COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Desert Properties Inc. v. G&T Martini Holdings Ltd.,* 2024 BCCA 320

Date: 20240909
Dockets: CA49527; CA49923

Docket: CA49527

Between:

Desert Properties Inc.

Appellant/
Respondent on Cross Appeal

And

G&T Martini Holdings Ltd.

Respondent/
Appellant on Cross Appeal

- and -

Docket: CA49923

Between:

G&T Martini Holdings Ltd.

Appellant
(Petitioner)

And

Desert Properties Inc.

Respondent
(Respondent)

Before: The Honourable Justice Skolrood
(In Chambers)

On appeal from: An award of an Arbitrator under the *Arbitration Act* S.B.C. 2020, c. 2, dated November 3, 2023 (*G&T Martini Holdings Ltd. v. Desert Properties Inc.*).

- and -

On appeal from: An order of the Supreme Court of British Columbia, dated May 14, 2024 (*G&T Martini Holdings Ltd. v. Desert Properties Inc.*, 2024 BCSC 828, Vancouver Docket S240361).

Counsel for Desert Properties Inc.:	A. Cocks C. Bildfell
Counsel for G&T Martini Holdings Ltd.:	S.R. Schachter, K.C. J. Parker
Place and Date of Hearing:	Vancouver, British Columbia August 14, 2024
Place and Date of Judgment:	Vancouver, British Columbia September 9, 2024

Summary:

The parties to an arbitration award, "Desert" and "Martini", apply for leave to appeal and cross-appeal different aspects of the award. Martini also applies for leave to appeal a chambers judge's dismissal of its application to set aside a portion of the award.

Held: Applications dismissed. The applications for leave to appeal and cross-appeal from the arbitration award fail to demonstrate an extricable question of law. Martini's proposed appeal from the chambers' judgment does not have sufficient merit, nor does it raise an issue of broader significance to the practice.

Reasons for Judgment of the Honourable Justice Skolrood:

Introduction

[1] The appellant, Desert Properties Inc. ("Desert"), seeks leave to appeal the arbitral award of Michael Carroll, K.C., on November 3, 2023, corrected on December 8, 2023 (the "Award"). The respondent, G&T Martini Holdings Ltd. ("Martini") applies for leave to cross-appeal. Martini also seeks leave to appeal a decision of a Supreme Court judge in chambers dismissing its petition seeking to set aside a second related award made by the arbitrator concerning interest payments owing by Desert to Martini (the "Interest Award").

[2] I will first address the proposed appeal and cross appeal from the Award and then will return to Martini's application for leave to appeal the judge's decision.

[3] The proposed appeal and cross appeal arise from a real estate development transaction involving Desert and Martini. The parties entered into a number of contracts including the Restated Subdivision and Servicing Agreement ("RSSA") on November 14, 2019, pursuant to which Desert agreed to sell certain lands in the Township of Langley ("Langley") to Martini. Under the RSSA, Desert was required to diligently pursue the subdivision, rezoning and servicing of those lands in exchange for a fixed fee.

[4] During the project, Martini commenced an arbitration alleging that Desert breached the RSSA in various ways. While the Award dealt with many issues, the parties each seek to appeal discrete elements.

[5] Desert's proposed appeal seeks to challenge the arbitrator's finding that the RSSA exempted Martini (and its affiliates who are not parties to this litigation) from payment of development works agreement ("DWA") levies to Langley. Based on this finding, the arbitrator held that Desert was liable for DWA levies that were charged to Martini and its affiliates for a community stormwater detention pond (the "Detention Pond") and sanitary pump station (the "Pump Station").

[6] Martini's proposed cross appeal concerns the arbitrator's finding that delays in obtaining rezoning of the subject lands were not attributable to Desert. As a result, the arbitrator dismissed Martini's claim for Desert's delay in obtaining rezoning. Martini also seeks to appeal the arbitrator's finding that Martini had no equitable interest in Desert's lands.

[7] For the reasons that follow, I would dismiss Desert's application for leave to appeal and dismiss Martini's application for leave to cross appeal.

Legal Framework

[8] Section 59 of the *Arbitration Act,* S.B.C. 2020, c. 2 [*Act*] governs appeals from arbitration proceedings. Section 59 reads:

> **Appeals on questions of law**
>
> **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.
>
> (5) If a justice of the Court of Appeal grants leave to appeal under subsection (4), the justice may attach to the order granting leave conditions that the justice considers just.
>
> [Emphasis added.]

[9] Three requirements must be met before a justice can grant leave to appeal an arbitration award:

a) the appeal must be based on a question of law;

b) the justice must be satisfied that one of the three circumstances identified in s. 59(4) exists; and

c) the justice must be prepared to exercise the residual discretion implicit in the phrase "the court may grant leave …"

(*MSI Methylation Sciences, Inc. v. Quark Venture Inc.*, 2019 BCCA 448 at para. 54).

[10] This Court has taken a narrow approach to appellate intervention in commercial arbitration. In *On Call Internet Services Ltd. v. Telus Communications Company*, 2013 BCCA 366 at para. 35, Justice Kirkpatrick noted that the substantial restraints on granting leave play an important role in preserving the integrity of the arbitration system and maintaining one of its key beneficial and distinguishing features — finality (citing *Ed Bulley Ventures Ltd. v. Eton-West Construction Inc.*, 2002 BCSC 826 at paras. 5–6). While these cases were decided prior to the enactment of the new *Act* in 2020, the language of the *Act* has remained the same in respect of the test that applies for leave to appeal in the courts.

[11] As a threshold matter, parties are required to identify an extricable question of law. Importantly, for the purposes of the present applications, this Court has noted that "questions of contractual interpretation generally give rise to questions of mixed fact and law and not to extricable errors of law": *Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294 at para. 41, leave to appeal to S.C.C. refused, 2023 CanLII 28894. One way of showing that an issue of contractual interpretation nonetheless raises an issue of law is to identify its broader precedential value: *Escape 101 Ventures* at para. 41, citing *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 24.

[12] Before turning to the leave applications, it is useful to keep in mind the context in which they are brought. As noted in Desert's response to Martini's leave

application, the arbitration was a fact intensive process involving voluminous evidence and numerous witnesses, both lay and expert. The arbitrator was called upon to make many findings of fact that underpinned his analysis of the claims advanced. Further, the parties chose to submit their disputes to arbitration by including an arbitration clause in the RSSA.

Desert's Application for Leave to Appeal

Background

[13] DWA levies are amounts charged to landowners who benefit from the construction of shared works required for development. The arbitrator concluded that Martini was exempt from making such payments to Langley based on s. 22 of the RSSA. Section 22 provides that "Desert will be responsible for the Project Costs applicable to the Martini Lands, net of any levy and/or contribution credits attributable to parent parcels comprising the Martini Lands".

[14] The RSSA defines "Project Costs" as the Servicing Costs, the Soft Costs, and the Development Costs. Development Costs, in turn, are "all costs payable to the Township and other governmental authorities in connection with obtaining the Development Approvals … but expressly excluding Development Cost Charges and any other application fees, costs and expenses typically related to any Development Permit or Building Permit for the Project".

[15] The question before the arbitrator was whether DWA levies fit the definition of Development Costs, and thus in turn Project Costs, and therefore fall to Desert to pay. The Township assessed DWA levies for the Detention Pond at approximately $14.9 million. There was no assessment of DWA levies for the Pump Station as Martini refused to sign a petition for its construction, which is a necessary condition for the developer to begin construction. However, if assessed, the arbitrator found that the levy would be approximately $4.85 million.

[16] The arbitrator found that the wording of s. 22 was ambiguous. Accordingly, he relied on previous drafts and correspondence to resolve its interpretation. He noted

that both parties argued that this material is helpful in interpreting s. 22 (Award at para. 207).

[17] In resolving the ambiguity in favour of Martini, the arbitrator relied on correspondence between the parties that occurred on November 4, 2019. On that date, Desert provided Martini with a draft copy of the RSSA. The arbitrator noted that this draft said that Desert "will continue to dedicate, install and construct the Detention Pond in a reasonably expeditious manner and to exempt the Martini lands from any contributions to the costs thereof, whether by latecomer or DWA charges…" (Award at para. 208, emphasis in original).

[18] On November 12, 2019, Martini advised Desert that it did not wish to commit to the servicing at that point. The final RSSA signed two days later removed the waiver of DWA levies and restored the servicing obligations to Desert (Award at para. 209). On this basis, the arbitrator agreed that s. 22 of the RSSA exempted Martini and its affiliates from paying the DWA levies.

Desert's Grounds of Appeal

[19] Desert now applies for leave to appeal this aspect of the Award. Desert argues that the arbitrator erred in finding that s. 22 of the RSSA was ambiguous without first interpreting its text in light of the surrounding circumstances or articulating the perceived ambiguity and Desert's competing interpretations. Desert also contends that the arbitrator's decision to rely on a prior draft to resolve the perceived ambiguity was an error, as was his decision to grant relief to non-parties to the contract, i.e., Martini's affiliates.

[20] Desert submits that the arbitrator failed to apply the proper principles of contractual interpretation which amounts to an error of law, relying on *Grace Residences Ltd. v. Whitewater Concrete Ltd.,* 2009 BCCA 144 at para. 22.

Analysis

[21] In my respectful view, Desert has failed to raise an extricable question of law that justifies granting leave to appeal from the Award.

[22] The threshold question on an application for leave to appeal an arbitral award is whether a question of law "can be clearly perceived and identified": *Grewal v. Mann*, 2022 BCCA 30 at para. 32.

[23] In *MSI Methylation Sciences*, this Court provided additional guidance on what constitutes an extricable question of law in the context of examining the scope of the right of appeal from an arbitral award (at para. 72):

> (c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to 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, the question will likely be considered a question of mixed fact and law…

[24] The issue raised by Desert on appeal is a question of contractual interpretation. As indicated above, Desert relies on *Grace Residences Ltd.,* where it was held that "[a] failure to apply the proper principles of contractual interpretation is an error of law" (at para. 22). That proposition was cited to *Hayes Forest Services Limited v. Weyerhaeuser Company Limited,* 2008 BCCA 31 at para. 44 [*Hayes Forest Services*], wherein Justice Smith stated:

> [44] In my view, taken broadly, the construction of a contract often is a question of mixed fact and law. Insofar as the task narrowly is to determine the meaning of the words in the contract the matter may be a question of law as was stated in [*Domtar Inc. v. Belkin Inc.* (1989), 62 D.L.R. 4th 530, 39 B.C.L.R. (2d) 257 (B.C.C.A.)], but where the factual matrix of the contract is questioned, determining that matrix and its significance is a question of fact. Interpreting the language of the contract in the context of the factual matrix is a question of mixed fact and law.

[25] In *Sattva Capital Corp. v. Creston Moly Corp.,* 2014 SCC 53 [*Sattva*], the Supreme Court referred to *Hayes Forest Services* as an example of Canadian courts' abandonment of the "historical approach" — i.e., the rule that determining the rights and obligations of parties under a written contract gives rise to a question of law (at para. 45). This approach originated in England at a time when there were frequent civil jury trials and widespread illiteracy. Thus, the interpretation of written

documents had to be considered a question of law, reviewable for correctness, because only the judge could be assured to be literate (at para. 43). Later, despite the historical rationale no longer applying, the rule was maintained in English as well as Canadian courts on the basis that it was "far too late to change the technical classification of the ascertainment of the meaning of a written contract between private parties as being 'a question of law'": see *Domtar Inc.* at 261–262, citing *Pioneer Shipping Ltd. v. BTP Tioxide Ltd.*; *The Nema,* [1982] A.C. 724, [1981] 2 All E.R. 1030 at 1035. *Domtar Inc.,* I would note, is the case referenced in *Hayes Forest Services* which in turn provides support for the proposition Desert relies on from *Grace Residences Ltd.*

[26] After concluding that the historical approach should be abandoned and that contractual interpretation involves issues of mixed fact and law, the Court in *Sattva* stated:

> [53] Nonetheless, it may be possible to identify an extricable question of law from within what was initially characterized as a question of mixed fact and law (*Housen*, at paras. 31 and 34-35). Legal errors made in the course of contractual interpretation include "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" (*King*, at para. 21). Moreover, there is no question that many other issues in contract law do engage substantive rules of law: the requirements for the formation of the contract, the capacity of the parties, the requirement that certain contracts be evidenced in writing, and so on.

[27] On this application, Desert's essential position is that the arbitrator failed to explicitly justify his conclusion that the contract was ambiguous. This, in Desert's submission, demonstrates an extricable question of law because the arbitrator erred by "start[ing] and end[ing] his analysis with extrinsic evidence", thereby skipping over other necessary steps.

[28] However, it is clear from the arbitrator's reasons that he considered the relevant provision in issue (Award at para. 197), and the differing interpretations offered by Martini and Desert (Award at paras. 201–207), and concluded that the clause was ambiguous (Award at para. 207). Only after concluding that the clause

was ambiguous did the arbitrator consider the parties' correspondence and previous drafts of the agreement to resolve the ambiguity.

[29] In my view, the arbitrator's analysis does not give rise to any extricable question of law which can be clearly identified. While Desert submits that the appeal would concern "the correct legal approach to identifying and resolving contractual ambiguity, and the role of extrinsic evidence", it is apparent that what Desert takes issue with is the arbitrator's ultimate interpretation of the clause "in the context of the factual matrix". Indeed, the parties approached the issue before the arbitrator from the standpoint that the text of the agreement as a whole may be insufficient to resolve the dispute and both relied on extrinsic evidence in support of their positions.

[30] Second, Desert argues that the arbitrator erred in law by granting relief to non-parties. As Martini submits, this is not an accurate characterization of the arbitrator's Award.

[31] The question before the arbitrator was the proper interpretation of s. 22, and whether it excluded the DWA levies from Desert's obligation to pay all Project Costs as Desert asserted. The arbitrator found it did not and essentially granted a declaration to that effect. The fact the Martini affiliates may benefit from this declaration does not mean that relief was granted to a non-party.

[32] Given my finding that Desert's proposed appeal does not raise a question of law, it is unnecessary to consider the additional criteria for leave set out in s. 59(4) of the *Act.*

Martini's Application For Leave to Cross Appeal

Background

[33] Section 3 of the RSSA provides:

> The parties agree each with the other that mutual co-operation and the utmost good faith are necessary in this Agreement and accordingly, each covenants with the other to co-operate fully in the utmost of good faith to fulfill its obligations under this Agreement in a timely fashion to expedite obtaining the completion of the matters outlined in Section 2. Each party recognizes

> that any delay in fulfilment of obligations under this Agreement by one party may cause significant losses to the other and each accordingly agrees to fulfill all of its obligations hereunder in a timely and expeditious manner.

[34] Desert's obligation to obtain rezoning is set out in s. 5 of the RSSA, titled "Development Approvals", which required Desert to "diligently pursue enactment of the Rezoning Bylaw by no later than July 1, 2021." That date was not met.

[35] Section 36 contained a provision to extend the dates for performance in the event of external forces beyond the parties' reasonable control:

> If a party is delayed in the performance of its obligations under this Agreement as a result of a strike, labour unrest, inability to obtain or delay in delivery of labour or materials, or other cause or event beyond that party's reasonable control, then the dates for performance of those obligations will be extended for a period equivalent to such period or periods of delay.

[36] The arbitrator found that Desert had clearly failed to meet its timelines as set out in the RSSA (Award at para. 72). The arbitrator then turned to the question of whether the delay was attributable to factors beyond Desert's reasonable control. In particular, the arbitrator articulated the relevant standard and onus as follows (at para. 73):

> I find that the combined effect of Sections 3, 5, 35 and 36 of the [RSSA] is that Desert must show on a balance of probabilities that any delays were beyond its reasonable control. However, Martini must also show on a balance of probabilities the causal connection between a delay and the resulting damage it claims to have suffered.

[37] The arbitrator went on to assess particular alleged causes of delay, characterizing the issues as follows:

> 1. Was the failure to obtain third reading of the rezoning bylaw prior to July 28, 2021 caused by Desert's lack of diligence or other shortcomings alleged by Martini or was it the result of events or causes beyond its reasonable control?
>
> 2. Was the failure to obtain a Decision Letter prior to November 15, 2021 caused by Desert's lack of diligence or other shortcomings alleged by Martini or was it the result of events or causes beyond its reasonable control?
>
> 3. Is the failure to obtaining rezoning of the Martini Lands after April 15, 2022 caused by Desert's lack of diligence or other shortcomings alleged by Martini or was it the result of events or causes beyond its reasonable control? I have chosen April 15, 2022 for the reasons stated later in this Award.

> 4. In the event that the evidence shows that the delays were caused by a lack of diligence or other shortcomings of Desert and were not the result of events or causes within its reasonable control were any of the delays material and cause damage to Martini? In such event when should rezoning have been accomplished but for the delays?

[38] The arbitrator found that the failure to achieve third reading earlier than July 2021 and to obtain a decision letter until November 2021 was not Desert's fault, and as a result he determined that the earliest achievable date for rezoning was extended to April 2022. The arbitrator went on to determine that the failure to achieve rezoning after April 2022 was beyond Desert's reasonable control due to impediments he said were attributable to Martini, specifically: (i) Martini's failure to apply for development permits before December 2022; (ii) Martini's refusal to sign the pump station DWA petition in June 2022 and a statutory right of way for the pump station in November 2022; and (iii) Martini's decision to file a certificate of pending litigation ("CPL") against Desert's lands in September 2022.

Martini's Grounds of Appeal

[39] Martini alleges three errors in the Award which form the basis of its proposed cross appeal.

[40] First, Martini says that the arbitrator erred in law because he did not analyze or make any findings for the time period between November 2021 and April 2022 or determine why Desert failed to obtain rezoning by the latter date, which he had found was an achievable date (Award at para. 151). Because the arbitrator did not consider whether Desert failed to achieve rezoning *by* April 2022 for reasons beyond its reasonable control, the arbitrator failed to apply the correct legal test. Put differently, while the arbitrator properly considered the reasons for the delay in the post-April 2022 period, he failed to consider whether prior to April 2022, the reasons for the delay were attributable to Desert.

[41] Second, Martini says the arbitrator misapprehended the evidence and failed to apply the correct legal test and principles in determining that, after April 2022,

Desert was thwarted by several impediments that prevented it from obtaining rezoning that were outside of its reasonable control.

[42] Third, Martini says that the arbitrator erred in dismissing Martini's claim for an equitable interest in Desert's lands. In particular, Martini says there was an inconsistency between the arbitrator's liability award and his interest award.

[43] Under s. 25 of the RSSA a party who pays a cost on behalf of the party responsible for it is deemed to have an equitable interest in the lands of the non-contributing party until the cost and contractual interest are repaid. Section 22 of the RSSA provides that Desert is responsible for Project Costs. Martini argued that it was entitled to repayment of BC Hydro Costs, bonding amounts required by Langley, and contractual interest.

[44] The arbitrator dismissed Martini's claim for BC Hydro Costs but found in favour of Martini on the bonding amounts and related interest and ordered Desert to repay these costs. However, Martini says the arbitrator failed to explain why Martini was not entitled to an equitable interest in Desert's lands per s. 25. This internal inconsistency, Martini says, was an error of law.

Analysis

[45] In my respectful view, Martini's application for leave to cross appeal must also be dismissed.

[46] As was the case with Desert's application for leave to appeal, the key issue on the application for leave to cross appeal is whether the proposed cross appeal discloses extricable questions of law. In my view, it does not.

[47] The first ground of appeal advanced by Martini is that the arbitrator, having found that April 15, 2022 was the earliest date by which Desert would have achieved rezoning, failed to assess whether Desert did not do so due to a lack of diligence or because of events beyond its control. Thus, says Martini, the arbitrator failed to apply the legal test that he had formulated. I disagree. At paras. 147–150 of the

Award, the arbitrator described the process of obtaining rezoning and the numerous factors that led to the conclusion that April 15, 2022 was the earliest possible date. Implicit in the arbitrator's analysis is the finding that any delays up to that date were beyond Desert's control. The arbitrator then turned to the key question of why rezoning was not achieved after April 15, 2022. In my view, Martini has not identified any legal error in that approach. I would add that the arbitrator's analysis of both the pre-and post April 15, 2022 periods required him to assess the evidence and make findings of fact. The analysis does not give rise to an extricable question of law.

[48] A similar analysis applies to Martini's contention that the arbitrator misapprehended the evidence and failed to apply the correct legal test and principles in determining that, after April 2022, Desert was thwarted by several impediments that prevented it from obtaining rezoning that were outside of its reasonable control.

[49] Misapprehensions of evidence that go the core of the outcome of a case are extricable errors of law: *Escape 101 Ventures* at para. 43.

[50] In *Escape 101 Ventures*, the Court, citing *Hayes Forest Services* at para. 69, noted that where there is "no evidence to sustain [an arbitrator's] conclusion or if his conclusion was not reasonably supportable on the available evidence, the judge could have concluded the arbitrator made an error in law" (at para. 73, emphasis added).

[51] Here, however, it *was* open to the arbitrator on the evidence to conclude that some of the delays were outside of Desert's reasonable control. The arbitrator reached this conclusion on account of several factors after a detailed review of the evidence and competing arguments (Award at para. 185). For example, the arbitrator concluded that Martini's refusal to sign the DWA petition or statutory right of way for the Pump Station Lands was an impediment which prevented rezoning (Award at paras. 154, 175). The arbitrator made a similar finding in respect of Martini's filing of a CPL against the Detention Pond Lands. Martini submits that the arbitrator failed to properly assess whether this was an event beyond Desert's

control, for example whether it was open to Desert to address the CPL by paying the disputed amount under protest.

[52] In my view, it was open to the arbitrator to conclude, based on the evidence, that the CPL hindered Desert's progress for reasons that were outside Desert's control. His conclusion is a matter of contractual interpretation, i.e., mixed fact and law, and therefore does not provide a basis for Martini's application for leave to cross appeal.

[53] Finally, Martini alleges that the arbitrator made inconsistent findings in concluding that it had no equitable interest in Desert's lands. This issue was the subject of Martini's application in the Supreme Court to set aside the Interest Award. As Martini acknowledged, the validity of this issue turns on the outcome of the leave application from the judge's decision declining to set aside that Award. As set out below, I am not inclined to grant that application, thus this proposed ground of appeal cannot be sustained.

[54] For the reasons given, Martini has failed to establish that its proposed cross appeal raises questions of law. Given this conclusion, as with Desert's application, it is unnecessary to address the other leave criteria in s. 59(4) of the *Act.*

Martini's Application for Leave to Appeal the Chambers Judge's Decision

The Interest Award

[55] Martini's application before the chambers judge was brought pursuant to s. 58(1)(c) of the *Act* which authorizes a party to an arbitration to apply to the Supreme Court to set aside an arbitral award where the award "deals with a dispute not falling within the terms of the arbitration agreement or contains a decision on a matter that is beyond the scope of the arbitration agreement".

[56] Martini took the position that in making the Interest Award, the Arbitrator exceeded his jurisdiction by varying his earlier decision set out in the Award concerning the payment of interest by Desert.

[57] The background to the Interest Award can be briefly summarized. In September 2021, Martini paid over $2.8 million in bonding costs and fees that it asserted were "Project Costs" as defined in the RSSA for which it said Desert was responsible. Before the arbitrator, Martini sought repayment of those costs with interest. It invoked s. 25 of the RSSA, which states:

> In the event any party (the "**Non-Contributing Party**") fails to pay a cost it is responsible for pursuant to this Agreement within 15 days of receipt of a request from another party, acting reasonably, the other (the **"Contributing Party**") may pay such cost on behalf of the Non-Contributing Party in which case the Non-Contributing Party shall pay interest to the Contributing Party on the amount so paid at a rate of two prevent per month (twenty four percent per annum) and the Contributing Party shall be deemed to have an equitable interest in the Non-Contributing Party's lands to the extent such contribution and interest remains unpaid.

[58] The Arbitrator found that certain of the costs paid, relating to BC Hydro, were the responsibility of Martini. However, in respect of certain other costs relating to bonds required to be posted for environmental security and tree replacement, Desert acknowledged that these were Project Costs, but it took the position it was not liable to pay those costs until fourth reading of the required zoning bylaw. An issue before the arbitrator was whether Martini was entitled to interest on what was in effect a prepayment of these costs. Martini claimed contractual interest in accordance with s. 25 of the RSSA.

[59] The arbitrator's consideration of this issue is succinct:

> 248. Martini says that the 3rd Reading letter Desert received from the TOL authorized the Mitchell Group [Desert's parent company] to proceed with streamside works, clearing and grading in advance of fourth reading subject to a number of conditions including environmental and tree bonding. It says it placed both the environmental and tree bonding on September 15, 2021 and performed the work in order to avoid a delay of approximately one year had the work not been done at that time. It seeks interest at the rate of 2% per month from September 15, 2021 to date.
>
> …
>
> 249. Desert says it is not required under the [RSSA] to perform the offsite works until fourth reading has been achieved.
>
> …

> 250. Since it was a legitimate concern that this work be done in order to avoid unnecessary delays in getting rezoning for the film studio in the business park, and since Desert was not prepared to do the work itself or post the bonding, I find it just and equitable that Desert pay interest on the amounts posted until the bonding is repaid to martini. The amount of interest will be determined at the damages hearing unless agreed upon by the parties. To the extent the bonding is still required Desert must replace it so that the amounts posted by Martini can be returned to it.
>
> [Citations omitted.]

[60] At the conclusion of the Award, the arbitrator set out a number of questions that had been agreed to by counsel, and provided his answers. The relevant questions and answers for the purposes of this application are:

> 12. Is Desert required to replace the environmental security bonding now?
>
> Yes, if it is still required and has not been repaid to Martini.
>
> 13. Is Desert required to replace the tree replacement bonding now?
>
> See answer to question 12.
>
> 15. Is Desert required pursuant to s. 25 of the [RSSA] to pay contractual interest of 2% per month (24% per annum) to Martini in respect of the Project Costs paid by Martini with respect to paragraphs 11-13 above? [para. 11 concerned BC Hydro costs which Desert was found not liable for]
>
> Desert is only obligated to pay interest with respect to environmental and tree replacement security bonding. The amount of interest remains to be determined as part of the damages hearing if necessary.
>
> 17. Is Martini entitled to an equitable interest in the Detention Pond Lands?
>
> No.
>
> 18. Is Martini entitled to an equitable lien on the Detention Pond Lands?
>
> No.

[61] Martini subsequently sought a correction of the Award on the basis that, pursuant to s. 25 of the RSSA, it was entitled to an equitable interest in the Detention Pond Lands while contractual interest for the bonding requirements remained unpaid.

[62] The arbitrator responded to Martini's request by way of an email dated December 1, 2023 in which he said:

> Without further submissions at this point I am not prepared to say that the Award should be corrected to state that Martini is entitled to an equitable interest in the Detention Pond lands pending payment of interest on sums posted by Martini for environmental and tree replacement bonding or replacement of the bonding itself. It is not clear to me that s.25 of the [RSSA] applies to payments of any interest which I may order Desert to pay or replacement of any such bonding. Section 25 of the [RSSA] applies to payments which a party is obliged to make under its terms. The [RSSA] states that Desert is not obliged to post bonding until 4th reading is achieved. In the Award I found that it was just and equitable that Desert pay interest and replace the bonding but not because it was required to do so under the terms of the [RSSA].

[63] On December 20, 2023, the arbitrator issued the Interest Award. He said the following with respect to his earlier decision in the Award concerning interest (at para. 10):

> In my references to environmental and tree replacement bonding in the Award I did not find that s.25 of the [RSSA] applied. I agree with Desert that it was not required to post environmental and tree bonding security pursuant to s.26 at the time it was posted. Thus it was not at that time a cost it is responsible for "*pursuant to this Agreement*" as required by s. 25 in order to generate interest at the contractual rate. However as stated in paragraph 250 of the Award I did find there was a legitimate interest of Martini to avoid the 1 year delay caused by losing the fisheries window, and because Desert was refusing to post the security, it was just and equitable that Desert pay interest on the amounts posted.

[64] Relying on s. 51(1) of the *Act*, which confers discretion on an arbitrator as to whether or not to award interest and at what rate, the arbitrator awarded "standard prejudgment interest" from September 15, 2021 to June 24, 2022 in the amount of $9,797.72.

The Application Below

[65] Martini then brought its application to set aside the Interest Award. It took the position that in issuing the Interest Award, the arbitrator improperly revisited and revised his original decision as set out in the Award. In addition to the Interest Award itself, Martini relied on the arbitrator's explanation as set out in his December 1, 2023 email (see para. 62 above). Martini's position was summarized by the judge in these terms, in reasons indexed at 2024 BCSC 828:

> [27] Martini argues, as it did before the arbitrator, that the liability decision lends itself to only one coherent interpretation, namely, that the arbitrator must have ruled in its favour on the contractual claim it had advanced. According to Martini, the arbitrator's reference to what is "just and equitable" in para. 250 must have been intended to connote Desert's liability in contract, because no other source of liability was pleaded or argued.
>
> …
>
> [31] It follows from all of this, in Martini's submission, that the only option available to the arbitrator at the damages phase, having effectively found Desert to be in breach of the RSSA at the liability phase, was to award Martini interest at the contract rate. The arbitrator's subsequent attempt to present a new rationale for the liability award was, it is argued, an improper, *post facto* effort to rationalize his liability decision. In support of its argument that this is a fatal flaw in the interest award justifying an order setting it aside under s. 58(1)(c) of the *Act*, Martini cites *Westnav Container Services Ltd. v. Freeport Properties Ltd*., 2010 BCCA 33.

[66] The judge rejected Martini's position and dismissed its petition. He found that the arbitrator used the term "just and equitable" in para. 250 of the Award to ground his award of interest on a non-contractual basis. His subsequent explanations in his email and in the Interest Award were not *ex post facto* attempts to recast what he had already decided, but rather were intended to elucidate the rationale he had already given for his interest decision (at paras. 33–34). He also rejected Martini's argument that the arbitrator answered a different question than the one posed by the parties. He noted that the amount of interest payable by Desert was clearly a matter that had been put before the arbitrator (at para. 37).

Martini's Proposed Appeal

[67] Martini now seeks leave to appeal on the grounds that the judge erred in his interpretation of the Award, and thus, further erred in finding that the Interest Award was not an impermissible variation of the Award. Martini also submits that the judge erred in adopting an overly narrow interpretation of s. 58(1)(c) of the *Act*.

[68] Leave to bring an appeal is required pursuant to s. 58(6) of the *Act*. That section has not yet been judicially considered, however in my view, a leave application brought pursuant to s. 58(6) is subject to the "usual" criteria governing leave to appeal to this Court:

(1) whether the point on appeal is of significance to the practice;

(2) whether the point raised is of significance to the action itself;

(3) whether the appeal is *prima facie* meritorious or, on the other hand, whether it is frivolous; and

(4) whether the appeal with unduly hinder the progress of the action.

(*Goldman, Sachs & Co. v. Sessions*, 2000 BCCA 326 at para. 10).

[69] I will first deal with the merits criterion. Martini's proposed appeal is premised on its position that the arbitrator found in the Award that Martini was entitled to contractual interest under s. 25 of the RSSA, hence the Interest Award amounted to an impermissible variation of the Award, and the judge erred in finding otherwise.

[70] Respectfully, I am unable to find any merit in this position, even sufficient to meet the relatively low merit threshold under the leave test.

[71] While the judge's decision on this issue is not entitled to deference, I agree with his analysis (at paras. 33, 34 and 37). As the judge noted, the arbitrator was clearly alive to the parties' competing positions, as summarized at paras. 248–249 of the Award. In particular, he appreciated that Martini was asserting a right to contractual interest under s. 25 of the RSSA, whereas Desert took the position that no contractual obligation arose until fourth reading of the zoning bylaw had occurred. While the arbitrator did not expressly say in para. 250 that he was rejecting Martini's position, that paragraph can only be read to mean that the arbitrator was awarding interest on a non-contractual basis because it was "just and equitable" to do so, given that Martini had incurred the bonding expenses. That interpretation is consistent with the arbitrator's answers to questions 17 and 18 in the Award that Martini is not entitled to an equitable interest in certain lands, as such an interest only arose if there was a failure on the part of Desert to make a contractually required payment.

[72] Viewed in this light, the arbitrator's subsequent explanation in his December 1, 2023 email and his decision in the Interest Award was not a variation of the original Award but "rather an elucidation of the rationale set out, albeit in less

than entirely clear terms, in the [Award] itself" (at para. 34). In my view, Martini has not identified any error in the judge's analysis that would warrant appellate intervention. I would add that the judge's interpretation of s. 58(1)(c) had no real bearing on his decision given his finding that the arbitrator had not decided a matter outside the scope of the arbitration.

[73] Further, I agree with Desert that Martini's challenge to the arbitrator's Interest Award is one of substance not jurisdiction. It turned on the arbitrator's interpretation of s. 25 of the RSSA, something that is not open to challenge under s. 58 of the *Act*. As the judge observed at para. 37, it might have been the subject of a separate leave application under s. 59, however Martini chose not to pursue that course.

[74] Turning to the other elements of the leave test, while the difference in the amount of interest owing if calculated under s. 25 of the RSSA versus the standard prejudgment interest ordered by the arbitrator is significant, this issue formed a very small part of the totality of issues in dispute between the parties. Further, I am not satisfied that this issue has any broader importance to the profession, turning as it does on the specific wording of s. 25 of the RSSA and the particular facts of the case.

[75] For all of these reasons, I decline to grant Martini leave to appeal.

Disposition

[76] For the foregoing reasons, Desert's application for leave to appeal and Martini's application for leave to cross appeal (CA49527) are dismissed. Martini's application for leave to appeal from the judge's decision (CA49923) is also dismissed.

"The Honourable Justice Skolrood"