COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bollhorn v. Lakehouse Custom Homes Ltd.,* 2024 BCCA 192

Date: 20240516
Docket: CA49300

Between:

Robert Tyler Bollhorn

Appellant
(Claimant)

And

Lakehouse Custom Homes Ltd.

Respondent
(Respondent)

Before: The Honourable Madam Justice Newbury
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

On appeal from: An order of an arbitrator, dated July 30, 2023 (*Bollhorn v. Lakehouse Custom Homes Ltd.*).

Counsel for the Appellant:	D.J. Barker K. Iacono
Counsel for the Respondent:	M.E.A. Danielson
Counsel for the Proposed Intervener, VanIAC Foundation:	R.J.C. Deane S. McEachern
Place and Date of Hearing:	Vancouver, British Columbia April 23, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 16, 2024

Written Reasons by:
The Honourable Madam Justice Newbury

Concurred in by:
The Honourable Mr. Justice Willcock
The Honourable Madam Justice Fisher

Summary:

Application for leave to appeal an order of an arbitrator referred to a division by a justice in Chambers (2023 BCCA 444). Also at issue is an application by the Vancouver International Arbitration Centre to intervene in the leave application — an application apparently now permitted under s. 30(f) of Court of Appeal Act. The Centre did not intend to apply to intervene in the appeal itself, should leave to appeal be granted.

Appellant buyer contracted with respondent home builder for a custom home. Unhappy circumstances during construction led the appellant to initiate a civil claim in Supreme Court. The claim was decided summarily, the Court granting an order for specific performance of the contract at the agreed-upon price, including a 6% markup on change orders. At final 'walk-through' a few days before closing date, appellant noted "deficiencies" and invoked the arbitration clause in the contract to resolve. Arbitrator issued an award indicating that the subject matter of the arbitration was res judicata, having been decided by the summary trial judge. Appellant seeks leave to appeal the award on a question of law, namely whether the arbitrator erred in applying res judicata.

Held: Leave to intervene on behalf of the Centre granted, leave to appeal dismissed. Appellant had agreed to an arbitration clause that incorporated the Centre's Rules, which included an expedited procedure for claims under $250,000. That procedure included a term that no appeal from the arbitrator's award on a question of law would be permitted. While CA was satisfied the arbitrator's decision was an "award" and that the issue was one of law that would be eligible for appeal under s. 59 of Arbitration Act, the expedited Rules of the Centre barred appellant from bringing the proposed appeal.

Reasons for Judgment of the Honourable Madam Justice Newbury:

[1] This matter comes to us in unusual circumstances. On November 30, 2023, Madam Justice Saunders, sitting in chambers, had before her an application from the plaintiff, Mr. Bollhorn, for leave to appeal a decision of an arbitrator. The arbitrator had been appointed to resolve a specific dispute concerning the identification, pricing and rectification of "deficiencies" under a contract that was itself unusual given that it was a "hybrid" of a contract for the construction of a house by the defendant Lakehouse Custom Homes Ltd. ("Lakehouse") and the sale of the property by Lakehouse to Mr. Bollhorn on completion. The terms of the agreement (referred to by counsel as the "CPS") represented a mélange of standard conditions taken from a form prepared by the BC Real Estate Association and the Canadian

Bar Association, together with various additional terms and appendices relating to the "custom" construction.

[2] Unhappy differences arose between the parties in the course of construction of the house, especially regarding the large number of change orders made by Mr. Bollhorn and the markup added by Lakehouse to the costs associated therewith. The original closing date for the transfer of the property, September 15, 2021, was delayed repeatedly. Finally, in February 2022, Lakehouse took the position that the CPS had been terminated. The house was estimated to be 90% complete at this point.

[3] Mr. Bollhorn immediately initiated a civil claim in the Supreme Court of British Columbia and sought a summary trial. His notice of application under R. 9-7 sought the following relief:

1. A declaration that the plaintiff is entitled to an order for specific performance of the Contract of Purchase and Sale dated February 18, 2021 and accepted by the defendant on February 23, 2021 ("the Contract").
2. An order that the defendant specifically perform the Contract by conveying and transferring the Property to the plaintiff upon payment by the plaintiff to the defendant of the purchase price on the terms set out in the Contract at a date to be determined by this Court;
3. An order that the defendant's claim or assertion, based on the Contract, of a 6% markup on change orders be dismissed;
4 Further, or in the alternative, a declaration that the change order and/or modification terms of the Contract be severed from the Contract along with the issue as to whether the defendant is entitled to a 6% markup on change orders and an order that the defendant specifically perform the Contract by conveying and transferring the Property to the plaintiff upon payment by the plaintiff to the defendant of the purchase price on the terms set out in the Contract with the referenced construction and modification terms of the Contract severed;
5. Further, or in the alternative an order that the plaintiff pay into trust or into Court the full amount of the 6% markup at issue, namely $15,161.16, pending resolution of the issue as to the defendant's entitlement to that compensation; and
6. Costs to the Plaintiff.

[4] Mr. Justice Stephens released his reasons on December 5, 2022. (See 2022 BCSC 2120.) He ordered specific performance of the contract at a purchase price that was to include a markup of six percent on all change orders made by the purchaser. The purchaser was to set a completion date within 90 days, giving Lakehouse at least four weeks' prior notice. The Court's *order* did not mention the matter of so-called "downgrades" or "deficiencies", but the judge stated in his *reasons* that:

> ... Since the plaintiff has failed to provide sufficient material facts including any associated financial amounts relating to any alleged modification "downgrades" I declined to make any adjustment for these items. Relatedly, the plaintiff contended it is entitled to a credit for lighting but has failed to prove this on the evidence before me, and I declined to make any adjustment to the purchase price on this basis….
>
> In the result, I find that the total purchase price for this transaction shall include the amount on signed change orders, including a 6% markup and taxes. I dismiss the related relief sought by the plaintiff in para. 3 of the notice of application. It follows that I further decline to sever the change order and modification terms of the CPS as sought by the plaintiff at para. 4 of the notice of application. [At paras. 91,93.]

The parties agreed on February 16, 2023 as the completion date for the property transfer.

[5] Under Article 3 of the CPS, the buyer was to conduct a "walk-through inspection" no later than seven days prior to the completion date and to provide Lakehouse immediately with a list of items (the "deficiencies") to be remedied by the seller. The list was also to contain a "mutually agreed upon value" for the remediation of the deficiencies and the seller was to correct them using work and materials of a quality "equal to or better than that of the surrounding construction." If the corrections were not made within two days prior to the completion date, Mr. Bollhorn's "conveyancer" was to hold back from the sale proceeds the amount specified for any uncorrected item and to place the holdback in trust. The funds would be retained in trust until the deficiencies were corrected by the seller, which was to occur not later than a number of days after the completion date. (Unfortunately, that number was not specified.) If the deficiencies were not corrected

by the unspecified date, the conveyancer was authorized to release the balance of the holdback to Mr. Bollhorn, who could "correct the deficiencies himself."

[6] Then followed the arbitration clause that lies at the heart of this proposed appeal. It stated:

> Any dispute concerning the identification and pricing of deficiencies, the rectification of the deficiencies, and release of the holdback will be settled by arbitration under the British Columbia Commercial Arbitration Act at the expense of the Seller.

This clause qualified the CPS as an "arbitration agreement" for purposes of the *Arbitration Act*, S.B.C. 2020, c. 2. Under s. 5 of the Act, any subsequent agreement between the parties as to how a dispute is to be arbitrated, and any arbitration rules incorporated by reference, become part of the arbitration agreement. Although the materials before us do not demonstrate exactly how the Rules and Expedited Procedures of the Vancouver International Arbitration Centre (to be discussed below) were incorporated in this instance, it appears both parties were content to proceed on the basis that they did become part of the arbitration agreement. I will therefore do likewise.

[7] Returning to the walk-through inspection of the house, according to Mr. Bollhorn's witness statement, it was carried out on February 6, 2023 with representatives of both parties present. Mr. Bollhorn then created an "Initial Deficiency Report". In addition to a series of minor items needing attention, it noted that various plumbing fixtures, light fixtures, and toilets that had been the subject of change orders had not been supplied *in accordance with the purchaser's specifications.* Essentially, the items supplied by Lakehouse were different versions of what had been ordered and were thus "deficient" as far as the purchaser was concerned. Certain landscaping also remained to be done.

[8] A few days later, counsel for Mr. Bollhorn received a letter from counsel for Lakehouse which stated in part:

> The items contained under the heading "Change Order Deficiencies" are not deficiencies. Pursuant to the Order made December 6, 2022, the Buyer is not

> entitled to any adjustment to the purchase price for these items. We refer you to our letter dated January 24, 2023 on this issue. We note that the spreadsheet enclosed with the Buyer's List estimates the cost of correcting the "Change Order Deficiencies" as $73,068.13. The Seller rejects any claim by the Buyer for compensation for these items which cannot be subject to any deficiency holdback. [Emphasis added.]

[9] Again according to Mr. Bollhorn's witness statement, the second walk-through was conducted on February 14, 2023, following which he prepared another report containing an itemized summary of the estimated costs of remedying the remaining deficiencies on his own. These came to a total of $96,350.19, plus the cost of undone landscaping, estimated to be $35,000. Various emails passed between the parties, but it appears no agreement was reached on any of the items.

[10] I note that Mr. Nestman, the principal of Lakehouse, acknowledged in his witness statement that "certain items were not installed in accordance with change orders 6, 19, 24 and 25." He says that at the time these were being discussed, "it was not clear to me whether the court would make an order for specific performance of the Property and I did not wish to be stuck with a House with some features that I thought were unusual and would not increase the market value of the House if Lakehouse were to sell it to a third party." He continued:

> I have built somewhere between 15 and 20 spec homes since I incorporated Lakehouse. In my experience, people are willing to pay more for a house with quality fixtures throughout, but I have never had anyone suggest to me that they would be willing to pay more for a house with, for example, an expensive toilet or pendant lights. I considered the items Lakehouse installed to have a broader appeal to potential buyers and potentially increasing the market value of the Property.
>
> Because there was no signed change order or amendment to the CPS dealing with the deletion of landscaping, I considered that I was at liberty to landscape the Property as required. As a result, Lakehouse performed the landscaping work in relation to the Property at a cost [of] more than $35,000.

[11] The transfer of the property completed on February 16, 2023 when Mr. Bollhorn paid Lakehouse $2,138,205.43, said to be the sum of the purchase

price, plus all signed change orders marked up by six percent. No holdback was made in respect of the deficiency claims. Mr. Bollhorn explained that:

> Given the respondent's objection to the deficiency list prepared by the appellant, and the appellant's desire to complete the sale of the house, no monies were held back for deficiencies and performance of the deficiency term of the CPS proceeded to arbitration as mandated by the CPS. The sale completed on February 16, 2023.

The Arbitration Proceeding

[12] On March 15, 2023, however, Mr. Bollhorn invoked the arbitration clause described above. His notice to arbitrate, filed with the Vancouver International Arbitration Centre ("VanIAC" or the "Centre"), sought a determination of the deficiencies identified in the walk-through and the quantification of the cost of remedying them, plus certain terms concerning payment. Lakehouse opposed the arbitration on the primary basis that the subject matter thereof had already been determined by the summary trial judge and was therefore *res judicata*. In its submission, issue estoppel and cause of action estoppel clearly applied because Mr. Bollhorn "could have, and did in fact, seek an adjustment in the Supreme Court to the purchase price on the basis of the Alleged Downgrades"; the Court had issued the judgment, which was final, holding that Mr. Bollhorn was not entitled to an adjustment; and the parties to the court proceeding were the same as the parties to the arbitration.

[13] Mr. Bollhorn on the other hand argued that his right to claim compensation for the deficiencies had not been decided in the summary trial proceeding; that the judge's decision did not relieve Lakehouse of its obligation to remedy deficiencies; and that they had been an "ancillary matter" rather than an integral part of the summary trial proceeding. In the alternative, if the tribunal took the view that the requirements of *res judicata* had been met, Mr. Bollhorn contended that the arbitrator had a residual discretion not to apply *res judicata* "as to do so would be 'significantly unjust'", and that he had not had a 'fair opportunity' to address those issues during the trial.

[14] On July 30, 2023, the arbitrator issued his decision, entitled “Award”. The first issue to be decided, he wrote, was “whether the claimant’s claims are barred by the doctrines of *res judicata*.” (At para. 6.) The parties agreed that in considering this question, he was required to consider both issue estoppel and cause of action estoppel and that the traditional ‘tests’ for both forms of estoppel were as set out in *Erschbamer v. Wallster* 2013 BCCA 76. He summarized them as follows:

> For there to be issue estoppel the following is required:
>
> (a) that the same question has been decided;
>
> (b) that the judicial decision which is said to create the estoppel was final; and,
>
> (c) that the parties to the judicial decision or their privies were the same persons as the proceedings in which the estoppel is raised.
>
> For there to be cause of action estoppel the following is required:
>
> (a) there must be a final decision of a court of competent jurisdiction in the prior action;
>
> (b) the parties to the subsequent litigation must have been parties to or in privy with the parties to the prior action;
>
> (c) the cause of action in the prior action must not be separate and distinct; and,
>
> (d) the basis of the cause of action and the subsequent action was argued or could have been argued in the prior action if the parties had exercised reasonable diligence. [At paras. 8–9; emphasis added.]

[15] The arbitrator agreed with Lakehouse’s position on *res judicata*. In his view, the question of Mr. Bollhorn’s entitlement to “compensation for the deficiencies” was “*the very question*” that had been determined by the summary trial judge. (Citing paras. 91 and 93 of Stephens J.’s reasons.) The arbitrator rejected the notion that the evidence tendered at trial by counsel for Mr. Bollhorn concerning the deficiencies had been tendered only to demonstrate that the parties would encounter further difficulties following the transfer of the property in accordance with any order for specific performance. In the arbitrator’s analysis, this argument was contrary to the notice of civil claim and to “the claimant actually seeking an adjustment for

deficiencies at the summary trial hearing"; and contrary to the Court's holding that he had failed to prove any amounts related to them. The arbitrator continued:

> The summary trial application was brought regarding all the claims put forward by the claimant in his notice of civil claim, which included a claim for damages against the respondent for failing to complete the construction of the home, in accordance with the contract. The summary trial application was not brought only in respect of the claim for specific performance. In my view, it therefore cannot be said that the claim for downgrades was an "ancillary matter".
>
> I therefore conclude that this proceeding is barred by the doctrine of *res judicata*. [At paras. 16–17.]

(I note that Mr. Bollhorn's notice of application for summary trial had *not* sought any order concerning the deficiencies, which of course were not known until just before completion of the conveyance. Thus they could not have been argued in the Supreme Court action, where the order for specific performance was the plaintiff's primary goal. The application for summary judgment did refer to "change order and /or modification terms of the Contract", on which Lakehouse's markup was the subject of contention.)

[16] The arbitrator also declined to exercise any residual discretion he might have in order to avoid a miscarriage of justice. He found that none of the "special circumstances" — such as fraud, misconduct, or the discovery of fresh evidence that could not have been adduced at trial — set forth in s. 58 of the *Arbitration Act* was present in this case. The arbitration proceeding was dismissed.

The First Leave Application

[17] It was this arbitral decision that led Mr. Bollhorn to seek leave to appeal what he characterized as a question of law, namely whether the arbitrator had erred in applying the doctrine of *res judicata*. The application came before Madam Justice Saunders in chambers on September 28, 2023. In her reasons (indexed as 2023 BCCA 444), she quoted the following sections of the *Arbitration Act*:

> 4 In matters governed by this Act,
>
> (a) a court must not intervene unless so provided in this Act, and

> (b) the following must not be questioned, reviewed or restrained by a proceeding under the Judicial Review Procedure Act or otherwise except to the extent provided in this Act:
>
> (i) an arbitral proceeding of an arbitral tribunal or an order, ruling or arbitral award made by an arbitral tribunal;
>
> (ii) a determination or direction by the designated appointing authority.
>
> 5 ...
>
> (3) If an arbitration agreement incorporates arbitration rules by reference, those rules form part of the arbitration agreement.
>
> …
>
> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
>
> (a) all the parties to the arbitration consent, or
>
> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.
>
> ...

[18] She also noted Article 2 of the Domestic Rules of Arbitration promulgated by VanIAC as follows:

> (a) The Centre shall administer an arbitration commenced on or after September 1, 2020 under these Rules:
>
> (i) where the seat of the arbitration is British Columbia and any agreement, submission or reference provides for arbitration under the Rules, ...
>
> ...
>
> (c) The Centre shall administer the services as designated appointing authority under the Act in accordance with Part C of these Rules,
>
> ... [At para. 16.]

[19] Part B of the Domestic Rules, entitled “Expedited Procedures”, applies to claims that (like Mr. Bollhorn’s claim in this case) do not exceed $250,000 in value. As Saunders J.A. observed:

> ... Rule 24(b) of Part B provides that by agreeing to arbitration under the Rules, the parties agree that the expedited procedures “shall take precedence over any contrary terms in the arbitration agreement or in these Rules.” When the claim is a Part B claim, the Centre must advise the parties that the arbitration will be conducted under the Expedited Procedures.
>
> Significantly, Part B prohibits appeals in these terms:
>
> > 27. ...
> >
> > (a) For arbitrations brought under an arbitration agreement entered into on or after September 1, 2020 that provide for arbitration under these Rules, the parties expressly agree that there shall be no appeal on a question of law from an Award issued under the Expedited Procedure, unless consented to by both parties.
>
> [Emphasis added.]

[20] Not surprisingly, Lakehouse argued that any jurisdiction over the items set out in Mr. Bollhorn’s Notice to Arbitrate had been removed from the Court. In response, Mr. Bollhorn contended that, read properly and in light of Part D of the Domestic Rules, R. 27 allowed his appeal to proceed in this court. He also contested the characterization of the arbitrator’s decision as an “award”. (At para. 21.)

[21] Saunders J.A. described the situation before her as follows:

> The parties, through their submissions, have revealed a *lacuna* in this domestic arbitration scheme, and it is a gap that may confound the general understanding of “where there is a right, there is a remedy”. The circumstances show that in the event Mr. Bollhorn is correct that the application of *res judicata* was an error of law, and Lakehouse is correct that the decision cannot be appealed, Mr. Bollhorn’s claim under his contract will not have been heard on its merits, contrary to the expectation implicit in the contract’s arbitration clause. Further, in that event, depending on whether the decision is an “award”, no other forum may be available to him because the contract assigns this dispute exclusively to arbitration. [At para. 22.]

In the result, she referred Mr. Bollhorn’s application for leave to a division of this court.

The Intervenor's Application

[22] Another unusual feature of this application is that it is accompanied by an application by the Centre to intervene in *the leave application*. Until recently, the right to apply to intervene in this court was restricted to persons wishing to intervene "*in an appeal*" under R. 36 of the previous *Court of Appeal Rules*, B.C. Reg. 297/2001. It did not extend to proceedings in chambers: see *Independent Contractors and Businesses Association v. British Columbia* 2018 BCCA 429 at para. 7. However, under the recently amended *Court of Appeal Act*, S.B.C. 2021, c. 6, a justice (and therefore a division as well) may grant leave to intervene "in an appeal *or other matter before the court*": see s. 30(f).

[23] It is arguable that the legislative drafter may not have intended to widen the scope of proceedings in which intervenors may appear. R. 61, headed "Intervenor Status", allows an interested party to apply "for leave to intervene in the appeal" and to do so by filing an application not later than 14 days *after* the filing of the appellant's factum. Thus the Rule contemplates that an appeal already exists and that an appellant's factum has been filed. This will obviously not be the case as long as leave to appeal is being sought. Nevertheless, s. 30 of the *Court of Appeal Act*, as now worded, would appear to grant this court the authority to permit an intervenor to intervene at the hearing of an application in chambers, and I will proceed on this assumption. I would add, however, that I expect that applications to intervene in leave applications will be rare and will be granted only in exceptional circumstances.

The Question of Leave

[24] Before addressing the intervention issue, however, I will consider whether, *setting aside* the Expedited Procedures in their entirety, I would have granted leave to Mr. Bollhorn to appeal the decision that the identification, pricing and rectification of the deficiencies listed by Mr. Bollhorn after the second walk-through were *res judicata*.

An "Award"?

[25] As a preliminary matter, I note Madam Justice Saunders' uncertainty as to whether the arbitrator's determination constituted an "award" for purposes of s. 59 of the *Arbitration Act*. (See para. 22 of her reasons, quoted above at para. 21.) Saunders J.A. sought submissions from the parties on this issue. In its submission filed November 6, 2023, Lakehouse noted that neither the VanIAC Rules nor the *Arbitration Act* contains a definition of "award", although ss. 48 and 54 of the Act state certain requirements applicable to awards: an arbitral award must be in writing and contain reasons for the award, state the place of arbitration and the date on which it was made.

[26] Both parties referred us to the Supreme Court of Canada's decision in *Desputeaux v. Éditions Chouette (1987) Inc.* 2003 SCC 17, where the Court observed:

> The parties to an arbitration agreement have virtually unfettered autonomy in identifying the disputes that may be the subject of the arbitration proceeding. As we shall later see, that agreement comprises the arbitrator's terms of reference and delineates the task he or she is to perform, subject to the applicable statutory provisions. The primary source of an arbitrator's competence is the content of the arbitration agreement (art. 2643 *C.C.Q.*). If the arbitrator steps outside that agreement, a court may refuse to homologate, or may annul, the arbitration award (arts. 946.4, para. 4 and 947.2 *C.C.P.*). In this case, the arbitrator's terms of reference were not defined by a single document. His task was delineated, and its content determined, by a judgment of the Superior Court, and by a lengthy exchange of correspondence and pleadings between the parties and Mr. Rémillard. [At para. 22; emphasis added.]

Further, the Court emphasized at para. 35 that an arbitrator's mandate "must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement" and that it includes "everything that is closely connected with that agreement". From this, Lakehouse contends that *res judicata* is "closely connected" to the question that was to be disposed of by the arbitrator, given that it constitutes a substantive defence to the claims made by Mr. Bollhorn in the arbitration proceeding.

[27] Lakehouse also referred us to an English decision, *ZCCM Investment Holdings plc v. Kansanshi Holdings plc* [2019] E.W.H.C. 1285 (Comm.), where the Court was asked to decide whether an arbitrator's ruling was an "award". Cockerill J. observed that the authorities on the subject did not provide "any set of principles by which such a consideration should be governed. They arise in a wide variety of circumstances ranging from decisions on interlocutory rulings regarding disclosure through strikeout applications and including amendment disputes with jurisdictional aspects. Nor is there a plainly analogous case." However, he continued, the authorities suggested the following points:

> a) The Court will certainly give real weight to the question of substance and not merely to form ….
>
> b) Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim ….
>
> c) The nature of the issues with which the decision deals is significant. The substantive rights and liabilities of parties are likely to be dealt with in the form of an award whereas a decision relating to purely procedural issues is more likely not to be an award ….
>
> d) There is a role however for form. The arbitral tribunal's own description of the decision is relevant, although it will not be conclusive in determining its status ….
>
> e) It may also be relevant to consider how a reasonable recipient of the tribunal's decision would have viewed it ….
>
> f) A reasonable recipient is likely to consider the objective attributes of the decision relevant. These include the description of the decision by the tribunal, the formality of the language used, the level of detail in which the tribunal has expressed its reasoning ….
>
> g) While the authorities do not expressly say so I also formed the view that:
>
> i. A reasonable recipient would also consider such matters as whether the decision complies with the formal requirements for an award under any applicable rules.
>
> ii. The focus must be on a reasonable recipient with all the information that would have been available to the parties and to the tribunal and the decision was made. It follows that the background or context in the proceedings in which the decision was made is also more likely to be relevant. This may include whether the arbitral tribunal intended to make an award …. [At para. 40; citations omitted.]

[28] Given these factors, the Court in *ZCCM* found that the ruling in question was in essence procedural, given that it did not decide an issue of substance relating to the claims, was not a final decision on the merits of any of the claims, and was a decision on a procedural issue. The arbitration was "not over" and the tribunal was not *functus*. The reasonable recipient of the ruling, the Court said, would have expected the document not to be an award in light of the debate between the tribunal and the parties and if an award was being produced, the tribunal would have said so. "Or, to put it the other way around" the judge observed, "what was expected was an *order with reasons*, that is what the Tribunal on its face produced. That is what a reasonable recipient would read the Ruling as being." (At para. 47; my emphasis.)

[29] Applying the *ZCCM* criteria to the arbitrator's decision in the case at bar, Lakehouse contends that the decision was a substantive one in the sense that the entire arbitral proceeding was dismissed, subject only to the question of costs. The decision would render the arbitral tribunal *functus officio* in relation to the subject matter of the proceeding. The arbitrator himself had described the decision as an "award" and, counsel says, each of the parties received and viewed the decision as an arbitral award. The decision also provided "considered reasons" which complied with the statutory requirements for awards.

[30] Mr. Bollhorn takes a very different view. In his submission, the arbitrator's decision cannot be properly characterized as an "award" on the ground that it "failed to consider the substantive questions set out specifically in the Notice to Arbitrate. He characterizes the finding of *res judicata* as a "significant departure" from the task that was assigned to the arbitrator and consented to by both parties.

[31] Mr. Bollhorn notes further that the *previous Arbitration Act*, R.S.B.C. 1996, c. 55, provided a definition of "award" at s. 1, namely:

> " award" means the decision of an arbitrator on the dispute that was submitted to the arbitrator and includes
>
> (a) an interim award,
>
> (b) the reasons for the decision, and

> (c) any amendments made to the award under this Act;

In his submission, if this definition is to provide any guidance at all, the "award" must contain a decision *on the question that was submitted to the arbitrator*, which Mr. Bollhorn submits did not occur in this case. Instead, he says the arbitrator *declined to consider* the substantive questions put before him and that in the result, R. 27 of the Expedited Procedures (see *supra* at para. 19) "should not apply to bar an appeal of this award on a question of law."

[32] Finally, Mr. Bollhorn contends that the issue of *res judicata* was not "closely connected" to the dispute regarding deficiencies. He says *res judicata* was not relevant to the arbitration "as the order to specifically perform the contract made any such argument not closely connected to the substantive issues."

[33] With respect, I cannot agree that because the arbitrator concluded the deficiency issues were *res judicata*, the decision should not be regarded as an "award". Nor can I agree that the decision was not a "decision on the question that was submitted to the arbitrator", although it was obviously not the answer that Mr. Bollhorn expected. As pointed out by Lakehouse, the *Arbitration Act* requires an arbitral tribunal to decide the substance of a dispute in accordance with the applicable law, including any available defences: see s. 25(3). Clearly, the arbitrator considered *res judicata* to be a defence available at law. The effect of the decision was substantive and final; the arbitrator is now *functus officio* except as to costs. Section 54 of the Act states that an arbitral award is final and binding on the parties.

[34] It follows in my opinion that the arbitrator's decision was an "award" and thus would be eligible to be the subject of an appeal with leave of this court under s. 59 of the *Arbitration Act*.

Res Judicata

[35] I turn next to the question of whether, still setting aside the Centre's Expedited Procedures, it would have been appropriate to grant leave to appeal on whether the decision-maker here erred in concluding that the claims for

compensation advanced by Mr. Bollhorn for rectifying the deficiencies were *res judicata*. In Mr. Bollhorn's analysis, this boils down to whether the trial judge's dismissal of those claims was "fundamental" to his decision or whether it was an ancillary matter. Mr. Bollhorn argues that it was ancillary. For one thing, he says (and I agree) the issue was *not* raised in his notice of application for summary trial. As noted earlier, the notice referred to "change order and/or modification terms" but these appear to be distinct from "deficiencies" as described above. Mr. Bollhorn was required to pay a markup on all change orders, but that appears to have been unrelated to his claim for compensation for funds he would have to expend in order to replace the faucets, light fixtures etc. installed by Lakehouse other than in accordance with the specifications. That said, I express no opinion as to whether Article 3 of the CPS (see para. 5 above) did in law leave it open for Mr. Bollhorn to seek such compensation, given that he chose not to hold back the estimated cost from the purchase price on completion.

[36] On the meaning of *res judicata*, counsel for Mr. Bollhorn referred us to the decision of the Alberta Court of Appeal in *574095 Alberta Ltd. v. Hamilton Brothers Exploration Co.* 2003 ABCA 34. It involved a dispute that had already been the subject of litigation concerning the computation of a "gas cost allowance" in the calculation of a royalty under an oil purchase agreement. When the parties later disagreed on the deductibility of development costs, the appellant raised estoppel, waiver and *res judicata*. The judge of first instance framed the issue as whether the questions sought to be raised and answered in the new proceeding had been put "distinctly in issue" in the previous cases and "directly answered" by those decisions, or whether the question and answer in this case were simply incidental to the previous decisions. (See para. 31.) He found that the question had not been put distinctly in issue in either of the previous decisions and had not been directly answered by them. Accordingly, issue estoppel was not made out. As well, he dismissed the argument based on cause of action estoppel since "the previous cause of action was separate and distinct from this action and that the same question had not been decided earlier". (At para. 33.)

[37] On appeal, the respondent in *Hamilton Brothers* contended that the decision of "whether to grant or deny the striking of a pleading" was discretionary in nature and thus was subject to the standard set forth in *Penner v. Niagara (Regional Police Services Board)* 2013 SCC 19 at para. 27 and in *Friends of the Oldman River Society v. Canada (Minister of Transport)* [1992] 1 S.C.R. 3 at 76–7. The appellants on the other hand contended that the appeal involved a "simple question of whether the correct legal test was applied by the chambers judge" and that this was a question of law and subject to the standard of correctness.

[38] The Court of Appeal agreed with the appellants on the standard of review, reasoning that:

> ... If the legal tests for either of the two branches, issue estoppel or cause of action estoppel, are met, then *res judicata* arises unless the court exercises a discretion to allow the matter to continue in the interest of justice and fairness: *Lange* [*The Doctrine of Res Judicata* in Canada (2000)] p. 32; *Danyluk v. Ainsworth Technologies Ltd.* 2001 SCC 44, [2001] 2 S.C.R. 460. On this basis, no discretion was applied in the present case since the chambers judge ruled that the tests for issue estoppel or cause of action estoppel were not made out. If the chambers judge applied the wrong legal test in coming to his conclusion that issue estoppel or cause of action estoppel did not apply then he made an error of law. The standard of review for an error of law is correctness. [At para. 37; emphasis added.]

(The opposite reasoning was found to apply to a more general argument based on abuse of process.)

[39] The Court of Appeal went on to consider whether the chambers judge had applied the correct legal test for issue estoppel, citing many of the leading cases, including *McIntosh v. Parent* [1924] 4 D.L.R. 420 (O.N.C.A.), *Angle v. Minister of National Revenue* [1975] 2 S.C.R. 248, *R. v. Duhamel* [1984] 2 S.C.R. 555 and *Danyluk v. Ainsworth Technologies Inc.* 2001 SCC 44. In the end, the Court in *Hamilton Brothers* adopted the words of Mr. Justice Binnie in *Danyluk*:

> A cause of action has traditionally been defined as comprising every fact which it would be necessary for the plaintiff to prove, if disputed, in order to support his or her right to the judgment of the court: *Poucher v. Wilkins* (1915), 33 O.L.R. 125 (C.A.). Establishing each such fact (sometimes referred to as material facts) constitutes a precondition to success. …Issue estoppel simply means that once a material fact such as a valid

> employment contract is found to exist (or not to exist) by a court or tribunal of competent jurisdiction, whether on the basis of evidence or admissions, the same issue cannot be relitigated in subsequent proceedings between the same parties. The estoppel, in other words, extends to the issues of fact, law, and mixed fact and law that are necessarily bound up with the determination of that "issue" in the prior proceeding. [At para. 54; emphasis added.]

[40] Counsel for Mr. Bollhorn submits that in the case at bar, the issue of the "downgrades" (i.e., deficiencies) at summary trial was "not so fundamental to the decision" that the judgment could not stand without it. Or, in the language of issue estoppel, the subject of deficiencies was not "necessarily bound up" with the two main issues pleaded by the parties and decided at trial—specific performance and the markup on change orders. Indeed, he says that any decision as to "downgrades" was *obiter*, and thus may not create an estoppel. (Citing *Aho v. Kelly* (1998) 57 B.C.L.R. (3d) 369 (S.C.).)

[41] Second, he argues that what he refers to as the doctrine of "changing situation" should have applied to bar an estoppel. In his submission, an issue arose at the summary trial as to whether there were any "downgrades" in the house sufficient to justify a reduction in the purchase price under the CPS, whereas in the second proceeding (i.e., the arbitration), the question was whether at the time of the "walk-through" *immediately before the completion date*, there were any deficiencies the remediation of which was left for Mr. Bollhorn to perform. Thus circumstances were "evolving" and the last step was to resolve by arbitration the issue of any compensation for remedying the deficiencies. Counsel for Mr. Bollhorn referred us to a passage from K.R. Handley, *Res Judicata* (4th ed., 2009) concerning changing situations of this kind:

> There can be no effective *res judicata* in a changing situation … a decision that a liquidator had not carried on a trade in one year was not *res judicata* in the next because 'the facts in the latter year may have been … different'. Breach of planning control on one date does not establish a breach of any other. In *Thrasyvoulou* [*v. Environment Secretary* [1990] 2 A.C. 273 at 290] Lord Bridges said:
>
> > '… a decision to withhold planning permission resolves no issue of legal right … it is no more than a decision that in existing circumstances and in the light of existing planning

> policies the development … is not one which would be appropriate to permit … such a decision cannot give rise to an estoppel *per rem judicatum*. ...
>
> A decision in favour of a defendant does not prevent the claimant commencing fresh proceedings 'founded on any new or altered state of circumstances.' [At §17.30; emphasis added.]

(See also *O'Donel v. The Commissioner for Road Transport & Tramways (NSW)* (1938) 59 C.L.R. 744 at 763.).

[42] In his submissions before the summary trial judge, counsel for Mr. Bollhorn had emphasized that even if specific performance were granted, there would remain various issues that the parties would "have to work out". What Mr. Bollhorn was seeking was an order for specific performance, not at a price to be stated by the Court, but "to be determined" using the rate of markup rate fixed by the Court. He argues that the arbitrator failed to consider that the order for specific performance required the builder to construct the house *as specified* and left in place the arbitration clause dealing with deficiencies.

[43] As for the importance of the issue of *res judicata* to the parties or to the profession or the public, Mr. Bollhorn contends that the outcome of the arbitration is obviously important to him as he had purchased the home with many specific 'customizations' and reasonably expected that the completed product would be built accordingly. As well, he says the proposed appeal poses questions of importance to the legal profession as it involves the law of *res judicata*, a complex matter the clarification of which could benefit both lawyers and arbitrators.

[44] Lakehouse disagrees with Mr. Bollhorn's characterization of the ground of appeal advanced by the plaintiff. It says Mr. Bollhorn is not alleging that the arbitrator misstated the correct legal test for *res judicata*; rather, Mr. Bollhorn's real complaint is that he misapplied that test upon a review of the pleadings in the court action, the "application materials", oral submissions and reasons for judgment. Thus, it says, the proposed ground of appeal is a question of mixed fact and law and may not be the subject of an appeal under the *Arbitration Act*, regardless of the applicability of R. 27 of the Centre's Expedited Procedures.

[45] The authorities are clear that the question of whether *res judicata* was properly applied is a question of law rather than mixed fact and law. On this point, I note the ruling of the Alberta Court of Appeal in *Ernst & Young Inc. v. Central Guaranty Trust Co.* 2006 ABCA 337 that:

> The applicability of the doctrine of *res judicata* is a question of law reviewable on the correctness standard: *Saggers v. Calgary (City)* ... 2000 ABCA 259 at para. 19. [At para. 26.]

This court took a similar view in *R. v. Punko* 2011 BCCA 55, where the Court observed:

> ... there can be no issue that the question before Leask J. was a question of law. In Spencer Bower & Handley, *The Doctrine of Res Judicata*, 4th ed. (London: LexisNexis, 2009) at 8.30, the authors distinguish between questions of law and fact in the determination of issue estoppel:
>
> > Whether a question determined by or necessarily involved in a judicial decision is the same as one raised in subsequent proceedings is a question of law. Questions as to physical identity and as to what was actually decided in former proceedings, where this depends on oral evidence, are questions of fact. [At para. 72; emphasis added.]

(See also *Re Cliffs Over Maple Bay* 2011 BCCA 180 at para. 24.) In addition, I regard the availability of an argument based on "change of situation" as a bar to *res judicata*, as a question of law, at least in the circumstances of this case.

[46] As for the third issue of law sought to be advanced by Mr. Bollhorn — i.e., whether the arbitrator failed to "consider the legal effects of an order for specific performance" — I am doubtful that the arbitrator can be taken, as a result of his *res judicata* holding, to have failed to appreciate that Lakehouse was compelled by the summary trial judge's order to complete construction of the house as specified. What the arbitrator based his conclusion on was the trial judge's statement that Mr. Bollhorn had *failed to adduce sufficient evidence* to make good his claim for damages consequent upon Lakehouse's installing different items (including lighting, a toilet, and water faucets) than had been specified. Whether this properly led to the arbitrator's *res judicata* finding is not dependent on an examination of evidence, but

an analysis of the pleadings and reasons for judgment. In my view it is a question of law.

[47] Of course, even assuming that a question of law is raised, the *Arbitration Act* imposes additional requirements before leave may be granted from an award: under s. 59(4) of the *Arbitration Act*, leave may be granted only if a justice (or a division) determines that:

> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

I am satisfied that the importance of the issue raised by Mr. Bollhorn, both to the parties and to the legal and arbitral professions, are such that leave would in normal circumstances have been granted.

[48] At the end of the day, then, and again apart from VanIAC's Expedited Procedures, I am satisfied that Mr. Bollhorn has raised a question of law of sufficient importance to justify an appeal to this court. I would have granted him leave to appeal the decision that his claims for compensation for the deficiencies were barred by *res judicata* arising out of the trial judge's order. In other words, if *a court of law* had ruled that this subject was *res judicata*, and Mr. Bollhorn could appeal only a question of law, I would have granted leave to appeal.

Arbitration and the Expedited Procedures

[49] I turn next to the question of whether Mr. Bollhorn's proposed appeal is barred by R. 27 of the Centre's Domestic Arbitration Rules. I repeat R. 27 here for convenience:

> For arbitrations brought under an arbitration agreement entered into on or after September 1, 2020 that provide for arbitration under these Rules, the parties expressly agree that there shall be no appeal on a question of law from an Award issued under the Expedited Procedure, unless consented to by both parties. [Emphasis added.]

[50] As noted earlier, R. 27 is contained in Part B ("Expedited Procedures") of the Domestic Rules. Part D of those Rules, entitled "Optional Arbitration Appeal Rules" authorizes a party to an arbitration to appeal *to an appeal tribunal* on any question of law arising out of an award *if* the arbitration agreement expressly provides that a party may do so, or if all the parties to the arbitration consent to such an appeal. Part B, however, states that by agreeing to arbitration under the Rules, the parties agree that the Expedited Procedures shall *take precedence over any contrary terms in the arbitration agreement or in the Rules*. Rule 24(a), found in Part B, states that where the parties agree or where no claim by any party exceeds $250,000 (exclusive of interest and costs), the Expedited Procedures shall apply.

[51] It might be argued that R. 27 is obscure at best, but Mr. Bollhorn did not make any submission to the effect that he had been unaware of the Rule when he signed the CPS, and he had legal counsel when the arbitration was sought on his behalf. However, I do note that most parties who are considering arbitration arrangements with the Centre might tend to overlook R. 27 of Part B of the Centre's Domestic Rules unless directed to that provision. Given that it relinquishes what may be an important right — a right normally protected by the Act — the Centre might be well advised to take steps to draw parties' attention to the Rule more effectively.

[52] There is no doubt that in this case, Mr. Bollhorn's claims in respect of the deficiencies do not exceed $250,000. And, as Lakehouse contends, it was Mr. Bollhorn who commenced the arbitration by means of his notice to arbitrate issued under the VanIAC Rules, and the Centre confirmed by letter dated March 17, 2023 to the parties, that the Expedited Procedures would apply to the arbitration. Since Lakehouse has not consented to Mr. Bollhorn's appeal of the award, it argues that Mr. Bollhorn is barred from bringing the proposed appeal.

[53] Mr. Bollhorn submits in response that the expedited Rules do not constitute a *clear and unambiguous* waiver of a party's right to appeal to this court on a question of law. He says that R. 27 is unclear, and that the "scheme" of the Rules could be read such that R. 27 excludes only the provisions regarding the appeal tribunal. On

this point, counsel contrasted R. 27 with the rules of other arbitration schemes that she says *are* clear and unequivocal. For example, the International Dispute Resolution Procedures state at Article 33.1:

> Awards shall be made in writing by the arbitral tribunal and shall be final and binding on the parties.… Unless otherwise agreed by the parties, specified by the law, or determined by the Administrator, the final award shall be made no later than 60 days from the date of the closing of the hearing pursuant to article 30. The parties shall carry out any such award without delay and, absent agreement otherwise, waive irrevocably their right to any form of appeal, review, or recourse to any court or other judicial authority, insofar as such waiver can validly be made. [Emphasis added.]

and the Rules of the London Court of International Arbitration state at Article 29:

> 29.2 To the extent permitted by any applicable law, the parties shall be taken to have waived any right of appeal or review in respect of any determination and decision of the LCIA court to any state court or other legal authority.

[54] In Mr. Bollhorn's submission, the "context and overall form" of the VanIAC Rules must also be considered. I understand his argument to be that since Part D of the Rules states at R. 31 that a party to an arbitration may appeal to an appeal tribunal on a question arising out of an award in certain conditions, it would be reasonable to read R. 27 as applying only to what counsel refers to as the "internal mechanisms provided by the Rules", rather than as ousting the jurisdiction of this *court* to hear an appeal. In my view, however, the unambiguous requirement in R. 24 that the Expedited Procedures be given precedence where the value of the dispute is equal to or less than $250,000 means that the appeal procedures in Part D have no application. R. 27 must, in other words, apply to prohibit appeals *to* a *court of law* under s. 59 of the *Arbitration Act* rather than to appeals to the appeal tribunal under the VanIAC Rules.

[55] For its part, Lakehouse simply says that R. 27 clearly applies and that it, Lakehouse, does not consent to Mr. Bollhorn's appeal of the award. Consequently, the proposed appeal is barred.

Intervention Application

[56] It is into this controversy — i.e., the question of whether Mr. Bollhorn's appeal is barred by R. 27 of the Expedited Procedures — that VanIAC seeks leave to intervene. It is important to emphasize that it does not at present intend to intervene in Mr. Bollhorn's actual *appeal*, should it be heard by this court, on the issue of *res judicata*. Indeed, Mr. Deane on behalf of the Centre stated that in most cases involving an appeal on a question of law from an arbitrator, VanIAC would *not* be seeking to intervene, as in most instances, that would be duplicative and time-wasting. It is only because the force and effectiveness of the Centre's Expedited Procedures are at issue at this stage and must be considered by this court in determining the leave question, that VanIAC contends its submissions will be useful to the Court.

[57] I agree that VanIAC does have a "unique and different perspective" that may be of assistance to us in resolving the question before us. In anticipation of this fact, we accepted the Centre's written memorandum of argument at the hearing of the application. I would grant intervenor status to the Centre in the unusual circumstances of this case.

Applicability of R. 27

[58] VanIAC submits that its Rules were designed by experts in the field of arbitration to achieve the objective of providing parties with a "fast and final resolution tailor-made for the issues". (See *Sattva Capital Corp. v. Crestin Moly Corp.* 2014 SCC 53 at para. 89, and *Teal Cedar Products Ltd. v. British Columbia* 2017 SCC 32.) In the latter case, Gascon J. for the majority stated that limited jurisdiction and deferential review "advance the central aims of commercial arbitration: efficiency and finality." (At para. 1.)

[59] The Centre submits that two values "at the core" of its Rules are party autonomy and the facilitation of access to justice. With respect to the former, counsel emphasized that the Expedited Procedures apply only if the parties have agreed to the VanIAC Rules and the value of the dispute is equal to or less than

$250,000, or if they have otherwise opted into those procedures regardless of the quantum of the dispute. Even where the value of the claim is less than $250,000, Mr. Deane notes, parties are free to agree to opt out of the of the Expedited Procedures in whole or in part. Further, parties are not left wholly without recourse to judicial review in the arbitral context: s. 58 of the *Arbitration Act* sets out several circumstances in which a party may apply to the Supreme Court to have an arbitral award set aside. These circumstances include where the arbitral award deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is "beyond the scope of the arbitration agreement" (subpara. c); where there are "justifiable doubts" as to the arbitrator's independence or impartiality (subpara. g); and where the arbitral award was the result of fraud or corruption by a member of the tribunal or was obtained by fraudulent behaviour by a party or its representative (subpara. (i)). Counsel for Mr. Bollhorn did suggest that the arbitrator's finding of *res judicata* took his decision beyond the scope of the arbitration agreement within the meaning of subpara. c, but as I have already suggested, *res judicata* was a defence properly asserted by Lakehouse and the arbitrator's finding did not take him beyond his stated task. None of the remaining circumstances listed in s. 58 of the Act was asserted by Mr. Bollhorn.

[60] As far as access to justice is concerned, the Expedited Procedures as a whole are aimed at promoting an "efficient and final" dispute resolution system with the "potential for reduced legal, arbitrator, and filing fees." Arbitrators' fees are set at a flat rate; timelines are shorter compared to "regular" arbitrations; and the parties have a right to proceed on written submissions only, without the necessity of a hearing, absent exceptional circumstances. In the Centre's submission, finality is "promoted" by the elimination of appeals even on questions of law.

[61] It is ironic indeed to argue that *barring* an appeal to a court of law can facilitate access to justice in an individual case. It cannot be denied, however, that for many parties, the expense of litigation and the delays of court procedures make the savings and finality of arbitrations attractive. To this end, VanIAC submits that the Expedited Procedures "prevent lengthy and expensive appeal proceedings that

detract from the finality, expediency, affordability, and efficiency of the proceedings." If parties do not wish to accept those objectives over the objective of justice as determined by a court of law, counsel adds, the parties can so state in their initial agreement or agree later to modify that aspect of the Expedited Procedures.

[62] At the end of the day, I am of the view that, having agreed at Article 3 of the CPS that any dispute concerning the identification, pricing and rectification of deficiencies would be settled by arbitration, and having sought and obtained an award from an arbitrator in circumstances that fall within Part B of VanIAC's Domestic Arbitration Rules, Mr. Bollhorn is barred from pursuing an appeal on the question of law that he seeks to have decided by this court. Section 59(3) of the *Arbitration Act* states that:

> A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.

The Expedited Procedures, which under s. 5 became part of the agreement, contain just such a statement, and there is in my view no lack of clarity as to its effect: under R. 27, there "shall be no appeal on a question of law" from an award issued under the Expedited Procedures unless both parties consent.

Disposition

[63] In the result, I would grant leave to VanIAC to intervene in the leave application, but dismiss Mr. Bollhorn's application for leave to appeal by reason of

the fact that the parties “expressly agreed” that no appeal on a question of law from the arbitrator’s award would be permitted.

“The Honourable Madam Justice Newbury”

I agree:

“The Honourable Mr. Justice Willcock”

I agree:

“The Honourable Madam Justice Fisher”