COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hudson's Bay Company ULC v. Piret (18111 Blundell Road) Holdings Inc.*, 2023 BCCA 428

Date: 20231115
Docket: CA49294

Between:

Hudson's Bay Company ULC

Appellant
(Tenant)

And

Piret (18111 Blundell Road) Holdings Inc.

Respondent
(Landlord)

Before: The Honourable Madam Justice Saunders
(In Chambers)

On appeal from: An award of an Arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2 dated July 24, 2023 (*Piret (18111 Blundell Road) Holdings Inc. v. Hudson's Bay Company ULC*).

Oral Reasons for Judgment

Counsel for the Appellant (via videoconference):	J. Renihan K. Wasielewski
Counsel for the Respondent (via videoconference):	S.M. Addison R. Benjamin
Place and Date of Hearing:	Vancouver, British Columbia November 10, 2023
Place and Date of Judgment:	Vancouver, British Columbia November 15, 2023

2023 BCCA 428 (CanLII)

Summary:

The application is to appeal an arbitration award in a commercial dispute. The question of law advanced is whether the arbitrator failed to address a fundamental question. Held: Application dismissed. The arbitrator did not fail to address the question. It follows that the foundational requirement for appeal, that there is an extricable question of law in issue, is not satisfied.

2023 BCCA 428 (CanLII)

[1] **SAUNDERS J.A.**: The applicant, Hudson's Bay Company ULC, applies for leave to appeal an arbitration award made by W. Graham Allen, Arbitrator, on July 24, 2023. The arbitration proceeding arose from a lease agreement in which Hudson's Bay is the tenant and Piret (18111 Blundell Road) Holdings Inc. is the landlord. The lease contained options to extend the initial term of the lease and provided that rent in a renewal term was to be determined in this fashion:

> The annual basic rent during each of the extension periods of the Term shall be the then current market rental for similar premises in a similar location, for the same use, but without regard to the value of the Tenants trade fixtures, furniture and equipment or any other improvements made by the Tenant to the Lands.
>
> … In the event that the current market rental is not agreed upon by the parties as of the date which is ninety (90) days prior to the commencement of the applicable extension period, the same shall be submitted to and determined by arbitration pursuant to the Commercial Arbitration Act of British Columbia. Each party agrees to act reasonably and in good faith in negotiating the annual basic rent for each extension period.

[2] When the initial term expired, the parties were unable to agree on the new amount payable in rent. The matter was submitted to arbitration pursuant to the arbitration agreement provision.

[3] Each party retained an expert to opine on the appropriate market rent as provided in the passage just quoted. Each expert identified a number of comparable properties and then adjusted their rents to account for differences between a comparable property and the subject property to arrive at an estimate of the appropriate market rent. Hudson's Bay expert opined that the appropriate rent was $16.95 per square foot. Piret's expert concluded it was $22.00 per square foot.

[4] The arbitral award addressed many different sub-issues, including the meaning of "same use" and "similar location". However, the issue of "timing

adjustments" is the only one relevant to the proposed appeal, described in the arbitration award as "Whether time adjustments should be made to reflect changing market conditions, and if so, what time adjustment is appropriate?"

[5] The issue of timing adjustments addressed the concern that the comparable properties' leases were negotiated and executed before the commencement date of the subject lease, January 1, 2023. Based on the proposition that market rent is increasing, Piret's expert increased the comparable properties rents at a rate of 33% per annum, from the comparable properties' negotiation date (the date the lease was executed) to the commencement date.

[6] Hudson's Bay observed that the timing adjustments had the effect of significantly increasing the comparable rent. It submitted that there were three serious flaws with the time adjustments, making them unreliable:

1) it ignored the fact that landlords and tenants negotiate rent with a view to what market rent will be at the commencement date of the lease, not the negotiation date;

2) it relied on "asking rents" published by brokers, rather than the rent actually agreed to by the tenant; and

3) by applying a uniform, consistent rate of increase, the landlord's expert ignored the fact that rent had not actually increased at a steady rate.

[7] The arbitrator acknowledged that the three "flaws" identified by Hudson's Bay "appeared to constitute a formidable attack" on the time adjustments. After addressing Piret's position and Hudson's Bay's position, the arbitrator stated:

> Time Adjustment is such a significant consideration in this Arbitration that, having canvassed the aspects extensively, I will defer my final decision until the closing analysis. For now, I will give a preliminary response to "what time adjustment is appropriate?" I expect to be relying much more on [the landlord's expert's] detailed analysis than [the tenant's expert's] "overarching background".

2023 BCCA 428 (CanLII)

[8] Hudson's Bay takes the position that the arbitrator never grappled with the three arguments, despite finding them to be a "formidable attack". It submits that the arbitrator never returned to visit these issues and merely addressed Hudson's Bay's alternate calculation of the time adjustments. It says that the arbitrator never addressed its primary position, that time adjustments should not be made at all.

[9] Section 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 governs appeals from arbitration proceedings. Section 59 provides:

> 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.
>
> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice 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.

[10] The jurisprudence describes the requirements before leave can be granted as:

1) the appeal must be based on a question of law;

2) the judge must be satisfied that one of the three circumstances identified in s. 59(4) exists;

2023 BCCA 428 (CanLII)

3) the judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave": *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448, at para. 54.

[11] More generally, this court has taken a narrow approach to appellate intervention in commercial arbitration, said to play an important role in preserving the integrity of the arbitration system through its beneficial and distinguishing feature, finality: *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366, at para. 35.

[12] Hudson's Bay contends that the arbitrator erred in law by failing to consider its arguments concerning the time adjustments. It says in failing to address whether a time adjustment should be made, the arbitrator ignored a submission material to the outcome of the arbitration.

[13] Hudson's Bay submits that as a result of the arbitrator's decision on time adjustments, it will be charged an additional $7.7 million over the renewal term, a magnitude which justifies judicial intervention and which, if not corrected, will result in a miscarriage of justice.

[14] Hudson's Bay further contends that the arbitration is of general or public importance on the issue of a party's right to a fair hearing and the necessary confidence the public must have that disputes submitted to arbitration will be fairly considered.

[15] Piret disputes that any of the requirements of s. 59 have been satisfied, starting with the requirement that the appellant identify an extricable question of law.

[16] Whether the arbitrator here failed to answer a fundamental question is a matter of interpretation of the arbitration award. Were it clear to me that the arbitrator had failed to address a threshold question in the arbitration, I would agree that the necessary question of law, of importance to the parties and perhaps of sufficient importance to the practice, had been identified so as to support the granting of leave to appeal.

2023 BCCA 428 (CanLII)

[17] I cannot draw this conclusion. After several readings of the arbitration award, it appears to me that the arbitrator resolved that fundamental question in favour of the landlord. I refer here in particular to the statement in para. 67 "I support the Landlord's conclusion", and the many references in the arbitration award to evidence as to whether a time adjustment should be made. Accordingly, I do not consider that Hudson's Bay has satisfied the foundational criteria for an appeal. The arbitration award is simply too expansive on the parties' positions, and descriptive on the alternatives for such an adjustment, to conclude that the arbitrator failed to consider Hudson's Bay's first position that there should be no assessment of rent on account of time adjustment.

[18] In the result, this appears to me to be an arbitration award that fits well within the class of questions that are intended, by contract, to be submitted to a single decision maker without resort onward to the courts.

[19] The application is dismissed.

"The Honourable Madam Justice Saunders"

2023 BCCA 428 (CanLII)