

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *RuggedWest Contracting Ltd. v Jayen
Homes Ltd.*,
2026 BCCA 392

Date: 20260929
Docket: CA51308

Between:

RuggedWest Contracting Ltd.

Appellant
(Claimant)

And

Jayen Homes Ltd.

Respondent
(Respondent)

Before: The Honourable Mr. Justice Butler
(In Chambers)

On appeal from: An award of an arbitrator under the *Arbitration Act*, SBC 2020, c 2,
dated December 22, 2025 (*RuggedWest Contracting Ltd. v Jayen Homes Ltd.*).

Counsel for the Appellant:

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J.K. Lockhart

Place and Date of Hearing:

Vancouver, British Columbia
April 28, 2026

Place and Date of Judgment:

Vancouver, British Columbia
September 29, 2026

Summary:

The appellant seeks leave to appeal an arbitration award, arguing that the arbitrator erred in his decision that it elected to claim in contractual quantum meruit damages, that s 51 of the Arbitration Act, SBC 2020, c 2 required the arbitrator to award the contractual interest rate, and that the contractual interest rate survived the contract's termination.

Held: Application for leave to appeal dismissed. The quantum meruit question raised is one of mixed law and fact, not of law, and thus there is no basis for leave to be granted. As there is no basis for leave on the quantum meruit question, there is no basis on the additional questions.

Reasons for Judgment of the Honourable Mr. Justice Butler:

[1] RuggedWest Contracting Ltd. ("RuggedWest") applies for leave to appeal an arbitration award described as the Supplementary Reasons, dated December 22, 2025 (the "Supplementary Award") issued by the arbitrator, Robert J. Bauman, K.C. The arbitration arose out of a dispute between RuggedWest and Jayen Homes Ltd. ("Jayen") over three subcontracts pursuant to which RuggedWest agreed to provide civil works for a residential development in Surrey, British Columbia. The Supplementary Award considered issues that were not resolved in the first award issued by the arbitrator, on August 22, 2025 (the "Partial Award"), including setting the rate of pre- and post-award interest on the award made to RuggedWest. In the Partial Award, the arbitrator found that Jayen, as general contractor, owed RuggedWest approximately \$2.3 million for work performed. RuggedWest seeks leave to appeal the arbitrator's decision to award interest at the rate of 8% per annum rather than at 59.99%, the rate of interest stipulated in the parties' agreement.

[2] The central question raised by this application is whether the alleged error of the arbitrator in deciding that RuggedWest elected to claim in contractual *quantum meruit* raises a question of law and is thus appealable pursuant to the provisions of the *Arbitration Act*, SBC 2020, c 2 [Act]. For the following reasons, I conclude that RuggedWest is unable to identify an extricable question of law and I dismiss the application for leave to appeal.

Background

[3] Between April 2022 and March 2023, Jayen engaged RuggedWest to perform civil works under three subcontracts—the On-Site Subcontract; the Off-Site Subcontract; and the Excavation Subcontract—each of which had a fixed contract price. The total value of the three subcontracts was approximately \$10 million. The relationship between the parties quickly soured with allegations of misconduct on both sides. In an effort to continue the work, the parties entered into a binding term sheet on July 20, 2023. When that failed to resolve their differences, they entered into an agreement described as the Amended and Restated Binding Term Sheet (the “ABTS”) on September 8, 2023, which was the contract document the parties were operating under when their relationship finally broke down.

[4] In November 2023, Jayen refused to make payment on outstanding invoices from RuggedWest who then terminated all contracts on January 5, 2024. RuggedWest subsequently issued invoices for the outstanding amounts it claimed were owing.

[5] The parties agreed that any dispute arising out of the ABTS would be referred to arbitration and would be conducted in accordance with the *Act*. The arbitrator was appointed on August 8, 2024, RuggedWest issued its statement of claim on August 23, 2024, and Jayen issued a counterclaim on September 13, 2024.

[6] In the Partial Award, the arbitrator determined that Jayen had failed to pay RuggedWest for work performed. He referred to Howard M. Wise, *Manual of Construction Law* (W Law, 2024) for the proposition that a contractor in RuggedWest’s position is entitled to pursue alternative remedies: either a contractual *quantum meruit* claim or a claim for damages for breach of contract. Based on his consideration of the ABTS, the circumstances leading to the termination of the three subcontracts and the pleadings, the arbitrator concluded that RuggedWest had elected a *quantum meruit* claim:

[135] As I take RuggedWest pleadings, although it speaks of damages for “breach of good faith performance” of the contracts herein it really has

elected a quantum meruit claim for the value of the work it has performed. In that regard, I turn to the expert evidence.

[7] To value the unpaid work, the arbitrator accepted the evidence presented by RuggedWest's expert, Augusto Patmore, with some minor adjustments. Mr. Patmore calculated the amount owing based on the subcontract fixed prices, taking into account change orders, and applying a reduction based on the progress assessment made by the project engineer. The arbitrator awarded \$2,366,598, which also included claims for extra work orders.

[8] The arbitrator noted that RuggedWest was entitled to interest on that award:

[197] Interest is payable on this sum (or on discrete parts of it) in accordance with the provisions of the ABTS. Mr. Patmore did this in respect of his assessment, but I cannot do so without further submissions from the parties. I direct this narrow issue be set down for a brief hearing at the convenience of the parties.

[9] Neither party applied for leave to appeal from the Partial Award prior to the additional hearing which was held on October 1, 2025. The parties provided written submissions concerning the rate of interest and other issues.

[10] At the further hearing, RuggedWest argued that interest should be payable at the interest rate of 59.99% as provided in paras 10, 15, 29 and 32 of the ABTS. It set out two different calculations (based on different dates for the commencement of the interest payments) for the interest claim using the contract rate of interest: \$2,195,300.53 and \$2,080,405.12. Jayen argued that as RuggedWest had elected to pursue its claim in contractual *quantum meruit*, it could not rely on the provisions of the ABTS for interest. It argued that interest should be awarded in accordance with the *Court Order Interest Act*, RSBC 1996, c 79.

[11] In the Supplementary Award, the arbitrator accepted Jayen's submission that RuggedWest could not claim interest at the contract rate:

[60] RuggedWest is advancing a lump sum claim in *quantum meruit* but seeking to rely on an onerous interest rate applied to discrete progress claims made at various times in the last months of the contracts and indeed, in a number of cases, concurrent with their termination.

[61] I said earlier in these reasons that Patmore’s “Base Amount “was a reasonable measure of RuggedWest’s work outstanding; but as it was based on a *quantum meruit* approach “the discernable intakes making up that number are subsumed in the Base Amount accepted by Patmore.”

[62] In my view so too are the individual progress claims and their timing.

[63] I agree with Jayen’s submission that in the circumstances contractual interest under the ABTS does not apply.

[12] The arbitrator held that he had a discretion under s 51 of the *Act* to award interest at an appropriate rate. He concluded:

[66] I do not consider interest at [*Court Order Interest Act*] rates appropriate in the circumstances. I do not have evidence of RuggedWest’s costs of borrowing, but I am setting simple interest payable on the net amount of my award herein as modified by these reasons at 8% per annum from 5 January 2024 until the date of payment. I decline to award interest on interest as appears possible under ss. (2).

[13] RuggedWest now seeks leave to appeal the interest award set out in the Supplementary Award on the following grounds which it says are questions of law:

- a) Whether the arbitrator applied an incorrect legal principle by concluding that the claimant’s damages for breach of contract were in the nature of contractual *quantum meruit*, and that, as a result, the contractual rate of interest did not apply;
- b) Whether the arbitrator erred by failing to award the contractual interest rate agreed by the parties, contrary to s 51 of the *Act*; and
- c) Whether the arbitrator erred in his alternative conclusion that the contractual interest rate did not survive the termination of the ABTS.

[14] Jayen opposes the application for leave. It submits that none of the questions are questions of law such that leave cannot be granted under s 59 of the *Act*. It also argues that the first question arises out of the Partial Award, not the Supplementary Award, and that pursuant to s 60(1) of the *Act*, any challenge to that finding is time barred.

Legal Framework

[15] The legal framework governing appeals from arbitration awards and the principles applicable to that framework are not contentious. The *Act* allows appeals from arbitral awards to this Court but only on questions of law and by leave:

59 (1) There is no appeal to a court from an arbitral award other than as provided under this section.

(2) A party to an arbitration may appeal to the Court of Appeal on any question of law arising out of an arbitral award if

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

(b) subject to subsection (3), a justice of that court grants leave to appeal under subsection (4).

(3) A party to an arbitration may seek leave to appeal to the Court of Appeal on any question of law arising out of an arbitral award unless the arbitration agreement expressly states that the parties to the agreement may not appeal any question of law arising out of an arbitral award.

(4) On an application for leave under subsection (3), a justice of the Court of Appeal may grant leave if the justice 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.

[16] An appeal or application for leave must be brought not more than 30 days after the appellant received “the arbitral award, correction, interpretation or additional award” that is the basis for the appeal: s 60(1). Three requirements must be met before leave to appeal an arbitration award can be granted:

a) The appeal must be based on a question of law arising out of the award;

b) The judge must be satisfied that one of the three circumstances identified in s 59(4) exists; and

c) The judge must be prepared to exercise the residual discretion implicit in the phrase “the court may grant leave ...”.

MSI Methylation Sciences, Inc. v Quark Venture Inc., 2019 BCCA 448 at para 54 [*MSI Methylation*].

[17] The distinction between questions of law, fact and questions of mixed law and fact was described by Justice Iacobucci in *Canada (Director of Investigation and Research) v Southam Inc.*, 1997 CanLII 385, [1997] 1 SCR 748 (SCC):

[35] ...questions of law are questions about what the correct legal test is; questions of fact are questions about what actually took place between the parties; and questions of mixed law and fact are questions about whether the facts satisfy the legal tests.

[18] Contractual interpretation involves applying contract principles to the words of a contract considered in light of the factual matrix. Accordingly, questions of contractual interpretation generally involve issues of mixed law and fact: *Sattva Capital Corp. v Creston Moy Corp.*, 2014 SCC 53 at para 50 [*Sattva*]. As noted by this Court in *MSI Methylation*, at para 61, the Court in *Sattva* considered the term “question of law” in the context of the B.C. *Arbitration Act* and observed that the central purpose of the statutory provisions was to limit possible intervention of appellate courts to cases where the results could be expected to have impact beyond the parties to the dispute: *Sattva* at para 51.

[19] Here, the parties disagree about the characterization of the questions identified by RuggedWest which Jayen maintains are questions of mixed fact and law. In *MSI Methylation*, at para 72, the Court helpfully set out principles applicable to appeals from arbitration awards that assist in properly characterizing questions proposed for appeal:

(a) Appeals are limited to questions of law arising out of the award. If the proposed question is not a question of law arising out of the award, there is no jurisdiction to grant leave to appeal.

(b) A question of law may be explicit or implicit in the award. If the question of law is explicit in the award, the statutory precondition is met. If the asserted question of law is implicit in the award, in the sense that it must be extricated from the application of the law to the facts, care must be taken to distinguish between an argument that a legal test has been altered in the course of its application (a question of law) and an argument that application of the legal test should have resulted in a different outcome (a question of mixed fact and law).

(c) One means of determining whether the challenged proposition is a question of law or part of a question of mixed fact and law is to consider the level of generality of the question. If the answer to the proposed question can be expected to have precedential value beyond the parties to the particular dispute, the question is more likely to be characterized as a question of law. On the other hand, if the answer to the proposed question is so tied to the particular circumstances of the parties to the arbitration that its resolution is unlikely to be useful for other litigants, the question will likely be considered a question of mixed fact and law. I would add to this that when the “question” is stated as a ground of appeal that is integrally tied to the facts of the case, it will more likely be characterized as a question of mixed fact and law, the answer to which cannot be of general application because of the integration of the particular facts of the case to the question. The more the question can be abstracted from the particular facts to a question of principle, the more likely it is that the challenged proposition will be characterized as a question of law with potential precedential value.

(d) A narrow scope for what constitutes extricable questions of law is consistent with finality in commercial arbitration.

[Emphasis added.]

[20] Nevertheless, extricable questions of law may be found in decisions involving contractual interpretation. These can include errors made in applying an incorrect principle, in failing to consider a required element of a legal test, or in failing to consider a relevant factor. However, courts must exercise caution in identifying extricable questions of law: *Sattva* at paras 53-54.

[21] The questions identified by RuggedWest also concern s 51 of the Act which grants an arbitral tribunal the discretion to award simple or compound interest on an award “unless otherwise agreed by the parties”.

Analysis

[22] The first two questions posed by RuggedWest are closely connected. The arbitrator’s conclusion that RuggedWest elected to pursue its claim in contractual *quantum meruit* was the basis for his conclusion that he had a discretion to set the rate of interest through application of s 51(1) of the Act. Given the connection between the two issues, it is difficult to see how the s 51 question can raise an extricable question of law. If the question regarding the contractual *quantum meruit* claim raises an extricable question of law, there is no need to consider the argument that the arbitrator erred in law in his application of s 51(1). However, if there can be

no challenge to the arbitrator's decision regarding *quantum meruit*, then the arbitrator's exercise of discretion cannot raise an extricable question of law. Accordingly, the central issue here is characterization of the *quantum meruit* question.

The *quantum meruit* question

[23] The substantive question posed by RuggedWest—whether the arbitrator erred in finding that the interest rate provided for in the ABTS did not apply to RuggedWest's claim because it elected to claim in contractual *quantum meruit*—raises two issues:

- a) Is it too late for RuggedWest to seek leave to appeal from that decision?
- b) If it is not too late, does the substantive question raise a question of law or of mixed law and fact?

Was the appeal filed too late?

[24] If Jayen is correct that the appeal was filed too late, then I need not consider whether the question raised is one of law or of mixed law and fact. However, I conclude that RuggedWest's application for leave to appeal the arbitrator's finding that it had elected to pursue a claim in *quantum meruit* was brought in time.

[25] Jayen argues that RuggedWest cannot seek leave to appeal this question because it arises out of the Partial Award, which was issued on August 22, 2025, and the application for leave was not made until January 21, 2026. It argues the application for leave had to be brought within 30 days after receipt of the Partial Award pursuant to s 60(1) of the Act:

60 (1) Subject to subsection (2), an application to set aside an arbitral award under section 58, an appeal under section 59 (2) (a) or an application for leave to appeal under section 59 (3) must be brought no more than 30 days after date on which the appellant or applicant receives the arbitral award, correction, interpretation or additional award on which the appeal or application is based.

[Emphasis added.]

[26] RuggedWest submits the application for leave was brought in time because the Supplemental Award corrected or interpreted the Partial Award in relation to interest on the *quantum meruit* award. In addition to s 60, RuggedWest refers to s 56 of the *Act* which deals with corrections, interpretations and additional awards:

(1) Within 30 days after receipt of an arbitral award, unless another period of time has been agreed to by the parties,

(a) a party may request the arbitral tribunal to correct in the arbitral award any computation, clerical or typographical errors or any other errors of a similar nature, and

(b) a party may, if agreed by the parties, request the arbitral tribunal to give an interpretation of a specific point or part of the arbitral award.

(2) If the arbitral tribunal considers the request made under subsection (1) to be justified, it must make the correction or give the interpretation within 30 days after receipt of the request, and the interpretation forms part of the arbitral award.

...

(4) Unless otherwise agreed by the parties, a party may request, within 30 days after receipt of the arbitral award, the arbitral tribunal to make an additional arbitral award as to a claim, including a claim for interest or costs, presented in the arbitral proceedings but omitted from the arbitral award.

[Emphasis added.]

[27] It is evident from these provisions that whether the application was brought within the time permitted depends on whether the Supplemental Award amounts to a correction or interpretation of the Partial Award or is additional to that award.

[28] Both parties rely on the decision of Justice Newbury in *Desert Properties Inc. v G&T Martini Holdings Ltd.*, 2024 BCCA 24 (Chambers) [*Desert Properties*]. I agree that *Desert Properties* is directly on point and persuasive.

[29] As I read *Desert Properties*, the time to commence an appeal runs from an arbitral award on the date the parties receive the final version of the award issued by the arbitrator *as corrected*. It matters not whether the corrections relate to an issue that an appellant seeks to raise on appeal. The question is when did the parties receive the final corrected award on the matter referred to arbitration. However, the issuance of a subsequent award that deals only with an additional matter, such as costs or interest, will not extend the time for commencing an appeal.

[30] Here, the decision on the applicable rate of interest in the Supplemental Award would amount to an “additional award” had it not dealt with the matter referred to arbitration. However, the Supplemental Award did not deal solely with the rate of interest. It contains the arbitrator’s decision on issues arising out of the Partial Award including “several minor issues involving Jayen’s claim for Onsite Deficiency Liquidated Damages and the Infill and Debris issues”, as well as “alleged ‘computation corrections’ under s. 56” of the Act: Supplemental Award at paras 1-3. Further, the interest rate ruling in the Supplemental Award expanded on the *quantum meruit* finding in a way that restated or interpreted the Partial Award.

[31] Applying the reasoning in *Desert Properties* to the present appeal, the application for leave to appeal had to be brought within 30 days of the issuance of the Supplemental Award on December 22, 2025. It was brought on January 21, 2026, and accordingly was brought in time.

[32] The relevant chronology concerning the arbitral award and the applications for leave in *Desert Properties* is summarized at para 3. In brief, the arbitral award was received by the parties on November 4, 2023. Shortly after receipt of the award, the parties corresponded with the arbitrator regarding disputed issues, one of which is described as “Issue 17”. On December 8, 2023, the arbitrator sent a corrected award to the parties in which he indicated he was not prepared to reconsider or make any change to Issue 17 but made minor corrections to three other issues raised by the parties. One party, Desert Properties Inc. (“Desert”), filed an appeal on December 4, 2023, but did not appeal the decision concerning Issue 17. The respondent, G&T Martini Holdings Ltd. (“G&T”), filed a cross appeal on December 11, 2023, in which it sought leave to appeal Issue 17 and other matters unrelated to the corrected award issued by the arbitrator. Desert took the position that because G&T’s application for leave to appeal was brought more than 30 days after the original award, it was not brought in time.

[33] Justice Newbury considered jurisprudence regarding limitation periods for commencing appeals under other provincial arbitration statutes. She found support

in the authorities for G&T's position that the final words of s 60(1) have the effect of extending the 30-day period for seeking leave to appeal in the circumstances present in *Desert Properties*.

[34] Justice Newbury began by referring to *Allen v Renouf*, 2019 ABCA 250 [*Allen*], in which the Alberta Court considered s 46(1) of the Alberta *Arbitration Act*, RSA 2000, c A-43, that requires an application for leave to be commenced within 30 days of receipt of the "award, correction, explanation, change or statement of reasons on which the appeal or application is based." In *Allen*, the appellant sought to appeal both the "main" award dealing with the substantive issues on appeal and the subsequent costs award. The application for leave was brought more than 30 days after the issuance of the main award, but within 30 days of the costs award.

[35] In *Allen*, the Court "agreed that the issuance of the *costs award* did not suspend the time running for the main appeal or for the seeking of permission to appeal the 'merits award' as corrected": at para 10. Justice Newbury noted, with approval, the Court's interpretation of the Alberta statute in relation to corrections, explanation or changes to awards:

[11] On the other hand, the Court did agree with the appellant that the "plain words" of s. 46(1) should be interpreted as follows:

... There must be an appeal within 30 days after an award; and by modification of that, if there is a correction of that award, within 30 days after the correction; or if there is an explanation of that award, within 30 days of the explanation; or if there is a change in the award, within 30 days after the change; or if there is a statement of reasons given subsequent to the award, within 30 days of the statement of reasons given so that the appeal always runs from the award as it is and any variation of that award itself on the terms of the award by correction, explanation, change or statement of reasons. [At para. 7; emphasis added.]

As I read this decision, the fact that the arbitrator had issued a second award dealing with costs did not extend the time for seeking leave to appeal the main award(s); but with respect to a "correction", "explanation" or other change in the arbitrator's main reasons, those events changed the award such that the time to seek leave to appeal ran for 30 days from the date of the correction, explanation or change. This would ensure that a court at any time would be in a position to deal with the "award as it is".

[Emphasis added.]

[36] Justice Newbury referred to *Broadbend Communications North Inc. v I-Netlink Inc.*, 2017 MBQB 32 and *Aztec Construction Ltd. v Frocan Industrial Contractors Ltd.*, 1993 CanLII 7191, [1993] 144 AR 276 (ABQB), which came to similar conclusions about the limitation provisions of the relevant statutes. The parties did not refer her to any authority that contradicted these cases.

[37] Desert argued, as Jayen does here, that the phrase “on which the appeal or application is based” means that “the ‘basis’ of an appeal is ‘of importance’ when a court is determining whether an applicant has complied with the 30-day time limitation.” Desert maintained that for a new 30-day period to begin, the “Court must be satisfied the appeal is *based specifically on the correction, change or explanation*”.

[38] Justice Newbury rejected that argument and other positions advanced by Desert to distinguish *Allen*:

[21] Finally, Desert distinguishes *Allen, supra*, on the basis that the Court of Appeal in that case rejected the appellant’s submission that a subsequent costs award suspended, or extended, the time limitation to appeal the initial award. With respect, I cannot agree that *Allen* is so easily distinguished. There were two awards in that case -- a “main arbitration award” and a costs award. The latter was similar to an “additional arbitration award”, usually dealing with costs or interest, that may be made in British Columbia under s. 56(4) of the *Act*. The Court in *Allen* endorsed the finding of the judge below that the “issuance of the costs award did not suspend the time running under s. 46(1) to appeal, or to seek permission to appeal the merits decision as corrected, explained, changed ...”. I am not aware of any such additional award having been made in this case. That aside, the Court endorsed the lower court’s statement that “there must be an appeal within 30 days after an award; and by modification of that, if there is a correction of that award, within 30 days after the correction or if there is an explanation of that award, within 30 days of the explanation... so that the appeal always runs from the award as it is...”. (At para. 7; my emphasis.)

[Emphasis in original.]

[39] Justice Newbury concluded:

[22] The Court of Appeal’s notion of “the award as it is” encapsulates the fact that when a correction or interpretation of an arbitral award is issued, the correction or interpretation forms part of the award going forward -- as opposed to the issuance of an additional “award” under s. 56(4). In my view, the “arbitral award” referred to in s. 60(1) is thus the corrected award and an

appeal from that award that is “*based on*” the *corrected award* must be brought within 30 days of the correction or interpretation. Similarly, if the appeal is “based” on the correction or interpretation issued under s. 56(1) or on an additional award made under s. 56(4), the 30-day limitation in s. 60(1) also applies. In this way, the phrase “on which the appeal or application is based” is given its full meaning.

[Emphasis added.]

[40] In my view, Justice Newbury’s reasoning is persuasive, and I see no reason why I should not follow it.

[41] Here, while the Supplemental Award is an “additional award” to the extent of the decision on the rate of interest on the claim, it also corrects and interprets the Partial Award.

[42] First, as RuggedWest argues, the Supplemental Award provides an explanation of the basis for the *quantum meruit* finding in relation to the interest claim. In the Partial Award, the arbitrator stated that interest on the award would be payable on the sum awarded to RuggedWest “(or on discrete parts of it) in accordance with the provisions of the ABTS”. As RuggedWest submits, that would suggest that the contract interest provisions would apply to at least part of the award. However, in the Supplemental Award, the arbitrator explained that the “Base Amount” to calculate the work outstanding was based on a *quantum meruit* approach, but “so too are the individual progress claims and their timing”: at paras 61-62. This amounts to an interpretation of the Partial Award which has the effect of extending the time for commencing the application for leave to appeal.

[43] Second, and of equal importance, in the Supplemental Award, the arbitrator dealt with issues raised by RuggedWest described as “Computation Corrections”. Its application was brought in accordance with s 56 of the *Act*. RuggedWest argued that the arbitrator had made errors in calculating the amounts owing to it. Jayen took the position that the arbitrator should not consider the requests to correct the award because the corrections sought did not fall within the type of correction that could be dealt with under s 56. While the arbitrator dismissed most of RuggedWest’s

arguments, he found that the calculation of the award was incorrect in one respect and decreased the amount of the award by \$47,942.

[44] Applying the reasoning in *Desert Properties*, the arbitrator's decision in the Supplemental Award as corrected "forms part of the award going forward". Accordingly, any appeal or application for leave could be brought within 30 days of the receipt of the Supplemental Award. That is so even though the subject matter of the appeal was not changed in any way by the "*corrected award*". As Justice Newbury noted, interpreting the provisions in this way means that any appeal taken under s 59 is based on the "award as it is". Further, it avoids the difficulties that would be encountered if there were "a series of 'awards', appeals and notices of appeal based on successive versions of the award": at para 23.

[45] In summary, I reject Jayen's argument that the application for leave was not brought in time in accordance with s 60(1) of the Act.

Is the quantum meruit question an extricable question of law?

[46] Having concluded that RuggedWest's application for leave was brought in time, I must consider whether the question raised is a question of law, or of mixed law and fact.

[47] RuggedWest submits the question raised is a question of law and points to two errors made by the arbitrator. First, he concluded the award was in the nature of a contractual *quantum meruit* claim despite the fact the ABTS set out a fixed and certain price for the work. Referring to *Infinity Steel Inc. v B & C Steel Erectors Inc.*, 2011 BCCA 215 [*Infinity Steel*], RuggedWest argues there is no room for application of the doctrine where the contract explicitly provides for the amount of remuneration or for the method of determining remuneration. It says the ABTS clearly provides for both. Second, it argues that the arbitrator erred in concluding that the contractual interest rate did not apply to the *quantum meruit* award when the ABTS specified the applicable interest rate to be applied to overdue payments.

[48] Jayen argues that the arbitrator's finding that RuggedWest had elected to recover in *quantum meruit* was based on his review of the pleadings and presentation of its case including expert evidence. It also relies on *Infinity Steel* as well as *Hugh's Contracting Ltd. v Stevens*, 2015 BCCA 491 [*Hugh's Contracting*], for the proposition that a finding that a claim is to be valued as a contractual *quantum meruit* claim is a principle of contract construction or interpretation. It argues that the arbitrator's finding decided a question of mixed fact and law, and that RuggedWest cannot point to any extricable error of law.

[49] I agree with the parties that *Infinity Steel* is instructive. Both parties referred to paras 12-13 of that decision where the Court quotes extensively from *CH2M Hill Energy Canada Ltd. v Consumers' Co-operative Refineries Ltd.*, 2010 SKCA 75 [*CH2M*] to explain the difference between restitutionary *quantum meruit* and contractual *quantum meruit*. In *Infinity Steel*, the Court found that the trial judge had confused the two remedies but that their confusion was understandable given the evidence.

[50] The portion of *CH2M* included in the reasons begins with a passage from G.H.L. Fridman, *The Law of Contract*, 4th ed (Ontario: Carswell, 1999) at pp 12-13, in which the author sets out the difference between contractual and restitutionary *quantum meruit*. The former is employed to value a liability that arises from a truly contractual relationship where the parties have not agreed upon a price for goods or services to be delivered or rendered by one party to the other, while the latter is used where no contract exists between the parties.

[51] The Court in *CH2M* then emphasized that contractual *quantum meruit* is a principle of contract construction or interpretation:

[24] This quotation, as well as the cases cited by the trial judge in the passage quoted above, make it clear that what Professor Fridman calls "contractual quantum meruit" is really a principle of contract construction, or interpretation, to the effect that, where the parties to a valid contract have agreed for the provision of goods or services, clearly intended to be paid for, but have failed to provide for the terms of remuneration, then they may be presumed to have intended a reasonable price and, on that basis, a contractual term to pay a reasonable price may be implied. As the cases cited

by the trial judge indicate, there is clearly no room for this doctrine, or for such an implication, where the contract explicitly provides for the amount of remuneration, or for the method for determining the same.

[25] Three points must be made about the application of this principle in the present case. The first is that, logically, the question of the proper construction of the contract, and therefore the question of the applicability to the case of the principle of contractual *quantum meruit*, precedes a determination of whether the contract has been breached. In the instant case, at least at first reading, the trial judge (apparently with the support of the parties) appears to have reversed the issues, finding, first, that the appellant failed to prove breach of contract, and then turning to consider the issue of contractual *quantum meruit*. The second issue is only of interest, however, insofar as it relates to the first. ...

[26] The second point is that the principle of *quantum meruit* is only one method among many of contract construction and, in any case, there may be other factors that influence the implication of terms into a contract that fails to expressly set out an essential term. Ultimately, the task of construction is the task of determining the intentions of the parties. In the instant case that has to be done in the context of very extensive and lengthy negotiations as to what would and would not be payable or reimbursable under the contract.

[27] The last point is that, even where the court concludes that it is necessary to resort to the principle of “contractual *quantum meruit*” because the contract has omitted an essential term, it is still necessary to decide what constitutes “reasonable remuneration” in accordance with that principle. ...

[Emphasis added.]

[52] RuggedWest’s argument is based on the proposition that there is no room for the application of contractual *quantum meruit* “where the contract explicitly provides for the amount of remuneration, or the method for determining the same.” However, that argument ignores the more fundamental proposition stated by the Court in *CH2M*: contractual *quantum meruit* is a principle of contract construction or interpretation. It is one method among other principles of contract construction that permits a court to imply a term for reasonable payment where the parties have failed to provide for the terms of remuneration in the particular circumstances that arose. As this passage makes clear, “the task of construction is the task of determining the intentions of the parties”.

[53] Here, there is no suggestion that the arbitrator erred in his approach to the characterization of the relationship between the parties: he found they had entered a valid contract and that Jayen had breached the contract. The arbitrator then found

that the provisions in the contract for determining compensation did not apply to the circumstances presented, and that RuggedWest was advancing a claim in contractual *quantum meruit*. He implied a term for payment of a reasonable price and quantified the reasonable remuneration.

[54] RuggedWest's challenge to the arbitrator's findings is based on its assertion that the arbitrator erred at the step in his analysis where he found that the provisions in the contract did not cover the claim as presented and that they had elected to pursue contractual *quantum meruit*. This is a challenge to his interpretation of the contract. As Jayen submits, it required the arbitrator to interpret the provisions of the ABTS taking into account his factual findings and the claims advanced. RuggedWest does not point to an extricable question of law. Rather, it says that the arbitrator should have arrived at a different conclusion about the intentions of the parties as expressed in the contract. That is not a question of law that can be advanced on appeal.

[55] *Hugh's Contracting* provides support for Jayen's position. The appellant challenged the trial judge's application of the principle of *quantum meruit* to value the contractor's claims for extra work. The trial judge relied on the principle that when contracting parties have agreed to terms regarding the provision of goods and services but the contract has failed to provide for the terms of remuneration, a contractual term to pay a reasonable price for the goods and services can be implied, as it may be presumed the parties intended that: at para 26. The Court described the issue on which the appeal turned:

[27] There is no doubt the parties agreed HCL would do extra work; they clearly intended that HCL would be paid for that work. The challenge to the judge's conclusion that an agreement to pay a reasonable price should be implied must be founded solely upon an argument that he was wrong to conclude the parties had failed to provide for the terms of remuneration in the contract. The judge took guidance from the contract terms in setting reasonable remuneration in relation to all extras except charges for HCL's own labour, the supervision fee claimed and the interest on unpaid fees. The appeal, thus, turns on whether the judge was wrong to find the contract did not provide for payment of such charges.

[Emphasis added.]

[56] Here, the appeal turns on a similar question. The arbitrator found there was no doubt the parties had agreed that RuggedWest would do the work in question and be paid a reasonable price for that work. The question arising from the award is whether the arbitrator was wrong to conclude the parties had failed to provide for the terms of remuneration. As in *Hugh's Contracting*, the question RuggedWest asks is whether the arbitrator was wrong to find that the payment terms in the contract did not apply in the particular circumstances that arose.

[57] In *Hugh's Contracting*, this Court could not find an extricable question of law given the issues defined:

[28] ... These are questions of mixed law and fact that a first-instance decision maker is best positioned to decide. They do not engage substantive rules of contract law but instead depend on the particular facts of the case, having regard to the surrounding circumstances. Accordingly, even if the contract may arguably have been read in another manner, the judge's conclusion that the parties came to no such implied agreements is entitled to deference: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633 at paras. 49-55. His conclusion cannot be said to have been coloured by any misapprehension of the facts or to have been a result of an error in principle.

[Emphasis added.]

[58] The basis on which the arbitrator found that the ABTS did not apply is different from that found in *Hugh's Contracting*. Here, the arbitrator examined a much broader range of circumstances that included the terms of the contract, the way the relationship broke down, the steps taken by the parties when that occurred, and the way in which the claims were pleaded and advanced in the arbitration. Given these circumstances, the arbitrator's conclusion undoubtedly required him to resolve questions of mixed law and fact. It is equally clear that the arbitrator was best positioned to decide those questions.

[59] Returning to *MSI Methylation*, at para 72(c), the Court noted that one way to determine whether the challenged proposition is a question of law, is to consider the level of generality of the question. Where the answer to the question can be expected to have precedential value beyond the parties to the dispute, it is more likely to be characterized as a question of law. Looking at the facts and

circumstances—including the provisions of the ABTS, a unique contract tailored to very particular circumstances—considered by the arbitrator in arriving at his decision that RuggedWest elected to claim in contractual *quantum meruit*, it is unlikely that the question posed could have precedential value beyond this case. In turn, this strongly supports the conclusion that the question raised is of mixed law and fact and does not raise an extricable question of law.

[60] Having concluded that the question raised is one of mixed law and fact, it is not necessary for me to consider whether one of the three circumstances identified in s 59(4) exists.

The s 51 question

[61] Section 51 of the *Act* provides:

51 (1) Unless otherwise agreed by the parties, an arbitral tribunal may award simple or compound interest for the time period and at the rate that the arbitral tribunal considers appropriate as follows:

(a) on the whole or part of any amount awarded by the arbitral tribunal, in respect of any period up to the date of the arbitral award;

(b) on the whole or part of any amount claimed in the arbitration and outstanding at the commencement of the arbitral proceedings but paid before the arbitral award was made, in respect of any period before the date of payment.

(2) Unless otherwise agreed by the parties, an arbitral tribunal may award simple or compound interest from the date of the arbitral award, or any later date, until payment, at such rates as the arbitral tribunal considers appropriate, on the outstanding amount of any arbitral award, including any interest awards under subsection (1) and any costs awards.

[Emphasis added.]

[62] RuggedWest argues that the arbitrator erred by failing to apply the agreed-upon contractual interest rate to both pre-award and post-award interest by purporting to exercise a discretion he did not have to apply an alternative rate of interest. It notes that the *Court Order Interest Act* requires a court to give effect to an agreement about interest between parties: s 2. It says that the requirement to give effect to agreed-upon interest rates applies with more force in the arbitral context because arbitrators have no inherent jurisdiction. In making this argument, it also

submits that the ABTS did provide for contract interest on an award in *quantum meruit*.

[63] Jayen accepts that an arbitrator has no discretion to fix an interest rate where the contract in issue expressly provides for the interest rate to be applied. However, the arbitrator determined that the contract interest rate did not apply because RuggedWest recovered in *quantum meruit*. Referring to ss 28-29 of the ABTS, Jayen argues the arbitrator correctly determined that the contract interest rate on claims for damages only applies following undisputed certification of a progress payment or, where certification is contested, based on an arbitral award to resolve that dispute. Neither condition was satisfied which factored into the arbitrator's decision that RuggedWest's claims were advanced in *quantum meruit*.

[64] It is evident from these positions that RuggedWest's argument based on s 51 turns entirely on whether the arbitrator erred in finding that it had elected to claim in *quantum meruit*. The exercise of his discretion to award interest at an alternate rate depended on that finding. Accordingly, if the arbitrator's decision on the *quantum meruit* question is a matter of mixed law and fact and leave cannot be granted to challenge that decision, there is no basis for granting leave on the s 51 question. Quite simply, it raises the same question and there is no basis for granting leave.

The alternative basis for the arbitrator's conclusion

[65] RuggedWest says this question raises the important issue of whether an innocent party is able to terminate an agreement in the face of fundamental breach without fear of waiving its right to claim contractual interest on the amount owing to it. It also says that the arbitrator failed to give reasons for his conclusion.

[66] Jayen notes that the arbitrator did not fail to give reasons as he specifically adopted Jayen's submissions on that issue. Further, it says that whether the ABTS provides for contractual interest after contract termination is a question of contractual interpretation which raises a question of mixed law and fact. It submits that RuggedWest has failed to identify an extricable question of law.

[67] I am of the view that the issue raised is a question of contractual interpretation involving mixed law and fact. On that basis alone, I would not grant leave. However, there is a further basis for denying leave: this question would only need to be considered if leave had been granted on the *quantum meruit* issue and would only arise if an appeal from that decision was successful. As I would not grant leave on the former question, no purpose would be served by granting leave on this question.

Disposition

[68] RuggedWest's application for leave to appeal is dismissed.

"The Honourable Mr. Justice Butler"