

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Bear Mountain Resort & Spa Ltd. v.
Ecoasis Resort and Golf LLP,*
2025 BCCA 368

Date: 20251028
Docket: CA50676

Between:

**Bear Mountain Resort & Spa Ltd., BM Management
Holdings Ltd., and BM Resort Assets Ltd.**

Applicants/Appellants

And

Ecoasis Resort and Golf LLP

Respondent

File Sealed in Part

Before: The Honourable Mr. Justice Harris
The Honourable Madam Justice DeWitt-Van Oosten
The Honourable Justice Edelmann

On an application to vary: An order of the Court of Appeal for British Columbia,
dated June 4, 2025 (*Bear Mountain Resort & Spa Ltd. v. Ecoasis Resort
and Golf LLP*, Vancouver Docket CA50676).

Counsel for the Applicants/Appellants:

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Place and Date of Hearing:

Vancouver, British Columbia
September 18, 2025

Place and Date of Judgment:

Vancouver, British Columbia
October 28, 2025

Written Reasons by:

The Honourable Madam Justice DeWitt-Van Oosten

Concurred in by:

The Honourable Mr. Justice Harris
The Honourable Justice Edelmann

Summary:

This is an application for review of a chambers’ decision denying leave to appeal a commercial arbitration award for damages. The chambers judge found that the application for leave failed to demonstrate extricable questions of law. HELD: The application for review is dismissed. Whether an extricable question of law has been shown to arise is assessed applying a correctness standard. In this case, the chambers judge correctly found that at best, the application for leave to appeal raised questions of mixed fact and law. In those circumstances, she was right to deny leave.

Reasons for Judgment of the Honourable Madam Justice DeWitt-Van Oosten:

Introduction

[1] Commercial arbitral awards can be appealed to this Court with leave: s. 59(3) of the *Arbitration Act*, S.B.C. 2020, c. 2. However, the applicant must show that extricable questions of law arise from the award, the arbitration agreement does not prohibit an appeal, and at least one of three sets of circumstances identified in s. 59(4) of the *Arbitration Act* exists. A justice retains residual discretion to deny leave even where the statutory criteria are met: *Urban Communications Inc. v. BCNET Networking Society*, 2015 BCCA 297 at para. 64, aff’d 2016 SCC 45.

[2] In this case, Justice Winteringham denied leave to appeal an arbitral award for damages in a commercial dispute. The appellants, Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd., and BM Resort Assets Ltd. (collectively, “Bear Mountain”) seek to vary her order under s. 29(1) of the *Court of Appeal Act*, S.B.C. 2021, c. 6. They say extricable questions of law arise from the award and leave should have been granted.

Background

[3] The parties have been in a commercial dispute since April 2020. The dispute led the respondent, Ecoasis Resort and Golf LLP (“Ecoasis”), to file a civil action in the British Columbia Supreme Court. The parties later agreed to resolve the matter through arbitration.

[4] The appointed arbitrator released a liability award in February 2021, finding various breaches of a contractual operations agreement between the parties. Bear Mountain sought leave to appeal the liability award. Leave was denied, with reasons indexed at 2021 BCCA 285 (Chambers). Bear Mountain filed but did not pursue a review of that denial under s. 29(1) of the *Court of Appeal Act*.

[5] The arbitrator then heard claims for damages based on the proved breaches of contract. On April 15, 2025, he awarded Ecoasis a cumulative \$2,058,017.63 in damages.

[6] In May 2025, Bear Mountain sought leave to appeal the damages award. It said the award raised eight extricable questions of law. Bear Mountain argued that the arbitrator: (1) erroneously awarded damages against an entity that was not a party to the operations agreement; (2) applied an incorrect legal principle when assessing Ecoasis' mitigation efforts; (3) assessed damages and applied contingency reductions based on speculation only; (4) made a liability finding against Bear Mountain contrary to conclusions reached in the liability award; (5) improperly assessed and awarded damages for this additional liability; (6) misapprehended the evidence about which entities were parties to the contract; (7) misapprehended the evidence of an expert witness about whether rental payments should have been factored into that witness's calculations; and (8) misapprehended the content and impact of certain receiver reports.

[7] On June 4, 2025, Justice Winteringham denied leave, concluding that the proposed appeal did not raise extricable questions of law.

Chambers Judgment

[8] Bear Mountain does not suggest Justice Winteringham misdirected herself on the legal test for leave. Rather, the request to vary her order challenges her application of that test to the damages award. Bear Mountain says there are obvious extricable questions of law that arise from the award, the denial of leave should be set aside, and the appeal should proceed.

[9] Justice Winteringham addressed each of the alleged questions of law identified for her consideration.

[10] First, she found that Bear Mountain cannot reasonably complain about a particular entity having been held liable for contractual breaches even though it was not named in the operations agreement because, in the liability arbitration, Bear Mountain agreed this entity would be bound by the result: at paras. 22–23.

[11] Second, specific to mitigation, Justice Winteringham concluded that the arbitrator’s impugned finding was “effectively a conclusion that [an] alleged failure to mitigate did not constitute a reasonable step in the circumstances of [the] case, which is a question of mixed fact and law”, not law alone: at para. 30.

[12] The third alleged question of law arose from the arbitrator’s contingency reductions. Bear Mountain said the reductions were applied to damages calculations that were speculative and not grounded in evidence. As such, they were not “anchored” in any way. Justice Winteringham disagreed. As I interpret her reasons, she found that both the quantification of damages and the contingency reductions reflected “findings regarding the frailties in the evidence”. The arbitrator’s determinations were grounded in “evidentiary” conclusions and the award was tethered to the record: at paras. 35–36.

[13] Justice Winteringham addressed the fourth and fifth alleged questions of law together. From her perspective, Bear Mountain’s submission that the arbitrator made a liability finding contrary to conclusions reached in the liability award misinterpreted the arbitrator’s reasons. He did not find Bear Mountain liable for a failure to transfer the whole or part of a liquor licence to Ecoasis. Nor did he award damages on that basis. Instead, damages for the inability to sell liquor were awarded to Ecoasis for loss of opportunity, and importantly, grounded in a contractual breach that was established in the liability arbitration: at para. 38.

[14] Justice Winteringham also addressed the six, seventh and eighth alleged questions of law together. Bear Mountain said the arbitrator misapprehended the evidence on several issues. Justice Winteringham disagreed. She reviewed each of the purported misapprehensions and concluded that: Bear Mountain could not complain about liability against a particular entity given the position it took in the liability arbitration; it had not shown an actual misapprehension of the record; and the misapprehension arguments challenged findings of fact, not conclusions of law: at paras. 39–43.

[15] Justice Winteringham denied leave to appeal, saying:

[44] This was a dispute about the arbitrator’s award of damages under various claims advanced by Ecoasis. The quantum portion of the arbitration lasted some 15 days. The arbitrator assessed the evidence and set out the correct legal principles applicable to the issues before him. As I consider each of the issues identified by Bear Mountain, I am of the view that the gist of Bear Mountain’s submission is that the application of the legal test should have resulted in a different outcome. It is clear from the Damages Award that the arbitrator considered the relevant provisions of the Operations Agreement and the evidence presented at the hearing. He discounted the aspects of the expert’s testimony that he found to be unreliable. The arbitrator set out the relevant legal principles governing contractual interpretation and considered thoroughly the various legal issues advanced by Bear Mountain. In my view, the arbitrator’s analysis does not give rise to any extricable question of law which can be clearly identified. It is apparent that Bear Mountain takes issue with the arbitrator’s weighing of the evidence in the context of the factual matrix presented.

[Emphasis added.]

[16] The conclusion about there being no extricable question of law put an end to the application for leave. Consequently, it was not necessary for Justice Winteringham to address s. 59(4) of the *Arbitration Act* or the residual discretion to deny leave even where the statutory criteria have been met.

Discussion

Standard of review

[17] The standard of review that applies to a denial of leave is well-established. As succinctly stated in *Seylynn (North Shore) Phase II GP Ltd. v. Seylynn (North Shore) Properties Phase II Limited Partnership*, 2025 BCCA 330:

[40] The standard of review on an application under s. 29 of the *Court of Appeal Act* is highly deferential. The review is not to be treated as a re-hearing. For a review division to interfere with the order of a justice in chambers, an applicant must demonstrate that the justice was wrong in law, wrong in principle, or misconceived the facts: *Seattle Environmental Consulting Ltd. v. Workers' Compensation Board of British Columbia*, 2017 BCCA 386 at paras. 5–7.

[41] The issue of whether a leave application under the *Arbitration Act* raises an extricable question of law is, itself, a question on which no deference is owed. Where there is an extricable question of law, deference is owed to a justice's exercise of discretion under s. 59(4) of the *Arbitration Act* in deciding whether to grant leave: *Greata Ranch Holding Corp. v. Concord Okanagan Developments Ltd.*, 2019 BCCA 304 at paras. 45–50.

[Emphasis added.]

Analysis

[18] Bear Mountain says intervention with Justice Winteringham's order is justified because she incorrectly held there are no extricable questions of law. In support of this position, it no longer asserts that the damages award gives rise to eight extricable questions of law. Instead, it says the arbitrator committed legal error when he:

- assessed damages and applied contingency reductions based on speculation only;
- made a new and contradictory finding of liability; and
- misapprehended the evidence.

[19] I will address each of these issues in turn. In my view, Bear Mountain has not shown that Justice Winteringham erred.

The damages assessment was grounded in the evidence

[20] In support of its claims, Ecoasis supplied the arbitrator with calculation summaries of its claimed losses. These summaries were labelled "Golf Summary Calculations 2020-2029" and "Tennis Summary Calculations 2020-2029", respectively. Bear Mountain submits that in awarding damages, the arbitrator worked from these summaries without asking or explaining whether the asserted

losses had been proved with evidence. Instead of making relevant evidentiary findings and particularizing the bases for those findings, he simply stated in conclusory terms that Ecoasis “[had] not proven the full losses claimed” (at para. 244), and then arbitrarily applied contingency reductions.

[21] I agree with Justice Winteringham that this contention is not borne out on a full and fair review of the arbitrator’s reasons for the damages award.

[22] The arbitrator began his damages assessment by instructing himself on the governing legal principles. He understood Ecoasis was obliged to prove all its claimed losses on a balance of probabilities and that if a particular claim, including any claim for loss of future profits, was grounded in “pure speculation”, it had to be denied. At the same time, the arbitrator recognized that “[q]uantifying a loss of future profits may ... be a matter of estimation” and consequently, “[m]athematical certainty may not be possible”. Instead, “quantum must be determined on the best evidence available”, recognizing that where a party “would have had a reasonable chance to earn a profit but for the wrongdoing of the other party”, it is generally entitled to damages: at para. 10. The arbitrator understood that uncertainty in quantifying loss of profits “may be addressed by the application of a discount factor”: at para. 11. In support of the latter principle, he cited *Houweling Nurseries Ltd. v. Fisons Western Corporation*, [1988] B.C.J. No. 306 at 8–9, 1988 CanLII 186 (C.A.), in which this Court held that:

... Where it is shown with some degree of certainty that a specific contract was lost as a result of the breach, with a consequent loss of profit, that sum should be awarded. However, damages may also be awarded for loss of more conjectural profits, where the evidence demonstrates the possibility that contracts have been lost because of the breach, and also establishes that it is probable that some of these possible contracts would have materialized, had the breach not occurred.

The matter may be put another way. Even though the plaintiff may not be able to prove with certainty that it would have obtained specific contracts but for the breach, it may be able to establish that the defendant’s breach of contract deprived it of the opportunity to obtain such business. The plaintiff is entitled to compensation for the loss of that opportunity. But it would be wrong to assess the damages for that lost opportunity as though it were a certainty.

See also *Seaboard Life Insurance Co. v. Bank of Montreal*, 2002 BCCA 192 at para. 88.

[23] After reviewing these principles, the arbitrator proceeded to assess damages. There were seven areas of loss requiring quantification. For each of them, the arbitrator identified the applicable provision(s) of the operations agreement, recited the result of the liability award, set out the parties' positions on damages and the evidence they pointed to in support of their positions, and provided a "Ruling on Damages". In these rulings, the arbitrator discussed relevant evidence and depending on the nature of that evidence, explained what he accepted, what he rejected, and whether the entirety of the claimed losses had been proved.

[24] For example, specific to "food and beverage losses" claimed by Ecoasis, the arbitrator accepted the "calculations in the Expert Report of Mr. [Ralph] Miller" (totalling \$276,744) but discounted that amount by 30% to account for the "risk that [the] profits claimed may not have been realized": at paras. 72, 74. Mr. Miller's calculations were based, at least in part, on past income statements produced by Ecoasis. The arbitrator's contingency reduction acknowledged that it would be "impossible to calculate the exact quantity of liquor sales if business had continued as usual with the cooperation and goodwill" of Bear Mountain: at para. 73.

[25] As another example, the arbitrator assessed damages for "disruption" to Ecoasis' business operations resulting from Bear Mountain's breaches. This was the largest claim advanced by Ecoasis, amounting to a cumulative \$13,870,606. The arbitrator noted that the claim was based on an expert report authored by Jeff Calderwood, as well as witness statements. At the arbitration hearing, various additional witnesses also "touched on issues related to the claim": at paras. 197–198.

[26] The arbitrator found as a fact that Bear Mountain's "breaches of contract caused disruptions to operations in the Ecoasis golf and tennis businesses". The:

[230] ... failure to provide proper accounting services, food and beverage service, and employee benefits and the improper actions to evict Ecoasis from the premises over the Easter holiday in the year 2020 had a negative impact on the reputation of Ecoasis and the level of satisfaction of its members. Amenities were limited and there was an effective loss of a clubhouse.

[27] In assessing damages for these breaches, the arbitrator reviewed evidence adduced by both parties and considered its weight, identifying various frailties as he went along, including “unproven assumptions”, “optimistic” and “speculative” projections, and “expressions of opinion” only: at para. 235. In assessing the evidence, he considered factors other than the “misconduct of [Bear Mountain]” that may have contributed to the claimed losses, such as “pandemic related issues ... or market conditions”: at para. 234. He reminded himself of the burden to prove losses on a balance of probabilities: at para. 233. Ultimately, because of “deficiencies in the evidence”, the arbitrator concluded that Ecoasis had not “proven the full losses claimed” specific to its golf business. Nor did the “evidence” support a “finding that the losses would have extended out to the year 2029”. Consequently, he awarded Ecoasis only 5% of its golf claim: at para. 244, emphasis added. Quantification of the tennis-related claims was also found to suffer from some “unproven assumptions” and “speculation”. Because of the “insufficient evidence, uncertainty and risk factors” relevant to disruption of the tennis business, the arbitrator applied a contingency reduction of 85% to that part of Ecoasis’ claim: at para. 246, emphasis added.

[28] In my view, the arbitrator’s reasons, considered as a whole, reveal that in assessing damages, he worked from the evidentiary record in combination with the “Summary Calculations” supplied by Ecoasis, not exclusively from the latter. He accepted some, but not all the evidence adduced by Ecoasis. He asked himself whether the losses set out in the “Summary Calculations” had been proved on a balance of probabilities. He did not refer to every piece of evidence he considered or explain in detail the grounding for each identified frailty, uncertainty, or risk factor; however, he was not obliged to do so.

[29] Bear Mountain has not persuaded me that the arbitrator’s assessment of damages was untethered to the evidentiary record or unprincipled. This case is not the same as *Century 21 Canada Limited Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196, which Bear Mountain cites as a supporting authority. In *Century 21*, the judge found that the party claiming losses for breach of contract did not “lead specific evidence” in support of its damages claim. The judge was provided with generalized descriptions of the type of loss said to have been sustained, but those losses were not “valued” in any way: at paras. 392–394. Here, Ecoasis tendered an evidentiary foundation.

[30] Nor does this case suffer from the same problem noted to exist in *Rab v. Prescott*, 2021 BCCA 345 at para. 75, another authority cited by Bear Mountain. Here, an “evidentiary connection” between the record and the conclusions reached by the arbitrator is apparent from the face of the reasons.

[31] I agree with Justice Winteringham—this first issue does not give rise to an extricable question of law. At best, Bear Mountain’s articulated concerns about the arbitrator’s approach to assessing damages and contingency reductions raise matters of mixed fact and law.

There was no new liability finding

[32] The liability arbitration determined that Bear Mountain did not have a contractual obligation under the operations agreement to transfer its liquor licence (or part of it) to Ecoasis. Bear Mountain argued before Justice Winteringham that despite this finding, the arbitrator awarded damages to Ecoasis on that basis and contradicted the outcome of the liability arbitration. Bear Mountain said the arbitrator also improperly found that it had “blocked” Ecoasis from obtaining a license of its own and made a new liability finding: at para. 65.

[33] I agree with Justice Winteringham that in advancing this issue, Bear Mountain has misinterpreted the arbitrator’s findings.

[34] At the damages arbitration, Ecoasis acknowledged that it could not seek damages for Bear Mountain not transferring its liquor licence to Ecoasis. However, it said its damages calculation for food and beverage losses could include “the failure of [Bear Mountain] to provide food and beverage service assuming a liquor licence”: at para. 65.

[35] The arbitrator found that although Bear Mountain could not be held responsible for “all of the losses resulting from the delay in [Ecoasis] obtaining a liquor licence”, it was “liable for the loss of opportunity for Ecoasis to earn profits from food and beverage sales caused by the breach of the Operations Agreement as found in the Partial Final Award”. The loss of opportunity was described as including “profits from liquor sales that Ecoasis might have earned but for the breakdown in business operations caused by [Bear Mountain]”: at para. 73, emphasis added.

[36] Section 4.2 of the operations agreement obliged Bear Mountain to provide food and beverage services to Ecoasis. It was found to have breached that obligation. In setting out the factual background in the liability award, the arbitrator noted when describing the breakdown of the parties’ relationship that Bear Mountain twice terminated food and beverage services because of unpaid invoices. However, Ecoasis was found to have conducted itself reasonably in refusing to pay those invoices as Bear Mountain failed to properly back them up. In submissions at the damages arbitration, the \$276,774 claimed by Ecoasis for loss of food and beverage services was said to arise from the “wrongful suspension”: at para. 58.

[37] As I read the arbitrator’s reasons for the damages award, he did not ground his assessment of damages for loss of food and beverages profits in a failure to transfer the liquor licence to Ecoasis or in attempts to block Ecoasis from obtaining a new licence. Instead, he accepted the evidence adduced in support of a \$276,774 claim attributed to the “wrongful suspension” (termination) of food and beverage services, subject to a contingency reduction for uncertainty and risk. That

misconduct occurred during the “breakdown in business operations” and was found to lay at the feet of Bear Mountain: at para. 73.

[38] Like Justice Winteringham, I see no extricable question of law under this proposed ground of appeal. On the face of the arbitrator’s reasons, the damages award for loss of food and beverage services is consistent with the earlier liability finding.

There was no clear misapprehension of the record

[39] In British Columbia, an arbitrator’s misapprehension of evidence is recognized as an error of law:

[76] ... Although an arbitrator is uniquely positioned to make credibility assessments and to address the matters in s. 28(1), where those assessments or determinations are based on a misapprehension of evidence and played a critical role in reaching a decision, the arbitrator will have committed an error of law that arises from the award and that can be appealed.

[*Escape 101 Ventures Inc. v. March of Dimes Canada*, 2022 BCCA 294, leave to appeal to SCC ref’d, 40439 (13 April 2023), emphasis added.]

[40] Bear Mountain says the arbitrator misapprehended the evidence in two material ways and it justifies leave to appeal. First, he accepted the calculations for food and beverage losses contained in Mr. Miller’s report, even though in cross-examination Mr. Miller testified that if Ecoasis was obliged to pay rent for a members’ lounge and other areas during the period in question, “that would be an expense that should have been factored in”. In other words, the arbitrator accepted calculations that were misleading. (I note that Mr. Miller was not asked by Bear Mountain to quantify the difference rental payments may have made to the overall total.) Second, Bear Mountain says the arbitrator stated there was nothing in the receiver reports adduced for purposes of the damages arbitration that contradicted Mr. Miller’s view (and underlying assumption) that hiring a full-time food and beverages manager was not necessary for Ecoasis. Bear Mountain says this was incorrect. The receiver reports did contradict Mr. Miller’s report and the cost of any such manager would have reduced Ecoasis’ claimed losses.

[41] In denying leave to appeal, Justice Winteringham was not persuaded that Bear Mountain’s concern about unaccounted-for rental payments “[rose] to the level of a plain and obvious misapprehension of the evidence”: at para. 41. In any event, the arbitrator discounted Ecoasis’ food and beverage claim by 30%, acknowledging a risk that the claimed profits may not have been realized. In that context, if there was a misapprehension, it was effectively accounted for by the contingency reduction. Specific to the receiver reports, Justice Winteringham saw no misapprehension: at para. 43. From her perspective, the receiver reports recommended that Ecoasis hire a food and beverages manager starting in 2025. On the face of it, this recommendation did not contradict Mr. Miller’s evidence, as the \$276,774 claimed by Ecoasis for loss of food and beverage services focused on the period of February 2020 to April 2022.

[42] I have reviewed the same material as Justice Winteringham and agree with her conclusions. It is not clear the arbitrator misapprehended the evidence surrounding rental payments (the point about rental payments was raised in submissions before him), and even if such was the case, Bear Mountain has not demonstrated that any such misapprehension was material given that the arbitrator ultimately reduced the relevant claimed losses by 30%. Like Justice Winteringham, I also see no contradiction between Mr. Miller’s evidence that it was not necessary to account for the costs of a food and beverages manager in his calculation of damages for 2020–2022 and the receiver’s recommendation that a manager be hired in 2025. It was open to the arbitrator to interpret the receiver’s recommendation as prospective, rather than an analysis of the necessity of a full-time food and beverage manager during the period in question.

Conclusion

[43] In the interests of efficiency and finality, leave to appeal from a commercial arbitral award should only be granted where extricable questions of law are clearly discernable: *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32. As explained in *Teal Cedar*:

[45] Courts should ... exercise caution in identifying extricable questions of law because mixed questions, by definition, involve aspects of law. 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 ... 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 ...), and a party alleging that a legal test, which was unaltered, should have, when applied, resulted in a different outcome (a mixed question).

[Internal references omitted.]

[44] In the circumstances of this case, I am satisfied the questions of law that Bear Mountain says arise from the damages award are not clearly discernable. Justice Winteringham correctly found that such is the case. Consequently, it is not necessary to consider s. 59(4) of the *Arbitration Act*, any other issues relevant to the granting of leave to appeal, or Bear Mountain’s application for a stay of the damages award pending appeal. The failure to demonstrate extricable questions of law is dispositive of the application for review.

Disposition

[45] For these reasons, I would dismiss the applications for review under s. 29(1) of the *Court of Appeal Act* and a stay of the damages award, with ordinary costs for the appeal to Ecoasis to be assessed in accordance with Scale A.

[46] Ecoasis sought special costs for the review on the basis that in its written material, Bear Mountain repeatedly accused Ecoasis of “misleading” Justice Winteringham on the facts of the case. Before us, Bear Mountain recharacterized its submissions as Ecoasis having “misstated” the facts.

[47] The accusations of “misleading” were most unfortunate given the negative connotations of that term. Counsel should not use this type of language unless doing so is objectively necessary to advance a particular ground of appeal, and critically, the allegation of “misleading” is well-supported by the record. Such was not the case here. However, in the context of this case and given the reframing of the allegation

in oral argument, I do not consider Bear Mountain's conduct to be so reprehensible that it justifies a special costs award: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17, 1994 CanLII 2570 (C.A.).

"The Honourable Madam Justice DeWitt-Van Oosten"

I AGREE:

"The Honourable Mr. Justice Harris"

I AGREE:

"The Honourable Justice Edelman"