SUPREME COURT OF YUKON

Citation: *Church v. H & R Block Canada, Inc.*, 2013 YKSC 76

Date: 20130809
S.C. No. 12-A0036
Registry: Whitehorse

Between:

CAROL CHURCH

Petitioner

And

H & R BLOCK CANADA, INC.

Respondent

Before: Mr. Justice L.F. Gower

Appearances:

Bruce L. Willis, Q.C. — Counsel for the Petitioner
Gary Clarke — Counsel for the Respondent

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by Carol Church ("Church") under s. 27(1)(a) of the *Arbitration Act*, R.S.Y. 2002, c. 8, (occasionally the "*Act*") to set aside an arbitration award dated May 1, 2012. Church is a franchisee of H&R Block Canada Inc. ("Block") pursuant to a franchise agreement dated January 2, 1998 (the "franchise agreement"). Block operates a franchise system which offers tax return preparation services. Church operates her franchise business in Whitehorse and has had a number of disputes with Block over the past few years. On October 26, 2010, pursuant to a provision in the

franchise agreement, Church gave notice to Block of her intention to proceed with arbitration over a number of these disputes. Over the course of the following year-and-a-half, a three-member arbitration panel was convened, and the parties exchanged written submissions and provided them to the panel. Two teleconference calls also took place along the way. The panel rendered an interim award on March 7, 2012, and the final award on May 1, 2012. One member of the panel dissented on one issue in the final award.

[2] The principal issue in dispute is one of contractual interpretation and the interplay between the franchise agreement and a Policy and Printed Procedures Manual (the "manual"), which is incorporated by reference in s. 9 of the franchise agreement. The manual is frequently and unilaterally amended by Block.

[3] More specifically, one of the main issues before the arbitration panel arose from an amendment to the manual in 2010, which purported to require all franchisees to use the supplied H&R Block computer software program for the preparation of all tax returns. Previously, s. 7 of the franchise agreement provided that the use of this software was optional. The majority of the panel held that this provision in the manual overrode and amended s. 7 of the franchise agreement. The dissenting member of the panel held that the policy change regarding the software usage was an alteration of the "fundamental relationship" between the franchisor and the franchisee. Accordingly, he concluded that such an amendment to the franchise agreement could only be done pursuant to s. 25 of the agreement, which required the amendment to be in writing and signed by both parties.

[4] Church filed her petition giving rise to this application on June 11, 2012. A number of additional issues were raised in the petition which will be better understood following a brief review of the procedural history of this arbitration.

HISTORY OF THE ARBITRATION

[5] As stated, on October 26, 2010, Church's counsel provided notice to Block of her intention to proceed to arbitration.

[6] The parties agreed to use the UNCITRAL (United Nations Commission on International Trade Law) Arbitration Rules, as revised in 2010 (the "UNCITRAL Rules").

[7] Counsel for the parties exchanged correspondence in early 2011 regarding the questions which would be put to the panel.

[8] On September 29, 2011, counsel for the parties participated in a teleconference call with the chair of the panel, John Waddell Q.C.[1] They agreed that there were no issues of credibility and that the positions of the parties would be advanced in the form of documents, written submissions and case law. Counsel also agreed to the following schedule for the delivery of that material to each other and to the panel:

> October 24, 2011 - initial materials from Church
>
> November 21, 2011 - materials from Block
>
> December 9, 2011 – Church's reply materials, if any

[9] On October 18, 2011, Church filed her initial submission with the panel. The submission raised a new issue which was not in her notice of arbitration. The issue was whether Block was required to reimburse her for paper used to print electronic tax returns, client receipts and bookkeeping copies.

[1] The other members of the panel were Paul D.K. Fraser Q.C. and Richard Buchan.

[10] On November 21, 2011, Block filed its submission with the panel.

[11] On December 6, 2011, Church filed her reply submission with the panel.

[12] On December 20, 2011, Block made a written submission to the panel objecting to the majority of Church's reply, stating:

> "… A party must not present submissions or evidence in reply that it could have adduced in the first instance or which is simply confirmatory of the submissions or evidence that is presented by them in the first instance."

The submission acknowledged that there were a number of matters which were properly raised by Church in the reply, but sought leave from the panel to have Block's responses to those points accepted as sur-reply.

[13] On December 29, 2011, Church's counsel wrote to the panel chair objecting to the attempt by Block to make a sur-reply.

[14] On January 9, 2012, in anticipation of an upcoming teleconference call, the panel chair wrote to the parties expressing concern that the issues were not clearly identified. Among the matters raised by the panel chair were the following:

1) Did the panel have jurisdiction to consider parts of Church's reply and Block's sur-reply?

2) Whether Church would be allowed to amend her claim to seek reimbursement for paper used to print electronic tax returns, client receipts and bookkeeping copies?

3) Did the panel have jurisdiction to consider Church's claim based on an alleged breach of a contractual duty of good faith?

[15] On February 29, 2012, the arbitration panel convened the second teleconference call with counsel for the parties to discuss the issues raised in the panel chair's letter of January 9th. Counsel were given an opportunity to make submissions and answer questions from the panel members.

[16] On March 7, 2012, the panel unanimously released its interim award. It determined that it would not consider Church's application to amend or supplement her claim to include a claim for reimbursement for paper. The reasons given were as follows:

> "a. This matter has been ongoing since October 2010 and any further delay occasioned by the amendment would be disproportionate to the nature and value of the claim;
> b. Additional delay its prejudicial itself but if it results in additional cost to the parties that is a further negative factor;
> c. The reference in paragraph 4 of Mr. Willis's letter of October 26, 2010 is not sufficiently similar to a claim for reimbursement used for paper to print electronic tax returns, client receipts and bookkeeping copies to constitute advance notice of such a claim;[2]
> d. No adequate reason has been given for the delay in advancing the claim beyond counsel's apparent reliance on Ms. Church to prepare her materials."

[17] The panel further agreed to consider both Church's reply, in full, and Block's sur-reply. In making that determination, they acknowledged that there were matters referred to in Church's reply that were not simply responses to the Block submission and could

[2] In that paragraph, Church's counsel demanded that Block continue to provide Church with envelopes and file folders, as well as guaranteeing her advertising budget. The final sentence of the paragraph read: "Church feels a reimbursement of prior years supplies is also required and is working on a calculation of the amounts."

not have been anticipated by Block in making that submission. The panel also paid heed to Article 17 of the UNCITRAL Rules, which provides:

> "17.1 Subject to these rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

[18] Finally, in the interim award, the panel identified the six issues that had been agreed to by counsel for both parties during the February 29th teleconference call.

[19] On May 1, 2012, the panel released its final award, with reasons from both the majority and the dissenting member.

THE FINAL AWARD

[20] In the final award, the dissenting member, Mr. Buchan, concurred with the majority on all of its determinations with the one exception indicated above. Mr. Buchan disagreed with the majority's conclusion that the condition in s. 7 of the franchise agreement regarding the optional use of H&R Block's tax preparation software could be amended unilaterally by Block making changes to the manual.

[21] The majority began its opinion by acknowledging that the parties had asked it to approach the matter "as a case of contractual interpretation." In its 12-page award, the majority made determinations on the six issues identified in the interim award.

[22] On the question of the software usage, the majority acknowledged that the change to the manual in 2010 making the use of the software mandatory conflicted with the permissive language in s. 7 of the franchise agreement. The majority considered

Church's resulting argument that Block's insistence that she use their software constituted a breach of the franchise agreement. They also considered Church's argument that a duty of good faith arises in contracts such as the franchise agreement, because of a presumed imbalance of power between franchisors and franchisees. Finally, the majority noted Church's alternative argument that, because of the conflict between the software policy in the manual and s. 7 of the franchise agreement, there was an ambiguity in the overall terms of the agreement. That in turn, argued Church, called into play the *contra proferentem* rule, which required that the ambiguity be resolved in favour of the franchisee.

[23] The majority agreed that the permissive language in s. 7 of the franchise agreement contradicted the mandatory language of the software policy in the manual. It also acknowledged that it was "arguable" that the purported amendment of s. 7 by the manual:

> "… goes beyond a matter of policy and procedure and involves a fundamental deviation from the original intention of the parties at the time the Franchise Agreement was entered into."

[24] However, in answer to that argument, the majority stated:

> "… the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract (see *Consolidated – Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Company* [1980] 1 S.C.R. 888)." (my emphasis)

[25] The majority then went on to consider s. 9 of the franchise agreement. Section 9 required the franchisee to conduct business in accordance with the rules and regulations specified in the manual, which, as defined under s. 34 of the franchise

agreement, could be "amended by Block from time to time." This was referred to by the majority as "an overriding obligation" on the franchisee throughout the franchise agreement. Section 9 also required the franchisee to provide client service "in accordance with the H&R Block System". The majority noted that, under s. 34, "H&R Block Systems" is a defined term that means:

> "The methodology, concepts, formats, and means of... performing Approved Services… but does not include any specific electronic or mechanical equipment used to provide Approved Services."

The majority then went on to remark that, under s. 34, "Approved Services" is also a defined term that includes "required services", which in turn is defined to mean:

> "Those products or services which a Franchisee must offer under this Agreement: namely, tax preparation and electronic filing of tax returns.

Finally, the majority referred to the fact that, prior to the 2010 policy change in the manual, any franchisees opting to use the H&R Block software were required to enter into a "Sub- Licence Agreement" for the use of the software. That requirement continued in the 2010 policy. The Sub-Licence Agreement, which Church entered into in November 2005, contained the following provision:

> "The materials are to be used solely in connection with the tax preparation business of the Franchisee which is carried on pursuant to the terms of the Franchise Agreement, Block's Policy and Procedure Manual and any other policies established by Block from time to time governing the Franchisee and its business…" (my emphasis)[3]

[3] Church attached a notice of intention to cancel the 2005 Sub-Licence Agreement to the notice of arbitration letter of October 26, 2010.

[26] The majority then concluded that, when all of the above provisions are considered in their entirety:

> "… it can be seen that the provision and use of computer software forms part of the H&R Block System."

The majority found that the 2010 policy change to the manual was permissible pursuant to s. 9 of the franchise agreement and effectively amended s. 7 of the franchise agreement to make the use of the software mandatory.

[27] The majority also found that there was "no ambiguity" in the franchise agreement, despite the policy amendment

[28] Lastly on the software issue, the majority considered s. 25 of the franchise agreement which provides:

> "…This Agreement may be amended only in writing signed by both of the parties hereto."

In this regard, the majority concluded that, with regard to the whole of the agreement, the parties could not have intended to require a signed amendment every time the policies in the manual were changed. Rather, it concluded that s. 25 was intended only to apply to "material changes… fundamental to the operation of the Franchise", which did not include a change in the use of software. At para. 42 of their reasons, the majority stated:

> "… The Agreement is replete with references to the Manual and its important application to the operation of the Franchise. The parties could not have intended to require a mutually signed Amended Agreement every time the Manual's policies were changed. The requirement for a written Amended Agreement could only have envisioned material changes to the wording of the body of the Agreement. For example, changes to the financial terms between the parties, the duration of the agreement, or the

> overall role the Manual was to play in the franchise relationship, would require the written agreement of the parties. So would changes to the Manual that were fundamental to the operation of the Franchise. A change in the use of software is not fundamental to the operation of the franchise but falls within the "methodology" required as part of the H&R Block system…"

In justification for this last comment about the software, the majority remarked that there was an absence of evidence of the impact of the change on Church's business, and therefore it did not have a basis to determine if the change could be considered fundamental. As noted earlier, the dissenting member disagreed, suggesting that the purported amendment altered "the fundamental relationship" between the parties.

ISSUES

[29] Section 27(1) of the *Arbitration Act*, cited above, provides:

> "27(1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under that party may apply to a judge to set aside an award on the grounds
>
> > (a) that an arbitrator or umpire has acted inappropriately; or
> >
> > (b) that an arbitration or an award has been improperly procured
>
> and the judge may dismiss the application or set aside the award."

[30] Church's counsel confirmed at the hearing of this petition that he is not relying upon paragraph (b).

[31] The petition asks that the award of the majority dated May 1, 2012, be set aside on the grounds that the majority "acted inappropriately" pursuant to s. 27(1)(a) of the *Act*. Church lists six specific grounds to support that assertion. The first two relate to the

issue of contractual interpretation and the remaining four are procedural. I will set them out using the exact words of Church's counsel (but not in his order):

1) "The findings by the majority that the use of the software supplied by the Respondent [was] mandatory and not optional contrary to the express terms of the Agreement;

2) the findings of the majority that the procedure manual in essence could modify the Agreement contrary to Section 25 of the Agreement;

3) the failure of the majority to treat the petitioner with procedural fairness;

4) the failure of the majority to comply with UNCITRAL Rules 2010, article 17(1), failure to treat the petitioner with equality and failure to permit the petitioner to reasonably present her case;

5) the failure of the majority of the panel to follow UNCITRAL Rules, 2010, article 17(2) and 24 in that they set out the requirement for a Statement of Claim, a Defence and a Reply, but later permitted the respondent to file a Sur-Reply; [and]

6) the refusal of the panel to allow an amended claim for the reimbursement of paper for electronic tax returns, client receipts and bookkeeping copies." [4]

AMENDMENT OF SECTION 27(1)(a)

[32] A preliminary issue arose at the hearing regarding a change in the wording of s. 27(1)(a) of the *Arbitration Act* when it was amended as part of a general revision of

[4] Technically, this decision was made in the interim award, which has not been challenged by the petition. However, Block's counsel did not object to its inclusion in the list.

Yukon statutes in 2002. In the 1986 *Arbitration Act* (R.S.Y. 1986, c. 7), s. 27(1)(a) stated:

> "27.(1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under him may apply to a judge to set aside an award on the grounds
>
> (a) that an arbitrator or umpire has misconducted himself…" (my emphasis)

[33] Following the 2002 revision and consolidation of Yukon statutes, s. 27(1)(a) now states:

> "27 (1) Whether or not a submission provides for an appeal from an award, a party to a submission or a person claiming under that party may apply to a judge to set aside an award on the grounds
>
> (a) that an arbitrator or umpire has acted inappropriately…" (my emphasis)

[34] This change in language from an arbitrator who has "misconducted himself" to an arbitrator who has "acted inappropriately" was given considerable attention by counsel for both parties at the hearing because of its potential impact on the scope of this court's review of the majority award. It also appears that the current wording in s. 27(1)(a) is unique among the other arbitration statutes in Canada.

[35] However, further research by this Court and counsel during the hearing revealed that the above amendment was made pursuant to the *Continuing Consolidation of Statutes Act*, R.S.Y. 2002, c. 41(the "*Consolidation Act"*). Section 4 of that *Act* provides:

> "In revising statutes or regulations, the Chief Legislative Counsel may

> (a) omit provisions that are obsolete, are spent or have no legal effect;
>
> (b) change the numbering or arrangement of provisions;
>
> (c) make changes in language and punctuation to achieve inclusiveness and greater uniformity;
>
> (d) make any changes that are necessary to clarify what is considered to be, in the case of a statute, the intention of the Legislature, or in the case of a regulation, the intention of the authority that made the regulation, and to reconcile apparently inconsistent provisions;
>
> (e) correct clerical, grammatical or typographical errors;
>
> (f) make amendments to other statutes or regulations to reconcile them with a revised statute or regulation as if the amendments were consequential amendments to the revised statute or regulation;
>
> (g) combine or separate statutes; and
>
> (h) combine or separate regulations." (my emphasis)

[36] Importantly, s. 17 of the *Consolidation Act*, which is subtitled "Legal effect of revision", provides:

> "A revision does not operate as new law but has effect and shall be interpreted as a consolidation of the law contained in the statutes or regulations replaced by the revision." (my emphasis)

[37] It also appears that s. 17 has codified a common-law presumption that a legislative body does not intend to make a substantial change in the law when undertaking a consolidation. In *Ammerlaan v. Drummond* (1982), 37 B.C.L.R. 394 (S.C.), Spencer J. observed at para. 2:

> "2 There is a common law presumption that a legislative body, under the guise of a consolidation, is presumed not to

> have intended a substantive change in the law. See *Cedar Rapids Saving Bank et al v. Dominion Purebred Stock Company Ltd.* (1923) 3 W.W.R. 1214…."

[38] I also note that the French text of s. 27(1)(a) did not change during the consolidation. Given that the English and French are equally authoritative pursuant to s. 4 of the *Languages Act*, R.S.Y. 2002, c. 133, the fact that one was varied while the other was not confirms that the changes made should not have substantive effect.

[39] Thus, the 2002 amendment did not change the scope of review in s. 27(1)(a) of the *Arbitration Act*. Rather, it would appear that this particular amendment was deemed necessary "to achieve inclusiveness" by eliminating the word "himself" in reference to the arbitrator, as authorized in s. 4(c) of the *Consolidation Act*. The fact that the other wording change was from "him" to "that party" supports this conclusion.

[40] Accordingly, in order to determine the scope of review in the current s. 27(1)(a), it would be appropriate to review the jurisprudence considering other arbitration statutes in Canada which have referred to an arbitrator who has "misconducted" him or herself.

SCOPE OF REVIEW

[41] I begin by referring to a decision of Vertes J. in *Union of Northern Workers v. Northwest Territories Power Corp.*, [1994] N.W.T.J. No. 59 (S.C.). That case involved an interpretation of s. 28 of the 1988 *Arbitration Act* of the Northwest Territories, which is worded almost identically to the 1986 version of s. 27(1)(a) of the Yukon *Arbitration Act*. At paras. 29 through 31, Vertes J., who is also a deputy judge of this Court,

observed:

> “29 Under s. 28, the grounds to set aside an award are "misconduct" by the arbitrator or where the award has been "improperly procured". The second standard would seem to apply where there is an allegation that one of the parties did something "improper" (such as the perpetration of a fraud) to "procure" the award. That is not suggested in this case. Therefore the question is whether there are any grounds to suggest "misconduct".
>
> 30 Both counsel agree that the scope of the court's review on an application under s. 28 is much more restricted than on an appeal. It is not a question of whether the award is the right one to make or the preferable one; it is simply a question of whether there has been "misconduct" as that term is known in law.
>
> 31 At common law the court had power to quash the decision of a consensual arbitrator for "misconduct". That term has always included such concepts as bias, corruption, and arbitrariness. It now also includes actions in excess of jurisdiction and errors of law on the face of the record (which would also be jurisdictional errors): see Jones & deVillars, *Principles of Administrative Law* (1985), at pages 305 - 309.” (my emphasis)

[42] In *St. John (City) v. Irving Oil Co.*, [1966] S.C.R. 581, the Supreme Court of Canada dealt with s. 17 of the *Arbitration Act* of New Brunswick, R.S.N.B. 1952, c. 9, which contained language very similar to s. 27(1) of the Yukon *Arbitration Act.* At p. 586, Ritchie J., speaking for the Court considered the role of the reviewing court in the context of an arbitral award:

> “…The limited jurisdiction of a court in considering an application to set aside or remit back an award under such circumstances was considered in this Court by Sir Lyman Duff in *Scotia Construction Co. Ltd. v. City of Halifax* [[1935] S.C.R. 124 at 129.], where he said:
>
> > An award can be set aside, (1) when it has been improperly procured, and (2) on the ground of misconduct of the arbitrator.

> 'Misconduct' is in this relation a term of very comprehensive denotation, and includes ambiguity and uncertainty in the award, as well as manifest error of law on the face of the award. The appellants have not established the existence of any of these grounds."

[43] Later, at p. 588, Ritchie J. held that an error in law "which can only become apparent after an examination of the evidence" is not an error of law on the face of the award. Rather, he cited the decision of the House of Lords in *Kelantan Government v. Duff Development Co.*, [1923] A.C. 395 (H. of L.), which held that:

> "…unless it appears on the face of the award that the arbitrator has proceeded on principles which were wrong in law, his conclusions as to the construction of the deed must be accepted. No doubt an award may be set aside for an error of law appearing on the face of it; and no doubt a question of construction is (generally speaking) a question of law. But where a question of construction is the very thing referred for arbitration, then the decision of the arbitrator upon that point cannot be set aside by the Court only because the Court would itself have come to a different conclusion. If it appears by the award that the arbitrator has proceeded illegally--for instance, that he has decided on evidence which in law was not admissible or on principles of construction which the law does not countenance, then there is error in law which may be ground for setting aside the award." (my emphasis)

[44] The *Irving Oil* case was decided well before the modern principled framework around judicial review was established. Although the Court's consideration of the specific wording used in arbitration statutes is useful, it should also be situated in the context of the standards of review set out in the current leading case of *Dunsmuir v. New Brunswick,* 2008 SCC 9. As noted in *Dunsmuir,* when a court is asked to review an administrative decision, it must ensure that the rule of law is upheld, but it should not unduly interfere with the tribunal's discharge of its administrative function. Accordingly,

courts generally show deference to tribunal determinations around questions of fact, discretion and policy and reserve a more rigorous review for errors of law. The Supreme Court in *Irving Oil* determined that 'misconduct' that would permit the overturning of an arbitral award includes a 'manifest error of law on the face of the award'. Errors of fact do not rise to the level of misconduct. This accords with the law set out in *Dunsmuir,* as the implication is that a tribunal's finding on a point of law will generally be reviewed on a less deferential standard than findings of fact and mixed fact and law.

ANALYSIS

The Contractual Interpretation Issue

[45] In my view, the first two issues raised by Church, as set out above at para. 3, are really part of one global question with two components. The first is whether the majority proceeded on principles which were wrong in law. There are no issues of jurisdiction or inadmissible evidence. The second sub-issue, assuming the majority erred, asks whether the error was truly one "in law" as opposed to "mixed fact and law". If the latter, then there would be no "error of law" on the face of the award, and thus no basis for holding that the majority misconducted itself or acted inappropriately under s. 27(1)(a) of the *Arbitration Act.*

[46] On the first sub-issue, the outline of Church's counsel failed to specifically identify which of the principles of contractual interpretation applied by the majority were wrong in law. Rather, the bulk of the argument in the outline was to suggest that the majority's conclusion was wrong, because the manual could not override the franchise agreement. That, however, is not the test under s. 27(1)(a). The award cannot be set aside simply because this Court might have come to a different conclusion on the

question of contractual interpretation, as did the minority member of the panel. Rather, what is required is for Church to establish on a balance of probabilities that the majority proceeded on principles which were wrong in law.

[47] The only point which approaches one of *principle* made by Church's counsel, albeit rather weakly, was that the majority erred by failing to consider or apply the contractual duty of good faith in interpreting the franchise agreement, which is a contract of adhesion, as defined in the case law. However once again, the argument seemed to turn on the majority's conclusion, rather than the principles it applied. Church's counsel submitted that Block "unilaterally changed" the terms of the franchise agreement by its reliance on the manual. And further, that Block was "under a duty of good faith to uphold its bargain" in the franchise agreement. Both of these submissions presume that the majority's conclusion was incorrect. The majority concluded, after interpreting the contract as a whole, that s. 7 of the franchise agreement had been amended by the 2010 policy change in the manual. Further, since changes to the manual were permissible under s. 9 of the franchise agreement, then pursuant to the "bargain" between the parties, the amendment was not, strictly speaking, unilateral.

[48] Turning to the majority's reasons themselves, I am satisfied that full and fair consideration was given to Church's arguments, including her assertion that a duty of good faith arises in franchise contracts, i.e. contracts of adhesion, because of the presumed power imbalance between franchisors and franchisees: see paras. 15 through 20, and 28 of those reasons. However, in answer to those arguments, as I set out above, the majority chose to follow the normal rules of construction which lead a court to discern the intentions of the parties from the contract as a whole: see paras. 21

and 29 of the majority's reasons. That approach also led the majority to conclude that there was no ambiguity between s. 7 of the franchise agreement, as amended by the manual, and s. 9 of the agreement.

[49] With respect to the issue of good faith, the majority commented that it did not feel it was necessary to determine whether or not there is a duty of good faith applicable in the Yukon. At paras. 24 and 25 of its reasons, the majority stated:

> "24… We have been asked to decide this case strictly by invoking principles of interpretation of contracts. We do not have any sworn evidence about the significance of the impact of the change of software to the operation of Church's business.
>
> We have no supporting evidence that would allow for a determination as to whether the Franchisor has acted contrary to community standards of honesty, reasonableness or fairness. An amendment to the terms of an agreement cannot be judged in an evidentiary vacuum.
>
> 25. For these reasons, the Panel is unable to make a finding that the Franchisor has breached any possible duty of good faith to Church."

[50] In short, Church's counsel has failed to persuade me that the majority applied any principles which were wrong in law. Nor has counsel shown that the majority committed any error of legal methodology, and, as stated, there are no issues of admissibility of evidence or jurisdiction. Accordingly, Church has not demonstrated that the majority committed an error of law on the face of the award. Thus, there is no basis for setting aside the award under s. 27(1)(a) of the *Arbitration Act*.

[51] In the alternative, the second sub-issue is whether, assuming the majority erred, the error is one of law or mixed fact and law. In *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834, Dickson J. noted the critical importance in cases

involving the construction of contracts for the reviewing court to confine itself to questions of law, because questions of mixed fact and law or questions of fact are solely within the jurisdiction of the arbitrator (para. 70). She also stressed the importance of distinguishing between a tribunal determining “the meaning” of words in a contract from “the legal effect” of those words, as the former often involves a consideration of the factual matrix in which the contract was made, and thus is a question of mixed fact and law. After canvassing the relevant authorities, at para. 72, Dickson J. helpfully sets out a summary of the law in this area:

> [72] As I understand it, the core ideas that emerge from the recent jurisprudence on errors of law related to contractual interpretation in the arbitration context are these:
>
> 1. An arbitrator must apply the proper principles of contractual interpretation, including consideration of the clause at issue in the context of the entirety of a contract. An error of legal methodology or failure to use the proper principles is an error of law which is reviewable on appeal.
>
> 2. An arbitrator's determination of the factual matrix giving rise to a contract is a question of fact. <u>When an arbitrator interprets the true meaning of a contract's words, viewed objectively in the context of the factual matrix, this is a question of mixed fact and law which is not reviewable on appeal.</u>
>
> 3. Once an arbitrator has determined the true meaning of a contract's words the final determination of their legal effect, or the legal relationship between the parties as expressed by the words, is an extricable question of law requiring no reference to the factual matrix which is reviewable on appeal.” (my emphasis in para. 72)

[52] In the case at bar, it is my view that the panel was asked to interpret the "true meaning" of the words in ss. 7 and 9 of the franchise agreement, together with the 2010 policy change in the manual, which was incorporated by reference into the franchise agreement. As stated in the majority opinion: "The Panel was asked to approach the matter as a case of contractual interpretation." The panel was not asked to grant any remedy, and in that sense did not make a final determination of the "legal effect" of the meaning of the words, or their impact on the "legal relationship" between the parties. Therefore, the question of contractual interpretation was one of mixed fact and law and, even if the majority erred in that regard, it is not an error of law on the face of the award. Accordingly, it cannot form the basis for setting aside the award under s. 27(1)(a) of the *Arbitration Act*.

The Procedural Fairness Issue

[53] The remaining four issues raised by Church's counsel all have to do with the question of procedural fairness. They are set out as issues 3 through 6, in para. 31 above. Although not expressly argued by Church's counsel, the point I presume he was trying to make here is that a denial of procedural fairness can constitute a jurisdictional error, which in turn could be an error on the face of the award, and thus grounds for setting aside the award.

[54] The first complaint in this regard is the alleged failure of the majority to comply with Article 17(1) of the UNCITRAL Rules. Article 17(1) states:

> "Subject to these Rules, the arbitral tribunal may conduct the arbitration in such manner as it considers appropriate, provided that the parties are treated with equality and that at an appropriate stage of the proceedings each party is given a reasonable opportunity of presenting its case. The arbitral tribunal, in exercising its discretion, shall conduct the

> proceedings so as to avoid unnecessary delay and expense and to provide a fair and efficient process for resolving the parties' dispute."

[55] Church submits that the majority failed to treat her with equality and failed to permit her to reasonably present her case. However, the outline of Church's counsel fails to specify how the majority failed in that regard, other than pointing to the refusal of the panel to allow an amended claim for the reimbursement of paper for electronic tax returns, client receipts and bookkeeping copies. This last point is itself a separate ground for seeking to set aside the award (issue # 6, at para. 31 above).

[56] I cannot agree that the panel failed to meet its duty of procedural fairness to Church. Block's counsel submits that neither the affidavits sworn in support of the petition, nor the interim or final awards, contain any evidence that the panel failed to treat Church with procedural fairness. I agree. In accordance with the UNCITRAL Rules, and the process agreed to by the parties, Church was given a "reasonable opportunity" to present her case to the panel by way of her initial submission filed on October 18, 2011, and a further submission in reply to Block's submission, on December 8, 2011. Furthermore, Church's counsel was given an opportunity to make submissions to the panel regarding the proposed amendment to the claim. Those submissions were made during the teleconference call on February 29, 2012, and were specifically addressed by the panel in its interim award, as was Article 17(1) of the Rules. Finally, as set out above at para. 16, in the interim award, the panel gave cogent reasons for the exercise of its discretion in denying the amendment. Those reasons provided justification for the panel's decision, and were transparent and intelligible. Accordingly, this ground must fail as a basis for setting aside the award under s. 27(1)(a) of the *Arbitration Act*.

[57] With regard to the specific decision of the panel to refuse Church's amended claim, the decision about allowing such an amendment was clearly one within the panel's discretion under Articles 17(1) and 22 of the Rules. This decision is entitled to deference, and the applicable standard of review is reasonableness. To use the language in *Dunsmuir,* so long as the panel's decision was justified, transparent and intelligible, and one falling within a range of possible, acceptable outcomes, then this Court should give deference to it (para. 47).

[58] Church's remaining complaint under the issue of procedural fairness is that the panel agreed to consider Block's sur-reply. In the petition, Church alleged that the panel failed to follow articles 17(2) and 24 of the UNCITRAL Rules. However, in the outline of Church's counsel, this argument was not pursued.

[59] Article 17(2) states:

> "As soon as practicable after its constitution and after inviting the parties to express their views, the arbitral tribunal shall establish the provisional timetable of the arbitration. The arbitral tribunal may, at any time, after inviting the parties to express their views, extend or abridge any period of time prescribed under these Rules or agreed to by the parties."

[60] Article 24 states:

> "The arbitral tribunal shall decide which further written statements, in addition to the statement of claim and the statement of defence, shall be required from the parties or may be presented by them and shall fix the periods of time for communicating such statements."

[61] In my view, this issue is disposed of in much the same fashion as the denied amendment to Church's claim. There is simply no basis in the evidence for suggesting that the panel treated Church without procedural fairness. While it is correct that Block's

attempt to file a sur-reply went beyond the provisional timetable established by the chair in his email of September 29, 2011, Block did seek "leave" from the panel to accept its sur-reply of December 20, 2011. Counsel for the parties were each given an opportunity to make further oral submissions on the question during the teleconference call on February 29, 2012. The panel then announced its decision in the interim award and agreed with Block that there were matters referred to in Church's reply of December 6, 2011 which were not simply responses to Block's submission, and could not have been anticipated by Block in making that submission. Accordingly, after also having regard to article 17(1) of the Rules, the panel concluded:

> "While it is unfortunate that the Reply and sur Reply expanded rather than clarified issues, the Panel is of the view that both documents are necessary to achieve equality and give each party a reasonable opportunity to present its case."

[62] Accordingly, this ground must also fail as a basis for setting aside the award under s. 27(1)(a) of the *Arbitration Act*.

CONCLUSION

[63] The petition to set aside the majority's arbitration award of May 1, 2012, is dismissed.

[64] While I did not specifically hear from counsel for the parties on the issue of costs, I would expect them to be able to agree that, pursuant to Rule 60(9) of the *Rules of Court*, the costs should follow the event. If they are unable to agree, I will remain seized of the matter for the purpose of hearing further submissions on the point.

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GOWER J.