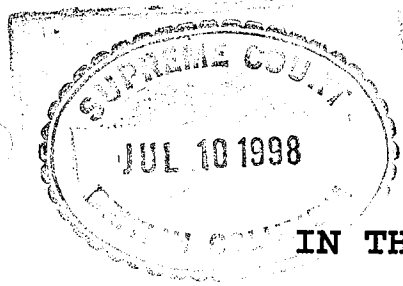


Date: 19980710  
Docket: S046974  
Registry: New Westminster



IN THE SUPREME COURT OF BRITISH COLUMBIA

BETWEEN:

DEREK PAGET AND PAKAR HOMES LTD.

PETITIONER

AND:

VERNOR KARPINSKI

RESPONDENT

REASONS FOR JUDGMENT

OF THE

HONOURABLE MR. JUSTICE LEGGATT

Counsel for the Petitioner:

Ronald A. Simunovic

Counsel for the Respondent:

Trevor S. Fowler

Place and Date of Hearing:

New Westminster, B.C.  
June 18, 1998

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**THE PRESENT APPLICATION**

[1] The petitioner seeks leave to appeal the decision of the arbitrator with respect to the \$200,000.00 loan. He argues that the arbitrator erred in failing to find that the relationship between the parties was one of partnership, in mischaracterising the nature of the loan and in failing to hold respondent liable for one half of the \$200,000.00 debt.

**SHAREHOLDERS AGREEMENT**

[2] Section 35 of the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "Act"), reads:

Exclusion agreements

35 If, after an arbitration has commenced, the parties to it agree in writing to exclude the jurisdiction of the court under sections 31, 33 and 34, the court has no jurisdiction to make an order under those sections except in accordance with the agreement, but otherwise an agreement to exclude the jurisdiction of the court under those sections has no effect.

**COMMERCIAL ARBITRATION ACT**

[3] Section 31 of the *Act* deals with appealing the decision of an arbitrator. Section 31 states:

Appeal to the court

31 (1) A party to an arbitration may appeal to the court on any question of law arising out of the award if

(a) all of the parties to the arbitration consent, or

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- (b) the court grants leave to appeal.
  - (2) In an application for leave under subsection (1)(b), the court may grant leave if it determines that
    - (a) the importance of the result of the arbitration to the parties justifies the intervention of the court and the determination of the point of law may prevent a miscarriage of justice,
    - (b) the point of law is of importance to some class or body of persons of which the applicant is a member, or
    - (c) the point of law is of general or public importance.
  - (3) If the court grants leave to appeal under this section, it may attach conditions to the order granting leave that it considers just.
  - (4) On appeal to the court, the court may
    - (a) confirm, amend or set aside the award, or
    - (b) remit the award to the arbitrator together with the court's opinion on the question of law that was the subject of the application.

**BACKGROUND**

[4] The petitioner and respondent were neighbours. The petitioner was a real estate agent and the respondent was involved in the construction industry. In late 1991 or early 1992 the two decided to go into business together to purchase residential lots and build homes for resale.

[5] At the petitioner's urging, the parties went to a lawyer to properly structure the business. The lawyer recommended

that the parties incorporate. They took that advice, incorporated under the name Pakar, and entered into a shareholders agreement.

[6] The respondent had no money. It was the petitioner's responsibility to obtain sufficient financing. In addition to the construction loans that he was able to obtain, the petitioner borrowed \$200,000.00 personally against his residence. He then loaned this sum to the company. It was documented as a loan from the petitioner to the company.

[7] The business was relatively successful at first but unfortunately for the parties the housing market took a turn for the worse. The company incurred substantial losses from which it was unable to recover.

[8] A dispute arose between the parties which was resolved through arbitration proceedings. The main issue at the arbitration was with respect to the debt incurred by the petitioner. The arbitrator found that the nature of the relationship between the parties was one of shareholders in a limited company, not one of a partnership, and that the loan was treated as a loan from the petitioner to the company. As a result, the arbitrator dismissed the petitioner's claim for \$100,000.00 arising from this loan.

**THE PETITION**

[9] The respondent submits that the petitioner has failed to specify in the petition the point of law from which it is appealing.

[10] In *Domtar Inc. v. Belkin Inc.* (1989), 39 B.C.L.R. (2d) 257 (B.C.C.A.) Lambert J.A., speaking for the court, said at 260:

As a matter of practice it is essential that the petition for leave under section 31 should state the question or questions of law on which leave to appeal is required. A general allegation of error in law is not sufficient. In my opinion, leave should not be granted except on specific questions of law, identified and stated in the petition.

[11] The respondent argues that paragraph 1 of the petition is not specific enough to meet this test. That paragraph reads:

The Petitioner applies to this Court for an order that:

1. Leave be granted to appeal the award of William McFetridge Arbitrator under the Commercial Arbitration Act R.S.B.C. 1996 rendered April 3, 1998 and supplemented pursuant to S.31 and 42 of the Commercial Arbitration Act R.S.B.C. 1996.

However, under the heading "The facts upon which this petition/appeal is based are as follows", the petitioner has more specifically outlined the alleged error. While this clarification may be slightly misplaced within the petition, it is, in and of itself, no reason to deny leave to appeal.

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QUESTION OF LAW

[12] It is necessary to determine whether the alleged error is an error of law or fact. Section 31 makes it clear that a court may only review issues of law on an appeal under the *Act*; it is inappropriate for a court to review findings of fact: *Domtar, supra*.

[13] In the present case the alleged errors relate to issues of fact.

[14] While the petitioner is appealing the arbitrator's refusal to find any liability on the part of the respondent in relation to the \$200,00.00 loan, the real basis of his complaint is the arbitrator's characterization of the relationship between the parties and of the nature of the loan. The arbitrator's decision on these matters stemmed from his evaluation of the evidence before him, not from interpretation of the law.

[15] The problem for the petitioner is not that the arbitrator erred in his interpretation of the law; it is simply that, on the law, the facts as found by the arbitrator did not justify a finding of liability.

[16] While I am of the opinion that the issue on which the petitioner bases his appeal is one of fact, I will nevertheless go on to consider whether, if the petitioner were appealing on

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a question of law, this would be an appropriate case to grant leave.

#### **DISSENTILEMENT PROVISIONS**

[17] If a petitioner seeks to appeal on a question of law, the court must be satisfied that one of the three conditions set out in 31(2) (a), (b), or (c) is met.

[18] The petitioner cannot satisfy (b) or (c). There are no people or classes other than the parties to whom the arbitration important.

[19] With respect to (a), Lambert J.A. said in *Domtar* 265:

I conclude that para. (a) is met if the result of the arbitration is sufficiently important to the parties that the expense and time of court proceedings is justified and if the point of law, if decided differently, would have led the arbitrator to a different result.

[20] The criterion in s. 31(2) (a) is met in this case. The matter is clearly sufficiently important to the parties, and the point being appealed (although I am of the opinion that it is a factual point) was central to the arbitrator's reasoning.

#### **RESIDUAL DISCRETION**

[21] Even if the petitioner falls within 31(2) (a), this does not end the matter. Section 3(2) is permissive not mandatory.

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I am still left to consider whether this is an appropriate case to exercise my discretion to allow the appeal. According to the Court of Appeal in *Domtar* at 263,

The three paragraphs establish three conditions. At least one of the three must be met before leave can be granted. But it is important to note at the outset that even if one of the three conditions is met the court is not required to grant leave. (*Domtar* at p. 263)

[22] In considering whether to exercise my discretion to grant leave I am guided by the Court of Appeal in *Domtar*.

[23] In *Domtar*, Lambert said at 267:

If the decision of the arbitrator in such cases is so obviously wrong that he cannot have reached his decision on a matter of substance by a considered decision-making process, which is what the parties have contracted for, then leave should be granted. Otherwise, it should be refused.

[24] In *Grant v. 546520 B.C. Ltd.* (10 March 1997), Vancouver A963031 (B.C.S.C.), referring to *Domtar*, Brenner J. said at paragraph 29:

That case, in my view, sets out a very clear principle that where the parties have together chosen commercial arbitration as an alternative form of dispute resolution and where the impact of the arbitrator's decision is strictly limited to the parties themselves, the court must exercise great care before allowing an application for an appeal from such an award. Having regard to those policy considerations I consider that the *Domtar* test should be applied to the case at bar and hence the question is whether the arbitrator's decision is so obviously wrong that he could not have reached his decision on



a matter of substance by a considered decision-making process.

[25] The arbitrator prepared a principled and reasoned decision. In considering the issue on which the petitioner appeals the arbitrator said the following:

Counsel for the Claimants argued that Paget and Karpinski had formed a partnership in 1991 or 1992 and that the partnership has continued to date. He further argued that, as partners, they were jointly liable for any and all debts incurred by the partnership. To this end he argued that the loan from New Westminster Credit Union to Mr. Paget was a debt of the partnership and therefore Mr. Karpinski was liable together with Mr. Paget for this partnership debt.

I cannot accept this argument. By accepting this argument I would be ignoring the legal consequences of the incorporation and the terms of the Shareholders Agreement which sets out the relationship between the parties and states clearly and unequivocally the terms upon which these funds were advanced.

The Partnership Act contains rules as what [sic] constitutes a partnership. Section 4 states as follows:

3. The relation between members of a company or association that is
  - (a) incorporated under an Act for the time being in force and relating to the incorporation of the joint stock companies, or licensed or registered under an Act relating to the licensing or registration of extraprovincial companies, or
  - (b) formed or incorporated by or under any other statute or letters patent or Royal Charter

is not a partnership within the meaning of this Act.

In order to characterise the legal relationship between Mr. Paget and Mr. Karpinski as one of partnership after the formation of Pakar, I would effectively be ignoring the legal effect of incorporation and in particular the Shareholders Agreement. Except for the evidence that Mr. Paget and Mr. Karpinski intended to go into partnership and that they called themselves "partners", there is really nothing which indicates that they did not want to be governed by the rules of limited companies and by the Shareholders Agreement. By agreeing to become shareholders in Pakar and by carrying on the business within Pakar, they explicitly or implicitly agreed to forego the partnership option. They intended to be shareholders, not partners, regardless if they fully understood the consequences. The mere fact that they referred to one another as partners is not enough to establish a legal partnership.

Section 5.01 of the Shareholders Agreement states that the company borrowed the sum of \$200,000.00 from Mr. Paget. It states that the loan will bear interest at 2% over the Base Lending Rate of the New Westminster Credit Union and that it is repayable out of the net sale proceeds of sale proceeds of the sale of the first two houses constructed by the company. Mr. Paget fully expected to get paid in priority before any profits were distributed to the shareholders.

In my view the Shareholder Agreement sets out the entire agreement between the principals as the terms of the loan. There is nothing in the Shareholders Agreement to suggest that Mr. Karpinski is in any way liable for this debt of the company. If Mr. Karpinski was to have been responsible for a portion of the loan, either by a right of contribution or by a guarantee, the Shareholders Agreement would have stated so. In fact, the Agreement addresses those issues quite clearly (see Section 5.02 and 5.03). There is insufficient evidence to suggest that Mr. Karpinski agreed, either in writing or orally, to guarantee the loan or to contribute to any losses suffered by Mr. Paget.

The Shareholders Agreement was prepared by the lawyers in accordance with the instructions from Mr. Paget. For whatever reason the loan from the credit union was not treated as a company debt. Instead it was treated as a loan from Mr. Paget to the company. The parties were adequately advised by lawyers and I have no doubt the terms and consequences of the agreement were explained to both Mr. Paget and Mr.

Karpinski. The Shareholders Agreement is a clear statement as to the relationship of the parties. It is too late to try to re-characterise the loan now.

I therefor dismiss the Claimants' claim against the Respondent with respect to the loan from New Westminster Credit Union.

[26] *Domtar* and *Grant* set out a high threshold which must be met by a petitioner before leave will be granted. The arbitrator in this case carefully considered the matter before him and it is not possible to say that his decision is obviously wrong. The evidence before him seems to justify his conclusions.

#### CONCLUSION

[27] I am of the opinion that the issue on which the petitioner seeks to appeal is a question of fact not one of law. Even if it were a question of law, this would not be an appropriate case for me to exercise my discretion in favour of the petitioner. The application for leave is denied. The respondent will have his costs for this application at scale three.



The Honourable Mr. Justice Leggatt