COURT OF APPEAL FOR ONTARIO

CITATION: Maisonneuve v. Clark, 2022 ONCA 113
DATE: 20220208
DOCKET: C69277

2022 ONCA 113 (CanLII)

Huscroft, Sossin and Favreau JJ.A.

BETWEEN

Jean Maisonneuve and 3721094 Canada Inc.

Applicants (Respondents)

and

Christopher Clark and Lanciter Consulting Inc.

Respondents (Appellants)

Bryce Dillon, for the appellants

David Cutler, for the respondents

Heard: February 1, 2022 by videoconference

On appeal from the order of Justice Sally A. Gomery of the Superior Court of Justice, dated March 16, 2021, with reasons reported at 2021 ONSC 1960.

REASONS FOR DECISION

[1] This appeal deals with the application of a limitation period to an arbitration agreement.

[2] The personal appellant and respondent are cousins who were in business together as shareholders of various companies, including Eastern Ontario Real Estate Investors Inc. (“EOREI”).

[3] Their relationship deteriorated over the years and, in early 2016, they referred their business disputes to arbitration. In September 2016, the parties reached an agreement on all issues in dispute except for one. As part of the agreement, the personal appellant agreed to transfer all his shares in EOREI to the personal respondent. However, the parties were not able to agree on the payment of various expenses associated with EOREI. The mutual release the parties signed in the context of their overall settlement provided that this outstanding issue was to be referred to arbitration. This term of the release was worded as follows:

> The undersigned agree and understand that there is one issue that is not covered by the Mutual Release and it is as set out in this paragraph (the "Excluded Issue"). Maisonneuve takes the position that Clark is responsible for certain EOREI related costs and expenses incurred prior and subsequent to the Acceptance date. Conversely, Clark takes the position that he is not responsible for any EOREI related costs and expenses prior and subsequent to the Acceptance date and, if he is responsible for any EOREI related costs and expenses, then he disputes Maisonneuve's accounting thereof. <u>If the parties are unable to resolve the Excluded Issue as between them, then the Excluded Issue shall be fully and finally referred to the Arbitrator for resolution.</u> The Arbitrator's decision shall not be subject to any appeal, either of law, fact or mixed law and fact. [Emphasis added.]

[4] The parties signed the release on September 26 and 27, 2016. In 2017, the parties became involved in litigation over the validity of the settlement agreement as a whole. On January 31, 2018, in the context of settlement negotiations

2022 ONCA 113 (CanLII)

regarding the litigation, the appellants' lawyer took the position that there would be no negotiations over the EOREI expenses.

[5] In June 2019, the respondents' lawyer wrote to the appellants' lawyer seeking to initiate the arbitration over the EOREI expenses. The appellants refused the request to arbitrate on the basis that it was time-barred.

[6] In September 2019, the respondents commenced an application to the Superior Court to appoint an arbitrator. On the application, the appellants took the position that the arbitration was time-barred because the parties had agreed that the referral for arbitration would take place within 90 days of the signing of the settlement agreement or, in the alternative, that the two-year limitation period in the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B, applied and the respondents were required to commence the arbitration within two years of the date when the parties signed the settlement agreement.

[7] The application judge held that there was no agreement that the parties would conduct the arbitration within 90 days of the agreement. She also held that the arbitration was not barred by the two-year limitation period in the *Limitations Act, 2002* because, based on s. 5(1)(a)(iv) of the Act, it was not evident that the arbitration was "appropriate" until it was clear that the dispute could not be resolved through negotiations. In reaching this conclusion, the application judge relied on the wording of the arbitration clause and the context of the negotiations leading up

2022 ONCA 113 (CanLII)

to the September 2016 settlement. Ultimately, she found that the respondents should have known by January 31, 2018 that a negotiated settlement of the EOREI expenses was not possible based on the communications between the parties' counsel. On that basis, she found that the respondents commenced the application within the two-year limitation period.

[8] On appeal, the appellants do not challenge the application judge's finding that there was no agreement that the arbitration would take place within 90 days. However, they challenge her finding that the two-year limitation period started to run on January 31, 2018 rather than in September 2016, when the parties signed the agreement.

[9] We do not agree that the application judge made any reversible errors.

[10] The only issue on the appeal is the application judge's interpretation of the arbitration agreement. This is not a standard form contract and, accordingly, the application judge's decision is owed deference and the palpable and overriding error standard of review applies.

[11] The appellants essentially raise four arguments on appeal.

[12] First, the appellants argue that the application judge erred in failing to apply this court's decision in *Markel Insurance Company of Canada v. ING Insurance Company of Canada*, 2012 ONCA 218, 109 O.R. (3d) 652, to the interpretation of the arbitration clause. We reject this argument. In *Markel*, this court addressed the

2022 ONCA 113 (CanLII)

limitation period that applies to s. 275(4) of the *Insurance Act*, R.S.O. 1990, c. I.8, which provides that "[i]f the insurers are unable to agree with respect to indemnification under this section, the dispute shall be resolved through arbitration under the *Arbitration Act, 1991*". In *Markel*, this court held that negotiation was not a precondition to arbitration and, therefore, the limitation period does not start to run at the conclusion of unsuccessful negotiations. The application judge here distinguished *Markel* on the basis that in that case this court was interpreting a statutory provision rather than a provision in an agreement. She explained that, in the context of an agreement, the factual matrix is also relevant to understanding the party's intentions. In addition, she found that the differences between the wording of s. 275(4) of the *Insurance Act* and the arbitration clause here are significant. She found that the use of the word "then" in the arbitration clause adds a temporal component that makes the clause "both temporal and conditional". An attempt at informal resolution is a prerequisite to arbitration. The application judge made no palpable and overriding error in reaching this conclusion. The distinctions she drew between *Markel* and the circumstances of this case were available on the law and on the record before her.

[13] Second, the appellants also argue that the application judge made a palpable and overriding error in finding that it was not clear at the time the parties agreed to the arbitration clause in September 2016 that they would not participate in any further negotiations over the EOREI expenses. In making this argument, the

2022 ONCA 113 (CanLII)

appellants ask this court to review and reweigh correspondence between the parties leading up to the agreement to arbitrate. It is evident from the decision that the application judge reviewed the correspondence at issue and concluded that it represented an "evolution" in the personal appellant's position. While the appellant initially insisted that there would be no discussion of the EOREI expenses claim, the application judge found that by the time the agreement was concluded he had "entered into Minutes that not only acknowledged Maisonneuve's claim for the expenses but contemplated that the parties could resolve the issue as between them prior to resorting to arbitration". The application judge made this finding based on her review of the correspondence and the wording of the arbitration clause. Her finding is entitled to deference and we see no palpable and overriding error.

[14] Third, the appellants argue that the application judge erred in relying on the decisions in *PQ Licensing S.A. v. LPQ Central Canada Inc.*, 2018 ONCA 331, and *L-3 Communication SPAR Aerospace Limited v. CAE Inc.*, 2010 ONSC 7133, as authority for the proposition that the limitation period that applies to an arbitration clause may not start to run until the parties have exhausted attempts at informal resolution. The appellants argue that the arbitration clauses in those cases were different and the preconditions for enforcement much clearer than in this case. While this may be true, it does not detract from our conclusion that the application

2022 ONCA 113 (CanLII)

judge made no palpable and overriding error in her interpretation of the arbitration clause as including a precondition in this case.

[15] Finally, the appellants argue that the application judge's decision will lead to uncertainty with respect to the application of limitation periods to arbitration clauses because it is necessarily difficult to ascertain when negotiations are at an end. We reject this argument. The application judge's decision was based on the specific wording of this arbitration clause and the circumstances in which it was negotiated. Parties are free to agree to arbitration clauses that make no reference to the possibility of an informal agreement or that are more specific about the steps and timing leading to arbitration. In this case, as stated by the application judge, it was open to the appellants to let the respondents know at any time that no further negotiations would take place. Indeed, this is what occurred in January 2018, which the application judge found triggered the start of the limitation period.

[16] For these reasons, we dismiss the appeal.

[17] The respondents are entitled to costs in the agreed amount of $5,000.

"Grant Huscroft J.A."
"L. Sossin J.A."
"L. Favreau J.A."

2022 ONCA 113 (CanLII)