impediments, including the costs associated with legal representation, discoveries, and the need for expert evidence: appellants' factum at para. 65. Mr. Stasch filed an affidavit in which he deposes that he cannot afford to hire a lawyer to pursue his individual claim, including through arbitration. Ms. Petty's affidavit is to the same effect.

[49] The arbitration agreement is said to constitute an improvident bargain because it frustrates access to justice, including the availability of a class action. The

appellants allege the judge failed to appreciate that the agreement has a “one-sided purpose”, namely, “to deny consumers access to effective means of advancing their claims while preserving access to the courts for the [respondents] where it suits them”: appellants’ factum at para. 75.

[50] As to whether the arbitration agreement offends public policy, in addition to their inequality of bargaining concerns, the appellants say the agreement should not be enforced because it deprives them and prospective class members of effective access to justice. The costs of arbitration are disproportionate to the value of the claims likely to be advanced. The claims are likely to be “significantly eclipsed by the up-front costs for expert evidence on Canadian legal issues and legal representation to advance [a] complex and novel claim”: appellants’ factum at para. 82. Furthermore, the non-availability of a class action means that if all “affected class members were to litigate their issues separately, [it] would overwhelm small claims courts with filings, waste judicial resources on duplicative hearings and fact-finding procedures, and risk the potential for inconsistent rulings”: at para. 86.

Respondents’ Position

[51] The respondents’ say the judge carefully considered the issues raised by the appellants and applied the proper legal framework in assessing validity. He viewed the arbitration agreement and its impact on the availability of effective dispute resolution differently from the appellants. This does not mean he must have committed reversible error. The respondents say the judge’s perspective was open to him on the face of the agreement and in the context of the record. The appellants did not meet their onus of establishing that the arbitration agreement is void, even with the inclusion of a class action waiver.

[52] The respondents argue that the position advanced by the appellants is, effectively, that “all standard form arbitration agreements entered into between corporations and consumers — [are] unenforceable because of [the] vulnerability of the consumer …”: respondents’ factum at para. 35. However, the Supreme Court of Canada has not directed that such is the case and the appellants’ position fails to

account for the individualized and contextual nature of the unconscionability and public policy analyses.

[53] The respondents contend that unlike *Uber*, the arbitration agreement in this case provides for a fair, accessible and low cost (sometimes no-cost) process of dispute resolution. For example, both appellants would be entitled to have their arbitration costs reimbursed. Neither of them has deposed to significant expenditures from an arbitration and its attendant processes. The arbitration process is easy to discern from the face of the agreement. There is no substantial upfront fee. Nor is there a requirement that the consumer travel to another jurisdiction for a hearing. In *Uber*, these latter features of the case carried significant impact and were found to functionally bar claimants from pursuing arbitration. In the practical result, the arbitration agreement in *Uber* left claimants with no means by which to address their disputes.

[54] It is the respondents' position that the judge's approach to bargaining power was appropriate. Notwithstanding the presence of a standard form contract, the judge was entitled to consider the nature of the relationship and the transactions between the parties, as well as the lack of the appellants' dependence on the services provided by the respondents. The parties' contract does not arise in the context of a dependent employment relationship like in *Uber*. Nor are the appellants vulnerable in the same way as the claimants in *Pearce.* The Terms of Service allow for the free use of video games; the consumer has a choice about whether to purchase in-game items; there is no trust relationship; and they can opt-out of the arbitration agreement altogether, with notice. There are also "plenty of mobile game options that the appellants could play": respondents' factum at para. 43. Objectively, this is not a situation of dependency.

Analysis

[55] In the specific context of this case, a non-dependent consumer relationship the purpose of which is to facilitate access to on-line video games, the appellants

have not persuaded me that the judge erred in finding the arbitration agreement neither unconscionable nor contrary to public policy.

[56] The appellants bore the onus of establishing a "clear" case of invalidity under s. 8(2) of the *International Commercial Arbitration Act* by showing, on a balance of probabilities, that the arbitration agreement is unconscionable or contrary to public policy: *Peace River* at paras. 79, 88–89, 172. See also *Sum Trade Corp. v. Agricom International Inc.*, 2018 BCCA 379 at paras. 36–37. The judge concluded they did not meet this burden. I am satisfied this conclusion was open to him. And, it is a conclusion that attracts deference.

[57] I agree with the respondents that the arbitration agreement, here, is profoundly different from the one in *Uber.* The appellants are also substantially less vulnerable than the claimants in *Pearce.* Vulnerability played a significant role in the analyses and outcomes of both *Uber* and *Pearce*; see paras. 93 and 97 of *Uber* and paras. 226, 228 and 236 of *Pearce.*

[58] I accept there is inequality of bargaining power between the parties. The arbitration agreement finds form in a contract of adhesion. The appellants had no input into the Terms of Service and they were not in a position to negotiate the general parameters of their contractual relationship with the respondents. According to the notice of civil claim (April 2021), the impugned video games are developed and distributed by the respondents, who are sophisticated corporate entities that operate internationally and within the context of a "multi-billion-dollar global industry".

[59] However, as is made clear by the majority in *Uber*, the fact that an arbitration agreement is housed within a standard form contract does not, by itself, establish inequality of bargaining power, or, more importantly, render the agreement unconscionable:

> [88] … Standard form contracts are in many instances both necessary and useful. Sophisticated commercial parties, for example, may be familiar with contracts of adhesion commonly used within an industry. Sufficient explanations or advice may offset uncertainty about the terms of a standard

> form agreement. Some standard form contracts may clearly and effectively communicate the meaning of clauses with unusual or onerous effects …
>
> [Internal references omitted.]

[60] Indeed, in both *Seidel* and *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 [*Wellman*], the Supreme Court of Canada gave effect to mandatory mediation and/or arbitration clauses that were contained in standard form contracts involving mobile phone services. In *Wellman*, Justice Moldaver, writing for the majority, specifically noted that "arbitration clauses, even those contained in adhesion contracts … will generally be enforced 'absent legislative language to the contrary'": at para. 46, citing *Seidel* at paras. 2 and 42, emphasis added.

[61] I do not interpret these decisions as rendering the fact of a standard form contract irrelevant to the unconscionability and public policy analyses. Indeed, in *Uber*, the majority recognized that unconscionability "has a meaningful role to play in examining the conditions behind consent to contracts of adhesion, as it does with any contract": at para. 89. See also paras. 87–88 and 90–91 of *Uber.* However, I agree with the respondents that the fact an arbitration agreement is contained in a contract of adhesion is not determinative.

[62] Moreover, a finding of unconscionability requires both inequality of bargaining power and a resultant improvident bargain: *Uber* at para. 79. The public policy analysis is also multi-factorial and inequality of bargaining power is but one of the relevant considerations: *Uber* at paras. 131, 134.

[63] In addition, both the unconscionability and public policy analyses are contextually informed. Consequently, as explained at paras. 129–130 of *Amazon*, there will be cases in which substantial differences in bargaining power may weigh in favour of a finding of unconscionability, or a conclusion that a particular arbitration agreement is contrary to public policy. In others cases, inequality of bargaining power may have lesser impact, depending on a claimant's vulnerability at the time the contract was formed, the nature of the relationship between the parties, the hardship produced by the arbitration agreement, and a balancing of all relevant

circumstances. As explained in *Uber*, “what matters is the presence of a bargaining context “where the law’s normal assumptions about free bargaining either no longer hold substantially true or are incapable of being fairly applied””: at para. 72, citing Rick Bigwood, “Antipodean Reflections on the Canadian Unconscionability Doctrine” (2005), 84 Can. Bar. Rev. 171 at 185.

[64] The judge was alive to the appellants’ concerns about the use of a standard form contract, inequality of bargaining power, and the important role an assessment of bargaining power plays in the unconscionability and public policy analyses: at paras. 43–47, 50, 54, 55–63. Contrary to the appellants’ suggestion, I do not read the reasons for judgment as reflecting a determination, by him, that there is no inequality of bargaining power between the parties. Rather, he was not satisfied that the appellants “made out” (or established) an “inequality of bargaining power [that justified] a finding that the arbitration clause is unconscionable”: at para. 59, emphasis added. In other words, any inequality of bargaining power that does exist is not of such a degree that it renders the arbitration agreement unconscionable.

[65] In reaching this conclusion, the judge considered the absence of evidence showing: (1) that the appellants are “particularly dependant or vulnerable in terms of their need to access the game platforms” (at para. 60); or (2) that a “special relationship of trust” exists between the parties (at para. 62). There was also no evidence that the appellants were unable to understand the arbitration agreement when they entered into it. The “ability to choose between proceeding in small claims court and arbitrating, the costs of arbitration and arbitration procedure are sufficiently described” in the agreement: at para. 63. The arbitration agreement identifies a website from which a consumer can obtain the procedural rules: at para. 78.

[66] These factors properly informed the judge’s assessment of bargaining power. The majority in *Uber* explains that differences in “wealth, knowledge, or experience may be relevant” to the analysis; however, an assessment of bargaining power “encompasses more than just those attributes”: at para. 67. It allows for consideration of personal weaknesses and circumstantial vulnerabilities that

realistically arise from the situation at hand: at para. 67, citing from Mitchell McInnes, *The Canadian Law of Unjust Enrichment and Restitution*, Markham, On.: Lexis Nexis, 2014 at 524–525.

[67] Circumstantial vulnerability includes scenarios in which the "weaker party" is "so dependent on the stronger that serious consequences would flow from not agreeing to a contract": *Uber* at para. 69. Circumstantial vulnerability may also arise "where, as a practical matter, only one party could understand and appreciate the full import of the contractual terms", because of the "presence of dense or difficult to understand terms in the parties' agreement": *Uber* at para. 71.

[68] Justice Brown's concurring reasons in *Uber* also recognize inequality of bargaining power as relevant to the public policy analysis. And, consistent with the majority's approach to unconscionability, the issue is contextually assessed: at paras. 134, 136.

[69] In my view, the judge's bargaining power analysis did not stray beyond the allowable parameters or take irrelevant factors into account. I do not see an error in principle that affected the analysis in a material way. Nor do I see a palpably wrong determination. Accordingly, I would not accede to this aspect of the appeal.

[70] The appellants also take issue with the judge's finding that the arbitration agreement does not constitute an improvident bargain: at para. 64.

[71] The judge acknowledged that the costs of advancing a claim through arbitration or in small claims court would "almost certainly exceed the amount" of the appellants' claims: at para. 73. However, he found that this disadvantage was "mitigated" by the parts of the arbitration agreement that provide for reimbursement of filing and arbitrator costs, and a claimant's legal costs if they succeed: at para. 74.

[72] The arbitration agreement also provides that the respondents will not seek their legal costs against a consumer if the latter does not prevail, unless the claim is found to be frivolous or improperly motivated: at para. 74. On the face of record, there was no reason for the judge to believe that reimbursement or a decision by the

arbitrator would not be made in a timely way: at paras. 75–76. For claims under CAD $10,000, an arbitration will generally be conducted in writing: at para. 76. Arbitration can be pursued in a claimant's home jurisdiction: at para. 89. The arbitrator can allow claimants to seek "further discovery" to assist in advancing their dispute: at para. 76.

[73] Contrary to the appellants' suggestion, the judge did not find it unlikely that the appellants' claims will be resolved at arbitration because of economic impediments. To the contrary, he found that the arbitration agreement "does not present an insurmountable economic or procedural barrier to the [appellants]": at para. 89, emphasis added.

[74] In *Uber*, the majority held that improvidence "is measured at the time the contract is formed": at para. 74. In this case, at the time the Terms of Service were agreed to, the appellants could have elected to opt-out of the arbitration agreement if they so desired, allowing them to avoid its limitations all together and preserve the ability to advance a claim in a superior court: at para. 79. Even with opting-in, they maintained the entitlement to bring a court-based action in small claims court: at para. 79.

[75] Improvidence is considered in the round: *Uber* at para. 75. The assessment considers the circumstances at the time the contract is formed, including the "market price, the commercial setting or the positions of the parties": *Uber* at para. 75. Where one of the parties to an arbitration agreement is in "desperate circumstances", the court must carefully examine whether the "stronger party has been unduly enriched": *Uber* at para. 76. Where the "weaker party did not understand or appreciate the meaning and significance of important contractual terms", the improvidence inquiry must consider "whether they have been unduly disadvantaged by the terms they did not understand or appreciate": *Uber* at para. 77. Because of the different ways in which improvidence can manifest itself, the assessment:

> … cannot be reduced to an exact science. When judges apply equitable concepts, they are trusted to "mete out situationally and doctrinally appropriate justice … Fairness, the foundational premise and goal of equity,

> is inherently contextual, not easily framed by formulae or enhanced by adjectives, and necessarily dependent on the circumstances.
>
> [*Uber* at para. 78, internal reference omitted.]

[76] As with the judge's approach to bargaining power, I see nothing in his reasons that is inconsistent with *Uber's* guidance on improvidence, or that suggests he was palpably wrong in concluding the appellants did not establish a resultant improvident bargain. He was alive to the bases on which the appellants alleged improvidence: at para. 65. He correctly instructed himself at paras. 69–70 of his reasons that an improvident bargain is a bargain that "unduly advantages the stronger party or unduly disadvantages the more vulnerable": *Uber* at para. 74, emphasis added. He was mindful of the comments of this Court in *Pearce*, specific to the potential unfairness associated with the use of class action waivers: at paras. 80–82. At the same time, he appropriately distinguished *Pearce* as a case that was not decided in the context of an arbitration clause, which raises countervailing considerations, including a legislative framework in support of enforcement: at para. 81.

[77] The Supreme Court of Canada's finding of unconscionability in *Uber* was grounded in: (1) a "significant gulf in sophistication" between the parties; (2) the arbitration agreement provided no information about the costs of mediation and arbitration, or the applicable rules; (3) arbitration required an up-front administrative fee of USD $14,500, which was clearly out of reach for the weaker party; (4) the agreement would have left claimants with the impression that they had to travel to the Netherlands at their own expense to pursue arbitration; (5) the agreement effectively made the "substantive rights given by the contract unenforceable"; and (6) no "reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it": at paras. 93–95.

[78] The case before us is not of the same ilk, even with the inclusion of a class action waiver. Specific to this latter point, see paras. 158–176 of *Amazon.* The principles discussed there carry equal force in this appeal.

[79] On balance, I am satisfied that given the lack of the appellants' dependency on the services provided by the respondents, the nature of the transactions in issue, and, importantly, the specific features of a tailored arbitration agreement, with reimbursement, the ability to opt-out, and, in any event, the continued availability of a small claims action, it was open to the judge to conclude that the arbitration agreement does not represent an "unfair [bargain] resulting from unfair bargaining": *Uber* at para. 82. It is not "so lop-sided as to be improvident": *Uber* at para. 91. Accordingly, I would not accede to this aspect of the appeal.

[80] Finally, the appellants say the arbitration agreement is contrary to public policy. There is considerable overlap between this contention and their unconscionability argument. In advancing their public policy submission, the appellants highlight many of the same features of the agreement. They allege that in their cumulative effect, these features deprive the appellants and prospective class members of effective access to justice.

[81] The judge disagreed. At para. 85 of his reasons, he correctly instructed himself on the factors relevant to a public policy analysis, as delineated in *Uber.* Then, after considering the Terms of Service "as a whole" (at para. 87), he found that the arbitration agreement does not prevent access to justice (at para. 88). It does "not present an insurmountable economic or procedural barrier" to the appellants' resolving their disputes: at para. 89.

[82] The arbitration agreement provides the ability to opt-out of its limitations. In this sense, it has greater flexibility than the agreement upheld in *Amazon*. Even if consumers choose not to opt-out, the judge found that despite "the relative cost of proceeding to arbitration or small claims court on an individual basis compared to the amount of the claims at issue, accessible arbitration remains a viable method of resolving the [appellants'] individual disputes": at para. 90.

[83] The judge accepted that arbitration or a small claims action is not the appellants' "preferred method of resolving [their] disputes"; however, he was of the view that, objectively, "accessible arbitration" was available to them and presented a

"viable method": at para. 90. From his perspective, the fact that they cannot access a class proceeding under the Terms of Service "does not make the Arbitration Agreement unfair or unduly burdensome": at para. 91.

[84] As with the other alleged errors, I am satisfied the conclusions reached by the judge in his public policy analysis were open to him. I cannot say in the context of this matrix that the arbitration agreement is palpably "an agreement *not to arbitrate* or to preclude parties from resorting to any form of dispute resolution according to law": *Uber* at para. 137, italics in the original. If such was the case, judicial intervention under s. 8(2) of the *International Commercial Arbitration Act* would be warranted.

[85] In *Uber*, Justice Brown noted it "will be the rare arbitration agreement that imposes undue hardship and acts as an effective bar to adjudication": at para. 130, emphasis added. The appellants have not persuaded me that this is one of those cases and that the judge committed palpable and overriding error in finding to the contrary.

Disposition

[86] For all of these reasons, I would decline to interfere with the stay of proceedings and dismiss the appeal.

[87] Doing so, of course, does not impact the judge's conclusion that the *Consumer Protection Act* claims may continue in the British Columbia Supreme Court.

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Madam Justice Saunders"

I AGREE:

"The Honourable Mr. Justice Fitch"