COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Green Light Solutions Corp. v. Kern BSG Management Ltd.,* 2025 BCCA 166

Date: 20250508
Docket: CA50380

Between:

Green Light Solutions Corp.

Appellant
(Respondent)

And

Kern BSG Management Ltd.

Respondent
(Claimant)

Before: The Honourable Justice Edelmann
(In Chambers)

On appeal from: An award of an Arbitrator, dated December 17, 2024 (*Kern BSG Management Ltd. v. Green Light Solutions Corp.*).

Oral Reasons for Judgment

Counsel for the Appellant:	M. Charles
Counsel for the Respondent:	M.G. Swanson S. Peloquin
Place and Date of Hearing:	Vancouver, British Columbia May 5, 2025
Place and Date of Judgment:	Vancouver, British Columbia May 8, 2025

Summary:

The applicant seeks leave to appeal from a costs award in an arbitration order, and a stay of that costs award. The parties entered a contract for a construction project. The respondent invoiced the applicant for work it completed. The applicant took the position that it was entitled to hold back the amount owed indefinitely due to ongoing deficiencies. The arbitrator found that while the amount payable requited assessment of deficiencies that ought to already have been done and contractual interest would be due from that point forward. The arbitrator found that neither party was substantially successful and ordered that the applicant was entitled to 40 percent of its costs while the respondent was entitled to 60 percent of its costs.

Held: Applications dismissed. Arbitration awards can only be appealed directly to this Court on questions of law, which the applicant has failed to establish. The arbitrator applied the correct test for determining substantial success; the applicant disagrees with how he applied the test. The arbitrator did not commit an error of law in exercising his discretion not to follow the ordinary rule that if neither party is substantially successful each will bear their own costs. The applicant alleges breaches of procedural fairness which under s. 58(1)(h) of the Arbitration Act are properly brought to the BC Supreme Court. Finally, the arbitrator did not improperly consider the applicant's pre-litigation conduct when allocating costs.

[1] **EDELMANN J.A.**: The applicant, Green Light Solutions Corp. (“GLS”), seeks leave to appeal from a costs order in an arbitration award. GLS also seeks a stay of the costs award.

[2] GLS and the respondent, Kern BSG Management Ltd. (“Kern”), were parties to a contract for a construction project in Nelson, BC. GLS was the project owner and Kern was the contractor. Kern had invoiced some $1,630,794.73 plus interest for work it had completed. As there were ongoing deficiencies, GLS took the position the invoices were not payable. Pursuant to the terms of the contract, the scope of deficiencies was to be assessed by the consultant PBX Engineering Ltd. The parties unsuccessfully attempted to mediate the dispute and Kern initiated arbitration proceedings on February 7, 2023.

[3] The arbitrator issued his decision in December 2024. GLS conceded in closing argument that $1,392,736.38 was properly invoiced and outstanding. The arbitrator accepted that at least that amount, pending any adjustment by the consultant for deficiencies, was owing to Kern. The parties had agreed that the issue of the value of the deficiencies was not to be determined in the arbitration, and therefore the amount payable to Kern had to be determined after assessment by the consultant. The arbitrator concluded that this ought to have been done by January 15, 2023 and that GLS should have paid Kern the certified monies owing at that time and could not withhold them indefinitely. He therefore awarded interest pursuant to the contract on the monies owing from that date.

Legal Framework

[4] Section 59 of the *Arbitration Act*, S.B.C. 2020, c. 2 [*Arbitration Act*] sets out the grounds on which an arbitral award can be appealed. Under s. 59(3), a party to an arbitration may seek leave to appeal to this Court on any question of law arising out of an arbitral award unless the arbitration agreement provides otherwise.

[5] As this Court noted in *Grewal v. Mann*, 2022 BCCA 30, there is a narrow jurisdiction when a court considers an appeal from a commercial arbitration (at

para. 31). The Court went on to summarize the approach to be taken to granting leave on a question of law in the following terms:

> [32] Leave should be granted only where questions of law can be clearly perceived and identified: *Sattva* at para. 54; *Teal Cedar* at para. 45; *Elk Valley* at para. 17. This analytical framework, furthermore, requires the judge to focus on whether the applicant has demonstrated an extricable question of law in the arbitrator's analysis; they are not to consider the substantive issue of the correctness of the arbitrator's decision: *Richmont Mines Inc. v. Teck Resources Limited*, 2018 BCCA 452 at para. 61.

[6] If an extricable question of law has been identified, s. 59(4) sets out the following considerations in exercising discretion to grant leave to appeal from an arbitrator's decision:

> (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.

Alleged Errors of Law

[7] Although not clearly articulated as propositions of law, the applicant submits that there were five errors that ought to be characterized as errors of law.

Failing to Apply the Correct Test for Substantial Success

[8] The arbitrator found that neither party was substantially successful. The applicant accepts that the arbitrator correctly instructed himself on the usual rule that costs go to the party who has achieved substantial success (citing *Fotheringham v. Fotheringham*, 2001 BCSC 1321 [*Fotheringham*], leave to appeal denied 2002 BCCA 454). The applicant argues that the arbitrator erred in the manner that he weighed success, in particular in the manner he characterized conclusions about the amounts outstanding under the invoices. The applicant argues that if the arbitrator had properly assessed the issues in dispute—that is, what amount was outstanding under the invoices and whether there were deficiencies entitling GLS to withhold payment—he would have concluded that GLS was the successful party on the only

two issues he decided: the existence of deficiencies and the entitlement to hold back funds.

[9] I am not satisfied the applicant has articulated an extricable error of law. The arbitrator explicitly cited *Fotheringham*, noted its four-part approach, acknowledged his discretion, and concluded that neither party was substantially successful. The applicant takes issue with the application of the law to the facts, not with the law that was applied.

Failing to Apply the Relevant Test: Where Neither Party Was Successful, Each Should Bear Their Own Costs

[10] The applicant argues that once the arbitrator concluded that "neither Kern nor GLS have been substantially successful" he erred in awarding Kern 60 percent of its costs and GLS 40 percent of its costs. Specifically, the arbitrator failed to apply the usual rule that, in such circumstances, each party should bear their own costs. I fail to see how this raises a question of law. The arbitrator was undoubtedly aware of the common practice that each party bear their own costs when neither is substantially successful. He chose to deviate in the circumstances of the case before him, in an exercise of discretion. Absent an error in principle, that exercise of discretion does not raise a question of law on which this Court could intervene.

Failing to Consider a Relevant Principle: Offers to Settle

[11] The applicant alleges that, because the arbitrator did not invite submissions on costs, he was unaware of any offers, and therefore erred in law by failing to consider offers to settle. Under the *Arbitration Act* enacted in 2020, the legislature has set out grounds upon which an award can be set aside in the BC Supreme Court in s. 58, while under s. 59 only appeals on questions of law can be appealed directly to this Court.

[12] Section 58(1)(h) specifically addresses circumstances such as those alleged here where "the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it." In my view, to seek to recharacterize the types of breaches of procedural fairness described in s. 58(1)(h) as questions of law

under s. 59 would not be consistent with the legislative intent in enacting that section. I am not satisfied that the alleged breach of procedural fairness raises a question of law for the purposes of s. 59. Even if it did raise a question of law, I would decline to grant leave, given the existence of s. 58(1)(h).

Applying Wrong Procedural Rules

[13] For the same reasons, I do not find the alleged misapplication of the procedural rules to raise a question of law for the purposes of s. 59 of the *Arbitration Act* and, even if it did, I would decline to grant leave in the circumstances, given the structure of the new *Arbitration Act*.

Consideration of Pre-Litigation Conduct

[14] Finally, the applicant argues that the arbitrator erred in considering pre-litigation conduct in the awarding of costs. The impugned paragraph is the following:

> I find that neither Kern nor GLS have been substantially successful in this proceeding. Although I accept that flooring deficiencies exist in the Project which entitle GLS to withhold funds, GLS and the Consultant's deviations from the Contract requirements have necessitated these proceedings.

[15] The applicant suggests the passage indicates the arbitrator made the decision to allocate costs on the basis that their conduct necessitated the proceedings, and erred in principle in doing so.

[16] I do not read the passage in question in the manner suggested by the applicant. The reference to the deviations from the contract is framed in the context of an assessment of substantial success. The issue of deviation from the timeliness requirements in the contract were a central issue in the arbitration, as GLS would appear to have taken the position that it could withhold the funds owing to Kern indefinitely. The arbitrator found against them on that issue.

[17] Even on the most generous reading of the passage, I do not conclude that the applicant has raised a question of law warranting the granting of leave. The applicant does not suggest the issue has broader significance to the public or some

subset of the public, and I am not satisfied its impact on the award may constitute a miscarriage of justice warranting the intervention of this Court.

Order

[18] I therefore dismiss leave to appeal with costs to the respondent.

"The Honourable Justice Edelmann"