IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Tresoro Mining Corporation v. Mercer Gold Corp. (B.C.)*, 2017 BCSC 825

Date: 20170518
Docket: S116184
Registry: Vancouver

Between:

Tresoro Mining Corporation (formerly Mercer Gold Corporation (Nevada)) (formerly Uranium International Corp.)

Plaintiff

And

Mercer Gold Corp. (B.C.)

Defendant

And

Tresoro Mining Corporation (formerly Mercer Gold Corporation (Nevada)) (formerly Uranium International Corp.), Gordon Brent Pierce, also known as Brent Pierce, Gary Powers, William (Bill) Thomas, Gerry Jardine and Leonard Braumberger

Defendants by Counterclaim

Before: The Honourable Mr. Justice Abrioux

Reasons for Judgment

Agent for Defendant/Applicant Mercer Gold (B.C.):	R. Jivraj
Counsel for the Defendant by Counterclaim/Respondent G.B. Pierce:	H.A. Mickelson, Q.C. A.L. Doolittle
Place and Date of Hearing:	Vancouver, B.C. February 23 - 24, 2017
Place and Date of Judgment:	Vancouver, B.C. May 18, 2017

Table of Contents

I: INTRODUCTION

[1] These proceedings involve various claims and counterclaims which arise from the exploration and potential development of gold on a property in Columbia (the "Property").

[2] The principal of Mercer Cold Corp. (B.C.) ("Mercer B.C.") and its sole officer, director and shareholder, is Mr. Rahim Jivraj. Mr. Jivraj incorporated Mercer B.C. in May 2008 for the purpose of pursuing various business opportunities.

[3] Between 2009 and early 2010, with the assistance of a geologist familiar with mineral properties in Columbia, Mr. Jivraj identified the Property as having what he thought to be significant potential for gold exploration and development.

[4] On April 13, 2010, Mercer B.C. and the plaintiff entered into an agreement whereby Mercer B.C. granted Tresoro Mining Corporation ("Tresoro"), then known as Mercer Gold Corporation (Nevada), the rights to acquire, on certain terms, a 100% interest in an option Mercer B.C. held to acquire the Property for development (the "Underlying Option Agreement") in exchange for cash and shares in Tresoro and whereby Mr. Jivraj became the president and CEO of Tresoro (the "Agreement").

[5] The Agreement, which is at times referred to as the Secondary Option Agreement, contained an arbitration clause.

[6] This is one of several actions involving this matter. It has been under judicial management since 2014, first with Justice Fenlon, as she then was, then Justice Greyell, and currently Justice MacNaughton.

[7] Tresoro is now bankrupt. Accordingly, the substantive claims are those raised by Mercer B.C., both in its amended counterclaim (the "ACC") and in certain of the other actions. Mercer B.C. intends to file what has been termed an "Omnibus Pleading" in relation to its various claims, that pleading is to be filed in this action.

[8] On September 19, 2014, all the actions were ordered stayed by Justice Fenlon pending the hearing of the following applications (the "Fenlon J. Order"):

> (a) an application by Mercer B.C. for leave to amend the pleadings in Action No. S116184 so that those pleadings represent all questions or matters in dispute between Mercer B.C. or Mr. Jivraj and any other person or persons (the "Omnibus Pleading");
>
> (b) an application by Mercer B.C. to lift a stay of proceedings ordered by Justice Greyell on December 5, 2011 of Mercer B.C.'s ACC (the "Greyell J. Order") in relation to some or all of the Omnibus Pleading; and
>
> (c) an application by the defendant by counterclaim, Brent Pierce, for security for costs in relation to all claims brought against him by Mercer B.C. and/or Mr. Jivraj.

[9] Justice Greyell's reasons for judgment pertaining to the December 2011 stay of proceedings are indexed at 2011 BCSC 1664. While I will review his conclusions in greater detail below, Justice Greyell essentially decided that the issues raised in the ACC should be stayed pending arbitration proceedings which had been commenced by Tresoro, then operating as Mercer (Nevada), pursuant to the arbitration clause in the Agreement.

[10] In reasons for judgment dated October 7, 2015, and indexed at 2015 BCSC 1822, Justice Fenlon ordered that security for costs totaling $100,000 be posted by Mercer B.C. and Mr. Jivraj personally (the "Security for Costs Reasons"). Security was posted in September 2016 after Mr. Jivraj successfully obtained an extension of time to do so.

[11] At the commencement of the hearing, I granted an order requested by counsel for three of the defendants by counterclaim, Gary Powers, William (Bill) Thomas and Gerry Jardine, to cease being their counsel of record. I was advised that all the defendants by counterclaim had been served with notice of this application.

[12] The Notice of Application before the Court on this application, and which is opposed by Mr. Pierce, seeks one order, namely:

> 1. The order of Mr. Justice Greyell made December 5, 2011 be further varied by deleting paragraph 3 therein.

[13] Paragraph 3 of the Greyell J. Order states:

> 3. Mercer B.C.'s Amended Counterclaim filed herein on October 24, 2011 is hereby stayed;

[14] For the reasons that follow the application is dismissed.

II: BACKGROUND

[15] In April 2010, Mercer B.C. and Tresoro entered into the Agreement referred to above which contained the following arbitration clause:

> 16.1 Matters for Arbitration. The parties hereto agree that all questions or matters in dispute with respect to this Agreement shall be submitted to arbitration pursuant to the terms hereof.

[16] The background to this litigation as a whole is set out in paragraphs 1 to 18 of Justice Fenlon's reasons (2015 BCSC 1822) with paragraphs 9 and 10 relating to this action:

> [9] In July 2011 Mercer B.C. sent Tresoro a notice of default of the option agreement. In September 2011 Tresoro filed an arbitration notice with respect to the dispute over Tresoro's compliance with the option. Tresoro also commenced Action No. S116184, seeking an injunction against Mercer B.C. to prevent it from interfering with the option and Tresoro's work in Colombia until the allegations of default could be addressed in the arbitration. Mercer B.C. filed a counterclaim saying it was induced to enter into the secondary option agreement with Tresoro by misrepresentations, non-disclosure and concealment by Mr. Pierce as to his interest in Tresoro, and alleging an unlawful conspiracy initiated by Mr. Pierce and later joined in by the other defendants to artificially pump the stock price of Tresoro.
>
> [10] On December 5, 2011, Greyell J. granted the injunction sought by Tresoro and stayed the counterclaim and all proceedings in that action pending arbitration. The arbitration commenced in January 2012 but was suspended in May 2012 when Mercer B.C. could not pay its share of the arbitration costs.

[17] The notice of civil claim (the "NOCC") alleged that the Agreement had been wrongfully terminated by Mercer B.C. and that the letter of default "contained spurious allegations of default". The NOCC referred to notice which had been provided on September 9, 2011, pursuant to the Agreement, that the plaintiff intended to pursue arbitration and sought an interlocutory injunction pending conclusion of the arbitration.

[18] On September 21, 2011 Tresoro filed its arbitration notice with the British Columbia International Commercial Arbitration Centre (the "BCICAC") (the "Arbitration").

[19] Mercer B.C. filed its ACC on October 24, 2011 which, *inter alia*, alleged that Messrs. Pierce et al. had, whilst under the direction of the plaintiff, engaged in a conspiracy and otherwise engaged in unlawful activity to obtain control of the Property and to conceal the control of the Property from regulatory authorities and certain shareholders, including Mercer B.C., in order to manipulate the company's stock and reap undisclosed profits.

[20] The ACC sought a variety of relief including:

- a declaration that the Agreement was void, or in the alternative, that Mercer B.C. was entitled to rescission;
- damages for fraudulent, or alternatively, negligent misrepresentation; and
- damages for conspiracy and for the torts of passing off and slander of title.

[21] Tresoro's application for a stay of proceedings pending the Arbitration proceeded before Justice Greyell for four days in late October and early November 2011 with reasons for judgment rendered on December 5, 2011.

[22] The Greyell J. Order stayed the ACC pursuant to section 15 of the *Arbitration Act*, R.S.B.C. 1996, c. 55 (the "*Act*") with the issues raised in the ACC sent to

arbitration for adjudication. Prior to March 2013 the *Act* was named the *Commercial Arbitration Act.*

[23] Justice Greyell found that it was the intention of the parties that all of the claims raised in the ACC were to be dealt with through arbitration, stating:

> [72] Mercer B.C. applies for an order staying the arbitration proceedings pending a determination of the issues in this Court. In my view, this would be inconsistent with the broad language used by the parties in the arbitration clause. The parties clearly intended to have all disputes in respect of the Agreement be dealt with through arbitration. It is incumbent upon this Court to respect that wish. As stated by Williams J. in *Maher v. Morelli Chertkow*, 2003 BCSC 48:
>
> > [14] As a general rule, where parties have committed themselves to arbitration as the chosen means of resolving disputes in relation to the subject of their agreement, and they have clearly indicated that commitment, then, absent proper reason, the Court should give effect to that wish.
> >
> > (quoted with approval by the Court of Appeal in *ABOP LLC v. Qtrade Canada Inc*., 2007 BCCA 290 (at para. 20))
>
> [73] Based on the foregoing, it is clear that the entirety of the dispute between the parties is within the scope of the arbitration clause in Article 16 of the Agreement.

[24] And further:

> [99] Section 15 of the *Commercial Arbitration Act* makes it mandatory for a court to issue a stay of proceedings pending arbitration. That section provides:
>
> > 15 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
> >
> > (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> [100] Mercer Nevada has applied to stay Mercer B.C.'s counterclaim pending arbitration. For the reasons already given, the arbitration clause continues to apply to disputes that arise out of the termination of the Agreement, in which the arbitration clause is found. Mercer Nevada has made filings with the BCICAC and the parties are in the process of appointing arbitrators. This Court has not been persuaded that the arbitration clause is

> void, inoperative or incapable of being performed. As such, it is mandatory that the court grant a stay of proceedings pending arbitration.
>
> [101] Further, in my view the issues raised in the ACC are bound up with, and in the main, are inseparable from "questions or matters in dispute with respect to" the Agreement and must be stayed pending the award of the arbitration board referred to in Article 16. It is for the arbitration board, once it has heard the evidence and made findings of fact, to make a determination on all issues covered under the scope of the Agreement. There may be issues the arbitration board concludes are not within the scope of its jurisdiction and which will remain for determination by this Court. However that determination is one for the arbitration board to make: see *Seidel v. TELUS Communications Inc*., 2011 SCC 15 ; *Bell Mobility Inc. v. Telus Communications Co*., 2006 BCCA 578; *Telus v. Rogers*, 2009 BCCA 581.
>
> [Emphasis added.]

[25] Paragraph 3 of the Greyell J. Order is excerpted at paragraph 13 above.

[26] Paragraph 4 of the Greyell J. Order directed Mercer B.C., *inter alia*, to restrain from dealing or communicating with the plaintiff's employees, consultants, investors or contractors.

[27] Mercer B.C. did not appeal the Greyell J. Order.

[28] A three-member panel (the "Panel") heard the first application in the Arbitration, concerning what was referred to as "technical issues" on February 16, 2012. On March 2, 2012 the Panel issued a partial final award (the "Partial Final Award").

[29] At the conclusion of the reasons for the Partial Final Award, the Panel directed Mercer B.C. to articulate the issues in the Notice of Default in order to "define the parameters of the dispute to be decided through arbitration." The Panel further noted Mercer B.C. had failed to pay the $35,000 deposit directed as a partial advance against the costs of the Arbitration. The Panel ordered Mercer B.C. provide that deposit forthwith, but in any event, no later than 14 days from the date of the Partial Final Award.

[30] The Partial Final Award was not appealed by either Mercer B.C. or Mr. Jivraj. The $35,000 deposit was also not paid by Mercer B.C.

[31] On August 3, 2012, Tresoro commenced an action in the United States against Mercer B.C. and Mr. Jivraj in which it alleged serious misconduct including federal securities fraud and breach of fiduciary duty. It sought damages between U.S. $43 and $57 million plus $300,000.00 in legal fees (the "US Action").

[32] On November 19, 2012, Mercer B.C. commenced an action in this court (Action No. VA-S128065) in which it sought to preserve its interest in the Property. It alleged that Tresoro had failed to make certain payments to the owner of the Property on Mercer B.C.'s behalf (the "Failed Payment Action"). On November 30, 2012 and December 12, 2012, respectively, Tresoro filed a response to civil claim and counterclaim to the Failed Payment Action. Tresoro's position was that the Failed Payment Action, "…must be resolved through the arbitration process…" It also alleged, that the Arbitration had been stayed as a result of Mercer B.C.'s failure to pay required fees, and that the company's and Mr. Jivraj's conduct was an abuse of process.

[33] In February 2013, Mercer B.C. filed a notice of application in the Failed Payment Action pursuant to the summary trial provisions of the *Supreme Court Civil Rules*.

[34] On March 4, 2013, counsel for Tresoro sent Mr. Jivraj an email containing its response to the summary trial application (the "March 2013 Email"). The March 2013 Email also stated that Tresoro would be withdrawing its opposition to action No. S113884, which was grounded in Tresoro's assertion that the matter should go to arbitration, to allow "Tresoro to have an opportunity to determine the truth of the claims" at a hearing.

[35] On July 29, 2013, the US Action was dismissed with Justice Pechman, of the United States District Court for the Western District of Washington, finding that Tresoro could, "…avoid stalled arbitration and avoid incurring more fees for both Parties in this Court by paying Defendants' arbitration fee."

[36] On July 30, 2013, Justice Dickson, as she then was, rendered reasons for judgment in the Failed Payment Action summary trial application which had been

heard on June 24, 2013. Her reasons refer to the Agreement as the "Secondary Option Agreement" in order to distinguish it from the Underlying Option Agreement referred to in paragraph 4 above.

[37] Justice Dickson found that Tresoro had not made certain instalment payments, pursuant to the Underlying Option Agreement, to the owner of the Property. These payments were required in order to preserve Mercer B.C.'s interest.

[38] At paragraph 37 of her reasons, which were delivered orally and not published, she stated:

> It follows that I accept Mercer [B.C.] is entitled to a declaration that Tresoro is in default pursuant to article 2.2(d) of the Secondary Option Agreement. It also follows that Mercer [B.C.] is entitled to a declaration that it is entitled immediately to terminate the Secondary Option Agreement. Given the numerous, complex and contested allegations of wrongful conduct made by both sides with respect to the other in connection with this business relationship, however, I decline to grant a declaration that all of Tresoro's rights, interests and entitlements in and to the Secondary Option Agreement have been extinguished. In my view, those matters cannot be appropriately determined on a summary trial.

[39] On July 31, 2013 Tresoro, commenced an action against Mercer B.C. and Mr. Jivraj. The allegations included allegedly defamatory conduct by the defendants and sought relief which appears to have been the subject of both the US Action and other actions commenced between the parties. In his written argument, Mr. Jivraj refers to this proceeding as the "Duplicitous Action".

[40] On September 11, 2013, Justice Sewell, on Mercer B.C.'s application varied the Greyell J. Order by deleting, *inter alia*, the directions referred to in paragraph 26 above. In doing so he accepted that there had been a material change of circumstances, including: Tresoro's defaults; Justice Dickson's reasons; the subsequent termination of the option by Mercer B.C.; and Tresoro's insolvency.

[41] In referring to paragraph 37 of Justice Dickson's reasons, excerpted at paragraph 39 above, Justice Sewell stated:

> I pause here to note that Madam Justice Dickson was careful in paragraph 37 to make a distinction between Tresoro's rights under the secondary option

> agreement and its rights to the subject matter of the secondary option agreement, that is the underlying property.

[42] On September 13, 2013, Mercer B.C. was successful before Justice Gaul in obtaining a $400,000.00 USD preliminary monetary judgment against Tresoro in the Failed Payment Action. The amount awarded represented payments regarding the Property that Tresoro had failed to pay on Mercer B.C.'s behalf pursuant to the Underlying Option Agreement (the "the Gaul J. Order").

[43] On October 10, 2013, that is, after the Gaul J. Order, Tresoro and Pierco Management ("Pierco"), Mr. Pierce's private company, entered into a General Security Agreement ("GSA"). Mercer B.C. and Mr. Jivraj allege this GSA fraudulently and in contradiction to the Gaul J. Order, gave priority to $741,034.04 in debt Tresoro allegedly owed to Pierco over any funds Tresoro owed to Mercer B.C. as judgment creditor.

[44] Mercer B.C. and Mr. Jivraj say that:

- on February 28, 2014, Tresoro and Pierco registered the GSA with the Nevada Secretary of State, thus enabling Pierco to foreclose on all assets as preferred creditor, including Tresoro's intangible rights per the registration document to the Property "held under Colombian law";

- the next business day, being March 3, 2014, Tresoro was abandoned by its remaining officers and directors, all of whom are alleged by Mercer B.C. to be nominees of Mr. Pierce in Mercer B.C.'s ACC.

[45] All of the actions between the parties were assigned to Justice Fenlon for case management. At a case management conference on July 22, 2014, Justice Fenlon directed Mr. Jivraj to seek directions from the Panel "in relation to the issues raised by Mr. Justice Greyell", that is, pursuant to the Greyell J. Order.

[46] On August 1, 2014, Mr. Jivraj sent a detailed letter to the Panel in which he informed the Panel of the directions Justice Fenlon had made following the Judicial Management Conference that had occurred before her:

> 1. Mr. Jivraj is to seek directions from the Arbitration Panel in relation to the issues raised by Mr. Justice Greyell. That letter of direction is to be delivered to the Arbitration Panel by August 1, 2014...
>
> 2. Mr. Jivraj's application for security for costs and for document production are not to be set down until the issue of whether the Tresoro action is to be heard in this court is determined.

In accordance with these directions, Mr. Jivraj requested the Panel determine if they would:

> … maintain jurisdiction of the matters referred to it pursuant to the order of Mr. Justice Greyell and require Mercer to pay $35,000 as security for the arbitrator's fees before the matter can resume; or, if the Panel will decline jurisdiction and/or terminate the arbitral proceedings as Mercer has not paid the said fees.

[47] The letter went on to raise several issues which Mr. Jivraj asked the Panel to consider, including:

- Tresoro was defunct;
- Tresoro had "declined arbitration and accepted the jurisdiction of the Supreme Court of British Columbia". The March 2013 Email was attached to the letter;
- there were several actions before the court relating to the issues between the parties. The letter provided an overview of the reasons for judgment of Justices Dickson, Sewell and Gaul; and
- that the potential for conflicting judgments and unnecessary expense would occur if the Arbitration maintained jurisdiction of certain disputes.

[48] On August 18, 2014 the Chair of the Panel responded to Mr. Jivraj's letter advising that Mercer B.C. was required to post $35,000 as security for the Panel's fees. Tresoro had posted its $35,000 as security in 2012. The Panel advised

Mr. Jivraj that if Mercer B.C. did not post its share of the security by September 15, 2014 the Arbitration would be terminated.

[49] By further letter dated October 24, 2014, the BCICAC informed Mr. Jivraj that as the BCICAC had not received the requested funds by September 15, 2014 the Arbitration had been terminated pursuant to Rule 34(3) effective September 15, 2014 (the "Termination").

[50] Mr. Jivraj did not seek judicial review or otherwise appeal the Termination.

[51] I referred above to the Fenlon J. Order of September 19, 2014 which makes it clear, in my view, that the original sequence of events was intended to require Mercer B.C. and Mr. Jivraj to prepare the Omnibus Pleading so that, following an amendment application, the issues to be litigated would be narrowed and crystalized.

[52] It took some time for Mr. Jivraj to deliver a draft of his proposed Omnibus Pleading. Rather than narrowing the issues as directed by Justice Fenlon, he added an additional 43 defendants, including a long list of auditors, brokers and several law firms and senior counsel in Vancouver, which included Mr. Pierce's present counsel.

[53] Counsel are named as proposed parties on the basis that they are people who were "controlled and/or influenced directly or indirectly by Pierce" and that they had become "tools or dupes" in furtherance of the "Conspiracy".

[54] As a result of the delivery of the proposed Omnibus Pleading, on April 2, 2015 Justice Fenlon reprioritized the matters under case management and ordered that Mr. Pierce bring a security for costs application against Mercer B.C. and Mr. Jivraj before Mercer B.C.'s application to further amend its ACC was determined. Justice Fenlon also directed that Mercer B.C. and Mr. Jivraj not pursue the claims relating to the allegedly fraudulent GSA until the applications referred to in the September 19, 2014 order had been heard.

[55] In the Security for Costs Reasons, which were issued October 7, 2015, Justice Fenlon stated that the proposed Omnibus Pleading would likely attract many applications to strike portions of the pleadings (para. 18), that many of the claims included in the Omnibus Pleadings would be difficult to prove (para. 28-36), and that many of the claims could be characterized as "unfocussed and ill-conceived" (para. 36).

[56] These reasons also identified the difficulties that Mr. Jivraj and Mercer B.C. faced in relation to having the stay lifted:

> [34] Whether impecuniosity is a basis for avoiding an obligation to arbitrate appears to be an untested question in this province. But the issue has been settled in the United Kingdom to the contrary. In Paczy v. Haendler & Natermann, [1981] 1 Lloyd's Rep 302, the Court of Appeal held that the impecuniosity of one party does not render the arbitration agreement incapable of performance so as to reinstate the Court's jurisdiction over claims otherwise subject to arbitration. Leave to appeal to the House of Lords was refused in that case.

[57] In September 2016, Mr. Jivraj obtained an extension to post the security for costs which was then deposited.

[58] On November 22, 2016, Justice Greyell, who by this time had replaced Justice Fenlon as the judicial management judge, declined Mr. Jivraj's application to sever the defamation claim on the basis that it would be difficult to resolve the issues raised in the defamation proceedings "without much of the background that forms the basis of the matters in issue between the parties in the omnibus proceedings" (para. 6). Justice Greyell also held that to sever the defamation claim would effectively result in the litigation proceeding "in pieces or slices" (para. 6).

[59] It is within the above factual and procedural framework that Mercer B.C.'s application to lift the stay contained in the Greyell J. Order should be considered.

[60] I would add that, in my view, it is not necessary in the discussion that follows for me to describe all of the other claims which arise between the parties and the various comments made in certain reasons for judgment to which I have not

referred, and which relate to the credibility and character of both Mr. Jivraj and Mr. Pierce.

III: DISCUSSION

A: The Legal Framework

[61] Section 15(2) of the *Act* provides:

> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.

[62] In *Seidel v. Telus Communications Inc.*, 2011 SCC 15, [*Seidel*], Justices LeBel and Deschamps, writing for the dissent, stated the following in relation to the jurisdiction of arbitrators:

> …
>
> [114] …Challenges to the arbitrator's jurisdiction — namely arguments that an agreement is void, inoperative or incapable of being performed — should be resolved first by the arbitrator. A court should depart from this general rule only if the challenge is based on a question of law, or on questions of mixed fact and law that require only superficial consideration of the documentary evidence in the record, and is not merely a delaying tactic (see Dell, at paras. 84-86).

Justice Binnie, writing for the majority, agreed with this proposition at paragraph 29.

[63] Rule 34 (now Rule 36) of the *Domestic Commercial Arbitration Rules of Procedure*, as published by the BCICAC, provides for the "Closure of Hearings and Termination of the Proceedings". Subsection (3) provides:

> (3) The arbitration tribunal may order the termination of the arbitration where it finds that the proceedings have become unnecessary or impossible.

[64] One of the issues on this application is whether the Termination amounts to a final award in the Arbitration.

[65] In *Premium Brands Operating GP Inc. v. Turner Distribution Systems Ltd.*, 2010 BCSC 258, the issue was whether an arbitrator had the power to dismiss a claim for want of prosecution. The arbitrator had determined he could not do so.

[66] Justice Pearlman found that the arbitrator's decision constituted an interim award on the dispute submitted to him; accordingly an arbitrator's jurisdiction to dismiss for want of prosecution was "a question of law arising out of the award" for the purposes of s. 31(1) of the *Act*:

> [57] Had Arbitrator Clemens determined that he had jurisdiction to dismiss for want of prosecution, he would have done so. His decision on Premium Brands' application to dismiss for want of prosecution would have finally disposed of the whole of the dispute between the parties, albeit without a hearing on the merits. In that scenario, Turner, as the unsuccessful party would likely have sought leave to appeal on the basis that the arbitrator's decision that he had jurisdiction to dismiss for want of prosecution raised a question of law arising out of his award. Had the arbitrator found that he had the jurisdiction to dismiss for want of prosecution, and then done so, his order would have been an award because it would have been the decision of the arbitrator on the dispute submitted to him by the parties.

[67] On appeal, in reasons for judgment indexed at 2011 BCCA 75, the Court of Appeal noted that the arbitrator did not need a specific power to dismiss for want of prosecution, as it already had such a power under the Rules; Rule 34(3) allows a case to be terminated for impossibility. As stated by Justice Newbury:

> [45] I do not find it necessary to address this question [being whether a tribunal in British Columbia has the jurisdiction to dismiss a claim for want of prosecution], since in my view the rules of natural justice do not require the implication of a general power, or jurisdiction, to dismiss an arbitral dispute for want of prosecution in addition to the specific powers available to an arbitrator under the Rules as they stand. If Premium had applied to the arbitrator for directions as to what steps were to be taken next and when they were to be taken, he could have invoked Rule 28(3) and in due course, could have exercised his discretion one way or the other in response to non-compliance (if such occurred) on Turner's part. Indeed, it is likely the arbitrator could on his own motion have fixed a deadline for the taking of any particular step. In cases where it is then too late to take this course, then the arbitrator can consider, as he did in this case, whether the arbitration should be terminated as "impossible" under Rule 34(3). (Indeed I read that Rule as requiring the arbitrator to terminate if he or she cannot conduct a proceeding that conforms with the principles of natural justice. In the case at bar, of course, the arbitrator found this point had not been reached.) The point is that the tribunal has specific mechanisms available to it to minimize or forestall delay in the proceedings which may prejudice a party. The Rules seem to me sufficient to allow an arbitrator to fulfil the demands of natural justice and procedural fairness in the arbitral context. It is not necessary for us to risk trespassing into the legislative domain by inferring further powers to ensure that he or she is able to "make a true determination" and that both parties receive a fair hearing.

[68] If the Termination is a final award, then it should be given deference by this Court. As Justice Dickson, as she then was, stated in *Arbutus Software Inc. v ACL Services Ltd.*, 2012 BCSC 1834:

> [64] Public policy requires the court to give substantial deference to decisions made in commercial arbitration. The need for deference arises out of the two principal objectives of arbitration: early finality and a determination made outside the court system. Section 32 of the Act provides:
>
> > 32 Arbitral proceedings of an arbitrator and any order, ruling or arbitral award made by an arbitrator must not be questioned, reviewed or restrained by a proceeding under the *Judicial Review Procedure Act* or otherwise except to the extent provided in this Act.

[69] Furthermore, section 15(4) of the *Act* provides that:

> (4) It is not incompatible with an arbitration agreement for a party to request from the Supreme Court, before or during arbitral proceedings, an interim measure of protection and for the court to grant that measure.

[70] Since Mr. Jivraj argues that Tresoro and/or Mr. Pierce are estopped from relying on the Greyell J. Order in light of their conduct after December 5, 2011, I shall briefly refer to the applicable principles.

[71] Cause of action estoppel and issue estoppel are the two main branches of the doctrine of *res judicata:* see *Angle v. Minister of National Revenue,* [1975] 2 S.C.R. 248 at para. 37. Justice Rice summarized the basic principles of these branches of *res judicata* in *Royal Bank of Canada v. United Used Auto & Truck Parts Ltd.,* 2006 BCSC 1192, aff'd 2007 BCCA 111, leave to appeal refused, [2007] SCCA No. 148:

> 38 Cause of action estoppel applies to bar proceedings that allege the same cause of action between the same parties if that cause has already been determined by the courts. However, despite its name, it is not so strictly limited. Cause of action estoppel also applies to bar subsequent proceedings covering the same subject matter and arising out of the same relationship between the parties, even though the second litigation may be based on a different legal description or conception of the cause: …
>
> …
>
> 41 Where a party seeks to pursue a second action against the same foe, the court must be satisfied that the new cause of action alleged is truly separate and distinct from the old, and not merely a new portrayal of the same subject matter, such as tort rather than contract. Litigants may not

> simply characterize the facts of the first action in a different way to avoid the application of *res judicata.*
>
> …
>
> 45 The second branch of the doctrine of *res judicata* prevents litigants from attempting to re-litigate the same point or issue against the same party even though the overall cause of action now being pursued may be different. Where a material fact or issue in a proceeding has already been determined by a court of competent jurisdiction, that fact or issue may not be attacked or thrown into dispute in subsequent proceedings among the same parties: ...
>
> 46 In *Danyluk* and *Angle*, *supra*, and the Supreme Court of Canada adopted the three-part test for issue estoppel first framed by Lord Guest in *Carl Zeiss Stiftung v. Rayner & Keeler Ltd. (No. 2)*, [1967] 1 A.C. 853 at p. 935:
>
> > (1) that the same question has been decided;
> >
> > (2) that the judicial decision which is said to create the estoppel was final; and
> >
> > (3) that the parties to the judicial decision or their privies were the same persons as the parties to the proceedings in which the estoppel is raised or their privies.

[Internal citations omitted.]

B: The Parties' Positions

[72] Mercer B.C. submits that the arbitration clause is now either void or inoperative.

[73] It argues that Tresoro, by its own conduct voided the arbitration agreement by:

- inappropriately challenged the court's jurisdiction in the Arbitration;
- invoking alternate jurisdictions such as the US District Court and this court in both the Failed Payment Action and the Duplicitous Action; and
- stating in the March 2013 email that it "voluntarily caused the Arbitration to cease remaining in effect and/or suspended the operation of the Arbitration, by abandoning its rights to arbitration in all actions".

[74] Furthermore, it submits that Mercer B.C.:

- will sustain undue hardship and great prejudice if the stay is not lifted;
- that it was impecunious at various times and thus unable to pay the $35,000 deposit required by the Partial Final Award;
- that Mr. Pierce, who was not a party to the Agreement, should not be entitled to benefit from the stay; and
- that the balance of convenience is in its favour since, if the stay is not lifted, then Mr. Pierce, who is Tresoro's "alter ego" and a "recidivist stock offender", will escape liability for both his own actions and those which he caused to be taken by Tresoro.

[75] Mr. Pierce's position is that the Termination was a final award from the Panel which effectively amounted to a dismissal for want of prosecution. The Termination disposed of the claims sent to arbitration by the Greyell J. Order, including those in the ACC.

[76] He also submits that Mercer B.C. chose not to appeal the Termination and that deference should be given to the final award. The claims, if any, which should return to this Court, were within the exclusive jurisdiction of the Panel, and to lift the stay would be contrary to the intentions of the Greyell J. Order and amount to an abuse of process.

[77] He also says that the principles of estoppel do not apply in the circumstances of this case.

C: Analysis

[78] First of all, I have concluded that the Termination was a final award which amounted to a dismissal of the issues submitted to arbitration. In particular, the Termination dismissed the claims in the ACC for want of prosecution.

[79] The Partial Final Award of March 2, 2012 essentially directed that the Arbitration should proceed on the basis that Mercer B.C. was the plaintiff. Mercer B.C. was also advised that it was required to pay its $35,000 deposit for security for costs within 14 days.

[80] That did not occur and on October 4, 2012 Mr. Jivraj was advised that:

- the Arbitration was currently suspended due to Mercer B.C.'s failure to post the deposit, with the Chair of the Panel confirming that the deposit posted by Tresoro had been used to pay the fees associated "with the last hearing", that is the Partial Final Award; and

- if the Arbitration was to resume, then Mercer B.C. must first post the deposit.

[81] On August 1, 2014 Mr. Jivraj brought a number of issues to the Panel's attention (see paragraphs 47-48 above). He noted that there were two alternatives: the first, that the Panel should decline jurisdiction; the second, that the Arbitration should be terminated since Mercer B.C. had not paid the deposit.

[82] He submitted, for many of the reasons advanced by Mercer B.C. on this application, that the Panel should decline jurisdiction.

[83] The Panel's response of August 18, 2014 could not have been clearer. If the deposit was not paid by September 15, 2014 the Arbitration would be terminated. That did not occur and by letter to the parties dated October 24, 2014 the Arbitration was terminated as of September 15, 2014.

[84] Mr. Jivraj submits that the "spirit" of the Termination was that the Panel had agreed with his arguments set out in the August 1, 2014 letter and that the Court should resume jurisdiction over the claims referred to Arbitration in the Greyell J. Order.

[85] I disagree. When I apply the principles to which I referred above to the circumstances in this case, I conclude that the Arbitration was terminated for want of

prosecution by the "plaintiff" in the Arbitration. This want of prosecution was the result of Mercer B.C.'s failure to pay the deposit which by September 14, 2014 had been outstanding for two years and nine months.

[86] Accordingly, the Termination, which was not appealed by Mercer B.C., amounted at law to a final award which dismissed the claims advanced in the ACC outright.

[87] In my view it would also be contrary to the intention of the Greyell J. Order, which was also not appealed by Mercer B.C., for this Court to now assume jurisdiction over the claims advanced in the ACC. This would effectively recompense Mercer B.C. for having deliberately avoided carrying out what it was directed to do by the Panel in relation to paying the deposit.

[88] I say "deliberately" because I do not accept Mr. Jivraj's argument that Mercer B.C. was unable to pay the deposit due to being forced to respond to the litigation which had been brought against it by Tresoro in the United States, and an action in defamation by Mr. Pierce against Mr. Jivraj in his personal capacity.

[89] On the evidence before me, I find that Mercer B.C./Mr. Jivraj have not established that they were unable to pay the required deposit between January 2012 and September 2014.

[90] Furthermore, by September 2016, Mr. Jivraj was able to ultimately raise the $100,000 for security for costs ordered by Justice Fenlon. There is no explanation before me as to if and/or why he was unable to raise $35,000 by September 2014 such that the Arbitration could proceed, but was able to raise $100,000 in less than 12 months. From this I conclude that the failure to pay the deposit in September 2014 was deliberate conduct on B.C. Mercer/Mr. Jivraj's part.

[91] In any event, as Justice Buckley of the United Kingdom Court of Appeal stated in *Paczy v. Haendler & Natermann*, [1981] 1 Lloyd's Rep 302 at p. 308:

> In my judgment the plaintiff cannot rely on his own inability to carry out his part of the arbitration agreement as a means of securing a release from the

> arbitration agreement. The arbitration agreement remains an agreement which is perfectly capable of being performed if the parties are themselves capable of performing it, and to construe s. 1(1) [s. 15 of the Act] in a way which would allow a plaintiff or claimant in arbitration proceedings to say, "I am unable to perform my part of the arbitration agreement, therefore the arbitration agreement has become incapable of performance, therefore the stay on the proceedings in the Court of law should be lifted" appears to me to be one which is quite contrary to the effect and the policy of the section.

[92] It is also clear from Justice Greyell's reasons for judgment, to which I referred at paragraphs 23-24 above, that:

- it was the intention of the parties that all of the claims raised in the ACC were to be dealt with through arbitration; and

- the issues raised in the ACC were inseparable from "questions or matters in dispute with respect to" the Agreement, and had to be stayed pending the award of the Panel.

[93] Having chosen not to pay the deposit and/or appeal the Termination, I also conclude that this application amounts to a collateral attack on the Termination and/or constitutes an abuse of process. See *Aboriginal Justice Centre Society v. Legal Services Society of British Columbia*, [1997] B.C.J. No. 2254 (BCCA) at para 36-37; *Reliable Mortgages Investment Corp. v. Chan,* 2013 BCSC 301, aff'd 2014 BCCA 14.

[94] I do not accept Mercer B.C.'s estoppel arguments which are based, *inter alia*, on the March 2013 Email, the summary trial proceedings before Justice Dickson, and Justice Gaul's order for judgment in the Failed Payment Action.

[95] In my view it is clear from the March 2013 Email that Tresoro's decision to end its opposition to the litigation was based on the fact that Mercer B.C. was not allowing the Arbitration to proceed due to its failure to pay the deposit. It also refers specifically to the Failed Payment Action, although the introductory paragraph appears to be broader in scope.

[96] While Mercer B.C. is ostensibly advancing an estoppel argument, when one takes into account the relevant principles of estoppel (discussed above at paragraph 71), I am of the view that Mercer B.C. is mischaracterizing its argument. It appears that Mercer B.C. is arguing that because Tresoro indicated in the March 2013 Email that it would no longer be opposing litigation, Mercer B.C. accepted the Termination based on a belief that Tresoro had agreed to resolve the claims through litigation. However, as discussed above, it is evident that Tresoro's statements in the March 2013 Email were a response to Mercer B.C.'s actions which prevented the Arbitration from proceeding. The March 2013 Email also preceded the Termination.

[97] In addition, to accede to Mercer B.C.'s submission on this point would essentially allow it to obtain indirectly what it had not done directly, that is, successfully appeal the Greyell J. Order and/or the Termination.

[98] There is also Mercer B.C.'s submission that Mr. Pierce should not be allowed to benefit from the arbitration clause in the Agreement since he was not a party to it. But this was well known to Justice Greyell in 2011, with paragraph 101 of the reasons for judgment (paragraph 24 above) referring to the fact that the issues raised in the ACC, in which Mr. Pierce is a defendant, were inseparable from the matters in dispute arising from the Agreement and had to be stayed.

[99] I am also of the view that it is not for Mercer B.C. to submit that it will sustain hardship or greater prejudice than the defendants by counterclaim if the balance of convenience is not found to be in its favor. That is because it is Mercer B.C.'s own deliberate conduct which resulted in the Termination.

[100] In conclusion, for the reasons I have outlined, the application is dismissed and the stay of the ACC ordered by Greyell J. in December 2011 remains in effect.

[101] Mr. Pierce submits that if the application is dismissed, the Court should be clear "as to what cannot go forward" and in particular "that the stay is not lifted with respect to any of the issues raised in the NOCC and the ACC as they were before Justice Greyell in 2011".

[102] I wish to make it clear that these reasons relate only to the relief sought in the Notice of Application, being that Greyell J.'s Order be varied by removing paragraph 3, that is the stay of the ACC.

[103] The next step, presumably, is for Mercer B.C. to apply for leave to amend the pleadings in this action, being the last application contemplated in the Fenlon J. Order (paragraph 8 above). As Mr. Jivraj acknowledged in his submissions on this application, the Omnibus Pleading would have required considerable redrafting even if this application were granted. I agree with the comments of Justice Fenlon in the Security for Costs reasons to which I refer at paragraph 55 above, and which relate to the present difficulties with the Omnibus Pleading as it is currently framed.

[104] Mercer B.C. will also have to decide whether it will in fact apply to add some or all of the proposed parties referred to in the Omnibus Pleading.

[105] In deciding in what manner to redraft the Omnibus Pleading, Mercer B.C. will also have to take into account the fact that a stay of proceedings remains in place with respect to the claims raised in the ACC.

[106] One of the arguments raised by Mr. Jivraj was that if the stay were not lifted, then Mr. Pierce would benefit from the allegedly fraudulent GSA which Tresoro granted to Pierco in October 2013.

[107] While this issue may have to be decided on the application to amend the Omnibus Pleading, I, for my part, have difficulty in understanding how claims relating to an allegedly fraudulent GSA entered into in October 2013, and which could not be contained in the ACC since the alleged conduct had not yet occurred, and which appears to relate to actions which had nothing to do with the Agreement, could be stayed by the Greyell J. Order which was made the better part of two years earlier.

IV:CONCLUSION

[108] The application is dismissed.

[109] Mr. Pierce is entitled to his costs of this application at Scale B which, once agreed to or assessed, are to be paid out of the funds posted as security for costs.

"Abrioux J."