

COURT OF APPEAL FOR ONTARIO

CITATION: J.P. Thomson Architects Ltd. v. Greater Essex County District School Board, 2025 ONCA 378
DATE: 20250520
DOCKET: COA-24-CV-0466

Rouleau, van Rensburg and Gomery JJ.A.

BETWEEN

J.P. Thomson Architects Ltd.

Applicant (Appellant)

and

Greater Essex County District School Board

Respondent (Respondent)

David Milosevic and Arad Moslehi, for the appellant

James Smith, for the respondent

Heard: April 30, 2025

On appeal from the judgment of Justice Maria V. Carroccia of the Superior Court of Justice, dated April 2, 2024.

Gomery J.A.:

[1] The appellant, J.P. Thomson Architects Ltd. (“Thomson”), appeals the application judge’s denial of an order appointing an arbitrator pursuant to a dispute resolution clause in its contract with the respondent, Greater Essex County District School Board (the “Board”). On the application judge’s reading of the clause, it required a party to seek mediation within 30 days of a dispute arising between the

parties, as a condition precedent to seeking arbitration. She found that any disputes between the parties had either been resolved within 30 days, or that more than 30 days had elapsed since any unresolved dispute arose before Thomson requested mediation. She accordingly concluded that Thomson's subsequent notice to the Board requesting the appointment of an arbitrator could not be enforced.

[2] In its appeal, Thomson contends that the application judge incorrectly interpreted the dispute resolution clause and the scope of the parties' dispute. I agree.

Background

[3] Thomson is an architectural services firm. The Board operates schools in Windsor, Ontario and surrounding municipalities. Thomson has been providing services to the Board, its most important client, for nearly 50 years.

[4] In 2016, Thomson successfully bid on two contracts with the Board. The first gave Thomson the status of an approved vendor of record, allowing it to bid on "rotational" work from the Board alongside other selected firms. This led to Thomson obtaining the second contract, under which Thomson provided architectural services for two new schools.

[5] The Board's requests for proposals set out the terms of the contracts. Each contained GC18, the dispute resolution clause that was in the then-standard form Ontario Association of Architects contract.¹ The clause states:

Any dispute between the parties arising out of or relevant to this Agreement which cannot be resolved by the parties within thirty (30) days of the dispute arising, shall be referred to mediation, upon the request of either party. A single mediator shall be selected by both parties from the list of approved mediators of the Ontario Superior Court of Justice, City of Windsor, and mediation will take place within thirty (30) days following selection of the mediator. The cost of the mediator shall be borne equally by both parties. In the event that the parties have not selected a mediator within thirty (30) days of the giving of notice of mediation by one party to the other, either party may proceed to the arbitration process as hereinafter set forth. In the event that any dispute between the parties has not been resolved by such mediation within thirty (30) days following selection of the mediator, such dispute shall be settled and determined by binding arbitration requested by either party, pursuant to the *Arbitration Act* of Ontario, in which case the following provisions shall apply. Either party may give written notice (the "**Arbitration Notice**") to the other of its desire to submit a dispute to arbitration, stating, with reasonable particularity, the subject matter of such dispute. Within ten (10) business days after receipt of the Arbitration Notice, the parties shall appoint a single arbitrator with appropriate experience to determine the dispute identified in the Arbitration Notice. If the parties fail to appoint an arbitrator, within ten (10) business days after receipt of the Arbitration Notice as set out above, either party may apply to a Judge of the Ontario Superior Court of Justice to appoint an arbitrator, who shall proceed to

¹ The OAA standard client contracts have been updated since the parties entered into the relevant agreements. The operative wording of GC18 as reproduced and referred to in these reasons is that of Ontario Association of Architects 600, 2008 Agreement as Amended.

deal with the dispute. The award of the arbitrator shall be final and binding upon the parties. Judgment of the award rendered by the arbitrator may be entered in any court having jurisdiction and enforced as a judgment. The costs of the arbitration shall be determined by the arbitrator and shall be paid by such party as shall be designated by the arbitrator. [Emphasis in original.]

[6] By letter dated October 12, 2021, Thomson invoked its right to seek mediation under GC18. In its notice, Thomson said that it was responding to letters sent by the Board over the preceding 15 months, which reflected a breakdown in the parties' working relationship.

[7] The Board refused to appoint a mediator. It took the position that there was no dispute between Thomson and the Board to refer to mediation under GC18, since the letters all pertained to disputes that arose more than 30 days before Thomson requested mediation. It took the same position when Thomson later served a notice to arbitrate. On March 7, 2022, Thomson applied for a court order appointing an arbitrator pursuant to GC18 and s. 10(1) of the *Arbitration Act, 1991*, S.O. 1991, c. 17.

The application judge's decision

[8] The application judge found that GC18 imposed a strict deadline on the parties to seek mediation, with which Thomson failed to comply.

[9] In the application judge's view, the wording of the first sentence of GC18 unambiguously required a party to request mediation within 30 days of any dispute

arising, in keeping with the overall purpose of the clause to “provide an alternative mechanism to deal with disputes between the parties promptly when they arise.”

[10] The application judge then considered whether, on the record before her, any dispute referenced in Thomson’s October 12, 2021 request to mediate was “outstanding”, and if so, whether the dispute had arisen between the parties no more than 30 days before Thomson made its request.

[11] The first letter cited in the request to mediate was a notice the Board sent Thomson in August 2020, in which the Board advised that it was dissatisfied with Thomson’s performance and asked Thomson to provide an action plan to address its concerns. Thomson did so. Despite this, in March 2021, the Board sent a second notice, saying that Thomson had failed to address its concerns adequately and so would be ineligible to bid on any further work from the Board for two years.

[12] In the application judge’s view, any dispute arising from the first notice was resolved when Thomson acknowledged the Board’s concerns and undertook to address them. Although the Board had not asked Thomson to respond to the second notice, to the extent that it gave rise to a dispute, the application judge found that Thomson’s failure “to give notice that the dispute was not resolved to their satisfaction precludes them from later saying, months later, that they are not satisfied with the resolution.” On her reading of GC18, Thompson would have had

to notify the Board within 30 days of receiving the March 2021 letter that it was dissatisfied and request mediation.

[13] The application judge came to a similar conclusion with respect to any dispute between the parties about Thomson's fees. In June 2021, Thomson submitted a request that its fees for a particular project be calculated based on the actual cost of construction, as opposed to the much lower pre-construction estimate. On July 28, 2021, the Board agreed that the original estimate should be increased to reflect construction expenses but not to the extent requested by Thomson. Thomson asked the Board to reconsider its decision, but the Board refused via a letter dated September 23, 2021.

[14] In the application judge's view, any dispute about Thomson's fees was resolved when the Board first took its position on Thomson's fee request in July 2021, and the window for requesting mediation was not extended when Thomson sought to revisit this decision. Thomson could therefore not rely on the Board's September 23, 2021 letter to request mediation pursuant to GC18.

[15] Having concluded that any disputes had been resolved by the parties by late July 2021 or that the window to request mediation had already elapsed by the time Thomson did so on October 12, 2021, the application judge dismissed Thomson's application to appoint an arbitrator.

The application judge incorrectly interpreted GC18

[16] The application judge erred in law in interpreting the dispute resolution clause. Properly interpreted, it does not require the parties to seek mediation within 30 days of a dispute arising. It instead sets a minimum 30-day period for the parties to attempt to resolve a dispute prior to requesting the appointment of a mediator.

[17] The application judge's interpretation of GC18 is reviewable on a correctness standard. The interpretation of a standard form contract attracts the correctness standard where it has precedential value and there is "no meaningful factual matrix specific to the particular parties to assist the interpretation process": *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23, at para. 46; see also *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.*, 2017 ONCA 293, 135 O.R. (3d) 241, at paras. 21, 41, leave to appeal refused, [2016] S.C.C.A. No. 249. GC18 was a standard dispute resolution clause in Ontario Association of Architects contracts. There is no factual matrix that would assist in interpreting the parties' intentions; Thomson was required to accept all contractual terms proposed by the Board, including GC18, when it responded to the Board's requests for proposal.

[18] Ordinary principles of contractual interpretation apply in interpreting an arbitration clause. The language of the clause must "be read in the context of the agreement as a whole, and its intended meaning gleaned within that context":

Mantini v. Smith Lyons LLP (2003), 64 O.R. (3d) 505 (C.A.), at para. 21, leave to appeal refused, [2003] S.C.C.A. No. 344; see also *Huras v. Primerica Financial Services Ltd.* (2001), 55 O.R. (3d) 449 (C.A.), at paras. 12-14. The chosen interpretation should be consistent with sound commercial principles and good business sense: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 4th ed. (Toronto: LexisNexis Canada, 2020), s. 2.6.1 and caselaw cited therein.

[19] The first sentence of GC18 reads: “Any dispute between the parties arising out of or relevant to this Agreement which cannot be resolved by the parties within thirty (30) days of the dispute arising, shall be referred to mediation, upon the request of either party.” On its face, this sentence does not impose any deadline for a party to seek mediation. The phrase “within thirty (30) days” qualifies the language that immediately precedes it. It sets a minimum time for the parties to attempt to resolve a dispute before they can make such a request, not a deadline to request mediation. Interpreting this sentence to impose a deadline for requesting mediation would require reading in language that is simply absent.

[20] A 30-day requirement for the parties to attempt to resolve any dispute before moving to mediation furthermore makes sense within the overall scheme set out in GC18. Some steps in the dispute resolution process are explicitly subject to strict deadlines:

- Mediation “will take place within thirty (30) days following selection of the mediator.”
- “In the event that the parties have not selected a mediator within thirty (30) days of the giving of notice of mediation by one party to the other, either party may proceed to the arbitration process”.
- “Within ten (10) business days after receipt of the Arbitration Notice, the parties shall appoint a single arbitrator with appropriate experience to determine the dispute identified in the Arbitration Notice.”
- “If the parties fail to appoint an arbitrator, within ten (10) business days after receipt of the Arbitration Notice as set out above, either party may apply to a Judge of the Ontario Superior Court of Justice to appoint an arbitrator, who shall proceed to deal with the dispute.”

[21] Notably, however, there is no deadline for a party to serve a notice to arbitrate. The clause instead requires that the parties engage in mediation for at least 30 days before such notice is given:

In the event that any dispute between the parties has not been resolved by such mediation within thirty (30) days following selection of the mediator, such dispute shall be settled and determined by binding arbitration requested by either party, pursuant to the *Arbitration Act* of Ontario, in which case the following provisions shall apply. Either party may give written notice (the “**Arbitration Notice**”) to the other of its desire to submit a dispute to arbitration, stating, with reasonable particularity, the subject matter of such dispute. [Emphasis in original.]

[22] At each stage, the clause requires the parties to attempt to settle their differences before escalating their dispute to the next level. The minimum 30-day period to attempt to mediate a dispute before seeking arbitration parallels the minimum 30-day period for the parties to attempt to resolve any dispute amicably before seeking mediation.

[23] This scheme makes good commercial sense in the context of long-standing and complex relationships such as that between the parties to this appeal, by obliging them to negotiate informally before triggering a more formal dispute resolution process overseen by a third party. Conversely, it would not make sense to interpret the clause to require the parties to serve notices of mediation every time they were unable to resolve their differences within 30 days.

[24] This is particularly obvious when GC18 is read in the context of other contractual terms. In the requests for proposal giving rise to the contracts, the Board retained the right to terminate if Thomson becomes a party to “any actual pending or threatened suits, actions, litigation proceedings, arbitrations, alternative dispute resolutions, investigations or claims”. The Board, in fact, invoked this term in May 2022, when it terminated the contract that had remained in place with Thomson. If the application judge’s interpretation of GC18 were accepted, it would put Thomson in a difficult position any time a dispute arose. If it could not resolve the issue within 30 days, it would have to either take the risk that the Board would terminate its contract or waive its right to ever seek mediation or arbitration.

[25] I conclude that a party to GC18 does not lose all right to engage in dispute resolution by failing to serve a mediation request within thirty days of a dispute arising. Such an interpretation of GC18 is inconsistent with the language of the clause, the overall dispute resolution scheme, other contractual terms, sound commercial principles and good business sense.

The application judge erred in principle by making findings about the scope of the parties' dispute

[26] Although my conclusion on the correct interpretation of GC18 is sufficient to dispose of the appeal, I will address a second error in principle by the application judge.

[27] The application judge correctly recognized that, where it is arguable that a dispute falls within the terms of an arbitration agreement, any final determination as to the scope of the dispute to be arbitrated is better left to the arbitration tribunal, “since the question of jurisdiction is itself within the jurisdiction of that tribunal”: *Patel v. Kanbay International Inc.*, 2008 ONCA 867, 93 O.R. (3d) 588, at para. 18; see also *Dalimpex Ltd. v. Janicki* (2003), 64 O.R. (3d) 737 (C.A.), at para. 21.

[28] Due in part to her misreading of GC18, however, the application judge failed to apply this principle. She did not limit her consideration of the record to whether the parties had a dispute that “arguably” triggered a right to arbitration under GC18

but instead made numerous findings of fact about the entire history of interactions between the parties over the preceding 15 months. She erred in doing so.

[29] GC18 gives an arbitrator jurisdiction over any dispute between the parties “arising out of or relevant to” their agreement. It is up to the arbitrator to determine the scope of the dispute being arbitrated and of their jurisdiction.

Disposition

[30] I would allow the appeal and grant the application. As requested by the appellant, I would order mediation to proceed within 60 days of the date of the order, with Thomson retaining the right to seek arbitration pursuant to GC18 should the parties fail to resolve their dispute. Costs to the appellant fixed in the all-inclusive amount of \$15,000. If the parties are unable to agree on the costs of the application, they may provide written submissions to this court of no more than three pages each, exclusive of any costs outline, within 30 days.

Released: May 20, 2025 “P.R.”

“S. Gomery J.A.”

“I agree. Paul Rouleau J.A.”

“I agree. K. van Rensburg J.A.”