

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Bear Mountain Resort & Spa Ltd. v.
Ecoasis Resort And Golf LLP*,
2026 BCSC 1278

Date: 20260709
Docket: S253638
Registry: Vancouver

Between:

**Bear Mountain Resort & Spa Ltd., BM Management Holdings Ltd., and BM
Resort Assets Ltd.**

Petitioners

And

Ecoasis Resort and Golf LLP

Respondent

Before: The Honourable Madam Justice Wilkinson

Reasons for Judgment

In Chambers

Counsel for the Petitioner:

M. C. Stacey
B. Palaschuk
D. Babcock

Counsel for the Respondents:

S. Robertson
N. Bond

Place and Date of Hearing:

Vancouver, B.C.
May 11-13, 2026

Place and Date of Judgment:

Vancouver, B.C.
July 9, 2026

[1] The petitioners seeks orders pursuant to s. 58(1) of the *Arbitration Act*, S.B.C. 2020, c. 2 [Act] setting aside an award made by an arbitrator on April 15, 2025 (the “Second Partial Final Award”) and a costs award made by the Arbitrator on December 15, 2025 (the “Costs Award”) in the arbitration proceeding between the petitioners and the respondent (the “Arbitration”).

[2] The petitioners seek to set aside the awards on the grounds that:

- a) pursuant to s. 58(1)(g) of the *Act*, there are justifiable doubts as to the arbitrator's independence or impartiality; and
- b) pursuant to s. 58(1)(h) of the *Act*, the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it.

[3] The petitioners have abandoned their originally claimed ground pursuant to s. 58(1)(c) of the *Act*, lack of jurisdiction.

[4] For the reasons that follow, I dismiss the petition.

Background

[5] Prior to July 8, 2019, the respondent, Ecoasis Resort and Golf LLP, owned The Westin Bear Mountain Golf Resort & Spa near Victoria, British Columbia, comprising mainly of the Westin hotel (the “Hotel”), and operated two 18-hole golf courses, the Mountain Golf Course and the Valley Golf Course (collectively, the “Golf Courses”).

[6] On July 8, 2019, the petitioners Bear Mountain Resort & Spa Ltd. (“Bear Mountain”) and BM Management Ltd. purchased the Hotel from the respondent.

[7] On July 11, 2019, as part of the purchase of the Hotel, the petitioners entered into a non-competition and non-solicitation agreement (the “Non-Competition Agreement”) with the respondent.

[8] Also on July 11, 2019, BM Resort Assets Ltd. and BM Management Ltd. entered into a commercial lease with the respondent (the “Commercial Lease”). Under the terms of the Commercial Lease, BM Resort Assets Ltd. and BM Management Ltd. leased portions of the Hotel, including the members lounge to the Ecoasis resort.

[9] In addition, on July 11, 2019, Bear Mountain and BM Management Ltd. entered into an operations agreement with the respondent (the “Operations Agreement”) for the integrated operation of the Hotel and Golf Courses.

[10] Shortly after July 2019, issues arose with respect to both the Operations Agreement and the Commercial Lease.

The Arbitration

[11] The parties sought third-party binding resolution through arbitration. Pursuant to terms of reference dated September 16, 2020, Murray L. Smith, K.C. was appointed as arbitrator and 15 issues under the Commercial Lease and Operations Agreement were referred for determination.

[12] The parties do not have a written arbitration agreement.

[13] A hearing on liability for the 15 issues outlined in the Terms of Reference was heard from January 5-13, 2021 (the “Liability Hearing”). On February 26, 2021, the arbitrator issued a partial final award in the arbitration with respect to liability of the parties in the matters subject to the arbitration (the “Partial Final Award”).

[14] A hearing on the quantification of damages was heard September 23-27, and October 7-11 and 15-18, 2024 (the “Damages Hearing”). On April 15, 2025, the Arbitrator issued the Second Partial Final Award. The respondent was awarded \$2,058,017.63, plus interest against the petitioners following the damages hearing.

[15] From May to August 2025, the parties exchanged submissions on costs for the Arbitration. On December 15, 2025, the arbitrator issued the Costs Award.

Leave to Appeal Application

[16] The petitioners filed an application for leave to appeal eight discrete issues, all of which were dismissed on June 4, 2025. The petitioners then applied to vary the leave application order on September 18, 2025: *Bear Mountain Resort & Spa Ltd. v. Ecoasis Resort and Golf LLP* (June 4, 2025), Vancouver CA50676 (B.C.C.A.) [*Bear Mountain Leave Application*]. A division of the Court of Appeal unanimously dismissed this application on October 28, 2025: *Bear Mountain Resort & Spa Ltd. v. Ecoasis Resort and Golf LLP*, 2025 BCCA 368 [*Bear Mountain BCCA*].

[17] The respondent has initiated enforcement proceedings against the Hotel.

Receivership Proceedings

[18] On May 23, 2024, Sanovest Holdings Ltd. commenced a petition in the BC Supreme Court, Vancouver Registry No. S-243389 (the “Receivership Petition”), seeking to have a receiver appointed as the receiver and manager over all of the assets, undertakings, and property of the respondent and various related partnerships and corporate entities.

[19] On September 18, 2024, a receiver was appointed in the Receivership Petition as receiver and manager over all of the assets, undertakings, and property of various related partnerships and corporate entities (but not the respondent), including any interest in the real property of the respondent, including all proceeds therefrom.

[20] On July 10, 2025, the Receivership Order was amended to appoint the receiver as receiver and manager, without security, of the respondent resort property and all of the operations and business of the respondent, including its interest in the arbitration which is the subject of this petition.

Jurisdiction of the Court to Interfere with an Award Under the Act

[21] Section 58(1) of the *Act* provides that there is limited ability to apply to this Court to set aside an award made under the *Act*. The petitioners seek relief under ss. 58(1) (g) and (h):

58(1) A party may apply to the Supreme Court to set aside an arbitral award only on one or more of the following grounds:

...

(g) there are justifiable doubts as to the arbitrator's independence or impartiality;

(h) the applicant was not given a reasonable opportunity to present its case or to answer the case presented against it

...

(3) For the purposes of subsection (1) (g), there are justifiable doubts as to the arbitrator's independence or impartiality only if there was a real danger of bias on the part of the arbitrator in conducting the arbitration.

Section 58(1)(g) - Bias

[22] The duty of fairness owed by arbitrators is set out in *Atlantic Industries Limited v. SNC-Lavalin Constructors (Pacific) Inc.*, 2017 BCSC 1263:

[18] Arbitrators owe a duty of fairness to the parties to an arbitration. Avoiding both a biased state of mind and the appearance of bias is part of that duty: *Newfoundland Telephone Co. v. Newfoundland (Board of Commissioners of Public Utilities)*, 1992 CanLII 84 (SCC), [1992] 1 S.C.R. 623 at 636. In *Szilard v. Szasz*, 1954 CanLII 4 (SCC), [1955] S.C.R. 3 at 7, Rand J. explained, “[e]ach party, acting reasonably, is entitled to sustained confidence in the independence of mind of those who are to sit in judgment on him and his affairs.”

[23] Pursuant to s. 58(3), there must be a real danger of bias on the part of the arbitrator in conducting the arbitration.

[24] However, there is no distinction between the terms “reasonable apprehension”, “real likelihood”, or “real danger” of bias. As the Supreme Court of Canada observed in *R. v. Burke*, 2002 SCC 55, at para. 61:

[...] the precise phrasing of the test is not crucial, if the substance is plain. It is interchangeably expressed as a “reasonable apprehension”, “real likelihood” or “real danger” of bias, a “reasonable suspicion” of prejudice or taint, and so forth. Whatever the exact formulation of the test, the essence of the inquiry is the same; namely, the test is “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude” [...]

[Empasis added]

[25] The comparable challenge procedure set out in the *International Commercial Arbitration Act*, RSBC 1996, c. 233 was considered in *Johnston v. Octaform Inc.*, 2024 BCSC 537. Applying *Burke*, the Court in *Johnston* found that there was no distinction between the terms “a reasonable apprehension of bias”, “justifiable doubts as the arbitrator’s independence impartiality”, or “a real danger of bias”: at paras. 37 and 47.

[26] The court in *Tepei v. ICBC*, 2007 BCSC 1694 observed at para. 83 that “the apprehension of bias must be a reasonable one, held by responsible and right minded persons, applying themselves to the question and obtaining thereon the required information.” In other words, “what would an informed person, viewing the matter realistically and practically – and having thought the matter through – conclude.” A mere suspicion will not suffice; the grounds to support a finding of bias must be substantial, as it calls into question the personal integrity of the decision maker and the administration of justice: *R v. S. (R.D.)*, [1997] 3 S.C.R. 484, at para. 112-113.

[27] This Court and others have also repeatedly endorsed two modes to challenge an arbitrator for bias: 1) attacking a specific decision of the arbitrator; and 2) challenging the arbitrator for bias based on the cumulative effect of their decisions when looking at the totality of the record: *New World Expedition Yachts LLC v. P.R. Yacht Builders Ltd.*, 2010 BCSC 1496, at para. 51; *McEwan v. Canadian Hockey League*, 2025 BCSC 455, at paras. 61-63; *Dufferin v. Morrison Hershfield*, 2022 ONSC 3485, at para. 90; *Yukon Francophone School Board, Education Area No. 23 v. Yukon Territory (Attorney General)*, 2015 SCC 25, at paras. 37-38; and *Johnston*, at paras. 56-57.

[28] The petitioners submit the cumulative effect of the various circumstances raised give rise to a reasonable apprehension of bias on the part of the arbitrator.

Treatment of the Petitioners’ Witnesses

[29] The arbitrator warned one of the petitioners’ witnesses on his second day of testifying as follows: “Mr. Malak, welcome back. Thank you. I’ll remind you that

you're still under the compulsion of the affirmation to tell the truth, nothing but the truth, and that that will weigh not only on your conscience but also could lead to serious consequences. So that's the warning for this morning. Thanks.” The petitioners submit this on its own is an oddity which indicates an unfair treatment of its witnesses. The petitioners further submit that the arbitrator’s demeanour was much more friendly towards one of the respondent’s witnesses when he thanked him for his testimony and saying it was helpful at the conclusion of his evidence.

[30] The administration of the oath by the arbitrator occurred at the start of the second day of Mr. Malak’s evidence. He had already testified the day before. This was not a situation where a reasonable person in the circumstances would apprehend that the arbitrator was immediately closed off to Mr. Malak’s evidence before he even started to give evidence. After reviewing his evidence from the prior day, it is reasonable to infer that the arbitrator was concerned about Mr. Malak’s failure to confirm he was telling the truth in his prior witness statements and his less than forthright testimony on the previous day of the hearing, which could have warranted a warning.

Procedural Order #9 and the Case Management Conference of August 2, 2024

[31] There had been considerable delays in the proceedings prior to July 2024, and the Arbitrator suddenly demonstrated urgency only after the petitioners had expressed their position on his withdrawal.

[32] On August 1, 2024, the Arbitrator proceeded to schedule a case management conference for the following day even though counsel for the petitioners was not available and provided alternative dates, which the Arbitrator declined to consider.

[33] When it became apparent to counsel for the petitioners that the case management conference would proceed in his absence, he changed his schedule to make sure he could attend. However, given the petitioners’ position on the Arbitrator’s lack of jurisdiction, he was unable to substantively participate.

[34] At the case management conference on August 2, 2024, the Arbitrator made Procedural Order #9, which dismissed four of the petitioners' applications that they had been trying to have scheduled, varied a previous order that deprived the petitioners of the relief they previously obtained, and the petitioners were given a demand to pay the Arbitrator's deposit for security for fees or the Arbitrator would terminate all proceedings in relation to their claims and preclude them from taking further steps. This order was notwithstanding the petitioners' position that the Arbitrator no longer had jurisdiction.

[35] The petitioners submit that the timing of Procedural Order #9 at the case management conference on August 2, 2024 amidst the petitioners taking the position the Arbitrator had withdrawn "makes it appear as though he was seeking to punish the Petitioners for their position".

[36] After a review of the procedures and timelines involved, when viewed in context, it is clear the arbitrator was simply attempting to move the matter forward in light of the imminent hearing dates starting on September 23, 2024, the petitioners' position that he had withdrawn, and their refusal to participate or take any steps to deal with the issue.

[37] When the arbitrator ruled on the petitioners' bias application on the basis of Procedural Order #9, the arbitrator stated:

9. The Tribunal was in an impossible position on August 2, 2024. Mr. Sennott was refusing to pay arbitrator fees and was refusing to participate in arbitration proceedings. Evidentiary hearings were imminently to begin. There was no way to know when, if ever, Hotel would reverse its position and agree to pay fees or participate in hearings. Hotel was taking no steps to prosecute its objection to jurisdiction or seek a stay of arbitration proceedings. Applications by Hotel for subpoenas and exclusion of evidence for lateness and other grounds were not being prosecuted. It was necessary to decide how and where evidentiary hearings were to proceed. Procedural Order #9 was issued to decide the way forward. There was no animus toward Hotel. There was critical need for expediency.

[38] There was no prejudice to the petitioners as a result of Procedural Order #9. Once they re-engaged with the arbitration, they continued with their various applications and to issue the subpoenas.

[39] It must be noted that the petitioners brought the bias application before the arbitrator pursuant to s. 18 of the *Act*. Section 18(4) states:

If a challenge under any procedure agreed to by the parties or under the procedure referred to in subsection (2) is not successful, the challenging party may, within 30 days after receiving notice of the decision rejecting the challenge, apply to the Supreme Court to decide on the challenge.

[40] The petitioners did not appeal the ruling.

[41] Given the context and circumstances, Procedural Order #9 and the case management conference on August 2, 2024 cannot be reasonably said to be evidence of bias on the part of the arbitrator.

Adverse Inference with Respect to Guest Receipts

[42] In the Second Partial Final Award, the petitioners submit the arbitrator made a series of unsupported findings, which they submit, can only be explained by bias towards the petitioners.

[43] The first was the adverse inference the arbitrator drew with respect to whether the petitioners had signed guest receipts in their possession. They submit that Mr. Clarke provided evidence that the petitioners were not in possession of the signed guest receipts and gave evidence that they were likely in the 50 boxes that were provided to the respondent by the petitioners in February 2020.

[44] This is a misapprehension of the evidence by the petitioners.

[45] Mr. Laroque gave evidence that while the respondent may have initially had the signed guest receipt, those receipts were then given to the Hotel who kept them. This is consistent with the fact the Hotel was handling all the accounting for the respondent.

[46] Mr. Matthews stated that of the 50 boxes of documents returned to the respondent, only 10 related to the respondent's accounting after the sale of the Hotel. He also stated that the respondent had done a thorough review of all the boxes returned and there were no signed guest receipts for the goods and services

charged to Hotel rooms contained in those boxes. He went on to state that the respondent had requested copies of the signed receipts from the Hotel in June 2022, but that the Hotel had never provided them.

[47] Neither Mr. Laroque nor Mr. Matthews were challenged on these statements in their cross-examinations.

[48] Contrary to what is alleged by the petitioners, Mr. Clarke never gave evidence that the signed guest receipts were likely in the 50 boxes delivered to the respondent. His only evidence was the following from his statement:

Guest receipts

9. Whenever a hotel guest charges the cost of a given good or service provided by the GT Operator to their hotel room or event account, the guest signs a receipt authorizing the charge. The signed receipts would have been collected from the individual guest by the GT Operator's staff.

10. In February of 2020, the Hotel Operator returned to the GT Operator approximately 50 boxes of accounting records, including bank statements and other backup documentation.

11. To the best of my knowledge, the Hotel Operator does not currently have in its possession any signed guest tickets relating to any goods or services provided by the GT Operator.

[49] It was open to the arbitrator to find that these drafted statements give the perception perhaps, by way of innuendo, that the guest receipts may have been in the 50 boxes. But it does not actually say that. The evidence before the arbitrator was that there were affirmative, unchallenged statements by Mr. Matthews and Mr. Laroque that the Hotel had had all the signed guest receipts; that the respondent never received them; and no statement or explanation from the Hotel about what had happened to them.

[50] As a result, the respondent sought and the arbitrator found an adverse inference against the petitioners on this point. There was sufficient evidence for the arbitrator to conclude that the petitioners were in "possession of the signed tickets and chose to suppress them."

[51] This conclusion cannot be said to be evidence of bias.

The Rent Deduction in Ralph Miller's Report

[52] The petitioners submit that even though the respondent's own expert, Mr. Miller, agreed that rent payable under the Commercial Lease for the members lounge should be factored into his calculations for expenses, in the Second Partial Final Award the arbitrator accepted Mr. Miller's calculations wholesale, without any adjustments for rent.

[53] The petitioners submit that such a failure to account for uncontroverted evidence can only be explained by bias towards them.

[54] However, the arbitrator explicitly acknowledged both the petitioners' argument that a portion of the respondent's rent should be included as an expense, and what the petitioners said the potential impact was (approximately \$40,285).

[55] The arbitrator did not explicitly comment on Mr. Miller's statement regarding rent. However, the petitioners did not ask Mr. Miller when cross-examined as to how rent would change his calculations, nor what the specific amount might be.

[56] It was open to the arbitrator to simply incorporate the rent issue into the overall evaluation of damages and the discount factor of 30% he ultimately applied. In any event, I note that the respondent continued to pay rent to the Hotel during the applicable time, and it is arguable that there should be no deduction in the damage award because the rent was already paid.

Hotel Rates and Discounts

[57] In the Partial Final Award, the Arbitrator found the petitioners were liable under the Operations Agreement for not providing respondent employees the benefit of reduced room rates through the Marriott Rewards Program.

[58] In dismissing the Petitioners' argument in the Damages Hearing that they offered a similar, albeit slightly inferior "friends-and-family" discount to the respondent as a replacement, the Arbitrator stated, that "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost."

[59] The petitioners submit that statement by the arbitrator on the duty to mitigate is contrary to existing principles of mitigation in commercial contract claims, because a party who has suffered from a breach of contract must take all reasonable steps to avoid losses flowing from the breach (*Hargreaves v. Brar*, 2010 BCCA 489, at para. 2); and that it is generally reasonable in commercial contracts to accept an offer from the party in default (*Real Organics & Naturals House Ltd. v. Canadian Phytopharmaceuticals Corporation*, 2024 BCSC 1303 at paras. 277-278).

[60] The petitioners submit that the arbitrator's unsupported statement of law "can only be explained by bias towards the petitioners". In the Court of Appeal the petitioners alleged this was an error in law. Now, after failing on that ground in the Court of Appeal, the petitioners have re-characterised their submission as an example of bias.

[61] I agree with Justice Winteringham in her analysis of the allegation in the *Bear Mountain Leave Application*, and adopt her findings on the issue:

[30] When read in context, I find that the arbitrator's impugned statement is clearly tied to the facts of the dispute, the submissions advanced, and is supported by the existing legal principles that Bear Mountain cites. The arbitrator's statement that "[t]he duty to mitigate does not include a duty to accept an inferior replacement for the thing that was lost" flows from the sentence immediately preceding: "[I]t was not incumbent upon Ecoasis to accept an offer of an inferior friends and family discount" from Bear Mountain: Damages Award at para. 90. In the paragraph that follows, the arbitrator set out the evidence of valuation regarding the "lost benefit". As I read the arbitrator's reasons as a whole, he is not saying the duty to mitigate in every case will not include a duty to accept an inferior replacement as a general legal principle. Instead, he is saying that the duty to mitigate in this case does not require Ecoasis to accept Bear Mountain's offer, which was an inferior version of what it was contractually obligated to provide. That finding is effectively a conclusion that the alleged failure to mitigate did not constitute a reasonable step in the circumstances of this case, which is a question of mixed fact and law. A finding about the duty to mitigate is one anchored on the evidentiary record presented in the circumstances - the arbitrator's finding on this point finds support in the evidentiary record. This issue does not raise an extricable question of law.

[62] Recharacterizing the "error" as an example of bias is wholly without merit in the circumstances.

The Arbitrator's Conclusion on Business Disruption Damages

[63] The petitioners submit the arbitrator's methodology in awarding \$602,959.75 in damages for disruption to the respondent's golf business and \$271,711.65 for disruption to the respondent's tennis business is fundamentally flawed. In support of this position they submit that after concluding the evidence put forward by the respondent to support its combined \$13,870,606 damages claim for business disruption was not sufficiently reliable, the arbitrator nevertheless used that evidence as the basis for making his damage award. Therefore, they submit, if the respondent could not provide any sufficiently reliable base to ground the damages award, the arbitrator ought to have awarded only nominal damages: *Century 21 Canada Ltd. Partnership v. Rogers Communications Inc.*, 2011 BCSC 1196 at para. 396. This is what the petitioner argued before the arbitrator. In this petition, they ask the Court to treat this error of law as an indication of bias, because the arbitrator "appears to have been searching for any means to support the respondent's damage claim, even if the methodology he used was not rationally supported at law."

[64] In addition, the petitioner submits that "another way of viewing the arbitrator's error is that the arbitrator was motivated by bias because he accepted some aspects of Mr. Matthews' unreliable damage calculation over the opinion of Mr. Johnston because he found Bear Mountain was at fault." This would be an error in principle rather than an error in law: *Gill v. Lai*, 2019 BCCA 103, at para. 47.

[65] The petitioner argued the error of law at the Court of Appeal. In the *Bear Mountain Leave Application* reasons, Justice Winteringham made the following finding with respect to that aspect of the leave to appeal application:

[33] The arbitrator concludes that Ecoasis did not prove the full amount of its claim under this head of damage in the amount of \$12,059,195, stating:

244. ... [t]he application of contingency reductions for uncertainty also preclude the full claim. The evidence does not support a finding that the losses would have extended out to the year 2029. The extent to which Ecoasis suffered financially as a result of [the] Hotels' breaches of contract is too speculative and too uncertain to allow the full claim. The appropriate reduction including a contingency discount under this head is 95%. The amount owing by [the] Hotel to Ecoasis is \$602,959.75.

[34] With respect to the business disruption for the tennis membership sales, the arbitrator applied a deduction of 85% and awarded \$271,711.65.

[35] Before he reached either of these figures, the arbitrator reviewed the evidentiary record. He noted flaws in the evidence tendered by both sides. His reduction was based on his findings regarding the frailties in the evidence. He outlined what evidence he accepted and what evidence he was rejecting. In my view, as I examine the paragraphs leading up to his conclusions, the arbitrator's figures used to reduce the claim were based on his evidentiary conclusions. That is, he accepted there was some loss but rejected the extent of the claim advanced by Ecoasis.

[36] As the arbitrator's reasons are consistent with the legal principles Bear Mountain outlines, I see no extricable question of law arising from his analysis.

[66] With respect to the allegation that the Arbitrator accepted Mr. Matthews' evidence regarding the Marriott privileges, which was hearsay, it is inaccurate to say that the arbitrator accepted it over the petitioners' evidence. The arbitrator found that the petitioners bore the onus of proving an inability to provide the benefit and had failed to meet that burden. I note that Mr. Matthews' evidence was that he reached out to Marriott and was told benefits could not be provided directly to the respondent but he never stated that the benefits could not be provided by the petitioners.

[67] There is no indication from the arbitrator's analysis on this point that he reached his decision in a fundamentally flawed manner, or that it was due to any bias against the petitioners.

The Arbitrator's Conclusions on the Receiver's Reports

[68] The petitioners submit that the arbitrator made four "unsupportable conclusions" when considering further submissions on the production and significance of the receiver's reports.

- a) First, the arbitrator did not order production of the second report of the receiver despite the petitioners establishing relevance on the basis the second report was likely to reveal that the Golf Courses or other assets of importance to the respondent's business may be sold in the foreseeable future. The arbitrator then explicitly relied on the absence of evidence of

the Golf Courses being sold when declining to factor that contingency into his damage award.

- b) Second, the arbitrator unreasonably rejected the petitioners' argument regarding how the first and third reports demonstrated that the respondent would need a food and beverage manager whose salary should be deducted from the award the arbitrator made in the respondent's favour.
- c) Third, the arbitrator ignored, or improperly failed to consider the impact of the fourth report and eighth report, in finding that the petitioners' submission that the respondent and its counsel had entered into undisclosed agreements as to fees to be charged was "based on speculation."
- d) Fourth, the arbitrator failed to consider the impact of the fourth and eighth reports of the receiver in awarding costs for fees not yet invoiced or paid, when there is no certainty the respondent will ever be liable for those fees.

[69] The petitioners submit there is no justifiable or logical reason for the arbitrator's failure to take into account the receivership proceedings, including the reports prepared therein. As such, they submit the arbitrator's failure to engage with the receivership proceedings throughout the arbitration, particularly after the respondent was brought under the receivership, raises a justifiable doubt as to his impartiality.

[70] The second report was prepared at a time when the respondent was not part of the receivership order and there was no order for sale sought.

[71] The issue of the treatment of the receiver's first and third reports and the need for a food and beverage manager was also raised at the Court of Appeal. Justice Winteringham found as follows in the *Bear Mountain Leave Application*:

[43] The Receiver's Reports are contained in the second affidavit of David Clarke. Based on Bear Mountain's submissions set out in its written and oral argument, I can see no misapprehension of the evidence here. As Ecoasis points out, it sought damages for loss of food and beverage sales from 2020

to 2022: Damages Award at para. 64. The Receiver's Reports were authored in October 2024 and December 2024^[4]. Bear Mountain relies on the Receiver's Reports about recommending hiring a food and beverage manager from 2025 onwards. They do not demonstrate that the arbitrator misapprehended the evidence by finding that those reports did not impact the analysis of damages related to food and beverage sales from 2020 to 2022. Finally, the arbitrator's finding that there was no basis to increase the contingency discount was a factual finding based on the evidence, not a legal conclusion that the 95% contingency could not be reduced in any circumstances.

[72] The complaint regarding the legal fees incurred in the Costs Award and the petitioners' submission that the receiver reports somehow called into question whether fees were actually incurred or payable is a complaint about the correctness of the arbitrator's finding that the submission was based on speculation.

[73] Although the petitioners say that the Fourth Report was "available" to the arbitrator throughout the costs submissions, it never brought the report to the arbitrator's attention. The Eighth Report was issued two months after the parties had finished their written submissions with respect to costs, and the petitioners never sought to make further submissions or otherwise bring the Eighth Report to the attention of the arbitrator for his consideration. It is mind boggling that the petitioners now seek to refer to these reports to support allegations of impartiality on the part of the arbitrator.

[74] The arbitrator engaged with the receivership proceedings in any event. He did not ignore them outright.

[75] There is no basis to find any indication of impartiality based on the arbitrator's treatment of the receiver reports.

Failure to Consider the Significance of the Business Plan

[76] The petitioners complain that in the Second Partial Final Award, the arbitrator did not comment on their submission that Mr. Matthews's evidence should not be accepted for having failed to mention the 2020 capital budget in the business plan even though it should have been a significant factor in Mr. Matthews's credibility as a witness.

[77] What Mr. Matthews said in his witness statement was that the lack of accounting information which the petitioners failed to provide affected the respondent's operations, specifically:

(c) Inability to properly capital budget. Due to not having accounting and the corresponding understanding of the business' capital planning requirements (capital in the sense of purchasing equipment, renovations, larger course projects etc.) we could not charge, for example, a one-time capital improvement fee. The accounting information was not available to provide an analysis of how much the fee should be and the project costs and needs.

[78] Mr. Matthews did not say they could not prepare a capital budget, but that they could not properly prepare a capital budget and do the necessary analyses for their needs. When the business plan was put to him on cross-examination, he was not asked about this supposed "contradiction" or given an opportunity to explain it. His evidence was that he had not prepared the plan and that either Mr. Laroque or a consultant had done it. The business plan was never put to Mr. Laroque in cross-examination. He explained that he attempted to put together a budget in late 2019, but as he was new, and as things were in flux between the parties at that time, and due to the developing pandemic situation, nothing was finalized or approved.

[79] In light of that evidence and the failure to cross-examine on the issue, one cannot ascribe bias on the part of the arbitrator for not addressing that point.

[80] The petitioners seem to suggest that the arbitrator must consider every single piece of evidence in his reasons. This is not the law: *Arbutus Software Inc. v. ACL Services Ltd.*, 2012 BCSC 1834, at para. 69. Given the volume of evidence and arguments in this arbitration the arbitrator could not, and is not required to, address every single point and argument.

Treatment of Mr. Clarke's Conduct and Evidence

[81] In the Partial Final Award, the arbitrator made findings that Mr. Clarke engaged in misconduct based on a limited review of documentary evidence, and without assessing Mr. Clarke's credibility, and used these findings to find the petitioners liable for breach of the Non-Competition Agreement.

[82] In the damages phase of the arbitration, Mr. Clarke provided two further witness statements rebutting the liability findings regarding his conduct in the Partial Final Award. In the Second Partial Final Award, the arbitrator did not engage with Mr. Clarke's new evidence in his reasons. This, the petitioners submit, is inexplicable.

[83] In the Costs Award, the arbitrator awarded costs against the petitioners based on his findings regarding Mr. Clarke's conduct, and for ongoing breaches of the Non-Competition Agreement. That agreement expired in July 2022 before the damages phase of the proceeding. As such, the petitioners submit there was no legal reason for the Arbitrator to award costs or damages for breach of an agreement that had expired.

[84] The petitioners submit that these factors, together, indicate that the arbitrator's treatment of Mr. Clarke and his evidence throughout the proceeding raise justifiable doubts as to his impartiality.

[85] The fact that Mr. Clarke gave further evidence in the damages phase (which on its face appears to be an attempt to rehabilitate his evidence) did not oblige the arbitrator to revisit or reverse the earlier findings. The petitioners cannot relitigate the arbitrator's findings on this issue which were central to the arbitration, and actively contested, at the costs phase or now.

[86] As to the arbitrator's finding that the breach of the non-solicitation provisions of the Non-Competition Agreement "continued throughout the lengthy arbitral process", the Hotel already sought leave to appeal in the Court of Appeal with respect to that alleged misapprehension of the evidence and leave was denied. This is a finding of fact or mixed fact and law and there is no indication of impartiality playing a part in the finding.

Whether the Arbitrator Awarded Damages and Costs for the Same Breaches

[87] The petitioners do not assert that the arbitrator was acting impartially when he determined in the Partial Final Award that the petitioners breached the Non-Competition Agreement, and that this could be remedied by either damages or costs.

[88] However, they submit that the arbitrator contradicted his finding in the Partial Final Award by awarding damages for breach of the Non-Competition Agreement under the business disruption head of damages because they could not be ascertained; and awarding costs for identical breaches at the costs phase.

[89] They submit that this raises justifiable doubts as to the impartiality of the arbitrator, particularly as the arbitration advanced to its later stages.

[90] This is a misreading of the arbitrator's decision. The arbitrator did not award damages and costs for breach of the Non-Solicitation Agreement. The arbitrator only considered that issue in awarding costs, and only found that it was an aggravating factor in his discretionary assessment of an appropriate costs award for the arbitral proceedings.

[91] I note that the petitioners' position on this issue in the amended petition appears to be inconsistent with their submissions with respect to damages and costs. As well, the petitioners raised this argument when they unsuccessfully sought leave to appeal the Costs Award to the Court of Appeal.

[92] The arbitrator did not commit a legal or factual error and there is no merit to the petitioners' position that the arbitrator's awards in this regard are somehow indicative of bias.

Exercise of Discretion in the Costs Award

[93] The petitioners do not dispute that the arbitrator has broad discretion under s. 50 of the Act to award costs. They also agree there is also discretion built into the

principle that substantial success should be assessed using a global qualitative approach: *I.A.M.M. v. H.F.S.S.*, 2025 BCSC 2134 at paras. 7-8 ,32.

[94] The petitioners submit that the Arbitrator did not exercise his considerable discretion fairly and impartially when relying on the respondent's success in the number of claims that it brought, rather than its overall success measured in terms of damages claimed versus damages awarded. The petitioners submit that, while both mechanisms are "global assessments," the arbitrator favoured the authorities of the respondent, including *Loft v. Nat*, 2014 BCCA 108, over the leading and oft cited rule that 75% is the measure of substantial success set out in *Fotheringham v. Fotheringham*, 2001 BCSC 1321.

[95] In addition, the arbitrator provided summary reasons, dismissing the petitioners' submissions on the basis that they were "speculative" or "unsupported by fact" without providing any meaningful particulars or without engaging with the underlying submissions.

[96] These complaints are not a basis to infer that the arbitrator was partial to the respondent. Applying a more recent Court of Appeal decision over an often-cited decision of this Court can in no way indicate impartiality. The fact that the arbitrator summarized and rejected the respondent's position simply does not amount to bias.

Conclusion

[97] The petitioners submit that overall, of the \$2,058,017.63 awarded to the respondent in the Second Partial Final Award, and the \$1,785,936.41 awarded to the respondents in the Costs Award, the petitioners' cumulative allegations of bias call into question the majority of the Second Partial Final Award.

[98] Simply piling on a series of non-meritorious allegations of bias does not create a global meritorious one. Neither does the accumulation of legal errors, without more, translate into impartiality.

[99] I can only conclude, based on the overwhelming lack of merit to the allegation of bias, that the petitioners have brought this proceeding for one purpose: to delay the inevitable.

[100] The petition is dismissed.

Costs

[101] The respondent is entitled its costs of this petition. If the parties cannot agree on the type of award they may contact scheduling within 30 days of this decision to arrange a hearing of up to one hour before me.

“Wilkinson J.”