COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Spark Event Rentals Ltd. v. Google LLC,* 2024 BCCA 148

Date: 20240419
Docket: CA49194

Between:

Spark Event Rentals Ltd.

Appellant
(Plaintiff)

And

Google LLC, Google Canada Corporation, Alphabet Inc, Apple Inc. and Apple Canada Inc.

Respondents
(Defendants)

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice Fisher
The Honourable Justice Winteringham

On appeal from: An order of the Supreme Court of British Columbia, dated June 28, 2023 (*Spark Event Rentals Ltd. v. Google LLC*, 2023 BCSC 1115, Vancouver Docket S218036).

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Place and Date of Hearing:	Vancouver, British Columbia February 8, 2024
Place and Date of Judgment:	Vancouver, British Columbia April 19, 2024

Written Reasons by:
The Honourable Mr. Justice Harris

Concurred in by:
The Honourable Madam Justice Fisher
The Honourable Justice Winteringham

Summary:

The appellant seeks an order lifting a stay of proceedings in a proposed class action issued in favour of the arbitral process mandated in an agreement between the parties. The appellant submits that the judge erred in finding that the court was not the proper venue to decide the validity of the arbitration agreement. Held: Appeal dismissed. There are two bases on which a court should decide a jurisdictional challenge: (1) in the presence of an exception to the competence-competence principle found in the Dell framework; and, (2) where there is a realistic prospect that the arbitrator will not decide the jurisdictional challenge because a "brick wall" stands between the appellant and the arbitrator. Under the Dell framework, the appellant failed to establish an exception to the arbitrator's primacy on the undisputed factual record. Under the brick wall framework, the chambers judge did not err in his finding that the appellant had not satisfied him of the existence of circumstances that would preclude it from reaching arbitration on the jurisdictional issue.

Reasons for Judgment of the Honourable Mr. Justice Harris:

Introduction

[1] The issue on this appeal is who has the authority to decide a jurisdictional challenge alleging an arbitration agreement is invalid: an arbitral tribunal or a court? In this case, the appellant Spark Event Rentals Ltd. ("Spark") is the plaintiff in a proposed price-fixing class action against the respondents Google and Apple. In the underlying action, Spark alleges that Google has engaged in anti-competitive practices with Apple to artificially maintain the price of Google search ads above a competitive market rate. In the court below, Google brought an application to stay the proceedings in favour of the arbitration process mandated in the purchase agreement. Spark alleges that its binding individual arbitration agreement with the respondent, Google, is void as unconscionable or contrary to public policy. In the circumstances, Spark says, an assessment of the agreement's validity should be made by the court and not the arbitral tribunal.

[2] The chambers judge stayed the action in favour of arbitration. In so doing, he applied what is commonly referred to as the competence-competence principle that mandates jurisdictional challenges to arbitration be decided within arbitration and not by courts, unless certain exceptions apply. The judge concluded that this case did not fall within any applicable exception and stayed the action. As a result, should this

Court refuse to intervene, the question whether the arbitration agreement is invalid would be a matter to be decided within the arbitration. In other words, Spark would need to convince the arbitral tribunal that the arbitration agreement is invalid in order to revive its proposed class proceeding.

[3] It is important to emphasize that the focus of this appeal is on whether the judge erred in staying the action to permit the jurisdictional challenge to be decided within the arbitration. This means that the focus is on a threshold question: who has the authority to decide the jurisdictional challenge to the arbitration agreement? The focus is not on who has the authority to decide the ultimate merits of the substantive issues in the proposed action (that is, are the proposed defendants guilty of price-fixing?). The threshold question in this appeal does not directly turn on the substantive issue raised in the dispute between the parties.

[4] Before turning to the merits of the appeal, it is useful to set out the analytical framework for determining when a court will assume the jurisdiction to determine a jurisdictional challenge to arbitration, rather than leaving that matter to be decided within the arbitration.

The Relevant Analytical Framework for Deciding Whether to Stay an Action in Favour of Arbitration

[5] The starting point is the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*ICAA*], which governs the arbitration agreement in issue. Section 8 provides:

> 8 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[6] There is no dispute that Google was entitled to apply for a stay, the necessary preconditions for doing so being satisfied.

[7] The *ICAA* also incorporates the competence-competence principle, which establishes that an arbitral tribunal may rule on its own jurisdiction, including objections to the validity of the arbitration agreement. Section 16(1) provides:

> 16 (1) The arbitral tribunal may rule on its own jurisdiction, including ruling on any objections with respect to the existence or validity of the arbitration agreement, and for that purpose,
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> (a) an arbitration clause which forms part of a contract must be treated as an agreement independent of the other terms of the contract, and
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> (b) a decision by the arbitral tribunal that the contract is null and void must not entail, as a matter of law, the invalidity of the arbitration clause.

[8] The case law related to these statutory provisions further suggests that arbitral tribunals generally should decide jurisdictional questions first, before the issue is determined by a court: *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 at para. 84.

[9] The framework for determining when a court will decide a jurisdictional challenge to arbitration rather than leaving that matter to be decided in the arbitration has been explained recently by a seven-judge majority of the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 SCC 16. It is important to identify the governing principles that emerge from that case.

[10] The substantive issue in *Uber* was whether Mr. Heller, an Uber driver, was an employee as defined by Ontario employment standards legislation. The issue before the Supreme Court of Canada, however, was who had the authority to resolve that substantive question, the courts of Ontario or the arbitrator specified in Uber's agreement with Mr. Heller. The answer to this jurisdictional question turned on whether the compulsory arbitration clause was valid and whether the authority to decide that question lay with the courts or the arbitrator. Only if the competence-competence principle was displaced would the court have the authority to adjudicate the validity of the arbitration agreement over the arbitral tribunal.

[11] After dealing with certain preliminary issues, such as which legislation applied to the dispute, the majority turned to the principles that courts should consider in their discretion to determine the validity of an arbitration agreement. It should be noted that the jurisdiction to determine the question whether to refuse an otherwise mandatory stay of proceedings conferred by the applicable legislation in *Uber* is functionally equivalent to the jurisdiction conferred by s. 8(2) in this case.

[12] What emerges from the majority reasons in *Uber* are two distinct but potentially complementary approaches to displacing the competence-competence principle. I shall rather colloquially refer to these approaches as the "*Dell* framework" and the "brick wall framework". The *Dell* framework describes a set of criteria, enumerated by the Supreme Court of Canada in *Dell*, that authorize a court to determine the jurisdictional challenge rather than leave the matter to the arbitration, even if it could practically be decided there. The brick wall framework, developed in the majority reasons of *Uber*, captures circumstances where there are impediments to bringing a jurisdictional challenge such that the issue of validity may not ever reach the arbitrator to be decided. The approach of a court in determining the jurisdictional challenge, as we shall see, differs depending on whether a court is deciding the issue only under the *Dell* framework (that is, in the absence of a brick wall) or only because of the presence of a brick wall. There may, however, be circumstances in which a court is authorized to decide the jurisdictional challenge under both approaches, in which case the approach mandated by the *Dell* framework may be supplemented by the brick wall framework, if necessary.

Competence-competence principle

[13] Under both frameworks, the starting point is a recognition that the competence-competence principle is not lightly displaced. The proposition that an arbitral tribunal has the authority to determine its own jurisdiction, and generally should be the one to do so at first instance, reflects deliberate policy choices. Arbitration statutes acknowledge the freedom of parties to determine how their disputes should be adjudicated along with the practical benefits of arbitration as a means of access to justice. Running through the jurisprudence is a recognition that

the competence-competence principle should be displaced only in “abnormal” or unusual circumstances.

[14] Notwithstanding this general rule, the courts retain the authority to decide a jurisdictional challenge in certain circumstances, thereby giving effect to the legislative policy found in various arbitration acts, including the *ICAA*.

The *Dell* framework

[15] As explained in *Uber*, the *Dell* framework establishes exceptions to the rule that any challenge to the jurisdiction of an arbitrator must first be referred to the arbitrator. First, a court may decide a question of law alone: *Uber* at para. 32, citing *Dell* at para. 84. This exception does not apply in this case. Second, where the jurisdiction of the arbitrator requires the admission and examination of factual proof alone, normally the matter is referred to the arbitrator: *Uber* at para. 32, citing *Dell* at para. 85. Third, “[f]or questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration”: *Uber* at para. 34, citing *Rogers Wireless Inc. v. Muroff*, 2007 SCC 35 at para. 11.

[16] In *Uber*, the majority observed, as noted, that in cases involving mixed fact and law, the jurisdictional issue must be referred to arbitration unless the relevant factual questions require only a superficial consideration of the documentary evidence in the record: at para. 32. The majority explained, at para. 33, as follows:

> In setting out this framework, *Dell* adopted an approach to the exercise of discretion that was designed to be faithful to what the international arbitration literature calls the “*prima facie*” analysis test as regards questions of fact and questions of mixed fact and law (para. 83). Under this test, the court must “refer the parties to arbitration unless the arbitration agreement is manifestly tainted by a defect rendering it invalid or inapplicable” (para. 75). To be so manifestly tainted, the invalidity must be “incontestable”, such that no serious debate can arise about the validity (para. 76, quoting Éric Loquin, “Compétence arbitrale”, in *Juris-classeur Procédure civile* (loose-leaf), fasc. 1034, at No. 105). Rather than adopting these standards literally, *Dell* gave practical effect to what was set out in the arbitration literature by creating a

> test whereby a court refers all challenges of an arbitrator's jurisdiction to the arbitrator unless they raise pure questions of law, or questions of mixed fact and law that require only superficial consideration of the evidence in the record (paras. 84-85).

[17] The meaning of a superficial review is addressed at para. 36:

> Neither *Dell* nor *Seidel* fully defined what is meant by a "superficial" review. The essential question, in our view, is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties (see *Trainor v. Fundstream Inc.*, 2019 ABQB 800, at para. 23 (CanLII); see also *Alberta Medical Association v. Alberta*, 2012 ABQB 113, 537 A.R. 75, at para. 26).

[18] What I take from this is that a "superficial" review is not inconsistent with a searching analysis of legal questions, provided that the necessary facts engaged in the analysis are evident or not legitimately disputed.

The brick wall framework

[19] *Uber* is important because it adds an alternative, or supplementary, basis authorizing a court to determine a challenge to arbitral jurisdiction. As the majority notes, the need to have recourse to this alternative is because the underlying assumption that if a court does not decide an issue, the arbitrator will, is not always true. Circumstances may exist where the issue may never be resolved, if not by the court: *Uber* at paras. 37–38. In *Uber*, for example, the Court found that Mr. Heller would be functionally barred from reaching arbitration, owing to terms that would require him to arbitrate in the Netherlands for fees approximately equivalent to his annual earnings as an Uber driver: at paras. 9–11, 47.

[20] As I read *Uber*, the Court does not purport to lay out a precise test of when a "brick wall" effectively prevents a determination of a jurisdictional challenge within the arbitration. Rather, the majority illustrates some circumstances in which there is a real prospect that "the validity of an arbitration agreement may not be determined", such as when resolving that question in arbitration is fundamentally too costly or otherwise unavailable. The majority gives, as specific examples, high fees relative to the claim or an inability reasonably to reach the place of arbitration—examples that were relevant to the facts before them. But the concern arises generally from

circumstances that effectively insulate the arbitration agreement from meaningful challenge: *Uber* at para. 39.

[21] The majority recognized that the assumption that if a court does not decide an issue, the arbitrator will, could be undermined by litigation tactics by either party to an agreement. Plaintiffs could advance spurious arguments attacking validity and defendants improperly complicate the record to avoid the application of the *Dell* framework. These concerns led the majority to ask, at para. 44:

> How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.

[22] I note here how the majority framed the issue: how is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? That question is answered in paras. 45–46:

> While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains narrowly focused (*Hryniak v. Mauldin*, [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must remain alert to "the danger that a party will obstruct the process by manipulating procedural rules" and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).
>
> As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

[23] It seems clear then that the first question a court must answer in determining whether the brick wall framework applies is whether, on a limited assessment of the evidence, there is a real prospect, for whatever legitimate reasons, that the challenge to the validity of the arbitration agreement may never be resolved by an

arbitrator. Although this standard permits a limited assessment of the evidence, it is not a mini-trial.

[24] Once the threshold test has been met, the court is then entitled to embark on a thorough analysis of the evidence to determine the issue of jurisdiction on the merits as if it were the arbitrator. Once one is beyond the brick wall—precisely because the assumption that if the court does not decide the challenge, the arbitrator will decide has been displaced—the court has free reign to delve as deeply as is necessary into the evidence to resolve legal and factual questions. By contrast, under the *Dell* framework, the court's assessment of the record is limited to a superficial assessment of evident and undisputed facts, precisely because a deeper dive can and should be undertaken by the arbitrator to give effect to the competence-competence principle.

[25] In my view, this framework governs the analysis the judge was required to undertake. I note, and will return to, the concurring judgment of Brown J. Justice Brown criticized the majority approach as unnecessary and undesirable: *Uber* at para. 103. He would have decided the case on the basis that the arbitration agreement in issue was contrary to public policy. In his view, the competence-competence principle should be displaced in circumstances where an arbitration agreement effectively bars access to arbitration so that rather than being an agreement to arbitrate, it becomes in practical terms an agreement not to arbitrate: *Uber* at para. 102. In his view this occurs when, viewed practically and in light of all the circumstances, the arbitration agreement effectively insulates the dispute from independent adjudication.

[26] At this stage, I point out that Brown J.'s approach was not commented on or endorsed by the majority, nor was it expressly disapproved of, although Côté J., in dissent, disagreed with it. It follows, in my view, that the starting point of the analysis in this case must be the approach adopted by the majority. Had Brown J.'s approach been approved of as an alternative or complementary approach to determining when competence-competence is displaced, one would expect the majority to have said

so. In saying this, I recognize that this Court has acknowledged that Brown J.'s analysis of public policy can be informative in assessing the substantive validity of contractual clauses in circumstances where there is no issue that a court has the jurisdiction to determine validity: see, for example, *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198.

The Substance of the Dispute Between the Parties

[27] Spark is a small event rental business located in Pemberton, serving Pemberton, Whistler, and Squamish. It entered into an agreement with Google to use Google Ads to promote its business.

[28] Spark is the proposed representative plaintiff in a proposed commercial national class action alleging that the Google and Apple parties engaged in price-fixing conduct contrary to the *Competition Act*, R.S.C. 1985, c. C-34. Spark says the alleged conduct caused the price paid for buying Google Ads to be higher than it ought to have been. Spark seeks to certify the action on behalf of all purchasers in Canada of Google Ads from 2005 to the present.

[29] Spark has purchased Google Ads since 2018. Although not detailed in the evidence, it can be taken that any damages it could prove individually are minimal, certainly insufficient economically to justify either an individual action or individual arbitration.

[30] As a purchaser of Google Ads, Spark accepted Google's Advertising Program Terms (the "Terms of Service"). The Terms of Service contain a dispute resolution agreement providing that disputes will be finally determined by arbitration (the "Arbitration Agreement"). The parties agreed that the claims advanced in the action are subject to the Arbitration Agreement.

[31] The first paragraph of the Terms of Service states: "Please read these Terms carefully. They require the use of binding individual arbitration to resolve disputes

rather than jury trials or class actions." A key term of the Arbitration Agreement provides, in Section 13(A):

> 13 Dispute Resolution Agreement.
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> A. Negotiation. In the event any dispute arises out of or in connection with the Terms (each, a “Dispute”), the parties will make good faith efforts to resolve the Dispute within 60 days of written notice of the Dispute from the other party. If the parties are unable or unwilling to resolve the Dispute in that time, the Dispute will be finally determined by arbitration administered by the International Centre for Dispute Resolution (“ICDR”) under its International Arbitration Rules (“Rules”). This agreement to arbitrate is intended to be broadly interpreted and, among other claims, applies to any claims brought by or against (i) Google, Google affiliates that provides the Programs to Customer or Advertiser, Google parent companies, and the respective officer, directors, employees, agents, predecessors, and assigns of these entities and (ii) Customer or Advertiser, the respective affiliates and parent companies of Customer or Advertiser, and the respective officers, directors, employees, agents, predecessors, successors, and assigns of these entities.

[32] I will return later to comment on the nature of the arbitration procedures as well as the evidence relating to whether the Arbitration Agreement should be found to be unconscionable or contrary to public policy. For the time being, it is sufficient to note that the parties hold very different views of the import of the evidence. Spark contends that the costs and other impediments to mounting a jurisdictional challenge are such that there is a real prospect the challenge will never be decided within arbitration. And, in any event, Spark says the Arbitration Agreement is unconscionable within the meaning of the test laid out in *Uber*, as well as being contrary to public policy for the reasons set out in the concurring judgment of Brown J. In response, Google says Spark has failed to show that a brick wall exists or that a determination that the Arbitration Agreement is invalid can be made by the court within the *Dell* framework. It says that the analysis proffered by Brown J. does not provide a basis to displace the competence-competence principle.

Reasons for Judgment

[33] The judge began by observing that Google applied to stay the action under s. 8(2) of the *ICAA*, while Apple applied under the *Law and Equity Act*, R.S.B.C. 1996, c. 253, on the basis that the matters are so intertwined that it would amount to an abuse of process to allow the action to proceed against Apple

contemporaneously with the arbitration against Google. As the judge framed the issue, he was obliged to stay the proceedings against Google unless Spark established that the Arbitration Agreement was void either because it is unconscionable or contrary to public policy.

[34] The judge turned first to the issue of unconscionability, referring to the elements of the test described in *Uber* and *Pearce*. He then outlined the doctrine of public policy as explained in *Pearce*, and by Brown J. in *Uber* as summarized by Justice Mayer in *Petty v. Niantic Inc.*, 2022 BCSC 1077, aff'd 2023 BCCA 315.

[35] The judge then articulated his view of the procedure to determine the accessibility of arbitration to determine jurisdiction, before turning to two distinct challenges to the Arbitration Agreement: at para. 28. First, Spark's allegation that the agreement prohibits it from initiating arbitration; and, second, Spark's allegation that the nature of the action cannot be resolved in arbitration as the action is cost prohibitive, such that it cannot be brought without a class action procedure.

[36] Next, the judge set out the positions of the parties, identifying disagreements between them about, for example, the cost and complexity of initiating arbitration to determine jurisdiction. It is helpful to quote the judge's reasoning. In respect of the first challenge, he said this:

> [34] This is a commercial, as opposed to a consumer, agreement. In this case, Spark has not provided any financial information, nor have they affirmed that they cannot afford the filing fees that they say apply. Rather, Spark asserts that it is not economic for them to pursue their claim as a whole against Google through the arbitration process.
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> [35] In *Uber Technologies Inc.*, the Supreme Court of Canada concluded that arbitration could not be initiated because the filing fees posed a "brick wall" that economically prevented the individual plaintiff from initiating arbitration: para. 47. This would have the effect of prohibiting the arbitrator from determining whether the agreement was valid or void due to unconscionability.
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> [36] I am not satisfied, under either expert's interpretation of the arbitration agreement, that a financial "brick wall" exists such that there is a reasonable prospect that Spark does not have the ability to initiate arbitration.
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> [37] Having made this determination there is no need for me to consider whether the arbitration agreement is void on unconscionability or public policy grounds on this issue.

[37] The judge then asked whether the dispute could be resolved within the arbitration and concluded that it could. He said:

> [38] Spark says the critical question is whether the entire dispute can be resolved within the arbitration process. In this case, due to the expense involved in establishing the impact of the alleged agreement on the price of ads, the dispute can only be resolved through a class action proceeding. Since the arbitration does not allow such procedural claims to be brought, the dispute cannot be resolved in arbitration.
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> [39] Google says the determination of the cost of the claim within the rubric of an unconscionability analysis must be resolved in the arbitration process. The arbitration agreement provides considerable flexibility with respect to procedural matters, how a claim will be heard, and costs.
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> [40] Alternatively, Google says the inability of arbitration to support a class action claim does not constitute an improvident bargain; Google relies on *Difederico v. Amazon.com, Inc.*, 2022 FC 1256.
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> [41] The parties are unable to agree on the overall cost of the action and the extent of the discretion afforded to the arbitrator or arbitrators. In my view, the rules make it clear under either expert's interpretation, that there is considerable discretion embedded in the process to enable claims to be heard in an expeditious and efficient manner.
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> [42] In my view, based on a superficial review of the evidence:
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> a) It is not clear that the arbitration process cannot resolve the entire dispute commenced by Spark;
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> b) Given the flexibility and discretion delegated to the arbitrator or arbitrators, the arbitrator or arbitrators are best suited to determine this issue;
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> c) Spark has the financial ability to initiate the arbitration process such that the arbitrator or arbitrators could determine whether the dispute can be resolved in the arbitration; and
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> d) If the arbitrator or arbitrators decide that the entire dispute cannot be resolved within the arbitration, they will be in a position to determine whether the arbitration is void on unconscionability or public policy grounds.
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> **Conclusions on Unconscionability and Public Policy**
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> [43] Spark has not established that there is not a reasonable prospect that they do not have the ability to initiate arbitration.
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> [44] Spark has not established, based on a superficial review of the evidence, that the dispute cannot be resolved within the arbitration process.
>
> [45] Therefore, the determination of whether the agreement is void on unconscionability or public policy grounds must be made in the arbitration process.

On Appeal

[38] Spark contends that the judge erred in applying the wrong framework to his analysis. More particularly, Spark says he erred in asking whether there was a reasonable prospect that Spark does not have the ability to initiate arbitration, rather than whether there was a "real prospect" that "the arbitrator may never decide the merits of the jurisdictional challenge". Spark contends that the judge ignored relevant evidence and relevant factors. It further contends that he erred in applying the superficial approach to the evidence, rather than a more stringent assessment required by *Uber*. Finally, Spark contends that the judge committed a palpable and overriding error of fact in finding that Spark did not affirm "that they cannot afford the filing fees that they say apply", despite that it did in fact affirm that it could not afford the fees.

[39] For their part, Google argues the judge correctly applied the framework set out in *Uber*, as he focused on whether there was a real prospect that the jurisdictional challenge could not be decided if referred to arbitration. Google says the judge correctly considered, on a limited assessment of the evidence, whether there was a real prospect that the jurisdictional challenge would never be decided if referred to arbitration. After concluding that no brick wall had been established, the chambers judge considered whether the jurisdictional challenge could be decided on a superficial review of the evidence in the record. Google goes on to submit that the judge did not make an error of fact, as alleged. Finally, Google argues that there is no separate public policy basis for a finding of unconscionability. Further, there was no basis in the record for a finding that the Arbitration Agreement is void as unconscionable or contrary to public policy.

Analysis

[40] I think it is important at the outset to be clear that, following the majority's approach in *Uber*, the question is whether the jurisdictional challenge can or should be decided first by the arbitrator. The two bases on which a court should decide a jurisdictional challenge are: (1) in the presence of an exception to the

competence-competence principle found in the *Dell* framework; or, (2) where there is a realistic prospect that that the arbitral tribunal will not decide the jurisdictional challenge under the brick wall framework described in *Uber*. I note, again, that the focus under both approaches is on the preliminary jurisdictional challenge and not the substantive merits of the question to be arbitrated.

[41] Both in its factum and in its argument below, as reflected in the judgment, Spark, at times, seemingly framed the issue as whether it was economic to pursue their claim as a whole within the arbitration process. In my view, that is not the issue. The issue is whether the arbitrator or the court should decide the threshold jurisdictional challenge. During oral argument on the appeal, Spark acknowledged that to be the question. Hence, one issue is whether there is a brick wall that raises a realistic prospect that an arbitrator will not decide whether the Arbitration Agreement is invalid because it is unconscionable. It follows from this that if the judge did not commit a reversible error in concluding that Spark had not established that a brick wall existed, he did not err in concluding that he did not need to consider whether the agreement was void as unconscionable. In that case, the latter consideration would be referred to the arbitrator.

[42] Before focusing more narrowly on the reasons for judgment, a comment on the role of public policy in the analysis is helpful. Spark contends that the analysis found in Brown J.'s decision should be treated as an alternative ground on which to permit a court, rather than an arbitrator, to decide whether an arbitration agreement is invalid. It says that public policy considerations take the analysis outside the application of competence-competence and this has been recognized by this Court in cases such as *Pearce*, *Petty*, and *Williams v. Amazon.com Inc.*, 2023 BCCA 314, each of which engaged in a detailed analysis of public policy considerations. It is this approach, it seems to me, that may explain why Spark's argument often conflated issues going to whether an arbitrator could decide the jurisdictional challenge and issues about whether the entire dispute on the merits could be decided within the arbitration. In other words, Spark conflated the jurisdictional challenge with the substantive question of unconscionability.

[43] With respect, I do not think this approach accurately describes the law as it currently stands. I say this for several reasons.

[44] First, as already noted, Brown J.'s approach was not endorsed or approved by the majority in *Uber*, as one would expect it to have been if it stood as an alternative approach to a court deciding the validity of an arbitration agreement.

[45] Second, the competence-competence principle addresses which adjudicator gets to decide validity. It raises a threshold issue which is not answered simply by alleging invalidity, whether on grounds of unconscionability, public policy, or other available grounds. It is not the case that only a court can decide whether an agreement is invalid because it is contrary to public policy. If the competence-competence principle is not displaced, then substantive issues of invalidity fall to be decided by an arbitral tribunal. These issues may include allegations of unconscionability and public policy.

[46] Third, *Pearce* does not address the issue before us. That case did not involve an arbitration agreement, but, rather, concerned the validity of a class action waiver clause on grounds of public policy. Accordingly, there was no threshold question about whether an alternative adjudicator presumptively had the first right to decide the question.

[47] Fourth, neither *Williams* nor *Petty* are of any assistance to Spark. It is true that both cases involved arbitration agreements and the Court engaged in a detailed analysis of the substantive question whether the agreements in issue were invalid because they were unconscionable or contrary to public policy. But, in both cases, the Court is explicit in proceeding on the basis that the parties did not contest the threshold question whether the issues of invalidity should be decided by an arbitrator rather than a court. Rather, the parties proceeded on the assumption that the *Dell* framework applied and the Court could reach necessary conclusions based on facts either evident on the record or undisputed by the parties: see *Williams* at paras. 47–48; *Petty* at para. 28. The issue of whether the challenges to the agreements should have been referred to arbitration was not before the Court in either case, as it is

here. Hence, the Court proceeded to analyse the substantive issues of validity on the assumption that the Court, rather than an arbitrator, had the jurisdiction to engage in that analysis. As the Court said in *Petty*:

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

[48] It follows also that neither case relied on Brown J.'s concurrence as a basis for engaging with public policy as a ground for displacing competence-competence as Spark suggests. The Court engaged in a detailed substantive analysis of invalidity, not because a threshold had been satisfied either on public policy grounds, per Brown J., or because the existence of a brick wall had been established, per the majority. Rather, the case was treated as falling within the *Dell* framework by agreement of the parties.

[49] *Williams* is important, however, for rejecting the proposition that individual binding arbitration containing a class action waiver is *per se* contrary to public policy, even though such a waiver has implications for access to justice: see paras. 170–171. There may be an argument to advance that class proceeding waivers in binding arbitration agreements undermine access to justice for certain types of claims since they are only capable of being pursued economically through class proceedings. That argument is one, however, that would likely need to be entertained by the Supreme Court of Canada.

[50] It follows that the analysis of the judgment below needs to be addressed within the framework of the majority in *Uber*, remembering that much of what the majority had to say about unconscionability arose only after the Court was satisfied that the threshold question had been met. In that case, the competence-competence

principle was displaced both within the *Dell* framework (see *Uber* at para. 35) and because of the existence of a brick wall (see *Uber* at paras. 37, 47).

Did the judge err in concluding that a brick wall had not been established?

[51] I propose first to address the “brick wall” issue. Spark contends the judge asked the wrong question. Namely, could Spark afford to initiate an arbitration? In doing so, Spark maintains that the judge did not properly analyse whether on a limited review of the evidence there was a real prospect the jurisdictional challenge may never be decided in the arbitration. In other words, Spark says the judge took too narrow a view of the task before him, thinking only of initial filing fees, when there are multiple reasons it may be practically prevented from reaching an arbitrator.

[52] With respect, I do not read the judgment as falling into the alleged error. I agree that in several places the judge refers to the issue as being whether Spark has established that it does not have the financial ability to initiate arbitration: see paras. 29, 35 and 36. Moreover, in para. 35 of his reasons, the judge describes the Supreme Court of Canada as defining a brick wall in terms of the financial inability to initiate arbitration: see *Uber* at para. 47.

[53] I agree with Spark that the question whether a brick wall exists does not reduce to the narrow issue of the cost of initial filing fees. It is clear from para. 46 of *Uber*, quoted above, and from para. 47, referred to by the judge, that there can be more bricks in the wall than just the cost of initiating an arbitration. Those bricks may include all of the financial costs associated with a determination of the jurisdictional challenge, as well as other practical impediments, such as the necessity of travel.

[54] In appellate review, we have been reminded by the Supreme Court of Canada that we should read judgments generously and not parse for error: see, e.g., *R. v. G.F.*, 2021 SCC 20 at para. 69. This is even more so in circumstances where a judge is responding to how an issue has been framed. While I understand that

written submissions are expanded and elaborated in oral argument, Spark's amended application response asserted the following in respect of the brick wall:

> The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. In this case the up-front arbitration fees impose a brick wall between the plaintiff and the resolution of its claim, and an arbitrator cannot decide the merits of the claim without those – possibly unconscionable – fees first being paid.

This point was repeated in Spark's written submissions, and the judge's reference to the cost of initiating arbitration echoes this language.

[55] In this case, I view the judge's statements as nothing more than shorthand encapsulating the test as set out in *Uber* at paras. 44–47. No doubt the reference to the cost of initiating arbitration is capable of being misleading if interpreted as the beginning and end of the inquiry, since there is clearly more to it than that. In my view, the parties would have benefitted from a more complete articulation of the test, so as to dispel this potential misunderstanding.

[56] Having said that, I do not think the judge lost sight of the test he had to apply, namely, whether there was a real prospect that a referral to arbitration would result in the challenge never being resolved. Indeed, the judge cited paras. 44–46 of *Uber* in laying out the test he had to apply. Almost immediately thereafter, he began his analysis of the brick wall issue, referring expressly to his need to determine whether Spark had the financial ability to initiate arbitration "so that the jurisdictional issue can be resolved": at para. 29. I am not persuaded that the judge unduly narrowed his focus. Instead, he addressed the live issue, framed as it was put before him.

[57] The primary conclusion, at this point of the judge's analysis, is that Spark had not discharged its burden to demonstrate that there was a real prospect that the jurisdictional challenge would not be decided by the arbitrator. That conclusion was founded on the judge's assessment of the evidence going to that particular question. As the judge was aware, much of the evidence went to the overall cost of resolving the entire price-fixing claim in arbitration. Indeed, Spark argued that it was only economic to pursue such a claim in a class action, not individual binding arbitration,

and it tendered evidence to support that claim. This evidence did not assist the judge in deciding the threshold question of whether a brick wall prevented an arbitrator deciding whether the agreement was invalid. Indeed, a considerable amount of the evidence relevant to whether the agreement was unconscionable was in the application record, and it is not obvious, apart from the fees of having the matter adjudicated by an arbitrator, that an arbitrator could not expeditiously rule on unconscionability and public policy. In my view, the judge did not make a reversible error in concluding that Spark had not established the existence of a brick wall that meant that if a stay were granted there was a real prospect the jurisdictional challenge would not be decided.

[58] In approaching this task, I am persuaded that the judge applied the correct approach in engaging in a limited review of the evidence to determine the threshold question whether a brick wall existed. As instructed by the majority in *Uber*, the judge did not turn the issue into a mini-trial. The reference in *Uber* to *Hryniak* does not, in my view, import, nor does it inform, an evidentiary standard to be applied to assessment. Rather, it is an admonishment to counsel and the courts to protect proportionality in resolving the issue.

[59] In his limited review of the evidence, the judge evaluated the contention advanced by Spark about the range of fees involved in arbitration and considered the highest of those potential fees. He did so even though Google took the position that the highest fees were not applicable to an individual arbitration with Spark, much less applicable to the determination of the jurisdictional question alone. The judge also considered the contention that the jurisdictional challenge would be heard by three arbitrators in California and that the costs may not be recoverable. He was also aware of the lack of concrete information about Spark's financial circumstances. It is apparent, from reading the judgment as a whole, that the judge was alive to the competing expert evidence about the procedures available to expedite the jurisdictional challenge along with the associated costs of each. Indeed, he concluded that there was considerable discretion embedded in the process to enable claims to be heard expeditiously and efficiently: at para. 41. Importantly, he

concluded, at para. 34, as set out above, that "Spark has not provided any financial information, nor have they affirmed that they cannot afford the filing fees that they say apply. Rather, Spark asserts that it is not economic for them to pursue their claim as a whole against Google through the arbitration process." The judge also concluded, at para. 42(c), that "Spark has the financial ability to initiate the arbitration process such that the arbitral tribunal could determine whether the dispute can be resolved in the arbitration."

[60] Spark attacks, in particular, the judge's conclusion that Spark had not affirmed that they cannot afford the filing fees they say apply. It says it did affirm that it could not afford the fees and that, therefore, the judge made a palpable and overriding error. I do not find this submission persuasive. The judge set out the evidence from Spark dealing with its financial position at para. 30 of his reasons. That evidence is as follows:

> [30] The affidavit #1 of Marc Cousineau sets out the financial position of the plaintiff contrasted with the costs of arbitration according to his expert:
>
> > Mr. Mogerman has informed me that CFM will fund all expenses necessary to prosecute this class action to its conclusion and indemnify me from any negative cost implications that might arise from the litigation.
> >
> > Mr. Mogerman has advised me that if Spark Event started an individual action against the defendants, the legal fees could be, at a minimum, hundreds of thousands of dollars and probably millions of dollars, and the money required to fund the expenses necessary to prosecute the action would also be, at a minimum, hundreds of thousands of dollars and probably millions of dollars. Based on this advice, I do not believe that I could justify pursuing Spark Event's individual action against the defendants in light of the potential value of its claim. The same would be true even if the cost of pursuing an individual action was thousands of dollars.
> >
> > Mr. Mogerman has informed me that the defendants have brought an application to stay the action of the previous representative plaintiff and that he expects them to bring a similar action to stay Spark Event's case. I understand that if such a stay application is granted I will not be able to pursue Spark Event's claim in the BC Courts, and would instead be required to pursue arbitration in California before a tribunal of three arbitrators. I also understand that the result of any arbitration would only be effective in Spark Event's individual claim, and would be confidential so that the members of the proposed class in this litigation would not have the benefit of knowing the result.

> Mr. Mogerman has informed me that his law firm would not take an arbitration case like this on contingency and will not fund expenses necessary to pursue an arbitration. He has also informed me that the costs associated with arbitration would be significant, including up front filing fees (in the range of USD $5,750), a minimum final fee (in the range of USD $7,125), arbitrator compensation (in the range of USD $500-1,000/hour for each arbitrator). In addition, someone would need to pay the significant travel costs to California for a multi-day hearing. Spark Event cannot afford these fees, much less the cost of a lawyer's hourly rate to pursue this litigation on an individual basis. As a result, I am unable to commence or pursue Spark Event's claim against the defendants through arbitration.

[61] At first blush, Mr. Cousineau's affirmed statement that "Spark Event cannot afford these fees" contradicts the judge's conclusion that "Spark has not… affirmed that they cannot afford the filing fees that they say apply": at para. 34. Spark says this is a palpable error. However, the entire context in which Mr. Cousineau's statement was made is important and relevant to the judge's conclusion. In my opinion, the judge did not err in concluding that there had been no clear affirmation that Spark could not afford the fees associated with an adjudication of the threshold jurisdictional challenge. The paragraphs set out above relate to the comparative costs of pursuing an action in the courts to determine the merits of the claim, as compared to the costs of arbitration, again on the merits. It was open to the judge to conclude, implicitly, that the fees referred to in the third paragraph relate to arbitrating the merits of the dispute, rather than the cost of an initial determination on the threshold jurisdictional question. In my view, the judge did not commit a palpable error.

[62] I also observe that Spark provided next to no financial information about its business or revenues. I can see no palpable error underlying the judge's conclusion that Spark had not established that it could not afford the costs associated with an adjudication of its jurisdictional challenge in the arbitration. In saying this, I acknowledge that I cannot divine the basis for the judge's positive finding of fact that Spark could afford those fees. I am not aware of the evidentiary basis underlying that finding. This, however, even if it were demonstrated to be a palpable error, is not overriding, since the gravamen of the judgment is that Spark had not

demonstrated that it could not afford the fees. A finding that it could is not necessary to the result.

[63] Accordingly, I cannot accede to Spark's challenge to the judgment on the basis that the judge erred in concluding that the absence of a brick wall created a real prospect that the jurisdictional challenge would not be decided by an arbitrator if the proposed class action was stayed. It follows, as I indicated earlier, that the judge did not err in concluding that it was not necessary for him to undertake the task of determining whether the Arbitration Agreement was unconscionable or contrary to public policy on the basis that the substantive merits of the dispute could not be determined in the arbitration. Those issues could appropriately be referred to arbitration under the competence-competence principle. The judge's conclusions about the absence of a brick wall entail also that, for the purpose of deciding the jurisdictional challenge, the Arbitration Agreement does not, contrary to public policy, insulate the dispute from independent adjudication.

Did the judge err in failing properly to determine whether the Arbitration Agreement was invalid under the *Dell* approach?

[64] The reasons are unclear as to whether the judge explicitly analysed the issue under the *Dell* framework. It will be recalled that the *Dell* framework endorses the proposition that, as a general rule, issues of mixed fact and law regarding the validity of an arbitration agreement must be referred to arbitration. The relevant exception to this proposition requires that an arbitration agreement be manifestly tainted by a defect rendering it invalid or inapplicable in the sense that its invalidity must be "incontestable", such that no serious debate can arise about the validity: *Uber* at para. 33. As explained by the Court, questions of mixed fact and law must be capable of being resolved on only superficial consideration of the evidence in the record: *Dell* at paras. 84–85. A superficial consideration means that the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties.

[65] On a review of the record before the judge, it is not plausible to suggest that the facts necessary to determine whether the Arbitration Agreement is unconscionable or contrary to public policy are evident on the face of the record or undisputed as between the parties. A finding of unconscionability requires two elements: (1) proof by the proponent that there was inequality of bargaining power between the parties; and, (2) proof that the contractual term in issue is improvident at the time the contract was entered into: see, e.g., *Uber* at paras. 62–63, citing *Hunter Engineering Co. v. Syncrude Canada Ltd.*, [1989] S.C.R. 426 at 512. Issues of vulnerability and necessity, while not determinative, figure prominently in an assessment of whether an agreement is unconscionable.

[66] On its face, I agree with Spark that there is certainly a difference in sophistication between it, a local events company, and Google, a multi-national technology company. However, in my view, there is a *bona fide* dispute about whether Spark can plausibly be described as vulnerable. Unlike in *Uber*, Spark is not an employee dependent on his employer, with whom he has a dispute over his livelihood. There is no self-evident evidence that Spark is on the verge of insolvency and financially vulnerable to the potential predations of a rich rival on which it depends for its viability. Arguably, Spark is simply a commercial entity for whom advertising through Google Ads is economically advantageous. It is not patently obvious that Spark's principals are subject to a cognitive asymmetry in relation to the Arbitration Agreement, although clearly it is a contract of adhesion if Spark wishes to make use of Google Ads.

[67] Moreover, there is some evidence, notwithstanding Spark's affirmation that Google Ads are commercially necessary for it to conduct its business, that there are multiple other means of advertising, engaged in by Spark, to market its services. The evidence is capable of supporting a conclusion that Spark can disseminate information about its services in the market without Google Ads, including by relying without any cost to it on organic Internet searches which provide information about Spark to those searching on Google and other Internet search engines, without the need to contract for Google Ads.

[68] There are other matters in dispute. These include the actual costs and procedures associated with challenging the validity of the Arbitration Agreement in the arbitration. Google submits that an expedited procedure would be available for the jurisdiction question, while Spark is dubious that the costs of the same would be markedly lower. It is, moreover, far from clear that the Arbitration Agreement is improvident. This would require an inquiry into the "surrounding circumstances at the time of contract formation, such as market price, the commercial setting or the positions of the parties": *Uber* at para. 75. Again, much of the necessary factual bases are in dispute or are matters in respect of which the record is lacking.

[69] Given my assessment that the determination of the question whether the Arbitration Agreement is unconscionable does not fall within the scope of the *Dell* framework, the matter must be referred to arbitration. In these circumstances, I do not think it appropriate to comment any further on the merits of the allegation that the Arbitration Agreement is invalid. That is a matter to be determined by the arbitrator.

Conclusion

[70] Accordingly, I would uphold the decision to order a stay of proceedings of the proposed class action. I would not disturb the order of the chambers judge and would dismiss the appeal. We were not invited by Spark to disturb the order as it affects Apple in the event the appeal is dismissed.

"The Honourable Mr. Justice Harris"

I agree:

"The Honourable Madam Justice Fisher"

I agree:

"The Honourable Justice Winteringham"