COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Davidson v. Lyra Growth Partners Inc.,* 2024 BCCA 133

Date: 20240409
Docket: CA48698

Between:

Reese Davidson

Appellant
(Defendant)

And

Lyra Growth Partners Inc., LGPI (US) Holdings Ltd., LGPI (Canada) Holdings Ltd., Charles Chang and Eve Chang

Respondents
(Plaintiffs)

Before: The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Hunter
The Honourable Mr. Justice Butler

On appeal from: An order of the Supreme Court of British Columbia, dated October 28, 2022 (*Lyra Growth Partners Inc. v. Davidson*, 2022 BCSC 2107, Vancouver Docket S222983).

Counsel for the Appellant:	A.A. Macdonald M.S. Smith
Counsel for the Respondents:	T.J. Moran C. Formosa
Place and Date of Hearing:	Vancouver, British Columbia June 7, 2023
Place and Date of Judgment:	Vancouver, British Columbia April 9, 2024

Written Reasons by:
The Honourable Mr. Justice Hunter

Concurred in by:
The Honourable Madam Justice Fenlon
The Honourable Mr. Justice Butler

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Summary:

The respondents brought a civil action against the appellant alleging that the appellant had misappropriated funds from the respondents. The respondents claimed various forms of relief, including what was characterized as disgorgement and relinquishment of shares in the respondent companies. The appellant and the respondents are parties to two shareholders agreements concerning ownership and transfer of these shares, each with an arbitration clause. The appellant brought an application to stay the action pursuant to s. 7 of the Arbitration Act on the ground that the claim for the shares was a matter agreed to be submitted to arbitration under the shareholders agreements. The application was dismissed. The appellant appeals.

Held: Appeal allowed in part. The claim for misappropriation of funds was not a matter agreed to be submitted to arbitration, but there was an arguable case that the claim for share-based relief fell within the scope of the shareholders agreements. The claim for share-based relief must be stayed to permit an arbitrator to determine their jurisdiction to adjudicate the share-based claims. A partial stay was appropriate so that the non-arbitrable issues could continue in the courts.

Reasons for Judgment of the Honourable Mr. Justice Hunter:

[1] If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, the court must, on application, stay the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[2] Application of this rule becomes more challenging when the legal proceedings involve some matters that were arguably agreed to be submitted to arbitration and some matters that are unconnected to the arbitration agreement.

[3] This appeal concerns legal proceedings where the principal cause of action has no connection with the matters the parties agreed to submit to arbitration, but some of the relief sought arguably falls within the scope of the arbitration agreement between the parties. The chambers judge hearing the stay application dismissed the application on the basis that there was no connection between the claims of the plaintiffs and the matters reserved for arbitration.

[4] I agree that there is no connection between the cause of action pleaded and the matters the parties have agreed to submit to arbitration, but in my view this conclusion does not adequately address the relief sought by the plaintiff, which arguably is caught by the arbitration agreement. In these circumstances, denial of a stay would depart from the mandatory nature of the stay of proceedings requirement.

[5] For the reasons that follow, I am the view that the proper disposition of the stay application is to order a partial stay in respect of those elements of the relief sought by the plaintiffs that are arguably within the scope of the arbitration agreement. To that extent I would allow the appeal.

Background

The Employment Relationship

[6] The appellant Ms. Davidson is a former employee of the respondent Lyra Growth Partners Inc. ("Lyra"). She commenced employment with Lyra in June of 2015. The employment agreement is in writing. It does not include an arbitration clause.

[7] During the course of her employment with Lyra, Ms. Davidson held the position of Director of Human Resources and Business Administration. The respondents take the position that in that capacity Ms. Davidson had significant control over, and responsibility for management of Lyra's financial affairs.

[8] On June 16, 2021, the respondents terminated Ms. Davidson's employment, alleging that she had misappropriated funds from the respondents. Ms. Davidson denies all allegations of misappropriation.

The Shareholder Relationship

[9] In 2017, Lyra started an incentive stock option program called the Long Term Incentive Share Option Plan whereby stock options were granted to employees. Ms. Davidson entered into the stock option arrangement, pursuant to which she and The Davidson Last Family Trust (the "Davidson Trust") became shareholders of

Class C and Class D shares in each of the respondents LGPI (US) Holdings Ltd. ("LGPI US"), and LGPI (Canada) Holdings Ltd. ("LGPI Canada"). Ms. Davidson is the trustee of the Davidson Trust and a beneficiary of that trust.

[10] To participate in the stock option program, Ms. Davidson and the Davidson Trust became signatories to shareholders' agreements with LGPI US and LGPI Canada ("the Shareholders Agreements"). The parties to the Shareholders Agreements are Lyra, Ms. Davidson, the Davidson Trust and LGPI US in respect of the US Shareholders' Agreement and LGPI Canada in respect of the Canadian Shareholders' Agreement.

[11] The Shareholders Agreements contain identical arbitration clauses in the following terms:

> 7. 1 Dispute Resolution
>
> Should there be any disagreement or dispute between the parties with respect to this Agreement (including, without limitation, any determination or valuation required hereunder) or the interpretation hereof, it is acknowledged and agreed that the parties to dispute [*sic*] will try to resolve the dispute by participating in a structured negotiation conference with a mediator under the Commercial Mediation Rules of the British Columbia International Commercial Arbitration Centre (the "BCICAC"). If such dispute cannot be settled by mediation, then the dispute shall be submitted to the arbitration of a single arbitrator under the Commercial Arbitration Rules of the BCICAC, either to be agreed upon between the parties to the dispute or to be nominated by BCICAC. The decision of such arbitrator shall be binding and non-appealable. The cost of mediation and/or arbitration shall be paid equally between the parties to the dispute.

The Litigation

[12] On April 8, 2022, the respondents filed a notice of civil claim against Ms. Davidson, alleging that she had "improperly and unlawfully converted, transferred, misused and/or misappropriated funds" from the respondents, and that the respondents had suffered "significant damages, loss and expense" as a result of these actions. The respondents subsequently filed an Amended Notice of Civil Claim on June 15, 2022 and a Further Amended Notice of Civil Claim on October 28, 2022. References to the respondents' claim in this judgment will be to the Further

Amended Notice of Civil Claim, which was the pleading before the chambers judge on the stay application.

[13] The factual basis for the claim is summarized in the following paragraphs of the Further Amended Notice of Civil Claim:

> 8. During the course of her employment with the plaintiff Lyra, the defendant Davidson held the position of Director of Human Resources and Business Administration. In this position, she had significant control over, and responsibility for, management of the plaintiffs' financial affairs, including the personal accounts and credit cards of Lyra's owners, Charles Chang and Eve Chang (together, the "Changs"). The defendant's duties included, among other things, preparing and signing cheques, organizing bank wires and bank drafts, tracking expenditures, managing bank accounts, managing payroll from time to time, and paying expenses, including on behalf of the Changs personally. At all material times, the defendant was in a position of trust and authority and owed fiduciary obligations to the plaintiffs.
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> …
>
> 13. Beginning in or about January 2017, on dates unknown to the plaintiffs, in breach of the Employment Agreement, the Share Purchase and Stock Option Plans and her fiduciary Obligations, the defendant Davidson improperly and unlawfully converted, transferred, misused and/or misappropriated funds from the plaintiffs (the "Misappropriated Funds").
>
> …
>
> 15. Following discovery of the Misappropriated Funds and the defendant Davidson's improper actions, the defendant Davidson's employment was terminated for cause on or about June 16, 2021.
>
> 16. The plaintiffs have suffered significant damages, loss and expense as a result of the defendant Davidson's unlawful and deceitful actions.

[14] Ms. Davidson denies that she has misappropriated funds from the respondents.

[15] The respondents summarized the legal basis for their claim in this way:

> 5. The defendant's actions to unlawfully transfer, misuse, convert or otherwise remove the Misappropriated Funds from the plaintiffs:
>
> (a) breached an express or implied term of her Employment Agreement;
>
> (b) breached an express or implied term of the Share Purchase and Stock Option Plans;
>
> (c) breached her common law duties as an employee to her employer; and
>
> (d) breached her fiduciary duties owed to the plaintiffs.

[16] The Relief Sought in the action was described as follows:

> The plaintiffs seeks [*sic*] the following relief against the defendant:
>
> (a) Damages for breach of contract, breach of fiduciary duty, conversion and fraud;
>
> (b) Disgorgement of the shares held by the Davidson Trust;
>
> (c) In the alternative, an Order that the Davidson Trust relinquish all shares held pursuant to the Share Purchase and Stock Option Plans, by delivering up the share certificates to the plaintiffs;
>
> (d) A declaration that any funds or property obtained as a result of the Misappropriated Funds of any other wrongful act by Davidson are held for the benefit of the Plaintiffs by operation of a constructive trust;
>
> (e) A tracing of the Misappropriated Funds and disgorgement of any Income derived therefrom or assets acquired with the Misappropriated Funds;
>
> (f) An accounting of all money, profits or benefits that Davidson has received or made as a result of her wrongful conduct;
>
> (g) Judgment in the amount found to be due to the Plaintiffs as a result of the accounting and tracing;
>
> (h) Punitive, aggravated and exemplary damages;
>
> (i) Special damages, including but not limited to investigation costs;
>
> (j) Interest pursuant to the *Court Order Interest Act*, R.S.B.C. 1996, c. 79;
>
> (k) Costs; and
>
> (l) Such further and other relief as this Honourable Court deems just.
>
> [Emphasis added.]

[17] I will refer to the relief sought in sub-paragraphs (b) and (c) as the share-based remedies.

[18] On October 3, 2022, prior to submitting any response on the substance of the dispute, Ms. Davidson brought an application seeking an order pursuant to s. 7(1) of the *Arbitration Act*, S.B.C. 2020, c. 2, staying the action pending the outcome of arbitration of any or all of the relief sought in paragraph 1 of Part 2 of the Notice of Civil Claim.

The Chambers Judgment

[19] The chambers judge reviewed the claims in the pleadings, and correctly set out the provisions of s. 7 of the *Arbitration Act*, as well as the relevant principles from

Clayworth v. Octaform Systems Inc., 2020 BCCA 117 [*Clayworth*]. He then characterized the issue to be addressed in this way:

> [15] As has been noted, the fundamental question to be determined on this application is whether the parties agreed to submit the subject of the Lyra Plaintiffs' claim against Ms. Davidson to arbitration. That claim is for relief in respect of Ms. Davidson's alleged misappropriation of funds and property from the Lyra Plaintiffs, in the form of both damages and disgorgement of the LGPI (US) and LGPI (Canada) shares.

[20] After reviewing the relevant provisions of the Shareholders Agreements, the judge concluded as follows:

> [22] On my assessment of the amended notice of civil claim and the evidence filed in the application record, I am not persuaded that Ms. Davidson has made out an arguable case that the parties had agreed that the subject of the Lyra Plaintiffs' claim before the Court would be decided through arbitration.
>
> [23] In particular, I accept that the Lyra Plaintiffs' claim is fundamentally a claim for relief in respect of alleged torts of conversion and fraud, as well as alleged breaches of an employment contract and fiduciary duty committed by Ms. Davidson. It will involve primarily an assessment of Ms. Davidson's conduct while she was a Lyra employee, and whether it warrants granting the Lyra Plaintiffs monetary damages and equitable relief in the form of disgorgement of the shares held in trust for Ms. Davidson. The claim is not a "disagreement or dispute between the parties with respect to the shareholder's agreement or the interpretation thereof" of a kind which the parties intended to be resolved through arbitration as per the s. 7.1 "Dispute Resolution" clause in the agreements.
>
> …
>
> [25] … I find that there is no nexus between the claims set out by the Lyra Plaintiffs in their pleading before this Court and the matters reserved for arbitration by the parties in their shareholder's agreements.
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> [Emphasis added.]

[21] The judge addressed the disgorgement remedy sought by the plaintiffs and concluded that it was not a matter covered by the shareholder agreement:

> [28] … In my view, it is manifest that the question of whether, as a result of Ms. Davidson's alleged breach of fiduciary duty, an equitable remedy of disgorgement should be granted in respect of the shares for either restitutionary or prophylactic purposes (*Strother v. 3464920 Canada Inc.*, 2007 SCC 24 at paras. 74 to 77) is not a matter covered by the shareholder agreement. As such, it cannot reasonably be argued that the parties intended an arbitrator to assess whether a share disgorgement remedy would be

> appropriate in a case of alleged employee theft of the employer's property, which is the situation here.

[22] As a consequence, the chambers judge dismissed the application to stay the proceedings.

Issues

[23] On appeal, Ms. Davidson submits that the chambers judge erred in failing to apply the arguable case test to the claims by LGPI US, LGPI Canada and Lyra for disgorgement of the shares held by the Davidson Trust or to the claim that the Davidson Trust relinquish all shares held pursuant to the Share Purchase and Stock Option Plans by delivering up the share certificates to the respondents.

Analysis

Standard of Review

[24] The appellant makes two related arguments on this appeal. She submits that the chambers judge erred in concluding that there was no connection between the share-based claims of the respondents and the matters dealt with in the arbitration agreement. Secondly, she submits that the chambers judge erred in law in failing to apply the arguable case test to the share-based claims.

[25] The question whether a particular dispute is arguably a matter agreed to be submitted to arbitration is a question of mixed fact and law, which requires an analysis of the nature of the dispute and an interpretation of the arbitration agreement: *Clayworth* at paras. 43–44.

[26] Whether the judge relied on the correct legal test is a question of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 44; *Clayworth* at para. 47.

Stay Applications – General Principles

[27] The stay application was brought pursuant to ss. 7(1) and (2) of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act*] which reads as follows:

> (1) If a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first response on the substance of the dispute, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[28] The prerequisites for the issuance of a stay may be summarized in this way:

> (a) the applicant must show that a party has commenced legal proceedings in respect of a matter agreed to be submitted to arbitration;
>
> (b) the application must be brought before the applicant submits its first response on the substance of the dispute; and
>
> (c) the arbitration agreement is not void, inoperative or incapable of being performed.

[29] It is common ground that the second and third of these prerequisites have been met. The issue is whether the legal proceedings are in respect of a matter agreed to be submitted to arbitration. More specifically, the question is whether the claim for share-based remedies falls within the scope of the arbitration agreement the parties have signed.

[30] The chambers judge correctly reviewed the legal principles applying to stay applications under the *Arbitration Act*. When an issue arises as to whether the legal proceedings are in respect of a matter agreed to be submitted to arbitration, a judge must first review the claim to determine whether there is any connection between the claim and the matters the parties have agreed to submit to arbitration. If there is no connection, the stay application should be dismissed. If there is a connection, the judge must consider whether there is an arguable case that the claim falls within the matters to be arbitrated. If so, the question should be referred to arbitration for determination by the arbitrator under the principle of competence-competence (the principle that it is for the arbitrator to first determine which claims are subject to arbitration and which should go before a court), unless the arbitration agreement is void, inoperative or incapable of being performed, or the jurisdictional question is a pure question of law or a question of mixed fact and law whose disposition requires

only a superficial consideration of the record in the case: *Clayworth* at paras. 22–35; *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 at paras. 84–85.

[31] The appellant submits that although the chambers judge correctly stated the test for a stay, he failed to apply the test by limiting his consideration to the cause of action for conversion and fraud, and by failing to apply the arguable case test to the share-based relief sought.

Onus of Proof

[32] A question arose before the chambers judge as to where the onus of proof lay in determining whether the claim was in respect of a matter agreed to be submitted to arbitration. The appellant had argued that the party bringing the claim bore the onus to show that the claim was not in respect of a matter reserved for arbitration. Decisions in the Supreme Court of British Columbia such as *Goel v. Dhaliwal*, 2015 BCSC 2305 at para. 67 and *Kwon v. Vanwest College Ltd*., 2021 BCSC 545 at para. 28 have expressed that principle.

[33] The chambers judge held that the onus to establish that the claim was in respect of a matter reserved for arbitration rests with the applicant for a stay, not the party who has made the claim. I agree with that conclusion. Both *Goel* and *Kwon* relied on *Range v. Bremner*, 2003 BCSC 2038 at para. 27, aff'd 2003 BCCA 675. *Range v. Bremner* in turn cited to *Dome Petroleum Limited v. Burrard Yarrows Corporation* (1983), 48 B.C.L.R. 370 (S.C.), which in fact held that the onus of showing that the dispute was within a valid arbitration agreement rests with the party seeking the stay. Once that has been done, the onus shifts to the party who has brought the claim to show that the arbitration agreement is void, inoperative or incapable of being performed. If that onus is not met, the stay is mandatory.

[34] The respondents do not allege that the arbitration agreement is void, inoperative or incapable of being performed.

[35] Thus, I agree with the chambers judge that the onus to establish that the claim was in respect of a matter agreed to be submitted to arbitration rests with the

applicant for a stay, not the party who has made the claim, with the qualification that the onus is to establish an arguable case that the claim is in respect of a matter agreed to be submitted to arbitration.

[36] The chambers judge held that the appellant had not met this onus. He held that there was no nexus between the cause of action for conversion and fraud and the matters reserved for arbitration. I agree with that conclusion.

[37] The judge also held that the question of whether an equitable remedy of disgorgement should be granted in respect of the shares for either restitutionary or prophylactic purposes was not a matter covered by the arbitration agreement, citing *Strother v. 3464920 Canada Inc*., 2007 SCC 24 at paras. 74 to 77. I note parenthetically that *Strother* was concerned solely with disgorgement of profits, not disgorgement of shares.

[38] To determine whether the chambers judge erred in not seeing a connection between the share-based remedies sought and the matters reserved for arbitration, it is necessary to review both the arbitration agreement and the matters in respect of which the claim is being made.

The Arbitration Agreement

[39] Under the terms of the arbitration clause in each of the Shareholders Agreements, any “disagreement or dispute between the parties with respect to this Agreement” is to be referred to arbitration. The Shareholders Agreements contain several terms that may be relevant to the question whether the dispute between the parties concerning the availability of share-based remedies is a dispute with respect to the Shareholders Agreements. Ms. Davidson relies on the Recital to the agreements, which reads as follows:

> B. The Parties are entering into this Agreement to provide for restrictions on the transfer and ownership of shares in the capital of the Corporation and to govern their relationship as holders of securities of the Corporation.

[40] The Shareholders Agreements contain specific provisions dealing with the transfer of shares acquired under the share option program:

> 3.1 General Prohibition of Transfer
>
> During the continuance of this Agreement and prior to completion of an initial public offering, none of the Shareholders shall deal with any Shares or any interest therein or Transfer any Shares now or hereafter held by such Shareholder except in accordance with this Agreement. …

[41] The Shareholders Agreements also deal with the procedure if a shareholder is no longer an employee and has been dismissed for cause:

> 3.3 Redemption on Termination of Employment
>
> This section only applies to the holders of the Class C Shares, Class D Shares, Class E Shares and the Options. If a Shareholder is no longer employed by the Corporation or an Affiliate of the Corporation, any Options to acquire addition [*sic*] Shares that have not yet vested shall expire and:
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> …
>
> (ii) if the Shareholder was terminated with cause, or if the Shareholder voluntarily left the employ of the Corporation, any vested Options shall expire within 30 days after the date of the termination, and the Corporation or Lyra will redeem the Shareholder's Shares by written notice for the Valuation Price and such payment will be made by the Corporation within such period of time as determined by the Board and in the Reverse Vesting provisions of Article 4 shall be applicable.

[42] Valuation Price is defined in the agreements as the fair market value of the shares.

[43] The use of the connecting language "with respect to" in the arbitration clause suggests that the connection between the dispute and the Shareholders Agreement should not be interpreted narrowly. The term "with respect to", like the connecting language "in respect of", is one of the widest of any expression intended to convey some connection between two related subject matters: *CanadianOxy Chemicals Ltd. v. Canada (Attorney General),* [1999] 1 S.C.R. 743, at paras. 15–17. It has a broader meaning, for example, than "disputes under the agreement" would have.

[44] I note that s. 7 of the *Arbitration Act* uses the connecting language "in respect of" to describe the relationship between the legal proceedings brought and the

matter reserved for arbitration, suggesting a broad approach to assessing that relationship.

[45] The chambers judge held that the arbitration clause was intended to apply to "disputes in relation to share transfers, share ownership, and the shareholder's corporate relationship with the companies in which they hold shares": at para. 24. I agree with that, but would add disputes concerning the disposition and valuation of shares when a shareholder has been terminated for cause, which is the circumstance alleged at bar.

[46] Ms. Davidson asserts by her stay application that the plaintiffs' claim for share-based remedies falls within the scope of the arbitration agreement. Whether there is any nexus between her share ownership and the legal proceedings brought by the respondents depends on the claims made in the Notice of Civil Claim.

The Plaintiffs' Claim

[47] The Notice of Civil Claim has been brought by five plaintiffs: Lyra, who is identified as the former employer of the defendant Ms. Davidson; Charles Chang and Eve Chang, who are identified as owners of Lyra; and two companies, LGPI US and LGPI Canada, who are affiliated with Lyra. The relationship between LGPI US and LGPI Canada with the defendant Ms. Davidson is not specified in the pleadings, apart from the companies being party to the Shareholders Agreements with Ms. Davidson and Lyra.

[48] The central claim is a claim for breach of the employment agreement with Lyra, and for fraud, conversion and breach of fiduciary duties.

[49] Ms. Davidson does not suggest that the claims relating to the alleged misappropriation are arbitrable, but focuses on the share-based remedies as set out in the Relief Sought — the claim for "disgorgement of the shares held by the Davidson Trust" and "an Order that the Davidson Trust relinquish all shares held pursuant to the Share Purchase and Stock Option Plans, by delivering up the share certificates to the plaintiffs".

[50] The claim for relinquishment of the shares is effectively a claim for transfer of the shares of Ms. Davidson to some or all of the plaintiffs, based on the conduct that is alleged to have provided cause for her dismissal. It is at least arguable that this claim falls within the scope of the Shareholders Agreements. As the theory underlying this claim has not been developed on this appeal, I do not consider this to be a matter that can be resolved on a superficial review of the record.

[51] The basis for the claim for disgorgement of the shares is also unclear. Disgorgement is an equitable, gain-based remedy, which requires a defendant who profits from wrongful acts to give up their profits: *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 24. A claim for disgorgement of profits may be open to the plaintiffs; for example, the plaintiffs also claim "a tracing of the Misappropriated Funds and disgorgement of any Income derived therefrom or assets acquired with the Misappropriated Funds". A claim for disgorgement of *shares*, however, if such a claim can be maintained at all, appears to be simply another way of claiming ownership of the shares of the Davidson Trust.

[52] It is unnecessary for the purposes of this appeal to determine whether disgorgement of shares (as opposed to profits) is an available remedy for the claims made by the plaintiffs, but at a minimum, the framing of the relief sought lends support for the appellant's theory that at least this aspect of the claim seeks a proprietary interest in the appellant's shares arising from the appellant's conduct, a matter arguably within the scope of the Shareholders Agreements.

[53] In my opinion, it cannot be said that there is no connection between the claim for share-based remedies made in the Further Amended Notice of Civil Claim and the provisions in the Shareholders Agreements relating to the transfer of shares acquired under the share option plans, including the redemption of shares when a shareholder's employment is terminated for cause. There are a number of factors that support such a connection:

(i) the purpose of the Shareholders Agreements is said to be to restrict the transfer and ownership of the shares, and govern the relationship of the parties as holders of securities of LGPI Canada and LGPI US;

(ii) the claim for relinquishment (and perhaps disgorgement) of the shares is a claim requiring the transfer of the shares, a subject which is addressed in the Shareholders Agreements as exclusively dealt with in those agreements;

(iii) the Shareholders Agreements address redemption and payment for the shares when a shareholder has been dismissed for cause, the circumstance alleged in the plaintiffs' claim as giving rise to the requirement to relinquish the shares; and

(iv) the connecting language "with respect to" in the arbitration agreement requires a broad interpretation of the connection between the dispute (the availability of share-based remedies) and the matters addressed in the Shareholders Agreements.

[54] Whether the claims for share-based remedies necessarily invoke the matters covered by the arbitration agreement cannot be resolved by a superficial consideration of the record, but it is arguable that they do. Under the competence-competence principle, the determination of that issue should in the first instance be made by an arbitrator pursuant to the parties' agreement.

[55] In those circumstances, the claims for disgorgement or relinquishment of the shares must be stayed, unless the absence of connection between the fraud and conversion claims to the matters reserved for arbitration under the Shareholders Agreements permits the stay to be refused. That in turn will depend upon the proper approach to a case where there are multiple issues, some of which are arguably required to be arbitrated and some of which are not.

Claims with Multiple Issues

[56] In their text *Commercial Arbitration in Canada: A Guide to Domestic and International Arbitrations* (Toronto: Thompson Reuters, 2023) (loose-leaf updated 2023, release 1), McEwan and Herbst devote a chapter to the subject of "Multiple Issues and Parties". They begin by pointing out (at s. 3. 61) that there are three options, at least in theory, when a legal proceeding raises multiple issues, some of which have arguably been reserved for arbitration, and some of which have not:

> Where there are multiple parties and/or issues and some but not all fall under the arbitration clause, three options, in theory, are available to the court: (1) grant a stay despite the fact some parties or issues do not fall within the arbitration clause; (2) grant a partial stay; or (3) refuse a stay altogether.

[57] To determine the proper approach to a case such as the case at bar involving multiple issues, some arguably arbitrable, some clearly not, it is necessary to consider three questions:

> (i) Is it open to a judge hearing a stay application to refuse a stay on the basis that the case is fundamentally concerned with non-arbitrable matters or, to put it another way, that the essential character or pith and substance of the dispute is concerned with matters unconnected to the matters reserved for arbitration?
>
> (ii) If a stay of some matters must be granted, is it open to a judge to grant a partial stay of the proceeding, staying the arbitrable matters while permitting the non-arbitrable matters to proceed in the courts?
>
> (iii) If there is jurisdiction to grant a partial stay, what are the considerations in determining whether a partial or complete stay of the action must be granted?

Jurisdiction to Refuse a Stay

[58] In the absence of the statutory exclusions in s. 7(2) of the *Arbitration Act*, there is no residual jurisdiction to refuse a stay of matters arguably reserved for arbitration. In particular, there is no jurisdiction to refuse a stay on the basis that the

case is fundamentally concerned with non-arbitrable matters, or the essential character or pith and substance of the claim is not connected to the matters reserved for arbitration.

[59] This conclusion derives from a consideration of the statutory history of s. 7 of the *Arbitration Act*, as well as recent Supreme Court of Canada jurisprudence on the mandatory nature of stays when the claim relates to any matter arguably reserved for arbitration.

Legislative History

[60] The question of whether there should be a residual discretion to refuse a stay in a case where some issues had been reserved for arbitration and some had not was the focus of much attention during the 1980's. In its 1982 Report 55 on Arbitration, the Law Reform Commission of British Columbia commented that under the then existing arbitration legislation, "(a) stay may also be refused where the arbitration agreement only covers some of the matters which are the subject of the legal proceedings to avoid multiple proceedings when it would be more convenient for all the related claims to be disposed of in the same action", and recommended legislative amendment to specify the circumstances in which this discretion could be exercised.

[61] When the British Columbia Legislature enacted the *Commercial Arbitration Act*, S.B.C. 1986 c. 3, s. 15 of that *Act* did include a residual discretion to refuse to stay legal proceedings if the party opposing the stay "shows a good reason why the court proceedings should continue in place of the arbitration".

[62] During the same period, international commercial arbitration was moving in the direction of clarifying that there should be no discretion to refuse a stay of matters reserved for arbitration unless the arbitration agreement was void, inoperative or incapable of being performed. In 1985, the United Nations Commission on International Trade Law ("UNCITRAL") adopted a Model Law on International Commercial Arbitration to guide legislative development in jurisdictions seeking to establish a modern legal framework in order to encourage commercial

arbitration: *Peace River Hydro Partners v. Petrowest Corp*., 2022 SCC 41 at para. 40.

[63] Article 8 of the UNCITRAL Model Law provided as follows:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[64] No residual jurisdiction to refuse to refer the parties to arbitration was included in the Model Law.

[65] British Columbia adopted this approach for international commercial arbitrations by enacting the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14, which included stay provisions identical to the UNCITRAL Model Law.

[66] Two years later, the legislature amended the domestic legislation to bring it into line with the Province's international commercial arbitration legislation by which there is no residual discretion to refuse a stay of legal proceedings concerning matters reserved for arbitration: *Miscellaneous Statutes Amendment Act (No. 2),* S.B.C. 1988, c. 46, s.11. The 1988 amendment replaced the earlier stay provisions with the following language:

> 15 (1) Where a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before or after entering an appearance and before delivery of any pleadings or taking any other step in the proceedings, apply to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court shall make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[67] The current *Arbitration Act*, enacted in 2020, follows the UNCITRAL approach, with a stay provision that is substantially identical to s. 8 of the *International Commercial Arbitration Act* and the 1988 amendment to the *Commercial Arbitration Act*. The result is that since 1988, British Columbia courts

have been required to stay legal proceedings brought in respect of matters agreed to be submitted to arbitration unless the court determines that the arbitration agreement is void, inoperative or incapable of being performed. There is no residual discretion to refuse a stay, as there was prior to the 1988 amendments to the legislation.

[68] In particular, there is no residual discretion to refuse to stay claims brought with respect to matters agreed to be submitted to arbitration on the ground that other matters in the litigation do not fall within the arbitration agreement.

Wellman and the Mandatory Stay Requirement

[69] The primacy of the requirement that arbitrable matters must be stayed was confirmed by the Supreme Court of Canada in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19 [*Wellman*]. In *Wellman*, the Court was concerned with whether there was a discretion to refuse to stay arbitrable claims in an action where some of the claims were subject to an arbitration requirement, and some were not. A claim had been brought by both business customers and consumers of Telus in respect of matters covered by an arbitration agreement. Telus sought a stay of proceedings under the Ontario *Arbitration Act,* S.O. 1991, c. 17 [*Ontario Act*]. The *Consumer Protection Act*, 2002, S.O. 2002, c.30, Sch. A expressly shields consumers, but not business customers, from a stay of proceedings under the *Ontario Act*.

[70] The stay provision in the *Ontario Act* is s. 7(1), which reads as follows:

> 7 (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.

[71] The lower courts in Ontario had held that a chambers judge could decline to stay the proceedings brought by business customers and could require all of the issues to proceed in court, notwithstanding the arbitrable issues, in the interests of judicial economy and the desire to avoid the possibility of inconsistent results. The issue before the Supreme Court was whether s. 7(5) of the *Ontario Act*, a provision

that conferred jurisdiction to grant partial stays, provided the discretion to require arbitrable matters to proceed in the courts with the non-arbitrable matters. The Supreme Court held that s. 7(5) did not override the mandatory nature of the stay requirements of s. 7(1).

[72] Justice Moldaver, writing for the majority, described the requirement to stay court proceedings in favour of arbitration as a mandatory obligation:

> [63] First, s. 7(1) establishes a general rule: where a party to an arbitration agreement commences a proceeding in respect of a matter dealt with in the agreement — that is, at least one matter in the proceeding is dealt with in the arbitration agreement — the court "shall", on the motion of another party to the agreement, stay the court proceeding in favour of arbitration. The use of the word "shall" in s. 7(1) indicates a mandatory obligation … This general rule reaffirms the concept of party autonomy and upholds the policy underlying the *Arbitration Act* that parties to a valid arbitration agreement should abide by their agreement.
>
> [Citations omitted; emphasis added.]

[73] There were five exceptions to this general rule in s. 7(2) of the *Ontario Act*, but none applied. (In the B.C. Act, there are three exceptions in s. 7(2), but none are invoked on this appeal.)

[74] The partial stay provision in s. 7(5) of the *Ontario Act* permitted the court to "allow the matters that are *not* dealt with in the arbitration agreement to proceed in court, though it must nonetheless stay the court proceeding in respect of the matters that *are* dealt with in the agreement": at para. 69 (emphasis in original). The overriding theme was party autonomy; parties to a valid arbitration agreement should abide by their agreement. In the result, the Court stayed the claims made by business customers and permitted the claims by consumers to proceed in the courts.

[75] The principle clarified in *Wellman* was summarized by Jamal J.A. (as he then was), writing for a five-judge division of the Ontario Court of Appeal in *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612:

> [42] Moldaver J. thus held that when arbitrable and non-arbitrable matters are combined in a single court proceeding and it is reasonable to separate these matters, s. 7(5) gives the motion judge discretion to allow the court proceeding to continue in respect of the matters not dealt with in the arbitration agreement, provided that the judge stays the court proceeding in respect of the matters dealt with in the arbitration agreement. But under s. 7(5) the motion judge cannot refuse to stay the court proceeding in respect of the matters dealt with in the arbitration agreement: at paras. 101–102. Section 7(5) "does not … permit the court to ignore a valid and binding arbitration agreement": at para. 103.

[76] The British Columbia *Arbitration Act* is structured differently than the *Ontario Act*, but contains the same mandatory requirement for a stay of matters reserved for arbitration. *Wellman* confirms that "where at least one matter in the proceeding is dealt with in a valid arbitration agreement", a stay must be ordered in respect of that matter.

[77] The respondents submit that the chambers judge was entitled to rely on the essential nature or pith and substance of the claim in refusing a stay, citing *Haas v. Gunasekaram*, 2016 ONCA 744 and *Northern Regional Health Authority v. Horrocks*, 2021 SCC 42.

[78] *Haas* was not a multiple issues case. The plaintiff and the defendants had entered into a shareholders agreement which contained an arbitration clause. The plaintiff brought an action claiming that he had been induced to enter into the shareholders agreement by fraudulent misrepresentations. The defendants sought a stay of the action on the basis that the misrepresentation claims related to matters agreed to be reserved for arbitration under the shareholders agreement. The motions judge refused the stay on the basis that the pith and substance of the claim was in misrepresentation, not a matter explicitly covered in the shareholders agreement. The Ontario Court of Appeal reversed, and ordered the stay.

[79] The Court of Appeal held that while the motions judge had not erred in taking a "pith and substance" approach to characterize the plaintiff's claims for the purpose of determining the proper scope of the arbitration agreement, he had erred by failing to consider whether the arbitration agreement applied nonetheless: at para. 30. The

Court held that the bulk of the plaintiff's claims fell within the arbitration agreement (at para. 34) and stayed the action (at para. 59).

[80] *Horrocks* was not a case concerning an application to stay civil proceedings under arbitration legislation, but rather a clash between the jurisdiction of a human rights adjudicator and an arbitrator appointed under a collective agreement. The court held that where labour legislation provided for the final settlement of disputes arising from a collective agreement, the jurisdiction of the decision-maker empowered by that legislation was exclusive. The analytical framework for such jurisdictional disputes does not assist in resolving applications under domestic arbitration legislation to refer matters previously agreed to be arbitrated to an arbitration process.

[81] In my view, the pith and substance or essential character approach provides little assistance in determining whether there is a connection between the claims brought by a plaintiff and any of the matters reserved for arbitration by the parties. It may well be, as in the case at bar, that the core of the claim is non-arbitrable, but the plaintiff has included in the claim arbitrable matters. If so, the arbitrable matters must be stayed, even if the essential character of the claim involves matters that are not arbitrable.

[82] The respondent also relies on this Court's decision in *Isagenix International LLC v. Harris*, 2023 BCCA 96, where a stay application was dismissed, but that was a case in which the applicant was unable to establish that the claim made had any connection with the matters the parties had reserved for arbitration. This Court held that "the nature of Ms. Harris's claim is a tort claim that has nothing to do with the contracts with Isagenix containing the arbitration clause": at para. 67. Absent any connection between the claims made and the matters the parties had agreed to reserve for arbitration, the stay was appropriately dismissed.

[83] I conclude that apart from the statutory exclusions, where a court is faced with a claim raising multiple issues, some of which are arguably matters reserved for arbitration and some of which are not, it is not open to an application judge to

dismiss the stay application in its entirety. The claims in respect of matters arguably reserved for arbitration must be stayed.

[84] I turn to the question of whether in such circumstances it is necessary in British Columbia to stay the entire proceeding, or whether a partial stay can be ordered as was done in *Wellman*.

Partial Stays

[85] In many jurisdictions in Canada, but not in British Columbia, there is express authority in the legislation to permit non-arbitrable claims to proceed in court even when paired with arbitrable claims by granting a partial stay of the proceedings.

[86] An example of arbitration legislation that expressly permits a partial stay is s. 7(5) of the *Ontario Act*, the provision that was considered in *Wellman*. Section 7(5) reads as follows:

> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> > (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> >
> > (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[87] Although the British Columbia *Act* does not contain provisions analogous to s. 7(5) of the *Ontario Act*, McEwan and Herbst conclude that a partial stay is available:

> The arbitration statutes in British Columbia do not give discretion to the courts to refuse a stay of proceedings merely because multiple parties and multiple issues arise in litigation. Rather, the room left open is for a partial stay.

[88] The leading case is *Prince George (City) v. McElhanney Engineering Services Ltd*. (1995), 9 B.C.L.R. (3d) 368 (C.A.). The plaintiff brought a claim against two parties. The plaintiff had an arbitration agreement with one of the defendants but not the other. An application for a stay was initially dismissed on the basis that there were broader issues which were inter-related between the two defendants and which

would remain undetermined by the arbitration process. This Court reversed, holding that "the mere fact that there are multiple parties and multiple issues which are inter-related and some, but not all, defendants are bound by an arbitration clause is not a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause": at para. 37.

[89] A stay was granted in respect of the claim against the defendant who was party to the arbitration agreement, but not with respect to the claim against the party who was not. This was effectively a partial stay, as one claim in the action proceeded in the courts and the other was referred to arbitration.

[90] In *Traff v. Evancic*, 1995 CanLII 2984 (B.C.S.C.), the court was faced with a situation similar to the facts at bar. A claim of fraudulent misrepresentation was made against one of the defendants which was also party to an arbitration agreement. The fraudulent misrepresentation claim was not caught by the arbitration agreement, but one of the remedies the plaintiff sought was an accounting, which was. Madam Justice Saunders (then a justice of the British Columbia Supreme Court) ordered that the claim be stayed "so long as the pleadings claim an accounting or other remedies against [the defendant] under the contracts".

[91] This creative remedy ensured that the arbitrable issue would be stayed, but provided an avenue to permit the plaintiff to continue the non-arbitrable issues in the courts.

[92] In *Seidel v. TELUS Communications Inc*., 2011 SCC 15, the Supreme Court considered a factual situation similar to that in *Wellman*, but under the British Columbia legislation. A civil claim had been brought by both consumers and business customers of Telus. The claims were subject to an arbitration agreement, and this Court had ordered that the entire claim be stayed in favour of arbitration.

[93] On appeal, a majority of the Supreme Court held that consumer legislation overrode the arbitration agreement. The court lifted the stay in respect of the consumer claims, permitting them to proceed in the civil courts, while the claims of

the business customers were referred to arbitration. The effect of this decision was to grant a partial stay of the action against Telus.

[94] In *Clayworth*, this Court considered an employment agreement in which most of the civil claims were arguably within the arbitration agreement, but one clearly was not. The plaintiff and defendant had been party to an employment agreement which contained an arbitration clause. After the appellant left her employment, a dispute arose concerning whether she had breached her agreement by the improper use of confidential information or trade secrets belonging to her employer. The plaintiff sued for damages, an accounting of profits, an injunction to restrain further use of the information and an order for delivery of all documents in her possession. The defendant sought a stay of the civil action, other than the injunction (as injunctive relief had been expressly excepted from the scope of the arbitration clause).

[95] The stay application was dismissed at first instance but allowed in this Court, on the basis that there was an arguable case that the claim for relief (other than the injunction) fell within the scope of the arbitration clause. In those circumstances, the arbitrability of the claim should be determined in the first instance by an arbitrator. The result was that the claim for an injunction could be pursued in the courts, but the remaining claims, including the remaining relief sought, were stayed, effectively a partial stay of the action.

[96] In *Mazzei Electric Ltd. v Western Canadian Construction Company Ltd*., 2021 BCSC 1873, the court applied *Clayworth* and rejected the argument that s. 7 of the *Arbitration Act* prevented the staying of only a portion of a claim. The litigants were party to an arbitration agreement. In response to a civil claim by the plaintiff, the defendant filed a counterclaim which contained certain paragraphs in the claim for relief which the chambers judge concluded were arguably in respect of a matter the parties had agreed to submit to arbitration. A stay was ordered in respect of those paragraphs which sought relief in relation to certain allegations of delay, while permitting the remainder of the claim for relief to proceed in the courts.

[97] The problem of multiple issues also arose in *Kwon v. Vanwest College Ltd*. The plaintiff commenced an action to recover fees and expenses for a consulting agreement. There was no connection between this action and any arbitrable issues. The defendant disputed the amount and filed a counterclaim alleging that the plaintiff had breached her obligations under a shareholders agreement which contained an arbitration clause. Justice Forth concluded that the counterclaim was arguably in relation to matters reserved for arbitration, and stayed the counterclaim, while permitting the main action to proceed.

[98] This Court briefly considered the jurisdiction to issue a partial stay in *Hawthorn v. Hawrish*, 2023 BCCA 182. The issue before the Court was whether the arguable case standard for referring disputes to an arbitrator applied when the issue was whether a party had responded to the substance of the dispute before applying for a stay. The Court concluded that the arguable case standard did not apply in those circumstances.

[99] In considering the principles applicable to stays under s. 7, Willcock J.A., writing for the Court, accepted that a partial stay of a claim was available in principle, commenting that:

> [68] There is some support for the proposition that the equivalent to s. 7 in the law upon which the *Arbitration Act* is modeled (s. 8(1) of the *Commercial Arbitration Code*) should be narrowly interpreted. …
>
> [69] Such a narrow interpretation of s. 7(1) does not preclude the court from issuing an order for a partial stay or from granting a stay after a dispute the parties have agreed to submit to arbitration is raised by an amendment. …

[100] Finally, in *Williams v. Amazon.com Inc.*, 2023 BCCA 314 [*Williams*], this Court affirmed an order staying the majority of claims advanced in a class action, but permitting claims under the *Business Practices and Consumer Protection Act*, S.B.C. 2004, c. 2 to proceed in the courts.

[101] In *Wellman*, Justice Moldaver recognized that separating the arbitrable from the non-arbitrable issues might be “cumbersome” or “a difficult exercise in certain cases”: at paras. 87–88. The Court also recognized that a multiplicity of proceedings

can cause practical difficulties, but concluded that "this concern cannot be permitted to trump the language of the statute": at para. 90. He concluded that the potential inconsistency of results arising from a multiplicity of proceedings, the principle that had been relied on in the Ontario courts prior to *Wellman* to foreclose bifurcating proceedings into arbitrable and non-arbitrable parts, was not decisive:

> [90] Lastly, while s. 138 of the *Courts of Justice Act* stipulates that courts "shall" avoid a multiplicity of proceedings, it tempers this language by indicating that the court must do so only "as far as possible". Accordingly, where the application of an Ontario statute, properly interpreted, leads to a multiplicity of proceedings, the court must give effect to the will of the legislature, even if the consequence is to potentially create a multiplicity of proceedings. …

[102] Section 10 of the *Law and Equity Act*, R.S.B.C. 1996, c. 253 contains the same qualification to the avoidance of multiplicity of proceedings.

[103] The Court concluded that a stay must be granted pursuant to the general rule under s. 7, but that it was not necessary to stay the entire proceeding:

> [102] … And although the word "proceeding" is used without qualification in s. 7(1), seemingly in the sense of "proceeding as a whole", I am of the view that the stay in this case must be restricted to the parties who are legally bound by an arbitration agreement … Moreover, taking a purposive approach, a principal object of the s. 7 framework is to ensure parties to a valid arbitration agreement abide by their agreement; it is not to keep parties who either never agreed to or are not bound by an arbitration agreement out of court. …

[104] The judgment in *Williams* is consistent with this result. The Court pointed out that s. 15(1) of the previous *Act* provided for a stay of the "legal proceedings", which by definition are the court proceedings brought by the plaintiff. The Court applied the stay to the court proceedings in relation to the arbitrable issues but permitted the proceedings in relation to remaining claims to continue: at para. 193.

[105] Sub-sections 7(1) and (2) of the current *Act* should be interpreted in the same way: if a party commences legal proceedings in a court in respect of a matter agreed to be submitted to arbitration, and the exceptions in s. 7(2) do not apply, the court

must make an order staying the legal proceedings in relation to the matter agreed to be submitted to arbitration.

[106] In the case at bar, it was not open to the chambers judge to dismiss the application for a stay on the basis that the plaintiffs' claim is fundamentally a claim for relief in respect of alleged torts of conversion and fraud. The arbitrable portion can be separated from the non-arbitrable so that those claims that are unconnected to the Shareholders Agreement can proceed in the courts. But the proceeding in relation to the matter that is arguably a matter agreed to be submitted to arbitration must be stayed pending the arbitrator's determination on jurisdiction.

When Should a Partial Stay be Ordered?

[107] Apart from *Wellman*, there has been little authoritative discussion of the factors that must be considered in determining whether the stay of proceedings should be partial or complete. In *Wellman*, the Court made clear that matters reserved for arbitration must be stayed, but observed that the mandatory stay provisions were not intended to keep parties who either never agreed to or are not bound by an arbitration agreement out of court.

[108] In my view, the question of whether the stay is to be partial or complete is a matter of discretion for the judge of first instance. One of the non-exclusive factors to be considered will be whether the arbitrable and non-arbitrable issues are so intertwined that they must be heard together, in which case a complete stay of the action will be appropriate: see e.g., *James v. Thow*, 2005 BCSC 809 at para. 105 and *The Owners, Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 29. Another factor will be whether the core of the claim concerns non-arbitrable matters, in which case a partial stay may be more appropriate.

Conclusion

[109] In my opinion, the chambers judge committed the same error as the motions judge in *Haas*, by focussing on what he characterized as "fundamentally a claim for relief in respect of alleged torts of conversion and fraud, as well as alleged breaches

of an employment contract and fiduciary duty" but failing to recognize that the arbitration agreement applied to the share-based remedies nonetheless.

[110] There is an arguable case that the dispute over the availability of share-based relief is a dispute with respect to a matter that had been reserved for arbitration under the Shareholders Agreements. In these circumstances, there was no residual jurisdiction to refuse a stay in relation to the share-based remedies.

[111] This is an appropriate case for a partial stay rather than a complete stay of the action. Liability and consequential loss can be determined in the courts without the necessity of determining whether the claim for relinquishment of shares must be referred to arbitration. If the action is unsuccessful, the arbitrable issue will not arise. If the claim is successful, the plaintiffs can consider whether the compensation awarded is adequate. If not, an arbitrator will have the benefit of the court's adjudication on the liability issues when assessing the jurisdictional question.

[112] This is not a case where the arbitrable and non-arbitrable issues are intertwined to such a degree that a stay of the entire action must be ordered pending the arbitrator's decision as to jurisdiction. As the chambers judge correctly pointed out, the fundamental claim is unconnected to the matters reserved for arbitration. That claim can be adjudicated separately in the civil courts, as liability and damages sometimes are.

Disposition

[113] In my opinion, the share-based claims brought by the respondents in this appeal must be stayed, but the claims based on the allegations of fraud and conversion may proceed in the courts.

[114] I would therefore allow the appeal in part and grant a stay of the claim for relief sought in paras. 1(b) and (c) of Part 2 of the Notice of Civil Claim relating to disgorgement and relinquishment of shares.

"The Honourable Mr. Justice Hunter"

I AGREE:

"The Honourable Madam Justice Fenlon"

I AGREE:

"The Honourable Mr. Justice Butler"