COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Colony Construction Corporation v. Scott Steel Erectors Ltd.,* 2024 BCCA 306

Date: 20240802
Docket: CA49922

Between:

Colony Construction Corporation

Appellant
(Claimant)

And

Scott Steel Erectors Inc.

Respondent
(Respondent)

Before: The Honourable Madam Justice Fenlon
(In Chambers)

On appeal from: An order of an arbitrator under the *Arbitration Act*, S.B.C. 2020, c. 2, dated May 9, 2024 (*Colony Construction Corporation v. Scott Steel Erectors Ltd.*).

Oral Reasons for Judgment

Counsel for the Appellant:	M.B. Morgan R.L.E. Davis
Counsel for the Respondent:	R.V. Aldridge
Place and Date of Hearing:	Vancouver, British Columbia July 30, 2024
Place and Date of Judgment:	Vancouver, British Columbia August 2, 2024

Summary:

The applicant and respondent entered into a joint venture agreement to design five buildings for a worker accommodation centre. After disputes arose between the parties, the applicant commenced arbitration to recover advances made to the respondent. The respondent conceded that it was liable to repay these advances and counterclaimed, seeking compensation for losses and damages allegedly caused by the applicant. The arbitrator found that the applicant breached a number of implied terms of the joint venture agreement with the respondent, and awarded damages to the respondent. The applicant applies for leave to appeal the arbitral award, asserting that the arbitrator made multiple errors of law. Held: Leave to appeal dismissed. The applicant has not established extricable questions of law to be determined on appeal.

FENLON J.A.:

Background

[1] Colony Construction Corporation (“Colony”) applies for leave to appeal an arbitration award pursuant to s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act*].

[2] On January 29, 2019, Colony entered into a written Joint Venture Agreement with Scott Steel Erectors Inc. (“Scott”) to design and erect five core camp buildings for the Cedar Valley Lodge in Kitimat, British Columbia. The agreement stipulated that Colony would be responsible for the design, procurement, fabrication and delivery of materials, while Scott would be responsible for on-site supervision, labour, equipment and various other tasks required to erect the buildings.

[3] CS Joint Venture Inc. (“CSJV”) was incorporated as the vehicle to carry out the work of the joint venture. On May 19, 2019, CSJV executed a subcontract with Bird Construction, the general contractor, for the construction of the project.

[4] Disputes began to arise between Colony and Scott soon after they entered into the Joint Venture Agreement.

[5] On February 13, 2020, the parties entered into a Going Forward Agreement. This agreement terminated the joint venture as of January 31, 2020, relieved Scott of any obligation to perform further work, required each party to pay for their own

subcontractors, vendors, suppliers, and employees, and provided that all claims would be arbitrated: Final Award at para. 17.

[6] On December 9, 2020, Colony initiated arbitration pursuant to the Joint Venture Agreement and the Going Forward Agreement seeking repayment of a $400,000 advance. Scott admitted it was liable to repay this sum: at para. 113. Scott also advanced numerous counterclaims in the arbitration, seeking to be compensated for losses and damages allegedly caused by Colony.

[7] The arbitration took place over eight days and the arbitrator delivered his final award on May 9, 2024.

[8] Scott submitted that Colony breached a number of implied terms in the Joint Venture Agreement which it contended were reasonably necessary to give the agreement commercial efficacy. The terms included the following:

- that materials would be of proper quality, and that the materials and work when completed would be fit for their intended purpose (the quality implied term);
- that each party to the Joint Venture Agreement would execute its work in a competent and workmanlike manner within a reasonable time (the timeliness implied term);
- that Colony would complete the design portion of its work in a manner that was equitable as between the parties, and not favour itself to the detriment of Scott (the design implied term).

[9] Colony argued that Scott failed to establish the implied terms. Citing *Pacific National Investments Ltd. v. Victoria (City)*, 2000 SCC 64 [*Pacific National*], Colony argued that the party asserting an implied term must demonstrate that the term has been “agreed to” by the parties. The arbitrator rejected this submission, finding that *Pacific National* required evidence only of the *presumed intention* of the parties where necessary to give business efficacy to the contract.

[10] The arbitrator concluded that each of the three terms asserted by Scott were implied in the Joint Venture Agreement. The arbitrator also found Colony in breach of all three terms.

[11] Colony filed a notice seeking leave to appeal the arbitral award on June 7, 2024.

Legal Framework

[12] Under s. 59(2) of the *Arbitration Act*, 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 justice of that Court grants leave to appeal under s. 59(4):

> 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.
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> (4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice determines that
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> (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,
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> (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
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> (c) the point of law is of general or public importance.

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

> (a) The appeal must be based on a question of law…;
>
> (b) The judge must be satisfied that one of the three circumstances identified in [s. 59(4)] exists; and

> (c) the judge must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave...".

[14] The threshold question on this application is whether a question of law "can be clearly perceived and identified": *Grewal v. Mann*, 2022 BCCA 30 at para. 32. If the proposed question is not a question of law arising out of the award, then there is no jurisdiction to grant leave to appeal. "If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, 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)": *MSI Methylation* at para. 72.

[15] Issues of contractual interpretation are generally questions of mixed fact and law and, as such, cannot be appealed under s. 59 of the *Arbitration Act* unless the applicant identifies an extricable question of law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at paras. 50, 53–55; *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2021 BCCA 313 at para. 20. An extricable question of law may be based on the application of an incorrect principle, the failure to consider a required element of a legal test, or the failure to consider a relevant factor. Courts should be "cautious in identifying extricable questions of law in disputes over contractual interpretation": *Sattva Capital Corp.* at para. 53.

[16] "[T]he implication of a term into a contract is always a question of the objective intentions of the parties and is by necessity a fact-driven exercise requiring evidence to support the inference that the parties intended the term to be implied": *Metro Paving and Roadbuilding Ltd. v. Fortitude Structures Inc.*, 2020 BCCA 126 at para. 114.

[17] These restraints on granting leave are in place to preserve the integrity of the arbitration system and to advance its central aims of efficiency and finality: *On Call*

Internet Services Ltd. v. Telus Communications Company, 2013 BCCA 366 at para. 35.

Analysis

[18] Colony identifies six errors of law in the arbitration award. I will consider each in turn.

[19] First, Colony states that the arbitrator made an express error of law by applying the wrong test. The arbitrator concluded that a party asserting an implied term on the basis of business efficacy does not have to demonstrate that such a term was agreed to by the parties. Colony says that is a required part of the test, relying on *Pacific National*. In that case, a developer had purchased city lands based on the existing zoning which allowed the development of three water lots in Victoria Harbour. The City subsequently changed the zoning of the lots in response to opposition to the development from citizens.

[20] The developer argued that the purchase agreement contained an implied term that the City would not change the zoning, at least for a specified period. The Court described the issue before it and the test the developer had to meet saying:

> 30 In the end, the appellant rests its case on the argument that the City of Victoria is bound by an implied term to keep the zoning in place for a number of years and to pay damages if it modifies it. The onus was on the appellant to demonstrate that such a term would be legal and in conformity with the legislation governing municipalities and with the public policy considerations underpinning the legislative rules. It would also have to demonstrate that such an implied term has indeed been agreed to by the parties and should thus be read into their contract. (*M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 S.C.R. 619, at para. 27, *per* Iacobucci J. citing *Canadian Pacific Hotels Ltd. v. Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 S.C.R. 711, at p. 775, *per* Le Dain J.) Reading in of such a term is an act of judicial authority particularly important in the context of a contractual relationship with municipalities, owing to the special nature of their powers and their societal functions.
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> [Emphasis added.]

[21] I cannot agree that *Pacific National* changed the test for implying terms into a contract to include proof that the parties agreed on the terms contended for. As the arbitrator observed, the whole point of an implied term is to recognize a term

necessary to the efficacy of the contract that the parties must have intended, but did not express. If there is evidence of an actual agreement that they mistakenly failed to include in the contract, other remedies exist to address that situation and it is not necessary to imply a term.

[22] The Court in *Pacific National* cited *M.J.B. Enterprises Ltd. v. Defence Construction (1951) Ltd.*, [1999] 1 S.C.R. 619, in support of its statement of the test. *M.J.B.* was delivered by the Supreme Court of Canada one year before *Pacific National*. Nothing in *Pacific National* suggests the Court is departing from the longstanding test recognized in *M.J.B.* That case clearly states that what must be established is presumed intention of the parties.

[23] *Pacific National* was also a very different case. It required the Court to address the question of whether the City had authority under its statute to agree to a term constraining its authority to change the zoning of property. If the term the developer sought to have implied into the contract was not within the City's power to agree to, it could hardly be a term those parties "obviously would have assumed to be included" in the agreement if questioned.

[24] In summary on the first proposed ground of appeal, the missing part of the test Colony relies on is not part of the test, and no question of law therefore arises.

[25] Second, Colony contends the arbitrator erred in law by concluding that the design implied term was clearly expressed despite Scott's varying articulations of the term. However, whether a term is clearly expressed is a finding of mixed fact and law, at best. The arbitrator found that different expressions amounted to the same thing, and he restricted the term in his award to changes initiated by Colony. I see no extricable question of law here.

[26] Third, Colony says the arbitrator did not apply another part of the test for an implied term. He found a presumed intention with respect to the quality implied term, but did not do so expressly with respect to the design and timeliness terms. That, says Colony, is an extricable error of law.

[27] I do not agree that the arbitrator was required to expressly address all components of the test in assessing each of the terms. The arbitrator fully and accurately described the test and applicable principles at paras. 136–153 of the award. He focused on the necessity of the design and timeliness terms because that was the factor principally driving the dispute over whether the terms should be included. Assessing presumed intention is closely linked to the necessity of a term to give business efficacy to the agreement.

[28] Fourth, Colony says it was a clear error of law for the arbitrator to conclude that s. 42 of the *Evidence Act*, R.S.B.C. 1996, c. 124, governing the admissibility of business records does not apply to arbitrations. Colony relies on *Cascadia International Resources Inc. v. Novawest Resources Inc.*, 2008 BCSC 679 which found to the contrary. However, that decision was rendered before significant changes were made to the relevant provisions of the *Arbitration Act*, and the decision was *obiter dictum*. Most importantly, the arbitrator expressly found that the s. 42 test, if it did apply, had been met—making the alleged error of law entirely moot.

[29] Fifth, Colony says the arbitrator erred in law because he misapprehended the evidence in determining damages for breach of the quality implied term. Colony argues that the arbitrator's misapprehension led him to inflate the damage award for breach of the quality term. In order to address this proposed ground of appeal, it is necessary to review the argument in some detail.

At the arbitration, Scott claimed $1,026,969.48 as losses arising from Colony's breach of the quality implied term: paras. 198 and 244. Scott arrived at this figure by totaling the potential change orders ("PCOs") it issued. In its written materials submitted at the arbitration, Scott provided a chart listing each PCO. It admitted that some of the PCOs in this chart "were for additional work arising from BAJV" (referring to the Bird subcontract) and not attributable to Colony's actions. As such, Scott excluded the BAJV PCOs and calculated the value of the "PCOs arising from Colony Breaches" as $1,026,969.48.

[30] Included in this figure was PCO 15 amounting to $651,227.30. Scott admitted in its written submissions that PCO 15 "related to Design Breaches", not quality breaches.

[31] The crux of Colony's argument is that because $1,026,969.48 already accounted for "design breaches" amounting to $651,277.30, namely PCO 15, the most Scott could have been awarded for breach with respect to quality was $375,692 (the difference between $1,026,969.48–$651,227.30).

[32] The arbitrator ultimately awarded Scott $800,000 for breach of the quality implied term, about $424,000 more than Colony says Scott could claim for quality breaches. Colony in effect argues that PCO 15 was double counted and included in the arbitrator's assessment of damages arising from both 1) the quality implied term; and 2) the design implied term.

[33] I conclude that the arbitrator did not misapprehend the evidence which was clearly set out in Scott's written submissions and clearly reflected in the arbitrator's award. Scott claimed $1,026,969.48 for quality breaches and $985,261.70 for design change breaches. While PCO 15 related to "design changes", Scott acknowledged it was included in losses claimed by Scott as arising from quality breaches. Scott ensured that PCO 15 would not be double counted by subtracting $651,227.30 from the initial position it took in relation to design change breaches ($1,636,489).

[34] The Final Award demonstrates that the arbitrator was aware of the accounting that occurred. He was alive to the fact that the value of PCO 15 had been discounted from the amount Scott was claiming as losses arising from breach of the design term:

> [19] Scott says that it is entitled to be compensated for its losses and damages caused by Colony on a total cost approach in the amount of $5,427,639.56. It says that included in this amount is the sum of $1,026.969.48 for PCOs and $985,261.70 (including a credit for PC015) for design changes. …
>
> …

> [118] …Scott claims the sum of $985,261.70, after giving a credit to Colony for PCO 15, for the increase in costs arising out of changes to the design. …
>
> [Emphasis added.]

[35] In short, no misapprehension is evident on the record.

[36] Finally, with respect to the timelines implied term, Colony identifies as a legal error the arbitrator's failure to determine the reasonable period of time for delivery of materials. It says that without such dates, the arbitrator could not determine whether a breach of the timeliness implied term occurred and what losses flowed from the alleged breach. However, damages were awarded for lost efficiency: Final Award at para. 246. The arbitrator found as a fact that Colony's late delivery of components caused productivity losses and delay costs. He then did his best to assess damages which he recognized could not be determined precisely.

[37] In summary, Mr. Morgan has said all that may properly be said, but Colony has not, in my respectful view, established questions of law to be determined on appeal. Even if some of the grounds could be characterized as questions of law, I would exercise my discretion to deny leave. The errors contended for appear to have little merit and there is no precedential value to this Court interpreting a unique joint venture agreement.

[38] Colony's application for leave to appeal is accordingly dismissed.

"The Honourable Madam Justice Fenlon"