IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tahmasebpour v. Freedom Mobile Inc.,* 2024 BCSC 726

Date: 20240501
Docket: S247637
Registry: New Westminster

Between:

Sepehr Tahmasebpour and Alireza Tahmasebpour

Plaintiffs

And

Freedom Mobile Inc.

Defendant

Before: The Honourable Justice Kirchner

Reasons for Judgment

Counsel for the Plaintiffs:	C. Ma
Counsel for the Defendant:	C.E. Chisholm J. Epp
Place and Dates of Hearing:	New Westminster, B.C. February 21-22, 2024
Place and Date of Judgment:	New Westminster, B.C. May 1, 2024

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I. Introduction

[1] The defendant, Freedom Mobile Inc., applies to stay this proceeding under s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2 on the basis that the plaintiffs' substantive claim is subject to a mandatory arbitration clause in a "Terms of Service" agreement that applies to the cell phone contract between the plaintiffs and Freedom Mobile.

[2] The plaintiff, Alireza Tahmasebpour, has an account with Freedom Mobile with four cell phone lines under that account, including one for the plaintiff Sepehr Tahmasebpour who is Alireza's son. (I refer to the two plaintiffs by their first names to distinguish them from one another and intend no disrespect.) In the action, the plaintiffs claim Freedom Mobile was negligent in permitting an unknown fraudster to swap the SIM card associated with Sepehr's phone. This ultimately allowed the fraudster to access a Bitcoin account held by Sepehr and evidently withdrew the full contents of that account, valued at over $63,000. The plaintiffs have sued Freedom Mobile for this loss. They also make a very small claim ($150) under the *Business Practices and Consumer Protection Act*, S.B.C. 2004 c. 2.

[3] The plaintiffs argue that they, or at least to Sepehr, was not made a party to the arbitration clause because they were never provided with a copy of the Terms of Service document which contains the clause. Alternatively, they argue the arbitration clause is void, inoperable, or incapable of being performed because Ontario law, which is the governing law under the Terms of Service, excludes mandatory arbitrations in certain circumstances for consumer contracts. Finally, the plaintiffs argue that arbitration clause is unconscionable and thus unenforceable.

[4] For the reasons that follow, I would grant the stay of proceedings as it relates to the plaintiffs' claims for negligence but not the claim based on the *Business Practices and Consumer Protection Act*. I would do so because I find Freedom Mobile has at least an arguable case (though not one without problems) that the arbitration clause applies to the substantive part of the plaintiffs' claim and the plaintiffs have not clearly shown that the arbitration clause is unenforceable or

unconscionable. Nor have the plaintiffs shown there is a real prospect that the issues of the arbitrator's jurisdiction or the enforceability of the arbitration clause will never being resolved if this matter is referred to arbitration.

II. Background

A. Contract with Freedom Mobile

[5] On May 9, 2015, Alireza opened an account with Freedom Mobile's predecessor, Wind Mobile, with four pre-paid phone lines associated with the account, including Sepehr's. In 2016, Shaw Communications acquired Wind Mobile and rebranded it as Freedom Mobile.

[6] In December 2018, Sepehr learned from a friend who worked at the Mobile Shop in North Vancouver that he could get a good deal on a new iPhone with the Freedom Mobile network. He and Alireza went to the Mobile Shop, bought the new iPhone, and migrated Sepehr's phone line to a new Freedom Mobile plan on Alireza's account.

[7] Walker Peters, Vice President, Customer Care with Freedom Mobile deposes that when Sepher's account was migrated to the new phone, Alireza, as the account holder, was provided with a contract called the "Services Agreement". He deposes that neither the 2018 Services Agreement nor the original 2012 Services Agreement could be located in in Freedom Mobile's files. He attaches what he describes as "regenerated" versions of the Services Agreements as exhibits to his affidavit. He says these documents were regenerated using "information that was retrieved from Freedom's databases" but he does not explain what this information is or how the copies of the agreements exhibited to his affidavit were regenerated.

[8] Mr. Peters deposes that the Services Agreement provided to Freedom Mobile customers in 2018 confirmed that the Terms of Service apply to the contract. However, the regenerated 2018 version of the Services Agreement attached to Mr. Walker's affidavit contains no such reference. The regenerated 2012 Services

Agreement contains a link to the Terms of Service but it does not confirm (except perhaps by inference) that the Terms of Service apply to the contract.

[9] Mr. Peters also attaches monthly invoices (phone bills) sent to Alireza both before and after the December 2018 migration to the new iPhone and deposes that the invoices "incorporated the Terms of Service" but there is nothing on the face of any of the invoices that refers to the Terms of Service.

[10] Mr. Peters also attaches a copy of the Terms of Service which he deposes were in place from January 2020 to July 19, 2022. These terms include the arbitration clause at article 12.

[11] Alireza deposes that he has never seen either the 2012 or 2018 Services Agreements attached to Mr. Walker's affidavit. Nor has he seen the Terms of Service. He denies that he was ever provided with a copy or that he was ever directed to them. Sepehr deposes that when he and Alireza bought the new phone at the Mobile Shop in December 2018, he was only given a receipt for the new phone and nothing on the receipt indicated the existence of the Terms of Service. However, he has only attached one page to the two-page receipt to his affidavit.

B. The SIM Swap Fraud and Bitcoin Theft

[12] On January 4, 2021, Sepehr was skiing at Mount Seymour when he received a text message from Freedom Mobile notifying him that the email address on his account had been changed. A second message followed two minutes later notifying him that the PIN for his account had also been changed. The message stated that if he did not make this change he was to call a number that was given. He tried to call that number but his phone lost service. He thought this was because cell service on Mount Seymour must have been poor but when he drove home later that evening he still had no service and learned that his sister's and his mother's phones also had lost service. He tried calling Freedom Mobile using his brother's phone but the support line was closed. He tried logging into Alireza's Freedom Mobile account but the password did not work. He then notified the police who opened a file.

[13] Sepehr was finally able to reach a Freedom Mobile agent the next day and he learned that someone had attended in person at a Freedom Mobile outlet, held themselves out to be Alireza, and obtained a new SIM card with Sepehr's phone number. This is known as a "SIM swap" and it is a scheme where a fraudster deceives a phone company into swapping a SIM card associated with one phone to a new device, giving the fraudster access to all the person's phone number, phone call records, and text messages.

[14] It appears that after effecting the SIM swap fraud on Freedom Mobile, the fraudster was able to access Sepehr's Bitcoin wallet. Sepehr suggests that once the fraudster had access to his phone account, the fraudster used the two-factor authentication method to change the password for Bitcoin wallet and gain access to it. The full contents of that wallet – 1.46049931 in Bitcoin then valued at CAD $63,099.84 – was withdrawn on January 5, 2021. (One Bitcoin in January 2021 was valued at CAD $43,204.29.)

C. These Proceedings

[15] Sepehr and Alireza filed a notice of civil claim on January 4, 2023, claiming damages for the value of the lost Bitcoin. The claim alleges that Freedom Mobile was negligent in allowing the fraudster to obtain a new SIM card with Sepehr's phone number. This is the sole legal basis for the claim for the lost Bitcoin.

[16] In accordance with the *Arbitration Act,* Freedom Mobile did not file a response to civil claim but instead brought this application seeking to stay the proceeding on the basis that the arbitration clause in the Terms of Service governs the dispute. That arbitration clause reads as follows:

> **22. Arbitration**
>
> To the fullest extent permitted by applicable law, you agree that, unless we agree otherwise, all claims, disputes or disagreements ("Disputes") between you and us relating to the Services, Terms of Service, Devices, equipment or any related promotions, advertisements, statements or communications will be determined and settled by confidential, final and binding arbitration to the exclusion of the courts by a single arbitrator in the forum and under the rules we mutually agree upon, failing which the Arbitration Act, 1991 (Ontario) will apply.

[17] Freedom Mobile now applies to stay this proceeding under s. 7 of the *Arbitration Act*.

III. Legal Principles

[18] Section 7 of the *Arbitration Act* provides that a defendant may apply for a stay of court proceedings in respect of a matter that is subject to an arbitration agreement. The stay application must be brought before a response to the action is filed. If the court is satisfied there is an arguable case that the arbitration clause applies, it must then stay the proceeding unless it determines the arbitration agreement is void, inoperative or incapable of being performed. Section 7 reads:

> Stay of proceedings
>
> **7**(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.

[19] In making a stay application under s. 7, a defendant need only satisfy the court that there is an "arguable case" that an arbitrator has jurisdiction over parties and the dispute: *Clayworth v. Octaform Systems.,* 2020 BCCA 117 at paras. 21-30. If an arguable case is made out, it must be left to the arbitrator to ultimately decide that jurisdictional question: *Peace River Hydro Partners v. Petrowest Corp.* 2022 SCC 41 at para. 39.

[20] The "arguable case" standard is a relatively low bar and will be met unless there is "no nexus between the claims and the matters reserved for arbitration". Any "legitimate question of the scope of the arbitration jurisdiction" is to be deferred to the arbitrator: *Clayworth* at para. 30; *Peace River Hydro*, para. 85.

[21] If the issue of jurisdiction turns on a pure question of law, that question may be determined by the court. However, where it turns on a question of fact or mixed fact and law, the court should only decide that issue if it can do so with a superficial regard to the record before it; otherwise, the question should be referred to the

arbitrator: *Peace River Hydro,* para. 42; *Spark Event Rentals v. Google LLC*, 2024 BCCA 148, paras. 15-18; *3-Sigma Consulting Inc. v. Ostara Nutrient Recovery Technologies Inc*., 2023 BCSC 100 at para 19. To make findings based on a "superficial" review of the record, the facts must either be evident on the face of the record or undisputed by the parties: *Uber Technologies Inc. v. Heller*, 2020 SCC 16, para. 36.

[22] As the Court of Appeal very recently confirmed, the question of whether the arbitration clause is void, inoperative or incapable of being performed is also to be referred to the arbitrator for determination unless that question can be clearly answered on a superficial regard to the record: *Spark Event Rentals,* paras. 15-18, 41, 47.

[23] Alternatively, the court may substantively address the questions of jurisdiction, validity, operability, or ability to perform the arbitration agreement if it is shown on a limited assessment of the evidence that there is a real prospect that referring those questions to arbitration would result in the issues never being resolved: *Spark Event Rentals* paras. 19-23 and 40. Only if this threshold is met on a limited review of the evidence can the court then embark on a thorough analysis of the evidence to determine the issues of jurisdiction or enforceability substantively: *Spark Event Rentals,* para. 24 and 45.

IV. Analysis

A. Is there an arguable case that the plaintiffs are subject to the arbitration clause?

[24] It is not for me to decide on this application whether the plaintiffs are subject to the arbitration clause but only if there is an arguable case that they are. In my view, while the evidence is weak, there is at least an arguable case that the Terms of Service, including the arbitration clause, apply to Alireza and Sepehr.

[25] The weakness in the evidence is the absence of any document that was given to either plaintiff stating expressly that the Terms of Service apply to Alireza's contract with Freedom Mobile. All that Freedom Mobile has presented is a

"regenerated" version of what is said to be the Services Agreement from 2012 which contains a hyperlink to the Terms of Service. There is no evidence to explain what a "regenerated" version of the document is or how it was regenerated. The regenerated document does not say (at least expressly) that the Terms of Service are incorporated into the contract, although perhaps that may be implied. Further, I see nothing in the regenerated 2018 Services Agreement or in the monthly invoices issued to Alireza refer to, link, or incorporate the Terms of Service. Thus, Freedom Mobile's assertion that the Terms of Service apply to the contract is founded only on that assertion being made in Mr. Peters' affidavit and the inference that may be drawn by the hyperlink in the 2012 Services Agreement.

[26] However, it is at least arguable that the hyperlink link was sufficient to draw Alireza's attention to the Terms of Service and, by implication, that they are incorporated into the contract. In *Hazell v. DoorDash Technologies Canada Inc.*, 2022 BCSC 2497 at para. 74. Justice Fleming found that a hyperlink to terms and conditions in an electronic consumer contract was sufficient to bind the consumer to those terms, even if the consumer did not click on the link or read the terms.

[27] Considering that this is a stay application in which Freedom Mobile has not (and cannot under the *Arbitration Act*) take any substantive steps such as discovery, the available evidence is necessary limited and, as mentioned, my task is merely to assess whether there is an arguable case that the arbitration clause applies to this contractual relationship. Applying that low threshold, I am satisfied there is at least an argument that the Terms of Service, including the arbitration clause, was incorporated into the contract between Freedom Mobile and Alireza.

[28] It is also unclear whether Sepehr is bound by the Terms of Service since he is not a party to the agreement with Freedom Mobile. However, since I found there is at least an arguable case that Alireza is bound by the Terms of Service, I will carry that assumption into my consideration of whether Sepehr is bound by those terms as well.

[29] Sepehr argues he has never seen the Terms of Service and when he attended with the Mobile Shop with Alireza he was only given a short invoice that made no reference to the Terms of Service or the arbitration clause specifically. However, that invoice states on its face that it is two pages and Sepehr has attached only the first page to his affidavit. That page refers to "terms of the carrier Service Agreement" in a passage outlining the return policy for the phone but it does include or specifically refer to the Terms of Service which include the arbitration clause. However, there is no way of knowing what might be found on the second page of the invoice that is not in evidence. I cannot find the necessary facts relating to this issue based on a superficial review of the record because without the second page of the invoice, it is not evident on the face of the record that Sepehr was not given notice of the Terms of Service.

[30] Regardless, there is an arguable case that if Alireza is bound by the Terms of Service, and it follows that Sepehr is also bound by those terms on the basis of agency and "direct benefit estoppel". In *Wittman v. Blackbaud, Inc.*, 2021 BCSC 2025 at para. 78, Justice Ahmad explained the doctrine of direct benefit estoppel quoting from *Blaustein v. Huete*, 449 F Appx. 347 at 350 (5th Cir. 2011):

> [78] …the doctrine of "direct benefit estoppel" applies where "non-signatories who during the life of the contract have embraced the contract despite their non-signatory status, but then during litigation attempt to repudiate the arbitration clause in the contract."

[31] Arguably, that is what Sepehr is attempting to do here. While I make no finding as to whether agency or direct benefit estoppel would succeed in this case, it is sufficient to find there is at least an arguable case that it could.

B. Is there an arguable case that the subject matter of the dispute falls within the scope of the arbitration clause?

[32] I next consider whether there is an arguable case that the subject matter of the dispute falls within the scope of the arbitration clause. I am satisfied there is. The arbitration clause encompasses "all claims, disputes or disagreements between you and us relating to the Services Terms of Service, Devices…" and more. "Services"

are defined in clause 1 as “any of Freedom’s services, including the mobile voice, text, data and related services”. “Devices” is defined as “any type of wireless telecommunications device that is, or is to be used with the Services, including mobile phones, tablets, Internet data sticks, etc.”. Arguably (and again without deciding), the plaintiffs’ claim relates to the Services or a Device.

C. Is the arbitration clause made inoperable by the application of Ontario law?

[33] The plaintiffs argue that the arbitration clause is ousted by Ontario law which applies to both the Terms of Service and, unless the parties agree otherwise, to the arbitration.

[34] The arbitration clause states that the arbitration will be “in the forum and under the rules we mutually agree upon, failing which the *Arbitration Act*, 1991 (Ontario) will apply.” The “Governing Law” clause in the Terms of Service states: “You agree that, to the fullest extent permitted by law these Terms of Service will be governed exclusively by the laws of the province of Ontario.”

[35] The plaintiffs argue that s. 7 of Ontario’s *Consumer Protection Act*, S.O. 2002, c. 90 applies to the contract with Freedom Mobile by the Governing Law clause and that Act renders the arbitration clause inoperable. That section reads:

> **7**(1) The substantive and procedural rights given under this Act apply despite any agreement or waiver to the contrary.
>
> (2) Without limiting the generality of subsection (1), any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action in the Superior Court of Justice given under this Act.

[36] The plaintiffs argue that the application of this Ontario law protects their right to bring a claim in the British Columbia Supreme Court which is this Province’s equivalent to the Ontario Superior Court of Justice.

[37] However, it is only the exercise of a right “given under this Act” that is shielded from an arbitration clause. The plaintiffs have not pointed to any section of

the Ontario *Consumer Protection Act* that parallels the negligence claim they make here. Apart from the very minor claim for $150 the plaintiffs make based on s. 171 of British Columbia's *Business Practices and Consumer Protection Act*, the plaintiffs' substantive claim is founded upon, as they put it in their Notice of Civil Claim (para. 41), "the common law of negligence". I see nothing in the Ontario *Consumer Protection Act* that equates with this claim and counsel has not directed me to any related provision. Thus, it cannot be said that the arbitration clause here prevents the plaintiffs from maintaining an action in this court that is equivalent to a claim that could be brought in the Ontario Superior Court of Justice under the Ontario *Consumer Protection Act.*

[38] The plaintiffs claim under the *Business Practices and Consumer Protection Act* is only a small element of their overall claim and can be severed from a stay of the substantive claim under s. 7 of the *Arbitration Act*: see for example *Williams v. Amazon.com Inc.*, 2023 BCCA 314 ["*Amazon*"].

D. Is the arbitration agreement void for being unconscionable?

[39] The plaintiffs submit that if there is an arguable case that the arbitration clause applies, the clause is unconscionable as it arose from a relationship of unequal bargaining power and is substantially unfair to the plaintiffs.

1. The doctrine of unconscionability

[40] The doctrine of unconscionability provides relief from improvident contracts where there is an inequality of bargaining power between the parties arising from some weakness or vulnerability affecting the claimant: *Uber* paras. 59 and 62. An inequality of bargaining power exists where one party cannot adequately protect their interests in the contracting process: *Uber*, para. 66. An improvident contract is one that unduly advantages the stronger party or unduly disadvantages the weaker: *Uber,* para. 74. Improvidence is assessed at the time the contract is made with reference to the surrounding circumstances: *Uber* paras. 74-75. Undue disadvantage may arise where the weaker party did not understand or appreciate the meaning and significance of important contractual terms. Those terms may be

unfair if, given the context, they flout the weaker party's reasonable expectations or cause unfair surprise: *Uber*, para. 77. Unconscionability does not require the stronger party to have knowingly taken advantage of the weaker. It can be triggered without wrongdoing: *Uber* para. 84.

2. Uber and Subsequent Cases

[41] The doctrine of unconscionability has particular implications for standard form contracts like the present one. *Uber* is the leading case on unconscionability in that context. There, the court said a standard form contract does not, by itself, establish an inequality of bargaining power but there is clear potential for inequality because the contract is drafted by one party without input from the other and it may contain provisions that are difficult to read or understand: *Uber* paras. 88-89. This also potentially enhances the stronger party's advantage over the weaker, "particularly through choice of law, forum selection, and arbitration clauses that violate the adhering party's reasonable expectations by depriving them of remedies": *Uber*, para. 89. The majority in *Uber* said at para. 89 that this is "precisely the kind of situation in which the unconscionability doctrine is meant to apply."

[42] In *Uber*, a driver sought to bring a class action against Uber for breaches of Ontario's *Employment Standards Act.* The standard form agreement between Uber and its drivers required that any dispute arising from the contract be submitted to arbitration. The clause stipulated that the arbitration had to be in the Netherlands under the Rules of Arbitration of the International Chamber of Commerce. Those rules required an up-front payment of USD $14,000 as an "administrative fee" simply to commence the arbitration process.

[43] A majority of the Supreme Court of Canada held that the arbitration clause was unconscionable. They said the inequality of bargaining power is clear in that the arbitration clause is part of a standard form contract of which the plaintiff was powerless to negotiate any terms. They observed that the plaintiff is a food delivery person whereas Uber is a large multi-national corporation. They also noted that the arbitration agreement contains no information about arbitration costs in the

Netherlands. (The USD $14,000 fee, which is part of the Rules of Arbitration of the International Chamber of Commerce, was not mentioned in the Uber contract.) Thus, even if the plaintiff is "the rare fellow who would have read through the [standard form] contract in its entirety before signing it", he would have had no reason to suspect that a USD $14,000 fee lay behind the applicable mediation rules: *Uber*, para. 93.

[44] The majority found the agreement was improvident in that the cost of arbitration, including travel to the Netherlands, accommodation, legal representation and lost wages as well as the USD $14,000 fee were prohibitive to the plaintiff who earned little more in a year than the fee itself. These barriers effectively made the whole contract unenforceable against Uber by any of its drivers. The majority said at para. 95: "No reasonable person who had understood and appreciated the implications of the arbitration clause would have agreed to it."

[45] *Uber* has been considered and applied in several British Columbia cases. In *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198, the plaintiff brought a class action to recover fees paid to 4 Pillars for services relating to debt restructuring. 4 Pillars applied to stay the proceeding on the basis of a "class action waiver" clause in the standard form services agreement between the plaintiff and 4 Pillars that precluded the plaintiff from bringing or participating in a class proceeding for a dispute arising from the agreement. The Court of Appeal found the class action waiver was unconscionable. Speaking for the court, Justice Griffin found the plaintiff and the proposed class were vulnerable in that they were in financial distress on the verge of insolvency and had turned to 4 Pillars for help in managing their debt. She found the contract did not effectively communicate the implications of the class action waiver, including that a class proceeding may be the only cost-effective way of pursuing a claim. She thus found there was inequality of bargaining power. She further found the class action waiver was improvident because, while it was open to members of the proposed class to bring their claims individually in small claims court or the Civil Resolution Tribunal, it is unlikely they would do so because of the novel and complex legal issues and the small amounts of the individual claims. She said

the class action waiver deprived the plaintiffs of the only practical way of seeking a remedy for the wrongs they alleged.

[46] In *DoorDash* a customer brought a class proceeding against DoorDash over certain delivery fees. DoorDash applied to stay the proceeding on the basis of an arbitration clause that also included a class action waiver. The clause also contained certain concessions to the customer, including that claims could still be brought in small claims court, DoorDash would pay the $250 filing fee for the arbitration if the customer could not afford it, DoorDash would reimburse the fee for any claims less than $10,000, and the customer could choose to have the arbitration by telephone, video conference, or written submissions.

[47] Similar to what Freedom Mobile says happened here, the DoorDash customers were not specifically given the terms of service that included the arbitration clause but were directed to them by a hyperlink. They did not need to click on the hyperlink or view the terms of service before adhering to the contract.

[48] Justice Fleming found the arbitration clause was not unconscionable. Although the customer had no power to negotiate terms of the standard form contract and he was an individual consumer matched against a “large and powerful multibillion-dollar technology company”, the food delivery service he contracted for was fundamentally different from the “vulnerability and dependence that arose from the employment-like relationship in *Uber*”: *DoorDash*, para. 71. She said there was no evidence that having access to DoorDash’s food delivery service was “an important element of everyday life in the sense that Mr. Hazell was therefore vulnerable to or needed to access the service.” She also found at para. 74 that the plaintiff had adequate notice of the terms of service by the hyperlink in the contract and this did not create inequality of bargaining power because “the law does not require one party to compel the other to read an arbitration agreement in order for it to be enforceable.”

[49] With respect to improvidence in the bargain, Fleming J. found there was nothing in Mr. Hazell’s claim that gave rise to an undue disadvantage given the

amount of his claim ($8.53), the lack of evidence that he could not afford the $250 filing fee, the provisions that required DoorDash to pay that fee if the customer could not afford it or reimburse it for claims under $10,000, the ability to proceed in small claims court, and the accommodations for the arbitration to be by telephone or video at the customer's discretion.

[50] In *Williams v. Amazon.com Inc*., 2023 BCCA 314 the plaintiff brought a class proceeding against Amazon claiming that its bookselling practice eliminated competition and resulted in consumers paying higher prices for books. Amazon applied to stay the majority of the claims on the basis of an arbitration clause that, like the one in *DoorDash*, precluded a customer from pursuing a small-value claim through a class proceeding. The arbitration clause contained similar concessions to the one in *DoorDash*, including reimbursement of fees for claims under $10,000 and telephone or video arbitrations at the customer's option. Amazon also agreed not to seek legal fees for low-value claims, even if the customer was unsuccessful in arbitration, as long as the arbitrator did not find the claim to be frivolous.

[51] Writing for the Court of Appeal, Justice DeWitt-Van Oosten held the chambers judge reasonably distinguished the Amazon arbitration clause from the one in *Uber* on the basis that the up-front fee was substantially smaller (USD $200) and would be refunded for claims under $10,000, the plaintiff need not incur travel costs because of the option for a telephone or video arbitration, and Amazon would not seek reimbursement for legal fees for non-frivolous claims. She also found it significant that, unlike the plaintiffs in *Uber* and *Pearse,* the plaintiff in *Amazon* was not dependent on Amazon or "in vulnerable and difficult circumstances" (para. 86) and there was no evidence of "serious consequences" that would flow from not agreeing to the terms of service (para. 126). Justice DeWitt-Van Oosten accepted that there was inequality of bargaining power between the parties but this did not result in an improvident bargain.

[52] In *Petty v. Niantic Inc.*, 2023 BCCA 315, a companion appeal to *Amazon,* the court also upheld a stay of proceedings in favour of an arbitration clause that was

similar to the one in *Amazon*, including the class action waiver, the preservation of the right to proceed in small claims court, waiver of legal fees by the Niantic, telephone or video arbitrations, and reimbursement of filing fees for claims under $10,000. At issue was a consumer contract with a multi-national video game company. As in *Amazon*, DeWitt-Van Oosten J.A. found there was inequality in bargaining power between the parties but said the context of that relationship is important to considering unconscionability. She said at para. 63:

> [63] … both the unconscionability and public policy analyses are contextually informed. Consequently, as explained at paras. 129–130 of *Amazon*, there will be cases in which substantial differences in bargaining power may weigh in favour of a finding of unconscionability, or a conclusion that a particular arbitration agreement is contrary to public policy. In others cases, inequality of bargaining power may have lesser impact, depending on a claimant's vulnerability at the time the contract was formed, the nature of the relationship between the parties, the hardship produced by the arbitration agreement, and a balancing of all relevant circumstances.

[53] Justice DeWitt-Van Oosten went on to say that "any inequality of bargaining power that does exist is not of such a degree that it renders the arbitration agreement unconscionable" (para. 64). She noted the chambers judge's findings that there was no evidence that the plaintiffs were "particularly dependent or vulnerable" in needing to access the game platforms and there was no special relationship of trust between the parties. Nor was there evidence that the plaintiffs could not understand the arbitration clause. She also noted that the agreement adequately described the ability to choose between arbitrating and proceeding in small claims court and the costs of arbitration.

[54] At the time of this judgment, applications for leave to appeal to the Supreme Court of Canada had been filed in both *Amazon* and *Niantic* but the court has not yet ruled on those applications.

3. Application to this case

[55] As the cases I have reviewed establish (particularly *Niantic*) the inequality in the parties' bargaining relationship must be considered in its full context (along with other factors) to assess whether the overall bargain is improvident and

unconscionable. I have no evidence of either Alireza's or Sepehr's sophistication as it relates to business or negotiations but I accept they were powerless to negotiate different terms of this phone contract. They were not, however, particularly vulnerable to or dependent on Freedom Mobile and no "serious consequences" would flow from the plaintiffs not agreeing to the terms of service: *Amazon* para. 126. I accept that a cell phone is a necessity for almost everyone and, in this respect, the contract has more significance to the plaintiffs than the contracts did in *DoorDash, Amazon,* and *Niantic* but it is not on par with *Uber* or *Pearce*.

[56] Nor am I persuaded that the arbitration clause in this case violates the plaintiffs' reasonable expectations to the point of "depriving them of remedies": *Uber* para. 89. It is readily conceivable that the plaintiffs might have to pay money up front to start an arbitration, such as an administration fee or a retainer for the arbitrator. (The arbitration clause is silent about costs which potentially makes it vulnerable to an unconscionably claim.) It is almost certain that the arbitration clause, which contains no carve-out for small claims matters, would result in an arbitration process whose costs are disproportionately high in relation to many types of claims that consumers might bring. However, whether that is true in the present case is not obvious.

[57] The amount of the plaintiffs' claim ($63,000) is smaller than most that are brought in this court but it is not insignificant. Unfortunately, the plaintiffs have led no evidence about what up-front costs they might have to pay for an arbitration and I cannot take judicial notice of what those fees might be or whether they would be disproportionate to the $63,000 claim. If the arbitration had to be brought in Ontario, which is the default forum under the arbitration clause subject to some other agreement of the parties, improvidence may be more evident on a superficial regard to the record. However, counsel for Freedom Mobile advised the court that she was instructed to agree to British Columbia as the forum for the arbitration, which takes potential travel costs off the table. Those were a significant factor in *Uber*.

[58] It is potentially significant, in my view, that the arbitration clause does not contain the kind of concessions to the consumer that helped to save the arbitration clauses in *DoorDash*, *Amazon*, and *Niantic*. There is no carve-out for small claims (although that would not apply here anyway), there is no provision for an arbitration to be by telephone or video (although presumably that is an option Freedom Mobile could and ought to consider), and there is no provision for Freedom Mobile to pay the up-front costs if the plaintiffs cannot afford them. The absence of these kinds of concessions distinguish this case from *DoorDash, Amazon,* and *Niantic.* However, the court is still left with no evidence of what up-front costs the plaintiffs might be burdened with under an arbitration. That evidence need not be extensive. I would think that an affidavit from counsel's legal assistant reporting on two or three inquiries with potential arbitrators would suffice. But the absence of any evidence of the potential costs makes it impossible to determine if the arbitration clause potentially deprives the plaintiffs of a meaningful remedy under their contract. Nor can I conclude that granting a stay in favour of arbitration will prevent any issue from being resolved, including the jurisdiction of the arbitrator, unconscionability of the arbitration clause, or the plaintiffs' substantive claim.

[59] In short, while I find there is potential that the arbitration clause could be unconscionable depending on the circumstances and particularly the costs the plaintiffs might have to pay up-front to start an arbitration, I am not satisfied that the plaintiffs have met their onus of clearly showing unconscionability on this application or that there is a real prospect that unconscionability (or, for that matter, the substantive claim for $63,325.99) will not be determined if the matter is referred to arbitration.

V. Conclusion

[60] For these reasons, I order that these proceedings as they relate to the relief sought in paragraph 37(a) of the Notice of Civil Claim (the $63,325.99 claim) be stayed pursuant to s 7(2) of the *Arbitration Act*. The stay does not apply to the relief claimed in paragraph 37(b) which is based on the *Business Practices and Consumer Protection Act.* The general, aggravated, and punitive damages claimed in

paragraphs 37(c) and (d) are stayed only to the extent that they are not founded upon the *Consumer Protection Act* claim.

[61] While I have found there is an arguable case that the arbitration clause applies, I have not decided that issue one way or the other. I recognize that the evidence available for this application is limited by the procedural requirement to seek a stay without taking any further steps in the proceeding. Nevertheless, the evidence that I do have on this application does not persuade me that Freedom Mobile specifically drew either plaintiff's attention to the arbitration clause at any time before entering the contract or after it was in place. For that reason, I decline to order that the plaintiffs pay Freedom Mobile's costs for this application. The parties will bear their own costs.

"Kirchner J."