THE BRITISH COLUMBIA COURT OF APPEAL'S JUDGMENT IN *BOLLHORN V LAKEHOUSE CUSTOM HOMES*: ITS CONSEQUENCES FOR ARBITRATION IN BRITISH COLUMBIA

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I. INTRODUCTION

The British Columbia Court of Appeal's judgment in *Bollhorn v Lakehouse Custom Homes Ltd*.[1] represents a significant step in British Columbia's evolving arbitration environment. Newbury JA, writing for a unanimous division of the Court of Appeal,[2] dismissed an application for leave to appeal an arbitrator's decision in a case arising from allegations of deficient home construction. The judgment turned on four issues: how the doctrine of *res judicata* applied, if at all; whether the arbitrator's decision represented an "award"; what implications followed from changes in the rules of the Vancouver International Arbitration Centre ("VanIAC") governing recourse from arbitral awards to the courts; and whether the VanIAC could intervene in the leave application. The issues addressed by Newbury JA are likely to engage courts again, and not only in the construction context.

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[1] 2024 BCCA 192, leave to appeal refused, 41389 (9 January 2025) [*Bollhorn* BCCA 2024].

[2] Willcock and Fisher JJA concurred in Newbury JA's judgment.

II. BACKGROUND TO THE COURT APPLICATION

The interactions between the Applicant, Robert Tyler Bollhorn ("Mr. Bollhorn"), and the Respondent, Lakehouse Custom Homes Ltd. ("Lakehouse"), proceeded in three phases.

The first phase began on 18 February 2021, when the Applicant and the Respondent entered into a contract ("the Contract"), under which Mr. Bollhorn purchased real property at Kelowna, British Columbia, and Lakehouse agreed to construct a home on it, all at a price to him of $1,865,000. On 7 February 2022, Lakehouse advised Mr. Bollhorn that it was terminating the Contract, although the home was 90% complete. He countered by instituting a civil claim in the BC Supreme Court on 10 March 2022, seeking a declaration that Lakehouse had breached the Contract and an order for specific performance (i.e., for Lakehouse to finish construction). Lakehouse counterclaimed on 12 April 2022, also alleging breach of contract.

Following a summary trial in the BC Supreme Court, on 5 December 2022, Stephens J ordered Lakehouse to specifically perform the Contract and held that the total purchase price would include Lakehouse's 6% markup and taxes on 24 change orders made by Mr. Bollhorn.[3] However, Stephens J concluded that he lacked sufficient evidence on "downgrades" or "deficiencies" alleged by Mr. Bollhorn to account for these in calculating the price to be paid on completion of the work.[4]

The second phase largely comprised attempts by Mr. Bollhorn and Lakehouse to resolve their ongoing disputes over the alleged deficiencies through arbitration. Shortly before the property transfer scheduled for 16 February 2023, Mr. Bollhorn conducted two walk-throughs of the property, during which he

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[3] *Bollhorn v Lakehouse Custom Homes Ltd.*, 2022 BCSC 2120 at para 94 [*Bollhorn* BCSC]. This recapitulation of events is drawn from *Bollhorn* BCCA 2024 at paras 2-3 and *Bollhorn* BCSC at paras 20, 29, 33, and 34.

[4] *Bollhorn* BCSC, *supra* note 3 at para 91.

observed deficiencies in plumbing, lighting fixtures, and toilets, as well as unfinished landscaping; he estimated the total cost of remediation as $131,350.19.[5] Arguing that these deficiencies remained uncorrected, Mr. Bollhorn invoked the Contract's arbitration clause, which read:

> Any dispute concerning the identification and pricing of deficiencies, the rectification of the deficiencies, and release of the holdback will be settled by arbitration under the British Columbia *Commercial Arbitration Act* at the expense of the Seller.[6]

Consistent with the arbitration clause, Mr. Bollhorn filed a Notice to Arbitrate with VanIAC on 15 March 2023, seeking a determination of the deficiencies, quantification of the cost of rectifying them, and miscellaneous orders regarding payment.[7] Lakehouse opposed the claims, asserting that issues surrounding the deficiencies had already been determined by Stephens J and were therefore *res judicata*.[8] The arbitrator sided with Lakehouse and Mr. Bollhorn sought leave to appeal.

In the third phase, the British Columbia Court of Appeal ("BCCA") considered Mr. Bollhorn's application for leave to appeal the arbitrator's decision. Saunders JA, after hearing the application in chambers, referred it to a division of the BCCA on 30 November 2023.[9] That decision is described in the next section.

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[5] *Bollhorn* BCCA 2024, *supra* note 1 at paras 7, 9.

[6] Quoted *ibid* at para 6. The British Columbia *Commercial Arbitration Act* was renamed the *Arbitration Act* by the *Family Law Act*, SBC 2011, c 25, s 305, effective 18 March 2013.

[7] *Bollhorn* BCCA 2024, *supra* note 1 at para 12.

[8] *Ibid.*

[9] *Bollhorn v Lakehouse Custom Homes Ltd.*, 2023 BCCA 444 [*Bollhorn* BCCA 2023].

III. THE BCCA JUDGMENT

Saunders JA's referral encompassed three of the four issues described above: whether the arbitrator erred in law by holding that the doctrine of *res judicata* applied to Mr. Bollhorn's Notice to Arbitrate; whether the arbitrator's decision counted as an "award"; and whether the *Arbitration Act* and VanIAC's Domestic Arbitration Rules, in combination, precluded any appeal from an award when the disputed amount did not exceed $250,000.[10] Newbury JA and her division colleagues resolved these issues in their judgment of 16 May 2024, where they also addressed whether VanIAC might be admitted as an intervenor in the leave application. I will discuss these issues in turn.

1. Res Judicata

The BCCA division first considered the res judicata issue, which Newbury JA described as a threshold matter. Mr. Bollhorn, noting that he had not raised deficiency-related issues when he applied to the BC Supreme Court or during the summary trial, argued that a change in the situation precluded the application of *res judicata*: at the summary trial, the issue was whether the deficiencies he observed sufficed to justify lowering the purchase price of the home under the Contract; whereas in the arbitration, the issue was whether, immediately before completion of the property transfer, there remained deficiencies that he would need to remedy.[11]

Lakehouse replied that the arbitrator's application of *res judicata* was a mixed issue of fact and law not involving any alleged extricable error of law, so it was not subject to appeal pursuant to subsections 59(2) and (3) of the *Arbitration Act*.[12] Newbury JA held that there existed viable arguments for Mr.

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[10] *Ibid* at paras 8-22.

[11] *Bollhorn* BCCA 2024, *supra* note 1 at para 40.

[12] *Ibid* at para 44.

Bollhorn's "change of situation" theory, and declined to hold that Mr. Bollhorn's claims were barred by *res judicata*.[13]

2. The Availability of an Appeal Right

A. The Arbitrator's Decision as an "Award"

Whether the arbitrator's decision qualified as an "award" was a controversial issue at the BCCA.[14] Mr. Bollhorn contended that the decision was not an "award" on the basis that the arbitrator had not addressed the substantive issues raised in the Notice to Arbitrate. In reply, Lakehouse cited seven principles for determining whether an arbitrator's decision qualifies as an "award", which were propounded by the English High Court in *ZCCM Investment Holdings plc v Kansanshi Holdings plc*. and have been cited widely.[15] Especially apposite is the second principle, which asserts:

> Thus, one factor in favour of the conclusion that a decision is an award is if the decision is final in the sense that it disposes of the matters submitted to arbitration so as to render the tribunal *functus officio*, either entirely or in relation to that issue or claim.[16]

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[13] *Ibid* at para 45. Newbury JA's conclusion on this point chimes with the view that "[t]here can be no effective *res judicata* in a changing situation". G Spencer Bower & KR Handley, *Res judicata*, 4th ed (London: LexisNexis, 2009) at §17.30.

[14] The submissions of Mr Bollhorn and Lakehouse are recapitulated in *Bollhorn* BCCA 2024, *supra* note 1 at paras 25-32.

[15] [2019] EWHC 1285 (Comm.) [*ZCCM*]. See "Procedural Orders or Challengeable Awards? The English High Court Clarifies Its Position" (1 November 2019), online (blog): *Kluwer Arbitration Blog* <https://arbitrationblog. kluwerarbitration.com/2019/11/01/procedural-orders-or-challengeable-awards-the-english-high-court-clarifies-its-position/>.

[16] *ZCCM*, *supra* note 15 at para 40.

Newbury JA, finding that the arbitrator's decision was "substantive" and its effects "final" as to the issues addressed, and that the arbitrator was *functus officio* save for costs, held that the decision did constitute an award.[17]

B. The Effect of the Arbitration Act and the VanIAC Rules

Mr. Bollhorn and Lakehouse's arbitration agreement incorporated VanIAC's Domestic Arbitration Rules, including the Expedited Procedures set out in Part B, Rules 24-27.[18] Rule 24(a) states that the Expedited Procedures apply if the parties agree, or if no claim by any party exceeds $250,000 exclusive of interest and costs.[19] The scope of application of the Expedited Procedures was crucial to the outcome, since Rule 27 provides:

> For arbitrations brought under an arbitration agreement entered into on or after September 1, 2020 that provide for arbitration under these Rules, the parties expressly agree that there shall be no appeal on a question of law from an Award issued under the Expedited Procedure, unless consented to by both parties.

Mr. Bollhorn asserted that Rule 27, read in conjunction with Rule 31 of Part D's Optional Arbitration Appeal Rules (which sets out prerequisites and procedures for appeals from arbitrators' decisions under the VanIAC Rules), did not prevent

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[17] *Bollhorn* BCCA 2024, *supra* note 1 at paras 33-34.

[18] *Ibid* at para 6.

[19] VanIAC, "Domestic Arbitration Rules", online: <htttps://vaniac.org/arbitration/rules-of-procedure/domestic-arbitration-rules/>.

him from instituting an appeal.[20] Lakehouse replied that Rule 27 answered his leave application completely.[21]

Newbury JA found that the Expedited Procedures were dispositive. She found that, by agreeing to the VanIAC Domestic Arbitration Rules the parties had agreed to the Expedited Procedures. Since Mr. Bollhorn's was for less than $250,000, exclusive of interest and costs, the Expedited Procedures applied, including their prohibition on appeals. Accordingly, she reasoned, Mr. Bollhorn and Lakehouse had "expressly agreed" that no appeal on a question of law from the arbitrator's award was available.[22] Thus, despite the existence of an "award" and a genuine question about whether that award was constrained by *res judicata*, the parties' agreement precluded any appeal.

3. The Intervention of VanIAC

Since the implications of VanIAC's Expedited Procedures were in controversy, VanIAC sought leave to intervene in Mr. Bollhorn's leave application.[23] Newbury JA observed that under section 30(f) of the recently amended *Court of Appeal Act*,[24] a justice–and hence, a division–could grant leave to intervene "on an appeal or other matter".[25] Persuaded that VanIAC offered an instructive perspective on whether Rule 27 of the Expedited

[20] *Bollhorn* BCCA 2024, *supra* note 1 at paras 53-54.

[21] *Ibid* at para 55.

[22] *Ibid* at para 62.

[23] *Ibid* at para 56 et seq. VanIAC requested intervenor status only in respect of the leave application, not in an eventual appeal should leave be granted.

[24] SBC 2021, c 6. This provision expanded the opportunities for intervening previously afforded by Rule 36 of the *Court of Appeal Rules*, BC Reg 297/2001, which restricted intervention applications to those wishing to intervene "in an appeal".

[25] *Bollhorn* BCCA 2024, *supra* note 1 at para 22.

Procedures precluded Mr. Bollhorn's appeal, she granted it intervenor status.[26]

IV. LEGACY OF THE JUDGMENT

Newbury JA's judgment has four immediate consequences for British Columbia's courts, arbitrators, and practitioners.

First, the judgment demonstrates that an arbitrator's decision that an issue raised in a notice to arbitrate is *res judicata* is not impregnable. Whether the doctrine of *res judicata* has been properly applied is a question of law reviewable on a correctness standard.[27] Whether a "change of situation" prevents the invocation of *res judicata* is a narrower question of law. In appropriate circumstances, the public importance of a question of law may also oppose the application of *res judicata*.

Second, the judgment paves the way for later courts to consult the seven principles that the English High Court of Justice set forth in *ZCCM* for establishing whether an arbitrator's decision amounts to an "award". This step is particularly welcome insofar as a comprehensive definition of "award" is contained in neither the *Arbitration Act* nor the VanIAC Rules.[28] Since arbitration legislation in other provinces also does not define "award" in anything close to a comprehensive manner, the *ZCCM* factors could be helpful to courts across Canada.

Third, the judgment is noteworthy for its exposition of the VanIAC Expedited Procedures, especially Rule 27. Newbury JA interpreted the words of Rule 27 exactly as they appear, expressing an agreement not to permit appeals, which is binding pursuant to subsection 59(3) of the *Arbitration Act*. Nevertheless, Rule 27, which bars appeals in disputes not

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[26] *Ibid* at para 57.

[27] *Ibid* at para 45.

[28] Sections 48 and 54 of the *Arbitration Act* specify various minimum requirements that an arbitral award must fulfil, but those provisions fall short of setting out a definition of "award".

exceeding $250,000, save by the parties' mutual consent, raises the risk that parties will unknowingly abdicate a potentially important right. For this reason, Newbury JA was surely justified in encouraging VanIAC to draw the attention of parties seeking to utilize its Domestic Arbitration Rules to this implication.[29]

Finally, the judgment shows that pursuant to section 30(f) of British Columbia's *Court of Appeal Act*, interventions in an application for leave to appeal can and will be allowed if, in the Court's view, the proposed intervenor has useful perspectives to contribute. However, the Court also noted its expectation that requests to intervene in leave applications will remain rare.[30]

Instructive as Newbury JA's judgment is, one of the foremost legacies of the dispute between Mr. Bellhorn and Lakehouse stems from the analysis of Saunders JA. She remarked that if Mr. Bollhorn correctly asserted that his claim was not blocked by *res judicata* and if Lakehouse equally accurately contended that the arbitrator's award was unappealable, the claim would not be heard on its merits.[31] Her observation, which foreshadowed Newbury JA's conclusions, suggests that the time-honoured maxim, "where there is a right, there is a remedy", may not always obtain in the arbitration context.[32]

Implicit in Newbury JA's judgment is a tension between two choices that Mr. Bollhorn and Lakehouse made. On the one hand, they adopted VanIAC's Rules, including the Expedited Procedures, into their arbitration agreement.[33] On the other, the language of the arbitration agreement suggests that they intended disputes to be determined according to their substance, and not cut off by procedural mechanisms. While

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[29] *Bollhorn* BCCA 2024, *supra* note 1 at para 51.

[30] *Ibid* at para 23.

[31] *Bollhorn* BCCA 2023, *supra* note 9 at para 22.

[32] This maxim received its classic expression in the judgment of Holt LCJ in *Ashby v White* (1703), 92 ER 126.

[33] *Bollhorn* BCCA 2024, *supra* note 1 at para 6.

Newbury JA resolved the tension in favour of the parties' express agreement to adopt the VanIAC Rules, future courts will likely need to address its consequences in other contexts.