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COURT OF KING'S BENCH OF MANITOBA

B E T W E E N:

CI 23-01-42432

ABCO HOLDINGS LTD. AND MARK YUSISHEN,	)	
	)	Faron J. Trippier
applicants,	)	for the applicants/
	)	respondents
- and -	)	
	)	
ROBERT MUNZ, ROBERT MUNZ AS TRUSTEE OF THE ROBERT MUNZ FAMILY TRUST 2035, PAUL VINCENT, PAUL VINCENT AS TRUSTEE OF THE PAUL VINCENT FAMILY TRUST 2035, PAUL BERARD, PAUL BERARD AS TRUSTEE OF THE PAUL BERARD FAMILY TRUST 2035, LEO GRATTON, LEO GRATTON AS TRUSTEE OF THE LEO GRATTON FAMILY TRUST 2021, CHAD SHORROCK, BRETT SHORROCK, BRENDON THIESSEN AND BRIAN CABRAL,	)	Maria L. Grande
	)	for the respondents/
	)	applicants
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LEO GRATTON FAMILY TRUST 2021, CHAD SHORROCK, BRETT SHORROCK, BRENDON THIESSEN, AND BRIAN CABRAL,	)	
applicants,	)	
- and -	)	
ABCO HOLDINGS LTD. (FORMERLY 10103036 MANITOBA LTD.) AND MARK YUSISHEN,	)	
respondents.	)	JUDGMENT DELIVERED: January 30, 2024

REMPEL J.

INTRODUCTION

[1] This is an application for leave to appeal an award issued on July 13, 2023, after a private commercial arbitration (the "Award").

[2] The arbitration came about as a result of a dispute over the terms of a Share Purchase Agreement ("SPA") involving the shares of a numbered corporation (10103036 Manitoba Ltd.) which is now known as ABCO Holdings Ltd. ("ABCO"). At the time ABCO consisted of a group of corporations that carried on business as electrical and mechanical contractors for industrial and commercial clients.

[3] Under the terms of the SPA, Mark Yusishen (the "Purchaser"), agreed to purchase the shares of ABCO and all the related corporations, which were owned by an array of individuals, trusts and holding companies (the "Vendors"). The SPA provided a closing date of August 13, 2021, and an effective date of June 30, 2021.

[4] The purchase price of the shares of ABCO under the SPA was $22 million, subject to two adjustments. The first adjustment provided for an additional payment of ABCO's cash on hand as at the closing date. The second adjustment called for an increase or decrease in the purchase price depending on the results of what the SPA defined as the "Working Capital Difference", which was a specific calculation called for after the effective date (the "Second Adjustment").

[5] After paying the $22 million and the first adjustment for the cash on hand, the Purchaser waited for the accountants to complete the calculation for the Second Adjustment as per the terms of the SPA. When the calculation for the Second Adjustment was completed, the Purchaser was advised that he owed the Vendors a further sum of $4,068,434 to complete the purchase of shares contemplated by the SPA.

[6] The Purchaser refused to pay this amount and the parties subsequently agreed to proceed with a private arbitration. The Award supported the position taken by the Vendors that they were entitled to payment of the disputed amount.

[7] The Purchaser then filed this application for leave on a question of law under the provisions of s. 44(2) of ***The Arbitration Act***, C.C.S.M. c. A120 (the "***Act***"). The Purchaser takes the position that they have met the criteria established by the ***Act***, namely that the arbitrator erred in his interpretation of the SPA and the Award significantly affects his rights and the importance of this matter justifies an appeal.

[8] The Vendors filed their own motion in this court under suit number no. CI 23-01-42753 to have the Award enforced. Due to the fact that the two actions deal with the same Award, an order was made that they be heard together.

ISSUES

[9] The SPA included various representations and warranties by the Vendors about the financial status of the various operating companies that carried on business under the ABCO umbrella. Central to this dispute are the Purchaser's allegations that the Vendors made misleading representations about the accuracy of the financial status of these operating companies and as a result of these breaches the Second Adjustment created a windfall for the Vendors which he could not have anticipated.

[10] This leave application is based on the windfall, as alleged by the Purchaser, which he says by definition constitutes a matter of great importance that significantly affects his rights. The Purchaser also alleges that by failing to give weight to the breaches of representations and warranties in the SPA and ignoring the ongoing duty of the Vendors to provide accurate information to the Purchaser, the arbitrator committed several errors of law that cumulatively rise to the level of a question of law.

[11] The Vendors have denied they made misleading representations or that they engaged in breaches of warranties and representations contained in the SPA.

DECISION

[12] I am dismissing the application for leave. My reasons follow.

APPLICABLE LEGAL PRINCIPLES

[13] Section 44(2) of ***The Arbitration Act***, C.C.S.M. c. A120 (the "Act") provides:

Appeal on question of law with leave	**Appel relatif à une question de droit — autorisation**
44(2) If the arbitration agreement (other than a family arbitration agreement) does not provide that the parties may appeal an award to the court on a question of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that	**44(2)** Si la convention d'arbitrage — exception faite d'une convention d'arbitrage familial — ne prévoit pas d'appel devant le tribunal judiciaire d'une sentence relative à une question de droit, une partie peut faire appel de cette sentence devant le tribunal judiciaire, sur autorisation du tribunal. Le tribunal n'accorde son autorisation que s'il est convaincu :
(a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and	a) d'une part, que l'importance pour les parties des questions en cause dans l'arbitrage justifie un appel;
(b) determination of the question of law at issue will significantly affect the rights of the parties	b) d'autre part, que le règlement de la question de droit en litige aura une incidence importante sur les droits des parties.

[14] The leading cases in Manitoba that interpret s. 44(2) of the ***Act*** are two decisions of Joyal C.J. in ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited***, 2021 MBQB 77 (CanLII) ("***Christie #1***") and ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited***, 2022 MBKB 239 (CanLII) ("***Christie #2***"). Both decisions were affirmed on appeal in ***Christie Building Holding Company, Limited v. Shelter Canadian Properties Limited***, 2023 MBCA 76 (CanLII).

[15] The public policy principle that undergirds the private commercial arbitration process is set out in ***Christie #1***, at para. 33

> [33] The key objectives of private commercial arbitration are efficiency and finality. Not surprisingly, the consequent scope of appellate intervention in commercial arbitration is comparatively narrow, limited as it is to a question of law. This limited scope for appellate intervention

> is seen to serve well the objectives of efficiency and finality and it is the antithesis to an invitation to a rehearing of the dispute [citations omitted].

[16] ***Christie #2*** establishes a limited scope for leave applications under s. 44(2) of the ***Act***, at paras. 4-5:

> [4] Absent an arbitration agreement agreed to by contracting parties that addresses the right of appeal in a different way, s. 44(2) represents a clear statutory limitation on the scope of appellate review of arbitration awards in Manitoba.
>
> [5] In considering leave applications pursuant to s. 44(2), it is clear from the governing jurisprudence that courts must take care to ensure that such leave applications and any eventual hearings on the merits, are not used as a forum to re-argue and re-litigate significant portions of the arbitration under the pretense of raising "questions of law".

[17] ***Christie #2*** also confirms five broad legal principles applicable in leave applications under s. 44(2) of the ***Act***. The headings of those broad legal principles are set out as follows beginning at para. 27:

a) The Applicant must identify a Question of Law of Arguable Merit;

b) Contractual Interpretation is a Question of Mixed Fact and Law;

c) Extricable Questions of Law Will be Rare;

d) Contractual Interpretation and Use of Surrounding Circumstances; and

e) Whether an Arbitrator Gave Excessive Weight to the Surrounding Circumstances or "Factual Matrix" is a Mixed Question.

[18] For the purposes of this leave application, I will focus on the second and fourth principles confirmed by ***Christie #2***, notwithstanding the fact that all of the principles will come into play in these reasons. ***Christie #2*** states at paras. 33-34 and 40-45:

B. *Contractual Interpretation is a Question of Mixed Fact and Law*

[33] It is important to note in a case like the present, that the historical approach of characterizing issues relating to the rights and obligations of parties under a written contract as questions of law was laid to rest by the Supreme Court of Canada in ***Sattva***. Writing for the Court, Rothstein J. concluded (at paras. 50 and 52):

> [50] ... I am of the opinion that the historical approach should be abandoned. Contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix.
>
> . . .
>
> [52] … The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.
>
> [emphasis added in the original]

[34] Rothstein J. explained how the shift away from the historical approach has been based in part on the adoption of an approach to contractual interpretation, which requires courts to have regard for the surrounding circumstances, or factual matrix, when interpreting a written contract. The objective of contractual interpretation — to ascertain the objective intentions of the parties — is an inherently fact specific exercise (***Sattva***, at paras. 46 – 49, 55).

. . .

D. CONTRACTUAL INTERPRETATION AND USE OF SURROUNDING CIRCUMSTANCES

[40] Given that much of what Christie argues suggests that the arbitrator's interpretation of the Development Agreement gives rise to questions of law, it is well to briefly review some of the principles of contractual interpretation.

[41] The general approach to contractual interpretation is well known, and was summarized by Rothstein J. in ***Sattva*** as follows (at para. 47):

> [47] ... [T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" [citation omitted]. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract.

[42] The role of surrounding circumstances in contractual interpretation is to deepen a decision maker's understanding of the mutual and objective intentions of the parties. As Rothstein J. wrote (***Sattva*** , at para. 57):

> [57] While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement [citation omitted]. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract [citation omitted]. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement [citation omitted].
>
> [emphasis added in the original]

[43] Examples of relevant surrounding circumstances or the "factual matrix" include the genesis, aim or purpose of the contract, the nature of the relationship created by the contract and the nature or custom of the market or industry in which the contract was executed (see ***IFP Technologies (Canada) Inc. v. EnCana Midstream and Marketing***, 2017 ABCA 157).

[44] As Rothstein J. remarked (***Sattva*** , at para. 58):

> [58] The nature of the evidence that can be relied upon under the rubric of 'surrounding circumstances' will necessarily vary from case to case.... [T]his includes ... 'absolutely anything which would have affected the way in which the language of the document would have been understood by a reasonable man'.

The limits of what can be relied upon were expressed as follows:

> [58] ... It should consist only of objective evidence of the background facts at the time of the execution of the contract [citation omitted] that is, knowledge that was or reasonably ought to have been within the knowledge of both parties at or before the date of contracting.... Whether something was or reasonably ought to have been within the common knowledge of the parties at the time of execution of the contract is a question of fact.
>
> [emphasis added in the original]

[45] It is also important when conducting contractual interpretation that the decision maker consider the principle of commercial reasonableness and efficacy. As Spivak J.A. remarked in ***Vesturland Development Ltd. et al. v. Gimli (Rural Municipality) et al.***, 2021 MBCA 45 (at para. 42):

> [42] ... Contracts are to be interpreted in accordance with sound commercial principles and good business sense [citation omitted]. The interpretative principle of commercial efficacy — and its corollary, avoiding interpretations that result in a commercial absurdity — is one of several tools used by courts to give an accurate meaning to the parties' intentions as stated in a contract.

POSITION OF THE PURCHASER

[19] At its core the argument of the Purchaser is that the Vendors engaged in a classic "bait and switch" scheme by making misrepresentations to him about how high a figure the Second Adjustment was actually going to be. The Purchaser maintains that the Vendors presented him with financial data from ABCO and other information prior to the completion of the Second Adjustment that falsely led him to believe that the potential increase to the purchase price would not be more than $1,442,394, when they knew that it was actually going to be a figure in excess of $4 million.

[20] From the Purchaser's perspective, the Vendors received a windfall that neither party had expected or bargained for in this transaction. Through the time leading up to the completion of the calculations of the Second Adjustment, the Purchaser insists he relied upon the explicit terms of the SPA which provided that the Vendors were giving express representations and warranties about the truth and accuracy of the financial statements they were providing to him.

[21] The Purchaser offers a critique of the analysis contained in the Award by insisting the arbitrator only gave lip service to the terms of the SPA and failed to tie his findings to an explicit breach of those terms. In particular, he points to the fact that the arbitrator did not explicitly consider generally accepted accounting

principles ("GAAP") and failed to look at the individual financial statements themselves to ensure that they were consistent with sound business practice. In essence the argument of the Purchaser is that the arbitrator relied on factors outside the terms of the SPA itself in assessing whether the terms of the SPA were indeed violated.

[22] The vast amount of the windfall is proof positive, according to the Purchaser, that the financial statements he was provided with could not have been truthful or accurate and by ignoring this breach of the terms of the SPA the arbitrator committed errors of law that rise to the level of questions of law. The Purchaser also argues that the arbitrator failed to recognize the Vendors' ongoing duty to provide accurate information to the purchaser under the terms of the SPA. The impact of these errors of law are so great that the Plaintiff says they constitute a question of law of arguable merit.

THE AWARD

[23] The arbitrator summarizes the Plaintiff's arguments with respect to the alleged misrepresentations in detail from paras. 49 through 53 of the Award. The summary of the arbitrator is detailed and underscores that he understood the details the Purchaser was relying on to advance his arguments as to misrepresentation.

[24] In the section of the Award entitled "*Analysis*" (beginning at para. 54) the arbitrator explained why he preferred the evidence of the Vendors over that of the Purchaser with respect to the allegations of misrepresentation. Key to this

analysis, was the arbitrator's finding that the Purchaser was the only witness to testify in support of his position and he failed to have his professional advisors, who played key roles in different aspects of the transaction, testify at the arbitration hearing. As a result, the arbitrator concluded, at para. 54 of the Award:

> 54. … While it was the Purchaser's right to decide that their evidence was not necessary, a consequence of that decision is an increased reliance on the documentary record, the testimony of other witnesses, and evidence of the surrounding circumstances at the time.

[25] The Award also notes that the Purchaser made a point of stating his allegations as to misrepresentation were not grounded in negligence but rather the vast discrepancy between what was stated on the financial statements he was presented with and the calculation in the Second Adjustment. By way of a response to this, the arbitrator makes a point of showing in detail through his analysis that that there was evidence that supported a calculation for the Second Adjustment that would yield a result closer to $4 million than the $1,442,394 figure that the Purchaser was expecting. The arbitrator also found that the Purchaser did not produce the monthly records or annual financial statements he ostensibly relied on that supported his claims of misrepresentation.

[26] In his conclusion, the arbitrator noted that the absence of testimony from the Purchaser's broker and accountant led to his finding that "*much*" of the Purchaser's evidence was a reflection of his "*subjective belief*" about what the calculations leading to the Second Adjustment should have been and not the evidence on the record (at para. 72 of the Award). The arbitrator also concluded at para. 81 of the Award:

> 81. There is insufficient evidence from either the documentary record or the viva voce evidence at the hearing to support the Purchaser's claim that "the Vendors breached the representations and warranties contained within the Share Purchase Agreement" and no challenge to the Effective Date Statements. The evidence also shows that, prior to signing the SPA, the Purchaser received all information it requested, full explanations about the differences between the monthly reports and annual financial statements, and clarification on the Vendor's practice of deferring certain revenue recognition until year-end.

ANALYSIS

[27] Sections 44(2) (a) and (b) of the ***Act*** require an applicant seeking leave to appeal an arbitration award to satisfy the court as to "… *the importance to the parties of the matters at stake in the arbitration* …" and if the "… *issue will significantly affect the rights of the parties*". This legal test has nothing to do with the subjective beliefs of the parties about what is at stake for them in the arbitration process or the actual dollar amount in dispute. The Purchaser in this case cannot satisfy the test set out in the ***Act*** by merely pointing to the "*eye watering*" impact the figure of $4,068,464 shown by the Second Adjustment had on him and that he would not have offered $22 million for the shares had he known about it in advance.

[28] The test set out in the ***Act*** is intended to weed out leave applications based on contractual interpretation that are only of interest to the parties themselves and do not address broad legal principles that would be relevant to litigants in other cases or otherwise further the development of the law. ***Christie #2*** confirms this in the section I have already cited in these reasons entitled "*Contractual Interpretation is a Question of Mixed Fact and Law*" at para. 33 where it refers to the following quotation from the Supreme Court of Canada decision in

Sattva Capital Corp. v. Creston Moly Corp., 2014 SCC 53 (CanLII), [2014] S.C.R. 633:

> [33] …
>
> > [52] … The legal obligations arising from a contract are, in most cases, limited to the interest of the particular parties. Given that our legal system leaves broad scope to tribunals of first instance to resolve issues of limited application, this supports treating contractual interpretation as a question of mixed fact and law.

[29] I am satisfied that the Purchaser has fallen into the trap of conflating questions of law and errors of law, which ***Christie #2*** warns us to avoid on leave applications at para. 32. In that paragraph it is made clear that only questions of law are relevant at the leave stage and errors of law only become relevant at the merits stage if an appellant has met the legal test for leave. This court has no jurisdiction to deal with the merits of an appeal until an applicant satisfies the legal test for leave.

[30] The arbitrator was careful in explaining the facts as he found them, and it is not difficult to follow his decision-making process arising from those facts. Yet, the leave application is entirely devoted to attacking the Award as being factually incorrect or unreasonable, which is not permitted at the leave stage. The onus on the applicant is to identify a question of law of arguable merit on a leave application and not an error of law.

[31] The following quotation from ***Christie #2*** in this section entitled "*The Applicant Must Identify a Question of Law of Arguable Merit*" underscores this point:

> [32] … In other words, the issue on a leave application is not whether the arbitrator's decision — be it their contractual analysis, conclusions respecting liability or assessment of damages — was correct or reasonable. The issue is whether the arbitrator's decision raises a legal question of arguable merit conferring jurisdiction on the court to review the award. The following statement from Gascon J. in ***Teal Cedar*** is instructive (at para. 60):
>
> > [60] Likewise, it is improper to claim that a court should have jurisdiction to review the arbitrator's contractual analysis merely on the basis that it was allegedly incorrect. Indeed, it would even be improper to claim jurisdiction to review an arbitrator's analysis merely on the basis that it was unreasonable. A court looking at the Amended Agreement could have held that the No Interest Clause precluded interest payments and that the Arbitration Clause incorporated that preclusion when it submitted "compensation" (without interest) to arbitration. But to immediately launch into the merits of the arbitrator's contractual analysis — whether it is incorrect or unreasonable — is to put the cart before the horse. His analysis must first be characterized as raising a legal question. And only on the basis of that characterization may his analysis then be reviewed.
>
> [emphasis added in the original]

[32] I am also satisfied that the Award gave proper attention to the surrounding circumstances or factual matrix when interpreting the SPA with a view to ascertaining the objective intentions of the parties. This process was "… *an inherently fact specific exercise*" (***Christie #2***, at para. 34) which is clearly a question of mixed fact and law. The Purchaser has been unable to persuade me that he has identified an extricable question of law as explained in ***Christie #2***.

[33] Alleging that an award should have yielded a different result if the correct legal test had been used is a question of mixed fact and law and not a question of law. This is confirmed in ***Christie #2***, under the heading "*Extricable Questions of Law Will be Rare*", at para. 36:

> [36] Despite the above, there is an important distinction between the allegation that an arbitrator applied the wrong legal test or altered the legal test in the course of applying it (questions of law) and the allegation that

> the arbitrator's application of the correct legal test *should have resulted in a different outcome* (a question of mixed fact and law). In this regard, the Court in ***Teal Cedar*** impressed upon reviewing courts the need to exercise *caution* in identifying extricable questions of law, since mixed questions, by definition, involve aspects of law (at para. 45):
>
> > [45] ... The motivations for counsel to strategically frame a mixed question as a legal question — for example, to gain jurisdiction in appeals from arbitration awards or a favourable standard of review in appeals from civil litigation judgments — are transparent [citation omitted]. A narrow scope for extricable questions of law is consistent with finality in commercial arbitration and, more broadly, with deference to factual findings. Courts must be vigilant in distinguishing between a party alleging that a legal test may have been altered in the course of its application (an extricable question of law; *Sattva,* at para. 53), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).
>
> [emphasis added in the original]

[34] I am satisfied the Purchaser has failed to identify a question of law of arguable merit by alleging that there were misrepresentations or breaches of the representations and warranties in the SPA. The Purchaser is simply re-litigating the matter decided by the arbitrator and advancing substantially the same arguments before me that failed to persuade the arbitrator. The arbitrator made specific factual findings that the allegations as to misrepresentation and breach of warranties could not be supported by the evidence. These factual findings are entitled to deference.

[35] There is nothing in the Award that suggests the arbitrator interpreted the factual matrix in isolation of the terms of the SPA. Quite the contrary, the arbitrator appreciated the contractual principles of interpretation and the modern-day approach established in ***Sattva*** and his analysis was consistently grounded in the SPA.

CONCLUSION

[36] In my opinion the Purchaser has failed to meet his onus under the ***Act*** to satisfy me that he has raised a question of law or arguable merit. At best, the arguments advanced by the Plaintiff constitute questions of mixed fact and law that do not meet the legal test for leave under the ***Act***. I am therefore dismissing the application for leave to appeal the Award.

[37] The parties can speak to costs if they cannot agree, provided they file written briefs in advance.

_____J.