IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Spark Event Rentals Ltd. v. Google LLC,* 2023 BCSC 1115

Date: 20230628
Docket: S218036
Registry: Vancouver

Between:

Spark Event Rentals Ltd.

Plaintiff

And

Google LLC, Google Canada Corporation, Alphabet Inc., Apple Inc. and Apple Canada Inc.

Defendants

Before: The Honourable Justice Thomas

Reasons for Judgment

Counsel for the Plaintiff:	R. Mogerman, K.C. D.G.A. Jones M. Segal
Counsel for Google LLC, Google Canada Corporation and Alphabet Inc.:	T.M. Cohen, K.C. A. Borrell
Counsel for Apple Inc. and Apple Canada Inc.:	J.M. Young N. Campbell M. Harmer
Place and Date of Trial/Hearing:	Vancouver, B.C. May 10-12, 2023
Place and Date of Judgment:	Vancouver, B.C. June 28, 2023

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Overview

[1] Spark Event Rentals Ltd. (“Spark”) purchased a series of Google ads from Google LLC and Google Canada Corporation (“Google”).

[2] Spark alleges that Google engaged in a conspiracy with Apple Inc. and Apple Canada Inc. (“Apple”) that caused the price Spark paid for Google ads to be higher than the price would have otherwise been.

[3] Google requires every party who purchases Google ads to sign a purchase agreement that contains a mandatory arbitration agreement.

[4] Google brings this application to stay this action against them in favour of arbitration mandated in the purchase agreement.

[5] Apple, although an alleged member of the conspiracy, is not a party to the purchase agreement or the arbitration process.

[6] Apple brings this application to stay this action against them pursuant to the *Law and Equity Act*, R.S.B.C. 1996, c. 253 on the basis that the matters are so intertwined that it would amount to an abuse of process to allow the action to proceed against Apple contemporaneously with the arbitration against Google.

International Commercial Arbitration Act

[7] Section 8 of the *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*ICAA*], enables Google to bring an application for a stay of proceedings.

[8] Section 8(2) states:

> … the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.

[9] The language is mandatory, which is consistent with the shift in legislative intention away from judicial intervention in arbitration to a preference for holding parties to arbitration agreements. There are now only limited grounds upon which the court can refuse to grant a stay.

[10] The guiding principle for applications under s. 8 is “competence-competence”, whereby jurisdictional issues relating to the scope of arbitration agreements are to be resolved in arbitration by the arbitrator: *Siedel v. TELUS Communications Inc.*, 2011 SCC 15 at paras. 4, 28-30.

[11] The parties agree that the issues in dispute between Spark and Google are subject to the arbitration agreement and the stay application has been brought in a timely manner.

[12] The court must stay the proceedings against Google in favour of arbitration unless Spark establishes that the arbitration agreement is void because it is:

a) Unconscionable; or

b) Contrary to public policy.

Doctrine of Unconscionability

[13] Courts will seek to enforce agreements freely entered into between relatively equal, consenting parties.

[14] There are two requirements for a finding of unconscionability: there must be an inequality of bargaining power, and the agreement must be improvident: *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [*Uber Technologies Inc.*].

[15] Inequality of bargaining power exists when one party cannot adequately protect their interests in the contracting process.

[16] In *Pearce v. 4 Pillars Consulting Group Inc.*, 2021 BCCA 198 [*Pearce*], our Court of Appeal noted that inequity in bargaining power may exist when a weaker party is dependent on the stronger party, such that serious consequences flow from not agreeing to the contract.

[17] In this situation, the focus is on whether one party is vulnerable to exploitation in the contracting process, such that the normal assumptions about free bargaining are incapable of being fairly applied.

[18] A situation where the normal assumptions may not apply is when a standard form of contract, generally referred to as a contract of adhesion, is presented by one party to another.

[19] In *Uber Technologies Inc.*, the Supreme Court of Canada noted an improvident bargain is one where the contract unduly advantages the stronger party or unduly disadvantages the weaker party: see para. 74. Enhancing the advantage of the stronger party through arbitration clauses that violate the weaker party's reasonable expectations by depriving them of a remedy are the types of situations that the doctrine of unconscionability is meant to address: see para. 84.

Doctrine of Public Policy

[20] In *Pearce*, at para. 192, our Court of Appeal noted that public policy focusses on harm to society that would flow from enforcing a particular contract or one of its terms.

[21] In concurring reasons in *Uber Technologies Inc.*, Justice Brown found that an arbitration clause was unenforceable for public policy reasons.

[22] Justice Brown's articulation of this doctrine was summarized by Justice Mayer in *Petty v. Niantic Inc.*, 2022 BCSC 1077, as follows:

> [52] Justice Brown stated that "[a]s a matter of public policy, courts will not enforce contractual terms that, expressly or by their effect, deny access to independent dispute resolution according to law." As well, Brown J. stated that "[w]here a clause expressly provides for 'arbitration', while simultaneously having the effect of precluding it, however, these considerations which promote curial respect for arbitration dissolve …": Uber, paras. 105 and119
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> [53] Later in his reasons Brown J. stated at para. 125:
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> > [125] … I would therefore recognize a further, narrow exception to the general rule that a challenge to an arbitrator's jurisdiction should first be resolved by the arbitrator. As I have explained, contracting parties cannot preclude access to legally determined dispute resolution. While arbitrators should typically rule on their own jurisdiction, an arbitrator cannot reasonably be tasked with determining whether an arbitration agreement, by its terms or effects, bars access, to that very arbitrator. It therefore falls to courts to do so.

> [54] Justice Brown's view was that the courts should ask whether a clause that places limits on dispute resolution is reasonable or causes undue hardship: Uber, para. 129. Justice Brown suggested that the following factors be applied in answering this question: the nature of the disputes likely to arise under the parties' agreement – including whether the cost to pursue a claim is disproportionate to the quantum of the claim; the relative bargaining power of the parties; and, whether the parties have attempted to tailor the limit on dispute resolution such as by agreeing to excuse certain claims or to require the party with a stronger bargaining position to pay a higher portion of upfront costs: Uber, paras. 131, 134–135.

Procedure to Review Accessibility of Arbitration

[23] Generally speaking, the arbitrator has the first opportunity to determine their own jurisdiction. If the party seeking a stay can establish an "arguable case" that the matter can be resolved through arbitration, the stay should be granted to allow the arbitrator the first opportunity to determine jurisdiction: see *Williams v. Amazon.com, Inc*., 2020 BCSC 300.

[24] This application involves questions of mixed fact and law. Therefore, a stay must be granted unless the issues can be conclusively determined on a superficial examination of the evidentiary record.

[25] The general rule is that a superficial review is one in which the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties: *Seidel* at para. 29; *Union des consommateurs c. Dell Computer Corp*., 2007 SCC 34 at paras. 84-85; *Sum Trade Corp. v. Agricom International Inc*., 2018 BCCA 379 at para. 35.

[26] The underlying assumption behind this test is that if this court does not decide the issue, the arbitrator will.

[27] *Uber* suggests a more stringent test incorporating the principles of *Hyrniak v. Mauldin*, 2014 SCC 7, is appropriate if the court is required to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only this court could resolve:

> [44] How is a court to determine whether there is a *bona fide* challenge to arbitral jurisdiction that only a court can resolve? First, the court must determine whether, assuming the facts pleaded to be true, there is a genuine challenge to arbitral jurisdiction. Second, the court must determine from the

> supporting evidence whether there is a real prospect that, if the stay is granted, the challenge may never be resolved by the arbitrator.
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> [45] While this second question requires some limited assessment of evidence, this assessment must not devolve into a mini-trial. The only question at this stage is whether there is a real prospect, in the circumstances, that the arbitrator may never decide the merits of the jurisdictional challenge. Generally, a single affidavit will suffice. Both counsel and judges are responsible for ensuring the hearing remains narrowly focused (*Hryniak v. Mauldin*, 2014 SCC 7 (CanLII), [2014] 1 S.C.R. 87, at paras. 31-32). In considering any attempt to expand the record, judges must remain alert to "the danger that a party will obstruct the process by manipulating procedural rules" and the possibility of delaying tactics (*Dell*, at para. 84; see also para. 86).
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> [46] As a result, therefore, a court should not refer a *bona fide* challenge to an arbitrator's jurisdiction to the arbitrator if there is a real prospect that doing so would result in the challenge never being resolved. In these circumstances, a court may resolve whether the arbitrator has jurisdiction over the dispute and, in so doing, may thoroughly analyze the issues and record.

Challenge to Arbitration

[28] The plaintiff raises two challenges to the arbitration process:

a) The agreement prohibits the plaintiff from initiating arbitration; and

b) The nature of the action cannot be resolved in arbitration as the action is cost prohibitive, such that it cannot be brought without a class action procedure.

Is Spark able to initiate the arbitration process?

[29] The first challenge requires me to determine whether Spark has the financial ability to initiate arbitration so that the jurisdictional issue can be resolved.

[30] The affidavit #1 of Marc Cousineau sets out the financial position of the plaintiff contrasted with the costs of arbitration according to his expert:

> Mr. Mogerman has informed me that CFM will fund all expenses necessary to prosecute this class action to its conclusion and indemnify me from any negative cost implications that might arise from the litigation.
>
> Mr. Mogerman has advised me that if Spark Event started an individual action against the defendants, the legal fees could be, at a minimum, hundreds of thousands of dollars and probably millions of dollars, and the money required to fund the expenses necessary to prosecute the action would also be, at a

> minimum, hundreds of thousands of dollars and probably millions of dollars. Based on this advice, I do not believe that I could justify pursuing Spark Event's individual action against the defendants in light of the potential value of its claim. The same would be true even if the cost of pursuing an individual action was thousands of dollars.
>
> Mr. Mogerman has informed me that the defendants have brought an application to stay the action of the previous representative plaintiff and that he expects them to bring a similar action to stay Spark Event's case. I understand that if such a stay application is granted I will not be able to pursue Spark Event's claim in the BC Courts, and would instead be required to pursue arbitration in California before a tribunal of three arbitrators. I also understand that the result of any arbitration would only be effective in Spark Event's individual claim, and would be confidential so that the members of the proposed class in this litigation would not have the benefit of knowing the result.
>
> Mr. Mogerman has informed me that his law firm would not take an arbitration case like this on contingency and will not fund expenses necessary to pursue an arbitration. He has also informed me that the costs associated with arbitration would be significant, including up front filing fees (in the range of USD $5,750), a minimum final fee (in the range of USD $7,125), arbitrator compensation (in the range of USD $500-1,000/hour for each arbitrator). In addition, someone would need to pay the significant travel costs to California for a multi-day hearing. Spark Event cannot afford these fees, much less the cost of a lawyer's hourly rate to pursue this litigation on an individual basis. As a result, I am unable to commence or pursue Spark Event's claim against the defendants through arbitration.

[31] The parties disagree with respect to the costs involved in initiating arbitration. The disagreement arises as to whether the expedited rules that govern claims less than $500,000 would apply.

[32] Google says:

a) Arbitration would occur before a sole arbitrator; expedited schedules and deadlines apply; there are no oral hearings by default and, if an oral hearing is held, it could likely be held remotely;

b) The initial fee to initiate arbitration is $1,000;

c) There is broad arbitral discretion to award costs and shift the burden of filing fees; and

d) A decision must be made within 30 days of the close of the hearing.

[33] Spark says:

a) The arbitration must occur before three arbitrators and travel to California may or may not be required;

b) The initial fee to initiate arbitration would range from $5,188 to $13,800; and

c) It is unclear to the extent that arbitral discretion with respect to costs and procedure would be exercised.

[34] This is a commercial, as opposed to a consumer, agreement. In this case, Spark has not provided any financial information, nor have they affirmed that they cannot afford the filing fees that they say apply. Rather, Spark asserts that it is not economic for them to pursue their claim as a whole against Google through the arbitration process.

[35] In *Uber Technologies Inc.*, the Supreme Court of Canada concluded that arbitration could not be initiated because the filing fees posed a “brick wall” that economically prevented the individual plaintiff from initiating arbitration: para. 47. This would have the effect of prohibiting the arbitrator from determining whether the agreement was valid or void due to unconscionability.

[36] I am not satisfied, under either expert’s interpretation of the arbitration agreement, that a financial “brick wall” exists such that there is a reasonable prospect that Spark does not have the ability to initiate arbitration.

[37] Having made this determination there is no need for me to consider whether the arbitration agreement is void on unconscionability or public policy grounds on this issue.

Can the dispute be resolved within the arbitration?

[38] Spark says the critical question is whether the entire dispute can be resolved within the arbitration process. In this case, due to the expense involved in establishing the impact of the alleged agreement on the price of ads, the dispute can

only be resolved through a class action proceeding. Since the arbitration does not allow such procedural claims to be brought, the dispute cannot be resolved in arbitration.

[39] Google says the determination of the cost of the claim within the rubric of an unconscionability analysis must be resolved in the arbitration process. The arbitration agreement provides considerable flexibility with respect to procedural matters, how a claim will be heard, and costs.

[40] Alternatively, Google says the inability of arbitration to support a class action claim does not constitute an improvident bargain; Google relies on *Difederico v. Amazon.com, Inc*., 2022 FC 1256.

[41] The parties are unable to agree on the overall cost of the action and the extent of the discretion afforded to the arbitrator or arbitrators. In my view, the rules make it clear under either expert's interpretation, that there is considerable discretion embedded in the process to enable claims to be heard in an expeditious and efficient manner.

[42] In my view, based on a superficial review of the evidence:

a) It is not clear that the arbitration process cannot resolve the entire dispute commenced by Spark;

b) Given the flexibility and discretion delegated to the arbitrator or arbitrators, the arbitrator or arbitrators are best suited to determine this issue;

c) Spark has the financial ability to initiate the arbitration process such that the arbitrator or arbitrators could determine whether the dispute can be resolved in the arbitration; and

d) If the arbitrator or arbitrators decide that the entire dispute cannot be resolved within the arbitration, they will be in a position to determine whether the arbitration is void on unconscionability or public policy grounds.

Conclusions on Unconscionability and Public Policy

[43] Spark has not established that there is not a reasonable prospect that they do not have the ability to initiate arbitration.

[44] Spark has not established, based on a superficial review of the evidence, that the dispute cannot be resolved within the arbitration process.

[45] Therefore, the determination of whether the agreement is void on unconscionability or public policy grounds must be made in the arbitration process.

Implications of determination

[46] Pursuant to s. 8(2) of the *ICAA*, Google is entitled to a stay so that the dispute can proceed to arbitration.

[47] Spark says if they are unable to have the jurisdictional issue in this forum, they:

a) Will not proceed to arbitration with Google;

b) Will enter a discontinuance against Google; and

c) Continue the action solely against Apple.

[48] I grant leave to Spark to discontinue the action against Google and continue this action against Apple.

[49] Google is entitled to costs against Spark.

[50] Apple’s application for a stay is moot and dismissed.

[51] Costs for Apple’s application will be in the cause.

“Thomas J.”