In the Court of Appeal of Alberta

Citation: Sivitilli v PesoRama Inc, 2024 ABCA 249

Date: 20240711
Docket: 2401-0034AC
Registry: Calgary

Between:

Edward Sivitilli

Respondent/Cross-Applicant

- and -

PesoRama Inc.

Applicant/Cross-Respondent

Reasons for Decision of
The Honourable Justice Joshua B. Hawkes

Applications for Permission to Appeal

Reasons for Decision of
The Honourable Justice Joshua Hawkes

[1] These reasons address both the applications of PesoRama Inc. for permission to appeal and the related application for permission to appeal a costs order by Mr. Sivitilli. Both sets of applications to this Court arise out of the same oral decision of Justice Neufeld of the Court of King's Bench on January 19, 2024. For the reasons that follow I order the following:

a) The application for late filing of the application for permission to appeal the decision of the chambers justice regarding s. 47(1)(b) of the *Arbitration Act*, RSA 2000, c A-43 by PesoRama is granted. However, leave to appeal that aspect of the decision is denied.

b) No permission to appeal is required for PesoRama to appeal the decision of the chambers justice regarding s. 6(c) of the *Arbitration Act.*

c) The application of Mr. Sivitilli for permission to appeal the costs portion of the decision of the chambers justice is denied.

The Background

[2] A brief chronology and some background is necessary to illustrate what Justice Neufeld referred to as "a procedural quagmire."

[3] Mr. Sivitilli was the CEO and President of PesoRama Inc. He was terminated from those positions by letter dated August 16, 2021. The employment agreement stated that disputes were to be resolved pursuant to the *Arbitration Act*. After initial discussions relating to arbitration stalled, he filed a statement of claim on November 2, 2021. It claimed oppressive and dishonest conduct by the company and other named individuals. Subsequently, and on short notice, he applied for an injunction to prevent PesoRama from holding an AGM at which they planned to seek approval for listing on the Toronto Stock Exchange. The injunction application was dismissed on December 1, 2021, with comments to the effect that it appeared to be an attempt to maximize leverage at a commercially sensitive time to force a settlement. The comments of that chambers justice were repeated in the decision of Justice Neufeld.

[4] PesoRama filed a statement of defence and counterclaim on December 13, 2021. Mr. Sivitilli then sought to discontinue the oppression claim and proceed with arbitration. He served a notice of arbitration on PesoRama on January 5, 2022. PesoRama responded with an application to enjoin the arbitration, dated January 20, 2022, contending that many of the same issues would be examined in the counterclaim to the prejudice of PesoRama. The validity of the employment agreement containing the arbitration clause was also disputed. PesoRama also contended that the

discontinuance of the oppression claim should only be allowed upon conditions and with costs payable by Mr. Sivitilli.

The Ruling in Question

[5] The decision of the chambers justice resolved the following issues as between these parties:

a) Mr. Sivitilli was granted leave to withdraw the oppression action against PesoRama without conditions. PesoRama was awarded costs in relation to their defence of that action.

b) The application by Mr. Sivitilli to appoint an arbitrator was granted. The opposing application by PesoRama to enjoin the proposed arbitration either on the basis that the contract that gave rise to it was not valid, or that it would result in a duplication of proceedings (either in the oppression action by Mr. Sivitilli, which he was granted leave to withdraw, or in the context of the separate counterclaim filed by PesoRama), was denied.

c) Apart from the costs relating to the defence of the oppression action, the trial judge concluded that each party was partially successful in the application. Further, he found that both parties had taken steps that led to the procedural complexity in this matter. As a result, he ordered that they bear their own costs.

The Applications for Permission to Appeal by PesoRama

[6] The procedural complexity of this matter continues. The substantive application by PesoRama is for permission to appeal that portion of the ruling of the chambers justice based on section 47(1)(b) of the *Arbitration Act* which provides for a declaration that an arbitration is invalid because the arbitration agreement is invalid or has ceased to exist. They also contend that the chambers justice erred in failing to stay the arbitration pursuant to section 6(c) of the *Arbitration Act* which permits court intervention to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement. Specifically, PesoRama relies on the decision of this Court in *New Era Nutrition Inc v Balance Bar Company,* 2004 ABCA 280 regarding the interpretation and application of that provision to stay an arbitration.

[7] They acknowledge that the first ground of appeal requires permission to appeal pursuant to section 48 of the *Arbitration Act* but contend that no permission is required for the second ground of appeal which they intend to pursue in any event.

[8] An application for late filing was also required because of an initial oversight regarding the need for permission to appeal as described above. The initial notice of appeal was filed within the time specified.

[9] Although Mr. Sivitilli opposed this aspect of the application, I have no difficulty in concluding that the test in *Jackson v Cooper,* 2023 ABCA 299 at para 7 has been satisfied. There

was a manifest intention to appeal within the time period, PesoRama has not taken any benefit of the decision under appeal in the interim, and Mr. Sivitilli will suffer no prejudice by reason of the extension of the time period for permission to appeal.

[10] The application for late filing is granted.

[11] The test for permission to appeal under section 48 of the *Arbitration Act* considers four factors:

> 1. Is the issue reasonably arguable?
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> 2. Is deciding the issue likely to affect the result of the litigation?
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> 3. Is the answer likely to be of interest to others or likely to influence later suits?
>
> 4. Is there any independent reason not to re-litigate the question or to limit the scope of the appeal?[1]

[12] The difficulty in this case is with respect to the third and fourth factors and arises from two separate considerations.

The Law is Settled

[13] The chambers justice concluded that the determination of whether the employment contract containing the arbitration clause was valid was a question of mixed fact and law in the circumstances of this case. That conclusion was amply supported by the record and the foundational cases articulating that distinction.

[14] Having reached that conclusion, the application of the "competence-competence" principle was also based on settled law from the Supreme Court of Canada and a litany of decisions from this and other appellate courts.[2]

[15] There is no controversy on either aspect of the conclusion of the chambers justice in this regard, and further consideration of these established principles would be of no benefit beyond the interests of the parties in this case. It would be an inefficient and unwise use of judicial resources.

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[1] As summarized in *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2023 ABCA 217 at para 11 (citations omitted).

[2] For example: *Dell Computer Corp. v Union des consommateurs*, 2007 SCC 34; *Peace River Hydro Partners v Petrowest Corp*, 2022 SCC 41***;*** *Dow Chemical Canada ULC v Nova Chemicals Corporation*, 2023 ABCA 343.

The Circumstances Are Unique

[16] The litigation context of this matter is both complex and unique. For example, Mr. Sivitilli claimed that he first attempted to pursue arbitration but could not because he was unable to secure an executed copy of the employment contract. Former corporate counsel would not release it due to a separate and unrelated lawsuit between the law firm and the corporation. Mr. Sivitilli maintained that the oppression action he subsequently filed contained valid claims that he wished to discontinue and only acknowledged that the related application for an injunction was ill advised. PesoRama contends that the employment agreement was not finally executed by the parties. Apart from the disputes about the validity of the contract, the counterclaim brought by the corporation alleges several breaches of Mr. Sivitilli's duties as a CEO and a Director.

[17] In a supplemental filing on June 19, 2024, PesoRama raised the issue of whether the decision by Mr. Sivitilli to litigate was a repudiation of his reliance on the arbitration clause in the impugned contract with reference to a recent decision of the Ontario Court of Appeal. The issue of repudiation was not raised in that fashion before the chambers justice. Rather, the issue was framed strictly in terms of the duplication of proceedings and unfair or unequal treatment of parties as described in the decision of this Court in *New Era.* As I have concluded that no leave is required for this ground of appeal, I will not comment further on this additional argument.

[18] These are just some of the case specific facets of this matter that would likely confine the applicability of any rulings in an appeal to the parties alone or to a very narrow group.

[19] For all of these reasons, I do not grant permission to appeal in relation to the order of the chambers justice regarding section 47(1)(b) of the *Arbitration Act*.

Is Leave to Appeal Required in Relation to Section 6(c) of the *Arbitration Act?*

[20] The issue of leave to appeal regarding the second ground of appeal is more complex. PesoRama made it clear in the application materials filed that it took the position that leave to appeal was not required for the ground arising under section 6(c) of the *Arbitration Act.* Mr. Sivitilli did not respond to this aspect of the argument in his written submissions. Rather, during the oral hearing he raised an argument that the combined impact of the decision of the Supreme Court of Canada in *TELUS Communications Inc v Wellman*, 2019 SCC 19, and the decision of the Court of King's Bench in *IBI Group Architects (Canada) Inc v Edmonton (City),* 2022 CarswellAlta 1805 (ABKB), by extension would require permission to appeal for the ground relating to section 6(c) of the *Arbitration Act.*

[21] I requested and received further written submissions from the parties on this new argument. Unfortunately, the submissions provided by Mr. Sivitilli did not directly address the novel argument he raised. Rather, they reiterated that a ground of appeal based on the interpretation of section 6(c) found in *New Era* could not succeed as that case has been overruled. As that ground

of appeal was no longer viable, the only remaining ground would require leave by virtue of section 48.

[22] PesoRama submitted that there is no provision in either the *Arbitration Act*, or in the *Alberta Rules of Court*, Alta Reg 124/2010 that require leave to appeal on the interpretation and application of section 6(c). This submission finds strong support in the recent decision of this Court in *Schafer v Schafer*, 2023 ABCA 117. As neither party previously cited this decision, I provided them a further opportunity to do so.

[23] While the Court in *Schafer* was considering the right of appeal arising under a different section of the *Arbitration Act*, RSA 2000, c J-2, the following paragraphs from that decision conclusively support the position of PesoRama on this point:

> [7] The Court of Appeal is a statutory court which means it can only hear and decide appeals provided for in legislation: [citations omitted].
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> [8] The jurisdiction of this Court to hear appeals from a decision of a Court of King's Bench judge is set out in Rule 14.4(1) of the *Alberta Rules of Court*, Alta Reg 124/2010 and section 3(b)(iv)(A) of the *Judicature Act*, RSA 2000, c J-2.
>
> [11] Rules 14.4 and 14.5 distinguish between appeals as of right and appeals where permission to appeal must be obtained. … Rule 14.4 carves out appeals where the legislature has "otherwise provided". The language "[e]xcept as otherwise provided" has been interpreted to mean that any claimed right to appeal under Rule 14.4 may be curtailed by another enactment: [citations omitted]. This is reinforced by Rule 1.9 which provides that an enactment prevails over the *Rules* to the extent of any inconsistency. Applying that reasoning to the *Arbitration Act*, … the right of appeal with permission in section 48 of the *Arbitration Act* prevails over the general appeal provisions in the *Alberta Rules of Court*: [citations omitted].
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> [40] … If the provisions in the *Arbitration Act* providing a right of appeal to this Court (ss 8(3), 15(5) and 48) were intended to be the only routes of appeal in matters related to arbitral proceedings, there would be no need for the legislature to enumerate the circumstances where there is no right of appeal (ss 7(6), 10(2), 15(6), 16(4) and 17(10)). It therefore cannot be said that the *Arbitration Act* is the sole source of this Court's jurisdiction to hear appeals related to arbitral proceedings.
>
> [41] This interpretation is consistent with this Court's practice of hearing appeals as of right that are related to arbitral proceedings where the appeal is not specifically curtailed by provisions of the *Arbitration Act*: [citation omitted].

[24] The sections of the *Arbitration Act* that expressly address rights of appeal include sections: 7(6), 8(3), 10(2), 15(5), 15(6), 16(4), 17(10), 44, 45, 46, 47, and 48. These are examples where the legislature has "otherwise provided" for a right of appeal thereby displacing a general right of appeal pursuant to the *Rules of Court*.

[25] The rationale in *Schafer* applies here, and as the *Arbitration Act* does not otherwise provide or otherwise restrict a right of appeal, the combined provisions of section 3 of the *Judicature Act*, RSA 2000, c J-2 and Rule 14.4 apply to provide that right. Further, there is nothing in either the *Arbitration Act* or in Rule 14.5 that would require leave on that ground of appeal.

[26] As a result, no permission to appeal is required for the ground of appeal in relation to section 6(c) of the *Arbitration Act.*

[27] While the ground of appeal relating to section 6(c) of the *Arbitration Act* does not require leave to appeal, both parties agree that the decision of this Court in *New Era* is central to that ground. Counsel for Mr. Sivitilli submits that *New Era* has been expressly overruled by the Supreme Court in *Wellman* as indicated above. The issue of whether a case has been overtaken by subsequent authority or expressly overturned may not always be clear – see for example *Agriculture Financial Services Corporation v Redmond*, 1998 ABCA 189 and the resulting decision in that same case at 1999 ABCA 175. Consideration of a formal application to reconsider pursuant to Rule 14.46 may be prudent in the circumstances of this case. I also note that this argument was not raised before the chambers justice, and so his reasons do not comment on it.

The Cross-Appeal by Mr. Sivitilli

[28] Mr. Sivitilli has filed a cross-appeal in relation to costs only, as his claim for costs encompasses issues not otherwise covered in the appeal by PesoRama. As a result, Rule 14.5(1)(e) requires permission to appeal. In his application he contends that the chambers justice erred in not permitting submissions on costs, in considering the earlier ruling on the failed injunction application in relation to costs, and in failing to consider offers of settlement in relation to costs.

[29] Most of these arguments are premised on an assertion not supported by the record. Both counsel for PesoRama and counsel for Mr. Sivitilli made submissions as to costs in the proceedings below. The fact that counsel for Mr. Sivitilli did not make the submissions regarding costs that he advances in this forum does not mean he was precluded from doing so.

[30] In oral submissions on this application, counsel for Mr. Sivitilli submitted that it would have been inappropriate to raise information relating to settlement discussions prior to the decision on the merits, and that as the costs decision followed immediately thereafter, he had no opportunity to do so.

[31] That argument fails for two reasons. First, as an experienced litigator, counsel for Mr. Sivitilli had the opportunity to immediately indicate to the chambers justice that there were other submissions as to costs that he now wished to make. He did not do so.

[32] Further, the exceptional authority to request that further submissions be permitted and that the decision as to costs be revisited pursuant to Rule 9.13 of the *Rules of Court* was available from the date of the decision to the date when the formal order was entered on April 19, 2024.

[33] While this Court has indicated that this Rule should be used sparingly, there are examples of it being raised where a party wishes to alert the court to factors that are germane to costs but that they did not have the opportunity to raise.[3]

[34] The chambers justice cited the appropriate general principles and made a discretionary decision based on the record and submissions before him at the time. The other issues raised by counsel for Mr. Sivitilli do not provide opportunities for clarification on matters of interest or importance to litigants generally. They are, taken at the highest, opportunities for mere error correction. They do not satisfy the high threshold to appeal in relation to costs orders articulated in many decisions of this Court, including most recently, *Ardmore Properties Inc v Sturgeon School Division No 24,* 2024 ABCA 88 at para 4.

[35] Permission to cross-appeal as to costs alone is denied.

Application heard on May 22, 2024

Supplemental Written submissions filed June 7, 19, 24, and July 5, 2024

Reasons filed at Calgary, Alberta
this 11th day of July, 2024

Hawkes J.A.

[3] *O'Kane v Lillqvist-O'Kane*, 2024 ABCA 32 at para 16; *Woodbridge Homes Inc v Andrews*, 2019 ABQB 968 at paras 19-33; *Equitable Trust Company v Lougheed Block Inc*, 2013 ABQB 544 at paras 1-10.

Appearances:

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