CITATION: Magna International Inc. v. Granite Real Estate Inc., 2022 ONSC 2200
COURT FILE NO.: CV-21-667901
DATE: 20220408

2022 ONSC 2200 (CanLII)

ONTARIO SUPERIOR COURT OF JUSTICE

RE: MAGNA INTERNATIONAL INC., Applicant

-and-

GRANITE REAL ESTATE INC., Respondent

BEFORE: FL Myers J

COUNSEL: *Jeffrey Levine and Guneev Bhinder*, for the Applicant

R. Seumas M. Woods, for the Respondent

HEARD: April 4, 2022

ENDORSEMENT

[1] The applicant tenant moves for an order appointing David Atlin as single arbitrator to fix the rent for a renewal term of a lease.

[2] The landlord opposes the appointment because the evidence is insufficient and because the arbitration clause is invalid. It submits that the arbitration clause in the lease is not mandatory and thereby fails to meet the definition of an arbitration agreement. In addition, it submits that the terms of the arbitration clause are too vague as they do not specify either a seat of the arbitration or the applicable rules.

[3] The parties agree that the tenant has validly renewed the lease.

[4] The applicant's evidence is plainly deficient. The legal assistant who has sworn the applicant's evidence has no knowledge of the facts. The information and belief evidence provided is all from counsel who appeared in court. Counsel are therefore making submissions on their own evidence.

[5] The bulk of the documents appended to the affidavit are not contentious. But there is email communication between counsel for the applicant and the proposed arbitrator that is criticized by the respondent. This left the

applicant's counsel in a difficult position of trying to explain and justify their own acts but without giving evidence.

[6] Although the respondent does not raise any credibility issues expressly, whenever evidence is received there is always implicitly some credibility and reliability assessment for the evidence to be accepted.

[7] There is no indication that the proposed arbitrator is available to undertake the arbitration within the very quick time limits set out in the lease. In fact, he has not been shown the lease. The arbitrator told the applicant's counsel that he had no conflict of interest with either party although he disclosed that he was acting for a landlord in a similar type of arbitration proceeding. There has been no formal compliance with s. 11 (2) of the *Arbitration Act, 1991*, SO 1991, c 17, as yet.

[8] I understand that where the parties are not cooperating, communication with the arbitrator prior to appointment can be challenging. Counsel straddles a line of not saying too much to potentially taint the process. The simple answer however, where the parties cannot cooperate, is to copy the other side on all preliminary communication including first contact with the potential arbitrator. In that way counsel could have sent the lease, asked the arbitrator to confirm his expertise, willingness, and availability to participate. The arbitrator could, in response, fulfill s. 11 (2) by communicating with both sides.

[9] While I am not suggesting that an affidavit from a potential arbitrator is required to prove his or her qualifications, something more than very preliminary emails from one counsel appended to a legal assistant's affidavit is required.

[10] In bankruptcy and receivership cases, by analogy, where someone is proposed for appointment to a court-appointed office, counsel submit a consent form signed by the person indicating his or her willingness to serve. Had counsel in this case written to the proposed arbitrator as suggested above, with a copy to the other side, the arbitrator's response to both, containing the arbitrator's own representation of his qualifications, his consent, and his availability for the foreshortened timeline, could have been appended to a consent form or perhaps even to a legal assistant's affidavit.

[11] The difference in that case would be that there would be no controversy about the content and completeness of the communications because they were transparent to all. In addition, the legal assistant would also not be reciting information and belief from counsel or the internet.

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[12] I am not content to dismiss this application on this basis however. Mr. Atlin's qualifications are not actually in doubt. But his availability needs to be confirmed and his consent to serve should be knowingly given after at least seeing the relevant clause(s). These points matter. But I am not about to require parties to start anew or waste thousands of dollars and months just to obtain a consent form.

[13] In my view the issues of jurisdiction raised by the landlord are to be resolved by the arbitrator. I will therefore say as little as I can about them.

[14] In *Trade Finance Solutions Inc. v. Equinox Global Limited,* 2018 ONCA 12 (CanLII), the Court of Appeal reiterated the central importance of the competence-competence principle in Ontario. The court defers to the arbitrator's determination of his or her own jurisdiction unless the answer is clear. The court wrote:

> [23] Generally speaking, the approach in Ontario is that in cases where the "existence or validity of the arbitration agreement" is not clear (i.e. the agreement is arguably, but not clearly: (a) null and void; (b) inoperative; or (c) incapable of being performed) it is preferable for the arbitrator to decide the issue: *Dalimpex Ltd. v. Janicki,* (2003), 2003 CanLII 34234 (ON CA), 64 O.R. (3d) 737 (Ont. C.A.), at paras. 21-22.

[15] But, in this case, there is no arbitrator yet. I am asked to appoint one. The respondent says that I should not do so because the lease does not contain a proper arbitration agreement. In *Electek Power Services Inc. v. Greenfield Energy Centre Limited Partnership*, 2022 ONSC 894 (CanLII), Perell J. determined that this is a circumstance in which the court may decide the issue or it may appoint the arbitrator and defer the question to the arbitrator. At para. 121, he wrote:

> [121] On an application for the appointment of an arbitrator, the Court must ascertain the nature of the dispute and whether it falls within the scope of the relevant arbitration agreement. Once again, the jurisdictional analysis is similar to the analysis used for a stay motion, and if an arbitrator is appointed, once again, the court may decide to allow the arbitrator to determine his or her jurisdiction to decide the dispute between the parties. [Notes omitted.]

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[16] Perell J likened the situation before me to a case where a stay of an arbitration is sought. He dealt with that circumstance as follows:

> [111] In the context of deciding the stay application, the court may decide that the arbitrator ***has or may have jurisdiction to decide the parties' dispute***, in which case, the court will grant a stay of the civil action, and it will remit the case to the arbitrator. Pursuant to the competence-competence principle on the stay motion, the court may decide to let the arbitrator rule on his or her own jurisdiction to decide the dispute. [Emphasis added.]

[17] As Perell J. found, the court may decide the issue or it may refer it to the arbitrator. How do I choose? It seems to me that the Court of Appeal has provided the answer in *Trade Finance*. If the issue is clear, I can decide it and save everyone the time and effort. But if the issue is not clear, the proper respect for the arbitral process chosen by the parties is to defer the question to the arbitrator.

[18] It is always important to bear in mind that it is the parties who have chosen to arbitrate. In this case there is a typical arbitration clause in the lease that governs all situations except the setting of rent on a renewal term i.e. the situation here.

[19] The parties turned their collective minds to this specific situation and decided upon a special provision that says:

> If the parties cannot agree on the fair market rent at least six (6) months prior to the commencement date of the applicable renewal term, **such rent may be referred to arbitration** pursuant to **the applicable AAA (as defined herein)** rules for arbitrations in force at the time of such reference, **by written notice by either the Landlord or the Tenant, to a single accredited property appraiser agreed by the Landlord and the Tenant**. If the Landlord and the Tenant fail to agree on such property appraiser within ten (10) days of such written notice, then either the Landlord or the Tenant may apply to a single judge in the jurisdiction in which the Leased Premises are situated to appoint such arbitrator. **Such arbitrator shall hold a hearing within ten (10) days of his/her appointment to determine the fair market rent, shall determine the fair market rent within thirty (30) days of such hearing,** and shall apportion the costs of the arbitration in his/her sole and unfettered discretion. T**he decision of the arbitrator shall be final and binding on the Landlord and the Tenant, without appeal on a question of law, fact or otherwise.**

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[20] The parties are to agree on an appraiser, i.e. a person with subject matter expertise, to act as arbitrator. But an arbitration is contemplated and not an expert determination. The proceeding is intended to be over within 30 days. The arbitrator must be available to hold a hearing within 10 days and he must be able and willing to decide the case within a month. No doubt that is why the parties determined to hire someone with expertise who can readily grasp the issue and decide the outcome.

[21] The landlord says that the clause is not an arbitration agreement however because its use is optional. The clause says, "**such rent may be referred to arbitration".** Nothing requires the respondent to participate. Both counsel acknowledge that while there are certainly precedents that say that arbitration agreements must be mandatory, the modern view is to interpret clauses to fulfill the parties' intention to resolve their issue by arbitration where the words reasonably support that intention. The court no longer strains to keep the parties from referring their issues elsewhere.

[22] It would be difficult if not impossible for the court to hear this as a non-urgent matter and resolve the question in 30 days with necessarily limited evidence and equally constrained cost. Yet that is what the parties agreed they wanted. The landlord now wants the longer, more typical arbitration process set out in the lease for other disputes. Perhaps it fears that in a quickie process the arbitrator may be inclined to split the difference. It seems to me that that is the very risk the parties would have adverted to and chose when they created this specific and speedy process with a knowledgeable arbitrator.

[23] While delivery of a notice to arbitrate by either side is optional, it is possible to interpret the arbitration clause to say that once either of the parties serves a notice to arbitrate, then the process is mandatory. If the respondent was entitled to refuse, then it would not make sense for the parties to be able to come to court to appoint an arbitrator where they disagree. The respondent would just say "no thanks". I do not know the various rules set out by the AAA. Perhaps they allow a responding party to decline the process. I rather doubt it.

[24] I am keen to the fact that the parties chose to use an appraiser rather than a lawyer as arbitrator. I do hesitate to defer legal contractual analysis to someone whose business does not necessarily equip him with background in the principles of contractual interpretation. Neither does he have much time to be deflected from the substance of the arbitration. But counsel can explain the principles and if an arbitrator brings an appraiser's eye to the

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clause to give it efficacy in an appraisal process, that is what the parties wanted.

[25] As I can see arguments on both sides of the question, although sorely tempted to resolve the issue, respect for the parties' contractual autonomy and the role of the arbitrator precludes me from doing so. ,

[26] The respondent says that the AAA has different rules and there is no certainty in the arbitration clause as to which applies. The Court of Appeal has held that questions as to the applicable rules are for the arbitrator and do not undermine his jurisdiction. See: *Rampton v. Eyre*, 2007 ONCA 331 (CanLII),at para. 15.

[27] The parties agree that the procedural law of the place of the arbitration applies to arbitrations. The respondent says that the arbitration agreement needs to provide for a place or a "seat" of the arbitration to know which procedural law applies. No case precedent says this. Moreover, with virtual proceedings on the ascendancy, the linkage of an arbitration to a particular place may be quite variable. In my view, the identification of the applicable procedural law is also a question for the arbitrator. Perhaps the parties will agree on a set of procedural rules. Or, perhaps in this case, with everyone being in Ontario, the issue will not even arise.

[28] I see no basis in law or practicality to say that an arbitration agreement that does not specify a specific "seat" of the arbitration is invalid. The determination of the procedures for this special speedy arbitration is for the arbitrator in consultation with the parties.

[29] Accordingly, upon the applicant delivering a consent from the arbitrator that confirms his agreement and availability to act in the next 30 days, the order will go appointing him as arbitrator as asked.

[30] Costs should follow the event. The costs claimed by both sides were close in quantum. In my view, the landlord ought to pay costs to the applicant fixed at $20,000 all-inclusive. Costs are payable forthwith as this matter is concluded.

FL Myers J

Date: April 8, 2022

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