COURT OF APEAL FOR BRITISH COLUMBIA

Citation: *Magnum Management Inc. v. Chilliwack Hangar Corp.,*
2024 BCCA 212

Date: 20240528
Docket: CA49607

Between:

Magnum Management Inc.

Appellant
(Claimant)

And

Chilliwack Hangar Corp.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: A final award of an arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2, dated December 19, 2023 (*Magnum Management Inc. v. Chilliwack Hangar Corp.*).

Oral Reasons for Judgment

Counsel for the Appellant:	B. Vickers R.K.A. Thomas
Counsel for the Respondent:	D. Fetterly
Place and Date of Hearing:	Vancouver, British Columbia May 23, 2024
Place and Date of Judgment:	Vancouver, British Columbia May 28, 2024

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Summary:

This application arises in the context of successive arbitration awards determining the annual minimum rent payable to the applicant by the respondent. The applicant applies for leave to appeal the award of an arbitrator at a 2023 arbitration under s. 59 of the Arbitration Act. One of the issues at the arbitration was the extent to which the doctrine of issue estoppel applied to findings made at the previous 2018 arbitration between the parties. The applicant says the arbitrator made legal errors in failing to apply or, alternatively, in his application of, legal principles of issue estoppel; in misapprehending the 2018 arbitrator's reasoning; and in not anchoring the award in the submissions of either party. Held: Application dismissed. The applicant has not identified an extricable question of law arising out of the award—the threshold requirement for granting leave to appeal—and, in any event, it has not established that any of the requirements in s. 59(4) are met.

BUTLER J.A.:

Nature of the Application

[1] The applicant, Magnum Management Inc., seeks leave pursuant to s. 59(3) of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Act*] to appeal an arbitral award establishing the annual minimum rent payable to it by the respondent, Chilliwack Hangar Corp., for premises at the Chilliwack Airport. The applicant submits that the arbitrator made four extricable errors of law that were material to the award. The applicant argues that leave should be granted as the issues raised are important to the parties and correction of the alleged errors of law may prevent a miscarriage of justice.

[2] The respondent opposes the application. It argues that the applicant has not identified an extricable question of law, and further, that the applicant has not shown that any of the circumstances required to justify leave in s. 59(4) of the *Act* are satisfied.

Background

[3] The applicant operates the Chilliwack Airport and surrounding lands pursuant to a 50-year lease with the City of Chilliwack dated April 1, 1997. On January 1, 2003, the applicant as sublandlord and the respondent as subtenant, entered into a sublease of premises at the airport to last for the balance, less a day, of the applicant's 50-year lease with the City. The sublease provides under s. 4.1(c) that

during each subsequent five-year period of the term, the annual minimum rent will be reviewed and agreed upon or determined by way of arbitration.

[4] The parties were unable to agree on rent for the period from January 1, 2023 to December 31, 2027, and submitted the determination of the annual minimum rent for that period to arbitration. On December 19, 2023, the arbitrator (the “Arbitrator”) issued the challenged award (the “Award”). The Award determined the minimum rent to be $4.08/m^2$.

[5] One of the issues at the 2023 arbitration was the extent to which the doctrine of issue estoppel applied to findings made at a previous arbitration between the parties.

[6] The earlier arbitration took place in 2018 after the parties were unable to agree on the annual minimum rent for the January 1, 2018 to December 31, 2022 rent period. At the 2018 arbitration, the appointed arbitrator arrived at an award setting the annual minimum rent and in doing so made findings about the interpretation of s. 4.1(c) of the sublease. The relevant portion of that provision required the arbitrator to:

> … proceed to hear and determine the matter of such Minimum Rent in accordance with the provisions of the *Commercial Arbitration Act* of British Columbia, as amended from time to time, <u>on the basis of rent payable with respect to similar premises in the area at that time, and on the basis that the Premises were unimproved and excluding the value of the Building</u>.
>
> [Emphasis added.]

[7] The main issue of contention between the parties was described in the 2018 award:

> 14. The parties disagree on the interpretation of article 4.1 (c)
>
> a. the Claimant says that the rent review is on the basis of current market rents at the date of the review, whereas
>
> b. the Respondent says that it is on the basis of rents actually being paid at the review date, irrespective of the date the rent was established.
>
> 15. Article 4.1 (c) can be interpreted by examining the components of the test set out as requiring a consideration of:

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> a. rent payable
>
> i. with respect to similar premises
>
> ii. in the area
>
> iii. at that time, and
>
> b. on the basis that the Premises were unimproved and excluding the value of the Building
>
> 16. The test makes no reference to "market" rent but it does require a comparison of rents payable on "similar premises" "at that time". Both counsel agreed, correctly in my view, that Article 4.1 (c) prescribes an objective test for the determination of rent.

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[8] The arbitrator made findings about the proper interpretation of the terms "rent payable", "similar premises", "in the area", and "at that time" as used in s. 4.1(c) of the sublease. Those conclusions are relevant to the issues raised on this leave application. In brief, at paras. 18–33, the arbitrator arrived at the following conclusions:

- "rent payable" meant rent payable for bare land;
- "similar premises" referred only to airport properties, in part because no evidence regarding rent for properties outside of the airport had been submitted;
- "in the area" required consideration of comparable properties in the Chilliwack area. However, the arbitrator acknowledged that properties at other airports, even though they were not in the area, could have some value if there was evidence that would have allowed him to make appropriate adjustments; and
- "at that time" was "a reference to current rents, not rents no matter when negotiated and not a rent that the premises might be rented for if offered on the market at the review date".

[9] In conclusion the arbitrator stated:

> 34. Accordingly, in my opinion s. 4.1 (c) of the Lease requires a consideration of current rents for similar properties in the area.

[10] The 2018 award was ultimately based on six comparable properties described in an expert appraisal report presented by the sublessor. The arbitrator found:

> 61. In my opinion these 6 comparables are the most consistent with the criteria set out in para. 4.1 (c) of the Lease. They are “similar premises in the area at that time”. I have, however, no evidence to assist me in making any adjustments for their specific location relative to the Premises, their date, or any other difference which might be relevant to their relative rental rates.

The 2023 arbitration

[11] At the hearing of the 2023 arbitration, the parties’ positions on the extent to which issue estoppel applied were not dissimilar. As described in the Award, the applicant argued that the 2018 arbitration findings were not binding because the expert evidence at the two arbitrations about airport rental rates was different. In contrast to the evidence at the earlier arbitration, the Arbitrator now had evidence that could allow him to make adjustments for rents at other airports and evidence that could enable the Arbitrator to make an award taking into account market trends. Nevertheless, as described in the Award, the applicant agreed that the contractual interpretation findings made in the 2018 award were binding:

> 22. The Claimant does not dispute that the findings of contractual interpretation of s. 4.1(c) in the 2018 Arbitration award are binding in this arbitration, and in particular, this means the determination of “similar premises” “in the area” and “at that time”. The Claimant disputes that the application of that interpretation on the evidence and ultimate decision reached is binding because the evidence in the two arbitrations is different.

[12] The applicant argued for an escalating rent structure and emphasized that there had been a “massive upward market shift” in airport rents which could be reflected by an award that incorporated annual increasing rents and market trends.

[13] The respondent argued that issue estoppel applied to the interpretation of the contractual terms because the question to be determined was the same as at the 2018 arbitration, which was a final decision between the same parties. The respondent took the position that:

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> 28. … the determination to be made on this arbitration can be reduced to the simple assessment of the rents payable as at January 1, 2023, for other premises at the Chilliwack Airport with rents set "too long" ago being excluded from this process.

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The Award

[14] Referring to *Danyluk v. Ainsworth Technologies Inc.*, 2001 SCC 44, the Arbitrator determined that the preconditions for the operation of the doctrine of issue estoppel were present for questions about the interpretation of terms in the sublease. He went on to set out his own interpretation of s. 4.1(c) in the event that he was incorrect about the application of issue estoppel. His comments on the interpretation of the relevant provisions included the following at para. 31:

- "[A]t that time" means the renewal date of January 1, 2023 because "the new Minimum Rent becomes payable commencing on the first day of the Rent Period, that is the date the arbitrator must determine the rent payable with respect to similar premises in the area".

- He referred to the evidence of Mr. Kirk, the applicant's expert, about unprecedented increases in real estate values with subsequent upward pressure on rents, particularly with aviation rents over the past three years, but stated:

  > While this may be the case, it is not relevant to my interpretation of s. 4.1(c), which is restricted to the parameters outlined in that section, subject to those aspects covered by issue estoppel or my interpretation of that section which happens to be essentially the same as the interpretation set out in the 2018 Arbitration award.
  >
  > [Emphasis added.]

- "[I]n the area" can only mean in the vicinity of the premises at the Chilliwack Airport.

- He concluded that "'similar premises' are not necessarily restricted to the properties that were considered similar at the time of the 2018 arbitration".

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[15] At both arbitrations, the applicant took the position that the minimum rent should reflect current market trends. The Arbitrator rejected those arguments at the 2023 arbitration, stating:

> 36. … Ultimately the Claimant submits that consideration of rents established other than within a short time of January 1, 2023, would reflect a retroactive influence of previous market trends that have since evolved. The Claimant states that the parties intended that the determination of Minimum Rent be based on the current rental market and to reflect current rental trends. In my assessment, none of this is within the terms of s. 4.1(c) of the Sublease, which is only concerned with rates payable on January 1, 2023.
>
> 37. It is not my task to reflect current rental trends, or to assist the Chilliwack Airport to bring this lease within its benchmark rate structure. My sole task is to refer to rents payable as of January 1, 2023, to bring the Minimum Rent payable by the Respondent into line with those rents, however and whenever they were negotiated.

[16] The Arbitrator also rejected the applicant's submission that the minimum rent could be variable or escalating based on comparison with similar premises in the area at the time. He found that the language of the sublease precluded a variable or escalating minimum rent.

[17] Finally, the Arbitrator noted:

> 58. …I have previously stated that I consider the interpretation of "similar premises" not to be subject to issue estoppel, and while the 2018 Arbitration award limits the comparables to 6 premises, I am not satisfied that it has been established that those 6 properties are more similar to the Premises than the other properties at the Chilliwack Airport. Accordingly I have included all of the premises which have a rental rate in effect in my calculations.

[18] The final award was calculated by averaging "all of the rates as of January 1, 2023, from those properties, which are similar properties in the area at that time".

<u>Legal Framework</u>

[19] Section 59 of the *Act* provides:

> 59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.
>
> (2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if
>
> > (a) all the parties to the arbitration consent, or

> (b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).
>
> (3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.
>
> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
>
> (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
>
> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
>
> (c) the point of law is of general or public importance.

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[20] The *Act* limits the right of appeal from arbitral awards in order to advance the central aims of arbitration, namely efficiency and finality: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 1.

[21] This Court in *MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54, described the three requirements that must be met before leave can be granted to appeal an arbitration award:

> 1. the appeal must be based on a question of law;
>
> 2. the judge must be satisfied that one of the three circumstances identified in s. 59(4) exists; and
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> 3. the judge must be prepared to exercise the residual discretion implicit in the phrase “the court may grant leave...”.

[22] Appeal courts are frequently required to wrestle with the question of how to identify an extricable question of law for the purpose of granting leave to appeal an arbitral decision, or more broadly for the purpose of determining the standard of review on appeal. In *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748, 1997 CanLII 385, Justice Iacobucci described how to

recognize the difference between questions of law and those of fact or mixed law and fact:

> [35] ...questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests. …

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[23] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, the Court emphasized that when considering applications for leave to appeal arbitral awards, appellate courts should be "cautious in identifying extricable questions of law in disputes over contractual interpretation". This is because:

> [55] ...the goal of contractual interpretation, to ascertain the objective intentions of the parties, is inherently fact specific. The close relationship between the selection and application of principles of contractual interpretation and the construction ultimately given to the instrument means that the circumstances in which a question of law can be extricated from the interpretation process will be rare.

[24] In *MSI Methylation*, after a review of the jurisprudence, Justice Hunter helpfully summarized the principles relevant to appeals of arbitration awards at para. 72. He cautioned that "care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law)". He also noted that one means of determining whether the challenged proposition is a question of law is to "consider the level of generality of the question" and whether it has precedential value beyond the parties to the dispute. If it does, it is more likely to be an extricable question of law. However, if "the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants" it is likely a question of mixed fact and law. Finally, he observed that a "narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration".

[25] Once a legal question has been identified, before leave can be granted, the question must be found to have arguable merit: *Sattva* at para. 74.

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Positions of the Parties

[26] Two questions arise on this application: has the applicant identified an extricable question of law; and if so, has the applicant met one of the conditions in s. 59(4) to justify granting leave.

Has the applicant identified a question of law?

Position of the applicant

[27] First, the applicant contends that the Arbitrator erred in failing to apply or, alternatively, in his application of, legal principles of issue estoppel to the findings of contractual interpretation made in the 2018 arbitration. Relying on *Kingsgate Property Ltd. v. Vancouver School District No. 39*, 2023 BCSC 560, aff'd 2024 BCCA 54, the applicant says that the question of interpretation of a prior legal decision for the application of issue estoppel is a question of law.

[28] The applicant says that at the 2023 arbitration, the parties agreed that issue estoppel applied and that the Arbitrator was bound by the 2018 arbitrator's interpretations of "similar premises", "in the area", and "at that time". The Arbitrator found the preconditions of issue estoppel were met and that he was therefore precluded from revisiting issues regarding the interpretation of the sublease. However, and in spite of that finding, the applicant argues that the Arbitrator determined that he was not bound by the 2018 interpretation of "similar premises". The applicant notes that the Arbitrator stated at para. 29(a) that he was bound by the prior determination of the meaning of "similar premises", but then stated in para. 58 that he "previously stated that I consider the interpretation of "similar premises" not to be subject to issue estoppel". The applicant argues that the statements in the Award are inconsistent and led the Arbitrator to err by failing to give any preference to recently negotiated rental rates, contrary to the findings made in the 2018 arbitration award.

[29] At the hearing in 2023, the main point of contention between the parties was the scope of "at that time"; specifically, whether the comparison was limited to rental rates negotiated from April 1, 2022 to January 1, 2023 (as the applicant argued) or

from January 1, 2021 to January 1, 2023 (as the respondent argued). By treating all premises at the Chilliwack Airport as similar, the Arbitrator failed to give any effect to the "temporal aspect" of the 2018 award which, the applicant alleges, is reflected in the Arbitrator's finding that the contract language did not refer to "rents no matter when negotiated". The applicant says that the Award thus failed to properly account for the fact that recent rents for similar premises were rapidly escalating.

[30] Second, the applicant says the Arbitrator misapprehended the 2018 arbitrator's reasoning. In particular, the Arbitrator understood the 2018 arbitrator to have considered only six comparable premises because those premises were "more similar" to the respondent's premises than others in the airport. The applicant submits that the 2018 arbitrator actually used those six premises because they had recently negotiated rental rates. And that, on the basis of this misapprehension, the Arbitrator said he was not satisfied that the six premises were "more similar" than other properties in the airport, and instead chose to average the current rental rates of all premises in the airport. The applicant says this misapprehension is a palpable and overriding error that was central to the Arbitrator's reasoning and conclusion, and is therefore an extricable error of law.

[31] Third and finally, the applicant says the Award was not anchored in the pleadings, submissions, or arguments of either party. The Arbitrator's decision to average all rents of comparable premises was made despite submissions from both parties that minimum rent should be based on recently negotiated rental rates, in accordance with the approach taken in the 2018 arbitration. The applicant says that by failing to ask the parties for submissions on this issue, the Arbitrator denied the parties' natural justice and procedural fairness.

Position of the respondent

[32] The respondent says the applicant has failed to identify an extricable question of law. The respondent submits that the applicant's arguments all raise issues about how the Arbitrator applied the findings from the 2018 arbitration about interpretation

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of the sublease to the evidence presented at the 2023 arbitration. It submits that these are issues of mixed fact and law.

[33] The respondent argues that when the Arbitrator stated he did not consider "similar premises" to be subject to issue estoppel, he was simply indicating that he was not bound to base his decision on the same six premises on which the 2018 arbitrator based his conclusion. There was no suggestion by either party in the 2023 arbitration that the rent should be determined based on those same six premises. The 2018 arbitrator did not mandate a specific formula for setting the rent in the future. The Arbitrator was free to base his decision on the evidence presented at the 2023 arbitration about the rental rates of any or all of the other airport premises.

[34] In response to the argument that the Arbitrator denied the parties' natural justice and procedural fairness by making an award based on an averaging of all current rents, a position that neither party took at the hearing, the respondent contends that an arbitrator is not bound to choose between the positions of the parties. In any event, any allegation of procedural unfairness must be advanced by way of an application under s. 58(h) of the *Act* to set aside an award, and not as a ground for leave to appeal under s. 59: *A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure)*, 2022 BCCA 440 at para. 94 (Chambers).

Has the applicant satisfied one of the requirements under s. 59(4)?

Position of the applicant

[35] The applicant says that in the present case, the result is important to the parties pursuant to s. 59(4)(a) of the *Act*. The Arbitrator's decision pertains to material issues in the dispute which are binding. The issues are important to the parties, since the minimum rent determination will be in effect for five years; the sublease will be in duration until 2047; and the Arbitrator's findings regarding s. 4.1(c), if not appealed, will lead to endless disputes for further negotiations of minimum rent.

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[36] Further, the applicant says the Arbitrator's decision affects other tenants and landlords during periodic rent reviews on tests similar to s. 4.1(c). The applicant submits that there is evidence that at least one of the tenants had agreed to accept the rent renewal rate increase based on the outcome of the respondent's 2023 arbitration. Therefore, the point of law is both of general importance pursuant to s. 59(4)(c), and is of importance to the class or body of persons which includes the applicant and tenants of the Chilliwack Airport pursuant to s. 59(4)(b).

Position of the respondent

[37] The respondent contends the applicant has not established that any of the criteria in s. 59(4) of the *Act* are met. The respondent says this is actually a very modest financial dispute which does not rise to the level of importance to the parties that would warrant this Court's intervention. The difference between the rent suggested in the closing submissions of the respondent and the rent set out in the Award was only $8,115; there is a difference of only $21,750 between the position taken by the applicant at the 2023 arbitration and the Award. Further, while the applicant says that if leave is not granted further arbitrations will follow, the respondent submits that the method of determining the rent set out in the Award should make the commencement of future arbitrations far less likely.

[38] Moreover, regarding the alleged importance of the Award to other tenants and landlords, the respondent says it is unclear how a private arbitration award could affect other tenants and landlords. Further, there is no evidence that other leases at the airport contain identical terms to those in the sublease at issue.

[39] Finally, the respondent argues the matters in dispute are unique to the parties and of no significance to the general public.

Analysis

Has the applicant identified a question of law?

[40] The applicant's argument that the Arbitrator erred in failing to apply, or by improperly applying, the legal principles of issue estoppel to the findings of

contractual interpretation made in the 2018 arbitration requires consideration of the decision in *Kingsgate*. The circumstances in *Kingsgate* have some similarity to the situation in the present case. The parties had submitted a question regarding the value of property leased to the School District by the landlord, Kingsgate, to arbitration in 1999 because, under the terms of the lease, the value of the property drove the determination of rent. The parties referred the same question to arbitration in 2022 and the landlord argued that issue estoppel applied to the 1999 award and that it was binding in 2022. A majority of the panel disagreed and the landlord sought leave to appeal.

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[41] The application was heard prior to the recent amendments to the *Act* and so was heard by a judge of the British Columbia Supreme Court who granted leave to appeal. In doing so, he reasoned that

> [69] … interpreting an award and identifying issues to which issue estoppel applies can be analogized more readily to a question of statutory interpretation—which is a question of law—being the interpretation of legal text with binding force (an award) to determine the parties' governing obligations under a legal doctrine (issue estoppel).

[42] The judge found that interpreting a prior arbitration award to apply issue estoppel is more a question of law than one of mixed fact and law: at paras. 69–70. He acknowledged that interpreting a prior arbitration award under the same contract does not have general or precedential value, but concluded:

> [74] In my view, the interpretation of an arbitration award for purposes of identifying the issue to which issue estoppel relates—while a matter peculiar to the interests of the parties involved in the arbitration proceeding—is a further exception to that 'precedential value' general rule for identifying questions of law.

[43] The judge granted leave on the following issue:

> [54] …Did the majority err in their interpretation of the [1999 Award] and identification of the issue to which estoppel applied?

The decision to grant leave was affirmed by this Court. In doing so, it approved of the judge's reasoning.

[44] The applicant says that the errors alleged are similar to those raised in *Kingsgate*, and that in this case, the Arbitrator erred in identifying the issues to which estoppel applied. It submits he did so by refusing to accept and apply the decision from the 2018 arbitration regarding “similar premises” and by failing to incorporate the “temporal element” in his analysis.

[45] I do not accept that the error identified in *Kingsgate* is analogous to the error alleged here. In *Kingsgate*, the panel was asked to apply issue estoppel to findings made at the earlier arbitration. The majority determined that “strictly applying issue estoppel would frustrate the contractual intentions of both parties because the 1999 award interpretation is not workable”. They purported to exercise their discretion not to apply the doctrine of issue estoppel but rather to apply their own “correct interpretation” of the lease: at para. 22.

[46] This is very different from the alleged error in this case. Here, the Arbitrator accepted that issue estoppel applied to the interpretation of the important terms in the sublease—the meaning of “similar premises”, “in the area”, and “at that time”. Moreover, the Arbitrator clearly stated in the Award that he accepted the interpretation of those terms as determined in the 2018 award. Accordingly, the question of law on which leave was granted in *Kingsgate* does not arise here. There is no question about error in the Arbitrator’s interpretation of the 2018 award, nor about identification of the issue to which estoppel applied. The interpretation of the sublease and the issues to which issue estoppel applied were accepted by the Arbitrator in making the Award.

[47] The alleged error raised by the applicant, is that the Arbitrator did not apply the interpretation of the terms in the sublease to which issue estoppel applied to the evidence presented at the 2023 arbitration. Applying the test for extricable questions of law, as reasoned by the judge in *Kingsgate*, that is a question of mixed fact and law, rather than a question of law. It is an alleged error in the application of the terms of the sublease to the evidence presented about rental rates in 2023. Using the language from *Southam* at para. 35, the issue raised by the applicant is whether the

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facts (the evidence about rental rates for similar premises) satisfy the legal test established by the 2018 award. That is not an extricable question of law.

[48] Of course, that does not respond to the applicant's submission that the Arbitrator made a decision that is incoherent or evidently wrong because he stated at para. 29 that he was bound by the prior determination of "similar premises", but then found at para. 58 that he did not consider the interpretation of "similar premises" to be subject to issue estoppel. However, I am not persuaded that the Arbitrator contradicted himself as alleged. Arbitral awards, like reasons for judgment, must be read as a whole and in context with the pleadings and submissions. When that is done, it is clear that the Arbitrator did not contradict himself or err as alleged.

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[49] The Arbitrator made it clear that he was not bound by the 2018 arbitrator's conclusion to use only six comparable premises to determine the rental rate. That is what he was referring to at para. 58 of the Award. That approach is consistent with the Arbitrator's view that he was free to determine which properties were comparable based on the evidence before him. As he stated at para. 31(d), "'similar premises' are not necessarily restricted to the properties that were considered similar at the time of the 2018 arbitration".

[50] Of note, that is the same position taken by the applicant at arbitration. As I have noted above, the applicant disputed that "the application of [the 2018 arbitrator's] interpretation on the evidence and ultimate decision reached is binding <u>because the evidence in the two arbitrations is different</u>": Award at para. 22 (emphasis added). In other words, the applicant took the position that the Arbitrator was free to arrive at a determination of the rent payable by applying the accepted contractual interpretation to the evidence before him. And that is what the Arbitrator did.

[51] With regard to the applicant's argument that the Arbitrator erred by ignoring the "temporal element", it is important to look at what the 2018 award actually determined. The 2018 arbitrator stated that the provision requires determination of

"current rents, not rents no matter when negotiated and not a rent that the Premises might be rented for if offered on the market at the review date": 2018 award at para. 33 (emphasis added). While it is difficult to give particular meaning to the phrase, "not rents no matter when negotiated", the other two phrases are crystal clear. The 2018 arbitrator determined that the test was objective and was to reflect current rents, not market rents. The applicant's position at both arbitrations was that the language of the sublease somehow required the Arbitrator to import some aspect of market rates into the contractual language. This was rejected in the 2018 award and that finding was accepted and applied by the Arbitrator.

[52] To summarize the applicant's argument on this issue, it complains that the Arbitrator accepted all current rates as comparable rather than a more limited selection similar to that accepted by the 2018 arbitrator. Expressing the argument in this way makes it clear that the applicant is raising a question of mixed fact and law; that is, a question of the application of the facts or evidence to the legal test. Quite simply, the Arbitrator was not constrained by issue estoppel in selecting which premises "in the area" were "similar premises" "at that time", so long as he accepted the interpretation of those terms. As I have indicated, that is certainly what he purported to do.

[53] Finally, turning to the considerations in *MSI Methylation*, I conclude that they support the conclusion that the applicant has failed to identify an extricable question of law. The issue raised by the applicant—application of the contractual terms in the sublease to the particular facts of this case—is of no precedential value. It depends entirely on the particular circumstances of the case and raises no question of general application. It is a question of mixed fact and law.

[54] I would also reject the applicant's allegation of procedural unfairness arising from the fact that the Award was based on an averaging of all current rents, a position that neither party took at the hearing. As submitted by the respondent, an arbitrator is not bound to choose between the positions advanced by the parties. Further, an allegation of procedural unfairness must be advanced by way of an

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application under s. 58(h) of the *Act* to set aside an award, and not as a ground for leave to appeal under s. 59: *A.L. Sims* at para. 94.

Has the applicant satisfied one of the requirements under s. 59(4)?

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[55] As the applicant has not identified an extricable question of law, it is unnecessary to consider the remaining requirements for leave to appeal under s. 59(4) of the *Act*. However, in the event that I am wrong about the identification of a question of law, I will consider whether the applicant has established that any of the s. 59(4) requirements are met.

[56] Starting with s. 59(4)(a) of the *Act*, this test is not met as the determination of the issue will not prevent a miscarriage of justice. As the respondent submits, the difference between the positions advanced by the parties at arbitration regarding the rental rate and what the Award decided amounts to a modest financial dispute that does not rise to the level of importance warranting intervention by this Court.

[57] Further, as the respondent argues, there was almost no evidence about the terms of the lease agreements between the applicant and other tenants, let alone if those were identical to the terms of the sublease. Accordingly, it is not possible to accept the applicant's contention that the Award will have a cascading effect for other rent renewals. Therefore, if there is a point of law, I cannot accept that it has application to other tenants and landlords such that s. 59(4)(b) could be satisfied.

[58] Finally, addressing s. 59(4)(c), this issue is not of general importance. As I set out above, the issue raised by the applicant is of no precedential value and raises no question of general application.

[59] Finally, I am not prepared to exercise my residual discretion to grant leave. Granting leave to appeal would not be in line with the narrow approach this Court has taken to appellate intervention in commercial arbitration. Nor would it accord with "the central aims of commercial arbitration: efficiency and finality": *Teal Cedar* at para. 1.

Disposition

[60] The application for leave to appeal is dismissed.

"The Honourable Mr. Justice Butler"

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