

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Puppet Killer Productions Inc. v. IndustryWorks Studios Inc.*,
2024 BCCA 135

Date: 20240409
Docket: CA49111

Between:

Puppet Killer Productions Inc.

Appellant
(Claimant)

And

IndustryWorks Studios Inc.

Respondent
(Respondent)

Before: The Honourable Madam Justice Stromberg-Stein
The Honourable Justice Skolrood
The Honourable Justice Winteringham

On an application to vary: An Order of the Court of Appeal for British Columbia,
dated September 13, 2023 (*Puppet Killer Productions Inc. v. IndustryWorks Studios Inc.*, Vancouver Docket CA49111).

Oral Reasons for Judgment

Counsel for the Appellant: R.S. Fleming

Counsel for the Respondent: W.J.S. Scrooby

Place and Date of Hearing: Vancouver, British Columbia
April 9, 2024

Place and Date of Judgment: Vancouver, British Columbia
April 9, 2024

Summary:

The applicant, Puppet Killer Productions Inc., applies pursuant to s. 29 of the Court of Appeal Act, S.B.C. 2021, c. 6, to vary the order of a single justice of this Court sitting in chambers. The chambers judge granted the applicant leave to appeal an arbitrator’s award of damages and ordinary costs, but denied leave to appeal the arbitrator’s decision on special costs. Held: Application dismissed. The arbitrator’s decision to decline to award special costs to the applicant did not give rise to a question of law that is appealable under s. 59(2) of the Arbitration Act, S.B.C. 2020, c. 2, and even if it did, the chambers judge correctly determined that there was insufficient merit to the proposed appeal.

STROMBERG-STEIN J.A.:

Introduction

[1] The applicant, Puppet Killer Productions Inc. (“Puppet Killer”), applies pursuant to s. 29 of the *Court of Appeal Act*, S.B.C. 2021, c. 6 to vary the order of a single justice of this Court sitting in chambers.

[2] The chambers judge granted Puppet Killer leave to appeal an arbitrator’s award of damages and ordinary costs, but denied leave to appeal the arbitrator’s decision on special costs. Puppet Killer seeks to vary the order of the chambers judge to also grant leave to appeal the arbitrator’s decision on special costs.

Background

[3] The background to the parties’ dispute and the substance of the arbitrator’s award were discussed by the chambers judge in her oral reasons for judgment: *Puppet Killer Productions Inc. v. IndustryWorks Studios Inc.* (13 September 2023), Vancouver CA49111 (B.C.C.A. Chambers). As it is not asserted she misapprehended the relevant facts or the arbitrator’s reasons, I will rely on the chambers judge’s discussion of the background and arbitration award.

[4] The issue raised on this application concerns the arbitrator’s decision not to award special costs to Puppet Killer. In its written submissions before the arbitrator, Puppet Killer set out its position on costs and requested that the arbitrator award special costs in light of the respondent’s conduct in the arbitration: at paras. 302–319.

[5] The arbitrator’s discussion of special costs is found at paras. 157–160 of his reasons:

157. The parties agreed at the outset of the Arbitration that any costs awarded shall be assessed in accordance with Scale B of the BC Supreme Court Rules Tariff, unless a party obtains an order assessing the costs in accordance with a different scale.

158. [Puppet Killer] submits that considering [IndustryWorks’] conduct in this arbitration, that an order for special or full indemnity costs is appropriate. [Puppet Killer] contend that [IndustryWorks] presented in this arbitration fabricated, self-service evidence in the form of its witness statements and Mr. Smiley’s expert report which states that delivery was not fulfilled with respect to certain items. Also, [Puppet Killer] contend that [IndustryWorks] pursued a meritless counterclaim that was unsupported by any evidence.

159. [IndustryWorks] also [] asked for costs on fully indemnity basis.

160. I decline to make an order for costs. As neither party was fully successful, each party will bear its own costs.

The Order Under Review

[6] Puppet Killer sought leave to appeal the arbitrator’s decision concerning special costs on the basis that the arbitrator erred in law by failing to apply the correct test, or by applying the wrong test.

[7] The chambers judge discussed s. 59 of the *Arbitration Act*, S.B.C. 2020, c. 2, which provides that a single justice of this Court may grant leave to appeal a question of law arising out of an arbitral award if the justice determines that the requirements of s. 59(4) are established:

...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.

[8] The chambers judge also discussed the “additional factors” which must be considered in an application for leave to appeal an arbitration award, as discussed in

A.L. Sims and Son Ltd. v. British Columbia (Transportation and Infrastructure), 2022 BCCA 440 (Chambers) [*Sims*]:

[83] Even where a s. 59 applicant identifies an extricable question of law, the Court must consider whether the proposed appeal has sufficient merit to warrant scrutiny by a division. The points raised must be arguable and there must be some prospect of success, bearing in mind the applicable standard of review: *Windshield Doctor Canada Ltd. v. Glass Masters Ltd.*, 2005 BCCA 220 (Chambers) at para. 11; *Teal Cedar Products* at para. 1...

[9] With respect to Puppet Killer’s proposed appeal concerning the issue of special costs, the chambers judge held that Puppet Killer had failed to meet the criteria for leave:

[48] I agree with IndustryWorks that Puppet Killer has failed to meet the criteria for leave with respect to special costs. The arbitrator made an obviously considered decision to decline to make a special costs award with the benefit of Puppet Killer’s submissions on special costs. Puppet Killer claims the arbitrator erred because he accepted factual findings which supported their claim for special costs, however, that argument lacks merit. The arbitrator is entitled to accept claims that Puppet Killer contends support the award without also making a special costs award.

The Application to Vary

[10] The sole issue is whether the chambers judge’s order should be varied to also grant leave to appeal the arbitrator’s decision on special costs.

[11] In Puppet Killer’s submission, the proposed appeal concerning the arbitrator’s decision on special costs satisfied the “importance of the result to the parties” element of the test for leave, and it was clear that the chambers judge would have exercised her discretion to grant leave had she not erroneously assessed the merits of the proposed appeal.

[12] With respect to the chambers judge’s assessment of the merits, Puppet Killer says that the judge erred by misunderstanding Puppet Killer’s proposed appeal as relying on an assertion that the arbitrator erred in the exercise of discretion. In Puppet Killer’s submission, this was an error because the basis of the proposed appeal was that the arbitrator did not apply the correct legal test.

Standard of Review

[13] The standard of review on an application under s. 29 of the *Court of Appeal Act* is highly deferential. It is not sufficient to challenge the justice’s exercise of discretion, and the review is not to be treated as a rehearing of the original application: *Pyper v. Schuetze*, 2023 BCCA 394 at para. 20.

[14] This Court will only interfere if the applicant demonstrates that the justice committed an error in principle, was “wrong in the legal sense”, or misconceived the facts: *Pyper* at para. 20, citing *Haldorson v. Coquitlam (City)*, 2000 BCCA 672 at paras. 6–7; *Cowichan Valley (Regional District) v. Cobble Hill Holdings Ltd.*, 2016 BCCA 215 at para. 23.

[15] However, the issue of whether a proposed appeal is arguable is not a matter of discretion: *Mead v. Mead*, 2021 BCCA 477 at para. 19. A decision of a justice in chambers refusing leave to appeal on the basis that the proposed appeal lacks merit is reviewable on a standard of correctness: *MacLachlan v. Nadeau*, 2017 BCCA 326 at para. 27.

[16] In this case, Puppet Killer submits that the merits were the distinguishing factor separating Puppet Killer’s proposed grounds for appeal concerning special costs from its other proposed grounds for which leave was granted. In other words, Puppet Killer submits that this application turns on the chambers judge’s assessment of the merits of the proposed grounds for appeal with respect to special costs, which is reviewable on a standard of correctness.

Analysis

[17] In my view, the chambers judge did not misapprehend Puppet Killer’s proposed grounds for appeal. At para. 28 of her reasons, the chambers judge set out Puppet Killer’s proposed grounds for appeal verbatim.

[18] The judge then addressed Puppet Killer’s first ground—that the arbitrator erred by failing to apply the test for special costs—by stating that the arbitrator “made an obviously considered decision to decline to make a special costs award

with the benefit of Puppet Killer’s submissions on special costs”. With respect to the second ground—that the arbitrator erred by applying the wrong test—the judge stated that it was open to the arbitrator “to accept claims that Puppet Killer contends support the award without also making a special costs award”.

[19] I see no error in these conclusions. The arbitrator had the benefit of the applicant’s extensive and comprehensive submissions concerning special costs, which included the applicable legal test. The respondent did not dispute the applicable test. Accordingly, as the applicant submits, the issue before the arbitrator was “whether the respondent engaged in reprehensible conduct”. Reading the arbitrator’s reasons holistically and in light of the record, it is clear that the arbitrator disagreed that the respondent’s impugned conduct was reprehensible within the meaning of that term in the relevant authorities, and in the result disagreed that an order for special costs was appropriate. I do not read the arbitrator’s reasons as declining to make an award of special costs on the basis that success was mixed.

[20] It is not apparent that the arbitrator failed to apply the legal test or applied an incorrect legal principle. In my view, the arbitrator’s decision to decline to order special costs was a discretionary decision, which does not raise a question of law appealable under s. 59(2) of the *Arbitration Act*.

[21] Even if the arbitrator’s decision on special costs could be said to be appealable, the merits of the proposed appeal must be assessed bearing in mind the applicable standard of review: *Sims* at para. 83. In the context of a discretionary costs order made in the absence of reasons, or with reasons that do not explain the foundation upon which the order was made, the test for setting aside the order asks whether “no judge acting judicially could, in the circumstances, have made the order”: *Gichuru v. Purewal*, 2021 BCCA 91 at para. 20, citing *E.T. v. K.H.T.* (1996), 27 B.C.L.R. (3d) 347 at para. 29 (C.A.). See also *White v. Nuraney*, 2000 BCCA 675 at paras. 9–11.

[22] In my view, there is no merit to the proposition that it was not open to the arbitrator, acting judicially in the circumstances, to decline to order special costs.

The power to award special costs is exercised sparingly, and is limited to exceptional circumstances: *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.); *Morriss v. British Columbia*, 2021 BCCA 451 at para. 22. The arbitrator clearly understood Puppet Killer’s basis for requesting special costs, but declined to order them. As the chambers judge correctly observed, it was open to the arbitrator to accept claims that Puppet Killer’s argument supported a special costs award, without making the award.

Disposition

[23] I am of the view that the arbitrator’s decision to decline to award special costs to Puppet Killer did not give rise to a question of law that is appealable under s. 59(2) of the *Arbitration Act*, and, even if it did, the chambers judge correctly determined that there was insufficient merit to the proposed appeal. I would dismiss the application to vary.

[24] The respondent is entitled to costs with respect to this application.

[25] **SKOLROOD J.A.:** I agree.

[26] **WINTERINGHAM J.A.:** I agree.

[27] **STROMBERG-STEIN J.A.:** The application to vary is dismissed.

“The Honourable Madam Justice Stromberg-Stein”