COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Hawthorn v. Hawrish,*
2023 BCCA 182

Date: 20230501
Dockets: CA48351; CA48353
Docket: CA48351

Between:

Scott Hawthorn

Appellant
(Defendant)

And

Darren Hawrish

Respondent
(Plaintiff)

And

Native Canada Footwear Ltd.

Respondent
(Defendant)

- and -

Docket: CA48353

Between:

Native Canada Footwear Ltd.

Appellant
(Defendant)

And

Darren Hawrish

Respondent
(Plaintiff)

And

Scott Hawthorn

Respondent
(Defendant)

Before: The Honourable Mr. Justice Willcock
The Honourable Justice Griffin
The Honourable Justice Skolrood

On appeal from: An order of the Supreme Court of British Columbia, dated May 19, 2022 (*Hawrish v. Hawthorn*, 2022 BCSC 849, Vancouver Docket S211121).

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Place and Date of Hearing:	Vancouver, British Columbia January 11, 2023
Place and Date of Judgment:	Vancouver, British Columbia May 1, 2023

Written Reasons by:
The Honourable Mr. Justice Willcock

Concurred in by:
The Honourable Justice Griffin
The Honourable Justice Skolrood

Summary:

The appellants challenge an order dismissing applications made pursuant to s. 7 of the Arbitration Act for a partial stay of proceedings in favour of arbitration. When the applications were heard, the appellants had responded to the claim described in a petition and a notice of civil claim, but had not responded to an amended notice of civil claim. The appellants sought a stay of only those new claims identified in the amended pleadings. They appeal on the basis that the judge should have referred the question of whether they had applied for a stay before responding to the substance of the dispute identified by the amendments to the arbitrator if it was "arguable" that they had. They further contend that the chambers judge erred in finding that the amended notice of civil claim did not assert new causes of action. Held: Appeal dismissed. The arguable case standard does not apply to the determination of whether a party has responded to the substance of the dispute before applying for a stay. Determining whether a party has responded to the substance of a civil dispute is generally within the court's competence, and need not be referred to an arbitrator for determination. The chambers judge did not err in concluding that the "new" issues raised by amendment could not be brought by an independent proceeding without being barred as an abuse of process, and therefore did not re-establish a right to seek a stay under s. 7 of the Act.

Reasons for Judgment of the Honourable Mr. Justice Willcock:

Introduction

[1] This is an appeal from an order dismissing applications for a partial stay of proceedings pursuant to an arbitration clause in a shareholders' agreement.

[2] The applications were made pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2:

> 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.

[3] When the applications were heard, the appellants had responded to the claim described in a petition and a notice of civil claim but had not responded to an

amended notice of civil claim. The appellants sought a stay of only those new claims identified in the amended pleadings.

[4] The chambers judge, for reasons indexed at 2022 BCSC 849, held the claims in the amended notice of civil claim were "substantially the same" as those in the original notice of civil claim, and for that reason dismissed the applications because they were not brought before the appellants' first response to the substance of the dispute in respect of matters they had agreed to submit to arbitration.

Issues on Appeal

[5] The issues on this appeal are:

a) whether the judge should have referred the question whether the appellants had responded to the substance of the dispute to an arbitrator rather than finally answering that question himself; and

b) if he did not so err, whether he erred in his interpretation and application of s. 7(1) of the *Arbitration Act*; in particular, whether he erred in finding that the amended notice of civil claim did not assert new causes of action.

Background

[6] The dispute is between shareholders in the corporate defendant, Native Canada Footwear Ltd. (the "Company"). The respondent Darren Hawrish ("Hawrish") and a company in which he has an interest, Presley Investments Ltd., own more than 25% but less than 33.3% of the Company's common shares. The appellant Scott Hawthorn ("Hawthorn") and his holding company, Blood Alley Holdings Inc., own more than 50% but less than two-thirds of the common shares. Hawrish is the former president of the Company. He was a director until 2020, when he was removed as a director in a dispute with respect to management of the Company.

[7] The dispute led to the filing of a petition for relief pursuant to the oppression provisions of the *Business Corporations Act*, S.B.C. 2002, c. 57. By consent, the proceedings were converted into an action. A notice of civil claim was filed, to which

the appellants responded. When an amended notice of civil claim was filed, the appellants sought a stay of proceedings, relying upon a clause in their shareholders agreement, to which the litigants were parties:

> 13. In the event of a dispute hereunder which does not involve a party seeking a court injunction, that dispute shall be resolved by arbitration subject to the provisions of the *Commercial Arbitration Act*, R.S.B.C. 1996 c. 55 [now the *Arbitration Act*, SBC 2020, c. 2] as amended from time to time. The arbitrated resolution of the dispute shall be final and binding on all parties. The place of arbitration shall be Vancouver, British Columbia. At the discretion of the claimant, three arbitrators may be appointed, and in such case the majority decision of such arbitrators shall be the arbitrated resolution.

The petition

[8] The proceedings were initiated by petition, filed on February 3, 2021, that described a claim founded upon the oppression provisions of s. 227 of the *Business Corporations Act*. The petitioner Hawrish named Hawthorn and the Company as respondents.

[9] Part 1 of the petition was 92 paragraphs long. Hawrish alleged that when he invested in the Company he sought to ensure his interests as a minority shareholder were protected by obtaining an option to purchase future share offerings *pro rata* with Hawthorn to prevent the dilution of Hawrish's ownership position; an assurance that the Company could not purchase Hawrish’s shares if he was no longer employed by the Company; and a guaranteed board seat. He alleged that the Company solicitor advised him that his right to be a director and the non-dilution of his ownership position shares should not be included in the shareholders agreement that was then drafted, but that they should form a separate and stand-alone agreement. He alleged those assurances were incorporated in a voting trust agreement.

[10] He alleged that to further protect minority shareholders, the shareholders agreement included, as schedule D, a list of corporate actions that would require a special resolution.

[11] Hawrish alleged oppression founded upon the “violation”, by a long course of conduct, of his reasonable expectation that his rights as a minority shareholder incorporated in the shareholders agreement and the voting trust agreement would be protected.

[12] The remedy he sought was an order requiring Hawthorn or the Company to purchase his shares at their fair value or the sale of Hawthorn’s shares.

[13] The appellants fairly characterize the principal allegation in the petition as the assertion that, beginning in 2018, Hawthorn and the Company “repeatedly engaged in an oppressive course of conduct with the purpose of removing [Hawrish] from the board and excluding him entirely from participating in all decisions relating to the company”.

The notice of civil claim

[14] Following an exchange of affidavits, the parties consented to convert the petition to an action. A consent order to that effect and a notice of civil claim were filed on July 15, 2021. The notice of civil claim sets out substantially the same allegations of fact as the petition does, but expands upon them. Part 1, the statement of facts, is 103 paragraphs long.

[15] Like the petition, the notice of civil claim describes an oppression claim founded upon breach of the expectation that the rights and interests protected in the shareholders agreement and the voting trust agreement would be respected.

[16] Additional causes of action are pleaded: breach of fiduciary duty and breach of trust, on the part of Hawthorn, and knowing inducement, on the part of the

Company. The new claims against Hawthorn are particularized in Part 3 of the notice of civil claim as follows:

> Breach of Fiduciary duty
>
> 3. … the Defendant Hawthorn owed fiduciary duties to Hawrish as a result of the following:
>
> (a) the nature of the Defendant Hawthorn's position as a director, chairman of the board of directors, chief executive officer and controlling shareholder of Native; and
>
> (b) the terms of the Voting Trust Agreement and the Shareholders' Agreement.
>
> 4. As a result of the foregoing and, in particular, the Defendant Hawthorn's control of 60.59% of the issued and outstanding common voting shares of Native:
>
> (a) the Defendant Hawthorn was in a position to unilaterally affect Hawrish's interests and, in particular, control the election of the board of directors; and
>
> (b) Hawrish was vulnerable to the exercise of the Defendant Hawthorne's unilateral acts including, but hot limited to, the Defendant Hawthorn not voting the shares he controlled to ensure Hawrish remained on Native's board.
>
> 5. The Defendant Hawthorn's fiduciary duties included the following:
>
> (a) a duty to act in good faith; and
>
> (b) a duty to vote the shares he controlled to ensure that Hawrish remained on Native's Board.
>
> 6. The Defendant Hawthorn breached the fiduciary duties he owed to Hawrish as a result of the following:
>
> (a) failed to act in good faith by executing the Term Sheet without any deliberation with Hawrish or with consultation at the board level;
>
> (b) repeatedly breach the terms of the Shareholders' Agreement and the minority shareholder protections; and
>
> (c) refusing to vote the shares he controlled at Native's 2020 AGM thereby breaching the terms of the Voting Trust Agreement.
>
> 7. As a result of the Defendant Hawthorn's breach of fiduciary duties, Hawrish has suffered damages including but not limited to, no longer sitting on Native's board and eliminating the rights and privileges Hawrish enjoyed as a Native director.
>
> Breach of Trust
>
> 8. The Voting Trust Agreement created a Trust whereby the Defendant Hawthorn, as a Trustee was obligated to vote the Native Shares he controlled in favour of Hawrish remaining on the Native board.

> 9. The Defendant Hawthorn breached the Trust by not voting the Native shares he controlled at the 2020 AGM in order that Hawrish remain on the Native board.

[17] The claims against the Company in knowing assistance are pleaded as follows:

> 25. At all material times, Native was aware of the Voting Trust Agreement and the Trust it created.
>
> 26. Native knowingly assisted the Defendant Hawthorn in breaching the Trust, particulars which include:
>
> (a) Native agreed to a clause in the Term Sheet Agreement [an agreement for financing entered into by Hawthorn in August 2020 referred to in the notice of civil claim] which provided that Hawrish would no longer have a position on the board;
>
> (b) Native "proposed" to the shareholders in its Circular [a circular published by the company on October 29, 2020 and described in the notice of civil claim] that Hawrish be replaced on the board by Doug regardless of whether the Yves Deal [a financing deal negotiated but not consummated with Yves Marchand a private equity investor referred to in the notice of civil claim] proceeded or not;
>
> (c) Native provided a Circular to its shareholders which contained misrepresentations and failed to disclose material information; and
>
> (d) Native agreed to indemnify the Defendant Hawthorn's legal fess incurred as a result of the defending the Action herein.

[18] Notwithstanding the expanded description of the causes of action, the relief sought was no different from that set out in the petition.

[19] The appellants say the central feature of Hawrish's oppression claim continued to be his exclusion from the board, including Hawthorn's refusal to vote the shares he controlled in favour of Hawrish's appointment to the board in 2020, and the exclusion of Hawrish from board decisions. However, the pleadings clearly allege that the provisions of the shareholders' agreement intended to protect minority shareholders had been breached and that there had been repeated threats to unilaterally amend the shareholders' agreement by removing shareholders' rights to vote on matters identified in schedule D to the shareholders agreement.

[20] The appellants correctly note the only loss alleged to have resulted from a breach of Hawthorn's fiduciary duties, as controlling shareholder or pursuant to the voting trust agreement and the shareholders agreement, was Hawrish's removal from the board. However, the allegation of oppression was, as in the petition, a long course of conduct, and the remedy sought was not Hawrish's reinstatement as a director but a buy-out.

[21] The appellants filed their responses to civil claim on September 3 and September 7, 2021. On November 9, 2021, the Company filed an application for summary judgment dismissing all of the claims against it.

[22] There were, clearly, steps taken in response to the dispute identified in the notice of civil claim.

The amended notice of civil claim

[23] The respondent filed an amended notice of civil claim on January 19, 2022, before the summary judgment application.

[24] Part 1, the statement of facts in the amended notice of civil claim adds 28 new sub-paragraphs to the factual allegations. Almost all of the additional allegations are in paras. 32A–32Z, which describe the Company's failure to amend the corporate articles to include the provisions for the protection of minority shareholders set out in the shareholders agreement, and the deletion of one provision from schedule D of the shareholders agreement (which mandated that a special resolution was required before the Company could enter into a revised credit facility) purportedly by "consent and amendment" but without the knowledge or consent of Hawrish.

[25] One sub-paragraph has been added to Part 2 of the amended notice of civil claim, the description of the relief sought: the prayer for an injunction requiring the articles to be amended to include the minority shareholder protection described in the shareholders agreement and removing the provisions inconsistent with schedule D of the shareholders agreement.

[26] Part 3, the legal basis for the claim, is amended by the addition of 10 paragraphs, all of which address the allegation that it was oppressive to fail to incorporate minority shareholder protection in the Company's articles and to delete the provision from schedule D to the shareholders agreement without consent.

The summary dismissal application

[27] An application for the summary dismissal of the claims against the Company in the original notice of civil claim was dismissed for reasons indexed at 2022 BCSC 651.

[28] While the judge hearing that application, Justice McDonald, did not address the merits of the claim set out in the amended notice of civil claim, she was required to consider whether, despite the amendment, there were, as the Company suggested, stand-alone claims that might be dismissed summarily "as part of a claim" pursuant to R. 9-6. She held:

> [26] In an amended notice of civil claim, the plaintiff sets out additional material facts and one additional item of relief sought against the Company, namely, a mandatory injunction. Many of the material facts are disputed.
>
> [27] Many of the material facts added to the Claim by way of the amendment relate to the oppression cause of action and the tort of knowing assistance cause of action. For example, the additional material facts refer to an ongoing failure by Mr. Hawthorn and the Company to call a shareholders' meeting to amend the Company's articles, which the plaintiff says is oppressive and unfairly prejudicial conduct.
>
> …
>
> [30] … [T]he Company distinguishes between the Original Claims and the New Claims and it submits that Rule 9-6 authorizes summary dismissal of the Original Claims as "part of a claim" because they are sufficiently distinct from the New Claims.
>
> [31] In *Borkovic v. Laurentian Bank of Canada et al,* 2001 BCSC 337 at para. 22, the Court provided this summary of the function of material facts in a pleading:
>
> > [22] "Material facts" are those necessary for the purpose of formulating a complete cause of action: *Troup v. McPherson* (1965), 53 W.W.R. 37 (B.C.S.C.) at p. 39. To put it another way material facts are statements of the parties' pleaders of what they claim to be the legal effect of the evidence to be produced, to the end that clear and narrow issues of fact will be defined for the trier of fact to adjudicate.
> > …

[29] She concluded the amendments were material facts properly connected to the original dispute.

The stay application

[30] By notice of application filed on January 21, 2022, the appellants sought a stay of the proceedings described in certain of the amended paragraphs of the amended notice of civil claim: Part 1, paras. 32A–32Z; Part 2, para. 5A [the prayer for injunctive relief] ; Part 3, paras. 1A, 2B, 6(a1), 9A, 9B, 24(f)–(g), the amended portions of paras. 25–26, 26(d) and 27–30 inclusive [the pleadings setting out the legal basis for the relief sought as a remedy to the failure to incorporate minority shareholder protection in the articles]. They argued these amendments set out extensive new allegations of fact and that the amendment to the prayer for relief to seek an injunction was a significant departure.

[31] It was undisputed that the claims in the amended notice of civil claim *could* fall under the arbitration clause because the plaintiff alleged that his rights as a shareholder under the shareholders' agreement had been violated. Respect for the "competence-competence" principle did not require that jurisdictional question to be referred to an arbitrator for resolution.

[32] The chambers judge noted that the original pleadings described a claim for oppression founded upon the respondent's exclusion from the board of directors, said to amount to a breach of the voting trust agreement but also a claim founded upon the appellants' contravention of restrictions in schedule D of the shareholders' agreement intended to protect minority shareholders. It was undisputed that the defendants had responded to the substance of the claims in the original notice of civil claim.

[33] That being the case the chambers judge identified the issue as follows:

> [42] The question of whether the defendant or the Company have made their applications in a timely manner depends on the answer to the question of whether the proposed Amended NOCC alleges different claims. If the claims are different, the applications should be granted.

[34] There does not appear to have been any question that the chambers judge could order a partial stay despite the appellants' *attornment* to the court in relation to the case made out in the initial pleadings. I use that word in the sense discussed by Justice Chiasson in *Commonwealth Insurance Co. v. Larc Developments Ltd*., 2010 BCCA 18, at para. 31:

> ... Although there are significant differences in the law of attornment and the law applicable to stays in favour of arbitration, in my view, the analogy is not misplaced. The law generally recognizes the right of litigants to their choice of forum. While usually the right of an opposing party to challenge that choice is preserved, at common law any step taken which invokes the jurisdiction of the court will result in attornment even if the party has reserved or is pursuing a challenge to jurisdiction.

[35] The appellants relied entirely upon s. 7 of the *Arbitration Act*. It was not argued here, or below, that even if the application was brought out of time and the judge was not required to stay proceedings in order to refer a claim to arbitration, he might have had a discretion to bifurcate proceedings and issue a partial stay. Accordingly, we are not asked to address the court's inherent jurisdiction to stay all or part of proceedings even where it is not compelled to do so by s. 7 of the *Act*.

[36] The possible bifurcation of the proceedings was not considered to be a sufficient justification to deny the application for a stay. The parties were presumed to have envisioned bifurcation as a consequence of the fact that only certain disputes would be resolved through arbitration. The judge was of the view that bifurcation in such cases is not prejudicial, considering the judgment in *The Owners, Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 103 to reflect that view. (Although it should be noted that the *Georgia Partnership* case stands for the slightly different proposition that the fact that some claims are beyond the scope of an arbitration clause is not itself a bar to the right of the defendants who are parties to the arbitration agreement to invoke the clause in relation to claims that do fall within its scope. The court there held: "no prejudice arises from the fact that the arbitrator cannot grant all the relief sought … in the action… so long as the [plaintiff] is not precluded from eventually seeking that other relief in court.")

[37] After observing that the claim had been amended to allege that the appellant Hawthorn had improperly made or threatened to make unilateral changes to the shareholders agreement, and the prayer for relief had been amended to seek an injunction to require the Company to amend its articles to implement the schedule D minority protections, the chambers judge held:

> [58] … I conclude the pith and substance of the dispute between the parties remains whether or not the plaintiff was oppressed, whether the defendant acted in breach of his fiduciary duty and whether the Company was liable for knowingly assisting the defendant with that conduct.

[38] He concluded:

> [64] If the Court were to adjudicate the claims based on the facts that were pleaded in the original [notice of civil claim] , but the new facts in the Amended [notice of civil claim] were decided by an arbitrator, the plaintiff would be pursuing the same causes of action in both forums while relying on different material facts in support of each.
>
> [65] … I confess I am unable to discern how one would draw a clear line between the claims under the [notice of civil claim] and the Amended [notice of civil claim].
>
> [66] Claims of oppression and of the existence of a fiduciary duty involve a holistic examination of all of the facts and of the relationship between the parties. It is not apparent how a bifurcated process could result in an overall evaluation of the plaintiff's claims if different facts were proved before different presiders, nor what process would be employed to assess and determine whether the plaintiff has established an entitlement to a remedy, recognizing that relief for oppression under the *Business Corporations Act* involves an exercise of discretion on the part of the presider.

Argument

Referral of the question to arbitration

[39] The appellants say the chambers judge correctly identified the "arguable case" standard applicable in cases where the court is required to determine whether an issue should be resolved by an arbitrator. However, they contend "he did not appreciate that this standard also applied to the requirements of s. 7(1), including whether the dispute raised by the amendments was a different dispute".

[40] They contend the judge made the error described in *Clayworth v. Octaform Systems Inc*., 2020 BCCA 117. In that case, the question before the Court was a

question of mixed fact and law: whether the dispute described in the pleadings fell within the scope of the arbitration clause, a classic "scope" question. Justice Hunter, writing for the Court observed:

> [47] In my opinion, while the chambers judge did state the correct test in the part of para. 28 of his judgment that Octaform relies on, his analysis does not support the conclusion that he applied the test he had stated. He did not assess the question whether there was an arguable case that the dispute fell within the arbitration clause, but instead made a final determination as to the scope of the exception to the arbitration clause, contrary to *Gulf Canada Resources*. Where a judge states the test correctly but fails to apply that test, the judge commits an error of law: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 at para. 44.

[41] The appellants claim that here, similarly, the chambers judge made a final determination: that "the pith and substance of the dispute" as described in the amended pleadings remained the same as the claim initially advanced. In making this final determination himself rather than referring the question to the arbitrator, the appellants contend the chambers judge fell into error.

[42] Hawrish, in response, contends that the chambers judge did not offend the competence-competence principle by making a final determination as to the nature of the dispute. He says that this is a case of first instance in Canada, but that the Court of Appeal for England and Wales, in similar circumstances, did not hesitate to make a final determination on whether amendments to pleadings raised a different substantive claim that should be referred to arbitration: *Ahad v. Uddin*, [2005] E.W.C.A. Civ. 883.

The nature of the amendments

[43] In the alternative, the appellants say if the judge was correct to answer the question whether the appellants had responded to the substance of the dispute described in the amended notice of civil claim, he erred in concluding that the amendments did not describe a fundamentally different claim. Specifically, the appellants describe the judge's error as follows:

> The judge did not determine the essential character of the dispute described in the amendments as a factual matter. Instead, he conflated the dispute's character with the legal characterisation Hawrish adopted, treating the "pith

> and substance" of both the original legal proceedings and the amendments as "whether or not the plaintiff was oppressed, whether the defendant acted in breach of his fiduciary duty and whether the Company was liable for knowingly assisting the defendant with that conduct". [Footnotes omitted.]

[44] They submit:

> … The question was not whether the original proceedings "relate[d] solely to [Hawrish's] exclusion from the board", or whether the claim for breach of fiduciary duty would be "informed by, at least in part", the Shareholders Agreement. The complaints of breach of the Shareholders Agreement were made in the original legal proceedings, but they were incidental, not essential. They were offered in an expansive pleading in support of a statutory claim for oppression where context "is almost everything". They did not change the essential nature of the original dispute as being one about Hawrish's entitlement to be a director in which he sought remedies unique to him. That question formed no part of the dispute disclosed by the amendments. If the judge had applied the correct test, it would have been clear that it was arguable that the amendments disclosed a different dispute. [Footnotes omitted.]

[45] They describe the new claim made by amendment as follows:

> The amendments disclosed new causes of action. They introduced extensive new facts, not previously known to Hawrish. Those facts, independent of what had previously been alleged, were sufficient to give rise to remedies. Based on those new facts, Hawrish sought a new remedy, a mandatory injunction to secure specific performance of the Shareholders Agreement. Unlike the "breaches" of the Shareholders Agreement referred to in the petition and notice of civil claim, these complaints presented a current, live dispute. Hawrish thought the amendments disclosed new causes of action: he amended the notice of civil claim's Legal Basis, adding allegations of breach of contract, a new claim for knowing assistance against the Company, and a new conspiracy claim against both defendants. [Emphasis added.]

[46] They say the essence of the original dispute was the denial of Hawrish's entitlement to be a director, and the source of this entitlement was not the shareholders agreement but the voting trust agreement between Hawrish and Hawthorn. The appellants do not go so far as to say that the initial claim did not arguably fall within the arbitration clause. That would be a difficult argument, given the explicit pleading that oppression arose from the failure to observe the covenants in the shareholders agreement.

[47] They say while the shareholders agreement is “mentioned” in the pleadings before the amended notice of civil claim, its provisions are not “essential” or “integral” to the personal claim there made out.

[48] The appellants assert that the amended pleadings describe claims that are not “personal claims” like oppression claims; the amendments relate to disagreements over the interpretation, performance and enforceability of the shareholders agreement that can stand as freestanding claims. “The object of the amendments is not the removal of one shareholder from the Company, but to determine the rights of all shareholders [as between themselves]”. The Company is “very concerned that the constating documents are affected” by the amended claim, and says that distinct claim should be subject to arbitration.

[49] The appellants further support their argument that the amendments describe a different claim by saying that the remedy sought in the original notice of civil claim was the purchase of all shares controlled by Hawrish or “a judicial shotgun order”. That remedy, they contend, was substantially different from the remedy sought by the amended pleadings: the amendment of the Company’s articles.

[50] In response, Hawrish says that the chambers judge correctly found that the amendments were “in pith and substance” related to the same matters as the original pleadings. He says an underlying issue, whether the shareholders agreement permits unilateral amendment, pervades the proceeding. Both Hawrish’s initial pleadings and the appellants’ responses identify the pervasive dispute with respect to whether there was a unilateral breach of the shareholders agreement by the appellants that amounted to oppression.

[51] Hawrish says, faced with a similar issue, the court in *Ahad* appropriately asked (at para. 22) whether, if there had been no arbitration clause, the claimants might have been able to raise the amendment issues by commencing proceedings before a different court:

> ... [Counsel for the applicant] accepted that there would likely be an order for the proceeding to be consolidated, but said that this would simply be a matter

> of case management. I do not agree. I consider that it would have been vexatious for the claimants to have sought to pursue those issues in separate proceedings and an infringement of the principle in *Henderson v. Henderson* [1843] 3 Hare 100. The issues raised by the amendment belong in the action.

[52] Hawrish says, here, the rule in *Henderson v. Henderson* that a party may not raise any claim in subsequent litigation which they ought properly to have raised in a previous action is equally applicable, and that we ought to adopt the same test as the English Court of Appeal. Applying that test here, Hawrish says the claims raised by amendment could not properly be raised in subsequent litigation, and thus the judge did not err in concluding that the amendments did not describe a fundamentally different claim. He contends the appeals should be dismissed on that basis.

Discussion and Analysis

Was it an error for the judge to determine whether the appellants had responded to the substance of the dispute described in the amended pleadings?

[53] The policy of deference to parties' choice to arbitrate is reflected in s. 7 of the *Arbitration Act*. Staying proceedings is "one of the ways in which courts may give effect to the policy that the parties to a valid arbitration agreement should abide by their agreement": *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, at para. 51.

[54] A stay must be granted where the statutory prerequisites in s. 7 have been satisfied. These include the prerequisite that the application must be brought before the applicant has taken any "step" in the proceedings: *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 83.

[55] Relying upon *Gulf Canada Resources Limited v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113, 1992 CanLII 4033 (C.A.), the appellants contend the judge should have referred the question of whether they had applied for a stay before responding to the substance of the dispute identified by the amendments to the arbitrator if it was "arguable" that they had.

[56] In *Gulf Canada* this Court considered s. 8(1) of the *International Commercial Arbitration Act*, S.B.C. 1986, c. 14 [*ICAA*], a provision that closely parallels s. 7 of the *Arbitration Act*. Justice E.E. Hinkson observed that the court's jurisdiction to order a stay under that provision was constrained by the rule incorporated in s. 16 of the *ICAA* that the arbitral tribunal is competent to rule on its own jurisdiction, including objections with respect to the existence or validity of the arbitration agreement.

> 43 Considering s. 8(1) in relation to the provisions of s. 16 and the jurisdiction conferred on the arbitral tribunal, in my opinion, it is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
>
> 44 Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.
>
> [Emphasis added.]

[57] The constraint requires deference to the arbitrator where there is an arguable case that the arbitrator has jurisdiction. As we noted in *Sum Trade Corp. v. Agricom International Inc*., 2018 BCCA 379:

> [31] As Deschamps J. noted in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, [2007] 2 S.C.R. 801 at para. 82, [I]n the common law jurisdictions in Canada the *prima facie* or "arguable case" analysis has been extended from cases involving the validity of arbitration clauses to cases concerning the applicability of such clauses. (Citing *Gulf Canada Resources Ltd. v. Arochem International Ltd.* (1992), 66 B.C.L.R. (2d) 113 (C.A.); *Dalimpex Ltd. v. Janicki* (2003), 228 D.L.R. (4th) 179, [2003] O.J. No. 2094 (Ont. C.A.)) …
>
> [Emphasis added, in part.]

[58] However, nothing in *Gulf Canada* suggests that the arguable case standard applies to the determination of whether a party has responded to the substance of the dispute before applying for a stay. To the contrary, the Court specifically

excepted the question whether "the application is out of time" from its description of arbitral jurisdiction. The question of attornment does not ordinarily relate to the validity or applicability of arbitration clauses. It is most often a legal question falling squarely within the court's expertise that should be resolved, if possible, once and for all by the courts.

[59] The limitation upon the recognition of arbitrators' competence to resolve questions concerning their competence was described in *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34, as follows:

> 84 … A court should depart from the rule of systematic referral to arbitration only if the challenge to the arbitrator's jurisdiction is based solely on a question of law. This exception is justified by the courts' expertise in resolving such questions, by the fact that the court is the forum to which the parties apply first when requesting referral and by the rule that an arbitrator's decision regarding his or her jurisdiction can be reviewed by a court. It allows a legal argument relating to the arbitrator's jurisdiction to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate…
>
> 85 … Where questions of mixed law and fact are concerned, the court hearing the referral application must refer the case to arbitration unless the questions of fact require only superficial consideration of the documentary evidence in the record.
>
> [Emphasis added.]

[60] The scope and limits of the "question of law" exception were described in *Seidel v. TELUS Communications Inc.,* 2011 SCC 15, and considered by Justice Lauwers in *Haas v. Gunasekaram*, 2016 ONCA 744 at para. 14, and, recently, by Hunter J.A. in *Clayworth.* In the latter case, Hunter J.A. observed:

> [33] In *Seidel*, the Court provided another example of the limited circumstance in which a stay application might raise a question of law for a court to properly decide:
>
> > [29] I agree with my colleagues LeBel and Deschamps JJ. (at para. 114) that in these circumstances, absent legislated exception, any challenge to an arbitrator's jurisdiction over Ms. Seidel's dispute with TELUS should first be determined by the arbitrator, unless the challenge involves a pure question of law, or one of mixed fact and law that requires for its disposition "only superficial consideration of the documentary evidence in the record" (*Dell*, at para. 85). See also, *Unifund Assurance Co. v. Insurance Corp. of British Columbia*, 2003 SCC 40, [2003] 2 S.C.R. 63, at paras. 37-38.

> [30] Whether or not s. 172 of the *BPCPA* has the legal effect claimed for it by Ms. Seidel was a question of law to be determined on undisputed facts. Accordingly, it was properly entertained by the Supreme Court of British Columbia in the first instance. The competence-competence principle was not violated.
>
> [Emphasis added by Hunter J.A.]
>
> [34] If the challenge is one of mixed fact and law, a judge may resolve it if a question of law can be extracted with only a superficial consideration of the record in the case.
>
> [Emphasis added.]

[61] Most recently, the exception to the competence-competence rule was described by Justice Coté in *Peace River*:

> [42] The competence-competence principle is not absolute, however. A court may resolve a challenge to an arbitrator's jurisdiction if the challenge involves pure questions of law, or questions of mixed fact and law requiring only superficial consideration of the evidentiary record (*Uber*, at para. 32; *Dell*, at paras. 84-85). This exception is justified by the particular expertise that courts have in deciding such questions. Further, it allows a legal argument relating to the arbitrator's jurisdiction "to be resolved once and for all, and also allows the parties to avoid duplication of a strictly legal debate" (*Dell*, at para. 84).

[62] It is noteworthy that the appellants concede in the following passage in their factum that the critical question addressed by the chambers judge is a question of law:

> The question of whether an amendment raises a new cause of action is a question of law. A cause of action is "a factual situation the existence of which entitles one person to obtain from the court a remedy against another person". Amendments which seek a new remedy based on facts not originally pleaded set up a new cause of action. By contrast, "[a] new cause of action is not asserted if the amendment pleads an alternative claim for relief out of the same facts previously pleaded and no new facts are relied upon, or amount simply to different legal conclusions drawn from the same set of facts, or simply provide particulars of an allegation already pled or additional facts upon which the original right of action is based". [Emphasis added, footnotes omitted.]

[63] It was undisputed that the appellants had responded to the substance of the dispute in the original notice of civil claim before applying for a stay. The question whether the dispute identified in the amended notice of civil claim was substantially the same as that identified in the notice of civil claim required the chambers judge to

examine the pleadings with a view to determining whether a new claim that might be stayed in favour of arbitration first appeared by way of amendment. Addressing that question, he held:

> [47] The plaintiff's case is three-pronged: oppression, breach of fiduciary duty, and knowing assistance. Both the claim for oppression and the claim for breach of fiduciary duty are based not only on the voting trust agreement as the defendant alleges, but also on the provisions of the [shareholders agreement].
>
> [48] The plaintiff's claims are that the defendant has breached the provisions of the [shareholders agreement], and in particular, has acted contrary to the Schedule D minority protections. This was specifically pleaded in the [notice of civil claim], and was supported by the affidavit that accompanied the petition.

[64] In my view, the question that faced the chambers judge with respect to whether the appellants had met the statutory prerequisites for an order pursuant to s. 7 fell squarely within the jurisdiction of the court, and should not have been referred to arbitration. Determining whether a party meets the statutory prerequisites under s. 7 falls within the Court's authority to control its own processes. Further, whether the statutory prerequisites were satisfied was a question of law that could be extracted with only a superficial consideration of the evidentiary record in the case.

Did the judge err in interpreting and applying s. 7(1) of the *Arbitration Act?*

[65] The chambers judge concluded that the question whether a stay should be ordered was to be answered by asking whether the claims made by amendment could stand alone, or whether bringing those claims by initiating new proceedings would constitute an abuse of process.

[66] It is arguable that s. 7(1) is applicable only where the application for a stay is brought before the applicant has first responded to the substance of the dispute described in the pleadings that start the legal proceedings (including, as I note below, a petition, claim or counterclaim). There is no provision in the *Act* expressly addressing applications for stays at any point after the applicant's first response to the substance of the dispute.

[67] It is also arguable that the *Act* only describes circumstances in which the issuance of a stay is mandatory: i.e., at the outset of proceedings where the parties have not yet attorned to the court, the arbitral agreement applies to the dispute, and the arbitration clause is relied upon to foreclose proceedings. Thereafter, a stay is discretionary and made pursuant to the court's inherent jurisdiction to control its process rather than s. 7 of the *Act*.

[68] There is some support for the proposition that the equivalent to s. 7 in the law upon which the *Arbitration Act* is modeled (s. 8(1) of the *Commercial Arbitration Code*) should be narrowly interpreted. The Analytical Commentary[1] referred to in *Ruhrkohle Handel Inter GMBH v. Federal Calumet (The)*, 1992 CanLII 14793 (F.C.A.), [1992] 3 F.C. 98, states:

> "3. (…) A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute. It is submitted that this point of time should be taken literally and applied uniformly in all legal systems, including those which normally regard such a request as a procedural plea to be raised at an earlier stage than any pleadings on substance.
>
> 4. As regards the effect of a party's failure to invoke the arbitration agreement by way of such a timely request, it seems clear that article 8(1) prevents that party from invoking the agreement during the subsequent phases of the court proceedings."
>
> [Emphasis added.]

[69] Such a narrow interpretation of s. 7(1) does not preclude the court from issuing an order for a partial stay or from granting a stay after a dispute the parties have agreed to submit to arbitration is raised by an amendment. J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: JurisNet, 2017) at 346–47 notes:

> "If the arbitration agreement deals with only some of the matters in respect of which the court proceeding was commenced and the matters can be separated, the court can allow the action on those matters to proceed or it can still stay the court proceeding with respect to those matters not covered

[1] *Report of the United Nations Commission on International Trade Law on the work of its eighteenth session*, held from June 3 to 21, 1985, and the Analytical Commentary contained in the *Report of the Secretary General to the eighteenth session of the United Nations Commission on International Trade Law.*

> by the arbitration agreement until the arbitration is finished. This can occur under the court's general jurisdiction to control its own process."
>
> [Emphasis added.]

[70] The respondent does not urge this narrow interpretation of s. 7(1) upon us. He does not take the position that s. 7(1) is inapplicable in any case where a stay is sought after responsive steps are taken by the defendant in civil proceedings. Rather, he says the judge was correct to find that s. 7(1) has no application in the circumstances of this case because the amendments do not raise, for the first time, a dispute the parties had agreed to submit to arbitration.

[71] In my opinion, it is not necessary to address the question whether s. 7(1) is available in principle to the appellant; it is not available in fact.

[72] The judge did not err in concluding that the matter of the breach of the shareholders agreement was pleaded in the original notice of civil claim, and that the amendments were so closely tied to the dispute identified from the outset that it would have been abusive to commence separate, free-standing proceedings with respect to the matter first raised by amendment. If it was correct to say, as both parties appear to have conceded, that s. 7 might be applicable to disputes first raised by amendment, after attornment to the court, then the judge did not err in concluding that it could only apply in respect of disputes that might form the basis of new proceedings.

[73] The timeliness requirement in s. 7 is intended to preclude parties from abusing the court process by attorning and then seeking to withdraw that election. For that reason, the test applied by the chambers judge in this case is apt. Section 7, like the doctrine of issue estoppel, is intended to avoid duplicative litigation so as to respect judicial economy, consistency, finality and the integrity of the administration of justice. (These principles in the context of issue estoppel are canvassed at length in *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77).

[74] Most of the cases cited by counsel concern the application of s. 7(1) in cases where a new dispute is the basis for a counterclaim. Reference to these cases is of

limited value, but they reflect appropriate concern for the integrity of the judicial process.

[75] In *Granville Shipping Co. v. Pegasus Lines Ltd. S.A*., [1996] F.C.J. No. 481, [1996] 2 F.C. 853 (F.C.), Justice Tremblay-Lamer concluded a party that had attorned to the court's jurisdiction by initiating proceedings was not entitled to an order staying a counterclaim. The application for the order was not brought before "submitting his first statement on the substance of the dispute". In part, this conclusion was founded upon the view (expressed at para. 26) that the claim and the counterclaim in that case were "interrelated and should not be separated".

[76] The Ontario Superior Court came to a similar conclusion in *Greta Energy Inc. v. Veresen Energy Infrastructure Inc.*, 2018 ONSC 2826. The master in that case concluded that because an "originating process", as defined in the Ontario Rules, does not include a counterclaim against an existing party, a counterclaim is not a distinct "proceeding" for the purposes of Ontario's *Arbitration Act*. That statute provides, in s. 7(5), for partial stays in cases where:

> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

[77] The master dismissed the application under that provision, holding:

> [40] ... In this case, I do not find it reasonable to send the Counterclaim to arbitration and have the main action continue in the Superior Court of Justice … The Counterclaim and Statement of Claim arise from the same factual matrix and cannot be reasonably parsed out. ...
>
> …
>
> [42] In sum, bifurcating the adjudication of the main claim and the counterclaim leads to an unnecessary multiplicity of proceedings, possible delay, the risk of inconsistent findings and extra cost to both Greta and Veresen, contrary to both subsection 7(5) of the *AA* and section 138 of the *CJA*. While in some cases bifurcation is warranted and reasonable, this is not one such case. The entire sale transaction and the respective issues of the parties are inextricably tied together such that the whole action ought to be adjudicated in one place.
>
> [Emphasis added.]

[78] In British Columbia a “proceeding” is defined by R. 1-1 of the *Supreme Court Civil Rules* as “an action, a petition proceeding and a requisition proceeding, and includes any other suit, cause, matter, stated case under R. 18-2 or appeal”. A counterclaim is regarded as a proceeding commenced by an “originating pleading”, which is defined as “a notice of civil claim, counterclaim, third party notice or any document, other than a petition, that starts a proceeding”. A counterclaim is a proceeding that continues, despite the settlement or judgment in the main action. For that reason, *Greta Energy* is distinguishable.

[79] Whereas the filing and service of a Counterclaim, intuitively, initiates new proceedings and may lend itself to bifurcation, the same cannot be said of an amendment to existing pleadings.

[80] In a case more directly applicable to the case before us, an application to stay a claim made by an amendment to pleadings was considered in *Ahad*. The UK Act, like ours, provides:

> 9 (1) A party to an arbitration agreement against whom legal proceedings are brought (whether by way of claim or counterclaim) in respect of a matter which under the agreement is to be referred to arbitration may (upon notice to the other parties to the proceedings) apply to the court in which the proceedings have been brought to stay the proceedings so far as they concern that matter.
>
> (2) An application may be made notwithstanding that the matter is to be referred to arbitration only after the exhaustion of other dispute resolution procedures.
>
> (3) An application may not be made by a person before taking the appropriate procedural step (if any) to acknowledge the legal proceedings against him or after he has taken any step in those proceedings to answer the substantive claim.
>
> [Emphasis added.]

[81] The UK Act expressly addresses counterclaims, in a manner consistent with the views I have expressed above, as distinct proceedings.

[82] The Master of the Rolls, Lord Phillips, described the issue before the court in *Ahad* as follows:

> 2 The claimants commenced an action raising issues which fell within the ambit of [the arbitration clause]. The defendant did not seek to stay the action. He responded by filing a defence and took other steps in the action. The claimants then applied to amend their particulars of claim to raise additional issues closely related to those that were already the subject of the action. The defendant objected that these should be referred to arbitration. What approach should the court adopt in such circumstances? ...

[83] The court found that bifurcation would only be appropriate if the claims raised by amendment were discrete; extricable from the issues in the initial notice of civil claim. The court framed the issue on appeal as follows:

> 19 … The simple issue is, so it seems to me, whether the matters introduced by amendment were part and parcel of the dispute of which the court was already seised, or whether they were discrete matters in respect of which [the *Arbitration Act*] entitled the defendant to insist that they be arbitrated.

[84] Phillips M.R. concluded that "the matters raised by the amendment were in respect of the matter raised by the original proceedings in relation to which the defendant had taken a number of steps in the proceedings" (at para. 21). In order to determine whether the matters raised by amendment were extricable from the initial dispute, he considered whether the claimants could have pursued the issues raised in the amended notice in a separate proceeding:

> 22 My conclusion can be tested in this way. Assume that there had been no arbitration clause and the claimants had sought to raise the amendment issues by commencing proceedings before a different court. Mr McGuire accepted that there would be likely to be an order for the proceedings to be consolidated, but said that this would simply be a matter of case management. I do not agree. I consider that it would have been vexatious for the claimants to have sought to pursue those issues in separate proceedings and an infringement of the principle in *Henderson v. Henderson* [1843] 3 Hare 100. The issues raised by the amendment belong in the action.

[85] The approach taken in *Ahad*, asking whether the "new" claim would be barred by cause of action or issue estoppel if brought as a separate proceeding, is more demanding than the test applied in *Greta*: whether both claims arose from the "same

factual matrix". That more stringent test, in my view, fairly reflects the deferential approach to questions of arbitral competence reflected in *Uber Technologies Inc. v. Heller*, 2020 SCC 16; *Wellman*; *Seidel*; and *Peace River*.

[86] In my opinion, by asking whether the claims first advanced by amendment to the notice of civil claim might stand alone or, on the other hand, whether if standing alone they would be regarded as an abuse of process, the chambers judge applied a demanding but appropriate test (assuming, without deciding the question, that s. 7(1) has any application in these circumstances).

[87] The appellants contend the chambers judge's conclusion that the new claims described in the amended notice of civil claim could not stand as independent claims was founded upon a misapprehension or mischaracterization of the pleadings.

[88] They say the judge "conflated the dispute's character with the legal characterisation Hawrish adopted" and that it was an error to conclude that the "pith and substance" of both pleadings was "whether or not the plaintiff was oppressed, whether the defendant acted in breach of his fiduciary duty and whether the Company was liable for knowingly assisting the defendant with that conduct". They submit the essential nature of the original dispute was about Hawrish's entitlement to be a director, in which he sought remedies unique to him. However, aside from the plea for an injunction (which, standing alone, could not be referred to arbitration), the relief sought did not change. The claim was founded in oppression throughout. The first and principal remedy sought, even after the amendment, was the court-ordered purchase or sale of Hawrish's shares.

[89] The reference to the shareholders agreement in the notice of civil claim was not, in my view, tangential to the claim but, rather, to use the respondent's phrase, part and parcel of the oppression claim.

[90] While, as the appellants contend, it may have been "arguable that the amendments disclosed a different dispute", the question was not whether it was arguable that the amendments raised a new dispute but, rather, whether the

appellants, having attorned to the proceedings initiated by the petition, could stay those proceedings because a new claim was being advanced by amendment. The onus fell upon the appellants to show they had met the statutory prerequisites. They could not do so by establishing that the amendments "arguably" raised a new claim.

[91] While the judge did refer to the "pith and substance" of the claims in the notice of civil claim and the amended notice of civil claim, there was more to his analysis. In para. 66 of his reasons, cited above, the judge noted that the assessment of the oppression claim under the *Business Corporations Act* made by the respondent would "involve a holistic examination of all of the facts and of the relationship between the parties". Consideration of the course of conduct said to amount to a breach of minority shareholder rights described in the shareholders agreement was part of that analysis. In my view, he did not err in concluding that the addition of the material facts pleaded in the amended notice of civil claim did not set up a freestanding claim.

[92] In my view, no error in principle or misapprehension is made out by the appellant. Assuming s. 7(1) might have been applicable if a new distinct claim was introduced by amendment, it was not an error to find that was not the case here. I would dismiss the appeal.

Conclusion

[93] I am of the view that the competence-competence principle did not require the chambers judge to refer the question of whether the appellants attorned to the court to an arbitrator. Determining whether a party has responded to the substance of a civil dispute is generally within the court's competence and need not be referred to an arbitrator for determination.

[94] Further, in my opinion, the chambers judge did not err in concluding that the "new" issues raised by amendment could not be brought by an independent

proceeding without being barred as an abuse of process, and therefore did not re-establish a right to seek a stay under s. 7(1) of the *Act*.

The Honourable Mr. Justice Willcock

I agree:

The Honourable Justice Griffin

I agree:

The Honourable Justice Skolrood