COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Vancouver School District No. 39 v. Kingsgate Property Ltd.,* 2024 BCCA 54

Date: 20240126
Docket: CA49063

Between:

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

Appellant
(Respondent)

And

Kingsgate Property Ltd. and Beedie Development LP

Respondents
(Petitioners)

Before: The Honourable Justice Dickson
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Madam Justice Horsman

On appeal from: An order of the Supreme Court of British Columbia, dated April 12, 2023 (*Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 560, Vancouver Docket S221885).

Oral Reasons for Judgment

Counsel for the Appellant:	J.K. McEwan, K.C. E.A. Kirkpatrick
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Place and Date of Hearing:	Vancouver, British Columbia January 15, 2024
Place and Date of Judgment:	Vancouver, British Columbia January 26, 2024

Summary:

This appeal arises in the context of successive arbitration awards regarding a long-term commercial tenancy. A 1999 arbitration award interpreted a provision of the lease between the parties in resolving the market value of the property for the purpose of calculating rent for the renewal term. The respondent was granted leave to appeal the decision of a 2022 arbitration award on questions related to issue estoppel, namely whether the 2022 tribunal erred in interpreting the 1999 arbitration award. The appellant appeals the decision of the chambers judge to grant leave on the basis that there is no extricable question of law. Held: Appeal dismissed. The 2022 tribunal arguably erred in determining that issue estoppel did not apply to the interpretation of the 1999 arbitration award. The substantial merits of the alleged errors will be determined in the appeal of the award itself.

DICKSON J.A.:

Introduction

[1] This appeal concerns the doctrine of issue estoppel in the context of successive arbitration awards regarding a long-term commercial tenancy. It focuses on the interpretation of a lease which provides for arbitration to resolve the market value of leased property for consecutive renewal terms. The appellant, the Board of Education of School District No. 39 (Vancouver) (the “VSB”), is the landlord. The respondent, Kingsgate Property Ltd. and Beedie Development LP (the “Beedie Group”), is the tenant.

[2] In the court below, the chambers judge granted the Beedie Group leave to appeal a 2022 arbitration award on two questions related to issue estoppel. By a two-member majority, the 2022 tribunal interpreted a key provision of the lease differently than a 1999 tribunal had previously interpreted it and declined to apply issue estoppel in determining market value of the property. The judge granted leave on the questions of whether the 2022 tribunal erred in its interpretation of the 1999 award and identification of the issue to which estoppel applied, and whether the 2022 tribunal considered irrelevant factors in declining to apply issue estoppel. The VSB appeals the decision to grant leave. It argues that the judge erred in finding the 2022 tribunal’s determination of what was decided in the 1999 award raised an arguable question of law, and in finding the 2022 tribunal arguably considered irrelevant factors in exercising its discretion not to apply issue estoppel.

[3] I see no error in the judge's analysis or determination. I would dismiss the appeal for substantially the reasons of the chambers judge.

Background

[4] It is not necessary to review the background in detail. It is set out in the chambers judge's reasons. For present purposes, it is sufficient to note that the lease in question includes a provision prescribing a formula for calculating rent based on the market value of the property shortly before an upcoming renewal term. In particular, s. 29.09 of the lease provides that rent for each renewal term is to be 8¼% of market value at the valuation date as the lands:

> … would be valued at that time if vacant and ready for immediate development to their highest and best lawful use by a person or persons ready, willing and able to purchase and develop the SAID LANDS for that immediate use…

The 1999 Arbitration Award

[5] In 1999, by a two-member majority, an arbitration tribunal interpreted s. 29.09 of the lease and determined market value of the property for the 1997–2007 term based on the 1.0 floor space ratio "outright approval use" scheme of the City of Vancouver, Bylaw District Schedule C-3A, Zoning and Development Bylaw. In doing so, the majority focused on the words "ready for immediate development … for that immediate use" in s. 29.09 and stated that it must determine which of two available zoning categories—outright use (which is not discretionary) or conditional use (which is discretionary)—fell within the meaning of "immediate". The evidence was that outright use could be obtained more quickly than conditional use and the majority stated that "[i]t is the additional fact of certainty in being able to develop for the outright use that tells the person or persons ready, willing and able to purchase and develop the SAID LANDS what 'immediate use' is". It also stated: "[i]n addition, the very fact that conditional use is discretionary and not a legal entitlement defeats coming within the concept of 'immediate development' or 'that immediate use'".

[6] The VSB applied for leave to appeal the 1999 arbitration award. Justice Melnick dismissed the leave application on the basis that the majority's interpretation of s. 29.09 was not obviously wrong, and described its reasoning like this:

> [15] [The 1999 majority] concluded that in using the natural meaning of immediate, s. 29.09 was referring to a development process that would use the outright approval scheme of Schedule C-3A of the Vancouver Zoning Bylaw, not the discretionary conditional use to 3.0 FSR. As I read the reasons of the majority, the latter process would be at odds with the concept of immediacy inherent in the wording of s. 29.09…

The 2022 Arbitration Award

[7] In 2020, the VSB sought arbitration to determine the market value of the property pursuant to s. 29.09 for the lease renewal term commencing in 2017. In making that determination, the 2022 majority interpreted s. 29.09 differently than the 1999 tribunal had interpreted it and declared a market value that had the effect of substantially increasing the rent from the preceding term. Specifically, the 2022 majority found that a proper interpretation of s. 29.09 led to the conclusion that the "highest and best use for which the Lands lawfully could be developed, as of the Valuation Date … was a conditional use permitted under the C-3A zoning", which was a 3.0 floor space ratio. It acknowledged that this interpretation of s. 29.09 differed from the interpretation of the 1999 tribunal.

[8] The 2022 majority stated that if issue estoppel applied it must examine the evidence to determine whether one or more of the available uses in 2017 was an "immediate use". The zoning had not changed and, as in 1999, the available uses were outright use and conditional use. However, the evidence indicated that the time to obtain development approval for outright use was longer in 2017 than it was in 1999. With that evidence in mind, the 2022 majority found that there was no immediate use to which the lands could be put in 2017 based on the 1999 award's definition of "immediate" in s. 29.09. Accordingly, it stated, the lease was unworkable and strictly applying issue estoppel would frustrate the contractual intentions of the parties.

[9] The 2022 majority went on to find that this result could be avoided by applying what it saw as the correct interpretation of the lease. It also stated that there were strong factors militating in favour of not applying issue estoppel, including a diminished public interest in the finality of commercial arbitration and a public interest in enforcing private contracts to reflect the true intentions of the parties. Accordingly, the 2022 majority declined to apply the doctrine of issue estoppel, reasoning that to "perpetuate the 1999 Award's interpretation in these circumstances would result in a serious injustice to both parties".

[10] The Beedie Group applied pursuant to s. 31 of the *Arbitration Act*, R.S.B.C. 1996, c. 55, for leave to appeal from "the refusal of the [2022 majority] to apply issue estoppel to a finding of a previous arbitration tribunal concerning the same provision of the same agreement". In support of its leave application, it proposed two alleged questions of law arising out of the 2022 award:

> i) Did the majority err in their interpretation of the [1999] award and identification of the issue to which estoppel applied?
>
> ii) Did the majority consider irrelevant factors in determining not to apply issue estoppel, in particular, by finding there is a diminished public interest in the finality of commercial arbitration and a public interest in enforcing private contracts to reflect the true intentions of the parties?

Reasons of the Chambers Judge

[11] The judge began with a thorough review of the factual background and applicable law, including the requirements of s. 31 of the *Arbitration Act*. He recognised the threshold requirement that leave must be sought on an extricable question of law, and, citing *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 45, noted that identification of mixed questions of fact of law will defeat a court's appellate review jurisdiction. He quoted Justice Hunter's summary in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 72 of the principles relating to the identification of a question of law capable of appeal. After also discussing the arguable merit criterion and other factors relevant to the exercise

of the court's discretion in deciding whether to grant leave, he turned to the two questions for appeal proposed by the Beedie Group.

[12] In analysing the first proposed question, the judge noted the Beedie Group relied on Justice Melnick's leave reasons regarding the 1999 award which referred to its connection between s. 29.09 and the "outright use" of the property, and submitted this demonstrated that the 2022 majority was incorrect to interpret the 1999 award otherwise. He also noted the VSB's submission that the proposed question was one of mixed fact and law strategically framed as a legal question for the purpose of seeking leave to appeal.

[13] Next, the judge discussed issue estoppel, quoting from *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44 at para. 18, concerning the preconditions to operation of the doctrine and its rationale, namely, that "[a]n issue, once decided, should not generally be re-litigated to the benefit of the losing party and harassment of the winner". He also noted there is authority to the effect that issue estoppel can apply to arbitration proceedings and that whether a court erred in applying principles of *res judicata* and purporting to overrule a previous decision has been held to be a question of law. However, the judge observed, he was unaware of any authorities directly on point on the question of whether issue estoppel in respect of an arbitral award is a pure question of law. Accordingly, he stated, he would reason on a first principles basis and by analogy.

[14] In conducting his analysis, the judge found that a prior arbitration award is unlike a set of facts, tendered as evidence, in a proceeding against which a legal test is applied to arrive at a result. He also found that the question of the interpretation of a prior arbitral award for purposes of the application of issue estoppel is more like interpreting a statute (a question of law) than like interpreting a contract (a question of mixed law and fact). In particular, he stated, interpreting an arbitral award involves "the interpretation of legal text with binding force (an award) to determine the parties' governing obligations under a legal doctrine (issue estoppel)". In addition, he found the proposed question was not inextricably bound

up in the facts of the case, and he noted authorities which support the proposition that interpretation of a prior legal decision for *res judicata* purposes is a question of law.

[15] Based on a first principles assessment and reasoning by analogy, the judge concluded that the first proposed question "is one of law capable of appeal under s. 31(1)(b) of the *Arbitration Act*". He also rejected the VSB's submissions that the Beedie Group had advanced a theory of issue estoppel it had not pleaded or argued and previously disavowed, and had misconducted itself, for which reasons he should deny leave to appeal. With respect to the merits criterion, the judge was satisfied that the 2022 majority arguably erred when interpreting the 1999 award for the purposes of application of issue estoppel, stating:

> [104] There is arguable merit to the proposed first ground of appeal that the 2022 majority erred by interpreting the 1999 Award, in terms of inquiring whether a use was "present", "next adjacent", or "taking effect without delay or lapse of time": *2022 Majority* at paras. 127(a), 171. The 2022 majority found this to be unworkable on the evidence before it since the outright uses would take six to eight months, leading the 2022 majority to not apply issue estoppel: paras. 169–172, 174. Whereas, it is arguable that the 2022 majority should have interpreted the 1999 majority as holding that s. 29.09 on its proper interpretation called for an outright (not conditional or discretionary) use of the lands under the *Zoning By-Law* leading to 1.0 FSR use, and applied that use. The zoning for the subject lands did not change from 1999 to 2022.

[16] As to the second proposed question, the judge noted that the Beedie Group submitted the 2022 majority decided not to apply issue estoppel based on its finding of a diminished public interest in the finality of commercial arbitration and its view of the "true intentions of the parties", which were irrelevant factors. He also noted the VSB's responsive submission that the Beedie Group was disputing the conclusions reached by the 2022 tribunal, not the considered factors themselves, which did not constitute an extricable error of law.

[17] The judge rejected the VSB's submission, emphasizing that consideration of an irrelevant factor is a legal error. He found the second question alleging such consideration in the application of issue estoppel is a question of law. He also found

that the 2022 award arguably suggested there is a diminished public interest in finality in the private arbitration context, which is arguably contrary to the principle of finality set out in *Teal Cedar*. He found further that the award arguably suggested a tribunal's disagreement with a prior decision otherwise subject to issue estoppel and not patently perverse can be relevant when deciding not to apply issue estoppel. The judge held that it was arguable the 2022 majority's disagreement with the 1999 award, which it saw as contrary to the parties' true intentions, was not a relevant factor for consideration when exercising discretion not to apply issue estoppel.

[18] After concluding the other s. 31 criteria were also satisfied, the judge granted the Beedie Group leave to appeal from the 2022 award on the questions proposed in its petition, subject to conditions as to the posting of security for the appeal.

Discussion

[19] The VSB contends the judge misapprehended the law of issue estoppel and committed four errors, namely:

1. Considering that the alleged failure to properly "identify the issue to which issue estoppel relates" is an error of law.

2. Concluding that the alleged failure to properly "identify the issue to which issue estoppel relates" had arguable merit.

3. Holding that an alleged erroneous conclusion in respect of a "diminished interest in finality" could arguably constitute a consideration of an irrelevant factor in deciding whether to apply issue estoppel.

4. Finding that the 2022 award supports a "suggestion" the tribunal considered its disagreement with the prior decision to be a relevant factor in deciding whether to apply issue estoppel.

[20] Dealing first with alleged errors #1 and #2, the VSB submits that once issue estoppel has been properly pleaded, the burden is on the party alleging the estoppel to establish as a matter of fact, based on evidence, that the issue specifically in

question was previously decided. In support of this submission it relies on the Supreme Court of Canada's statement in *R. v. Mahalingan*, 2008 SCC 63 at para. 26, that "… the determination of whether an issue was decided at the first trial will be a factual issue at the second trial in each case". However, the VSB says, the judge misapprehended the factual nature of the identification question and conflated the questions of identification of an alleged issue estoppel with the application of *res judicata* to a given set of circumstances.

[21] According to the VSB, the question of what a prior decision decided is a question of fact in a proceeding against which a court or tribunal applies a legal test. It follows, it says, that the 2022 majority's findings as to what the 1999 majority decided were factual findings, or at best findings of mixed fact and law. Therefore, the VSB says, the judge erred in concluding that any alleged error in relation to those findings could ground an appeal pursuant to s. 31(1).

[22] Moreover, the VSB contends, the judge erred in concluding that the alleged misinterpretation had arguable merit based on a new theory advanced before him by the Beedie Group. The new theory alleged that the 1999 majority's conclusion that the lease required valuation based on "outright use" was subject to issue estoppel, and the 2022 majority arguably should have interpreted the 1999 award "as holding that s. 29.09 on its proper interpretation called for an outright (not conditional or discretionary) use of the lands under the *Zoning By-Law* leading to 1.0 FSR use". In its submission, in reaching this conclusion the judge erroneously: shifted the burden of identifying the findings that allegedly give rise to issue estoppel from the Beedie Group to the tribunal; concluded the 2022 majority failed to consider an unpleaded, unargued, and unproven issue estoppel; and relied on Justice Melnick's characterization of the 1999 majority's conclusion.

[23] I am not persuaded by these submissions. I agree with the Beedie Group that they are inconsistent with established Supreme Court of Canada authority on issue estoppel in civil litigation, which is "a branch of *res judicata* … which precludes the relitigation of issues previously decided in court in another proceeding": *Toronto*

(City) v. C.U.P.E., Local 79, 2003 SCC 63 at para. 23. As the Court explained in *Danyluk*, in the civil litigation context, issue estoppel is a flexible doctrine that prevents the relitigation of "constituent issues or material facts necessarily embraced" in an earlier decision, and it can extend to "the material facts and the conclusions of law or of mixed fact and law ("the questions") that were necessarily (even if not explicitly) determined in the earlier proceedings". The Court's statement in *Mahalingan* to which the VSB points was made in the context of a criminal proceeding where reasons were not provided and has no application where the issue estoppel in question is determined based on the face of reasons for decision.

[24] In my view, the chambers judge correctly determined that the first proposed question was a question of law with arguable merit for the reasons he articulated. The alleged misinterpretation of the 1999 award for the purpose of issue estoppel turned on the reasons provided by the 1999 majority. In addition, based on the record the judge was entitled to find that issue estoppel was adequately pleaded and argued before the tribunal and the court in an adequate and sufficiently consistent manner. His assessment of the merit criterion on the first question is entitled to appellate deference.

[25] As to alleged errors #3 and #4, the VSB contends that, properly understood, the Beedie Group's challenge was to the 2022 majority's conclusion on the application of the factors that it considered, not to the relevance of those factors to the exercise of its discretion. However, it says, the judge failed to engage with this argument and to properly scrutinize the alleged errors identified by the Beedie Group, which were not actually legal errors at all.

[26] According to the VSB, the 2022 majority held that the existence of a different evidentiary record militated in favour of not applying issue estoppel, which led to its conclusion that application of issue estoppel would frustrate the parties' contractual intentions. Then it sought to balance finality and "justice on the facts" based on its findings. In the VSB's submission, these were all manifestly relevant factors for the tribunal's consideration. However, the judge failed to recognize that the Beedie

Group was not seeking to correct identifiable legal errors in alleging the 2022 majority considered "irrelevant factors" in exercising its discretion. Rather, it was impugning the 2022 tribunal's conclusion with respect to the relevant factors it considered, such as the interests of finality in commercial arbitration.

[27] I do not accept these submissions. In my view, given the significance attributed to finality in commercial arbitration in authorities such as *Teal Cedar* and the absence of authority as to a diminished public interest in finality in an arbitral setting, the 2022 majority's finding of a diminished interest in finality involves an arguably meritorious extricable legal error in connection with its consideration of the finality factor. Moreover, the 2022 majority's apparent reference to its own interpretation of s. 29.09 of the lease with respect to the parties' "true intentions" as a relevant factor for consideration in the exercise of its discretion constitutes an arguable legal error.

Conclusion

[28] I would dismiss the appeal from the decision to grant leave.

[29] The substantive merits of the errors alleged by the Beedie Group will, of course, be determined in the appeal from the award itself.

[30] **DEWITT-VAN OOSTEN J.A.**: I agree.

[31] **HORSMAN J.A.**: I agree.

[32] **DICKSON J.A.**: The appeal is dismissed.

"The Honourable Justice Dickson"