CITATION: GRANT et al v. SEAWAY AUTO GROUP. INC. et al 2023 ONSC 3873
COURT FILE NO.: CV-22-00090804-0000
DATE: June 28, 2023

2023 ONSC 3873 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: CAMERON GRANT, 11678833 CANADA INC., and CHRISTOPHER GRANT, Applicants

AND:

SEAWAY AUTO GROUP INC., OEM AUTOMOTIVE SOLUTIONS INC. and CAROLINE BOURRET, Respondents

BEFORE: Justice Patrick Hurley

COUNSEL: Danesh Rana, for the Applicants

Chris Trivisonno and Kevin Droz, for the Respondents

Seaway Auto Group Inc. and OEM Automotive Solutions Inc.

Gabriel Poliquin, for the Respondent Caroline Bourret

HEARD: June 7, 2023

ENDORSEMENT

Overview

[1] This is an application under s. 46 of the *Arbitration Act 1991*, S. O. 1991, c.17 to set aside three arbitral awards of Joy Noonan, the first two dated November 3, 2022 and the third issued February 21, 2023. The respondents have brought an application to enforce the awards.

[2] The arbitration stemmed from ongoing conflict over the operation of a Volkswagen dealership in Cornwall. A shareholders agreement required any dispute to be submitted to arbitration. An additional term stated that the decision of the arbitrator was final and binding and not subject to an appeal.

[3] The applicants Cameron and Christopher Grant are brothers. Cameron is the sole shareholder of 11678833 Canada Inc. ("116"). This corporation, in turn, owns 49% of the respondent Seaway Auto Group Inc. ("Seaway"). The respondent Carolyn Bourett owns 51%. Seaway is the parent company of the respondent OEM Automotive Solutions Inc. ("OEM") which is the corporation that operates the Volkswagen dealership.

[4] The Grants are corporate officers and directors as is Ms. Bourret. She is also responsible for the day-to-day management of the dealership.

[5] Seaway and OEM commenced the arbitration process in February 2021. The Grants commenced one against Ms. Bourett the same month and in March made a counterclaim against the corporations and Ms. Bourett.

[6] The parties agreed to the appointment of Ms. Noonan in November 2021 (the "Arbitrator"). All matters in dispute were heard together over the course of approximately three weeks in May 2022.

2023 ONSC 3873 (CanLII)

[7] The Arbitrator released a lengthy written decision on November 3, 2022. She found that the applicants wrongfully interfered with the operation of the Volkswagen dealership by various obstructive acts and thereby failed to act in the best interests of the business; contravened the shareholders agreement; breached their fiduciary duties; and breached their duty of care as directors.

[8] She awarded damages of $348,278.73 under two headings: impairment of goodwill and lost revenue. She dismissed the counterclaim.

[9] She requested written submissions on costs. In a decision dated February 21, 2023, the Arbitrator awarded costs on a substantial indemnity basis – $204,985.72 in favour of Seaway and OEM and $101,804.61 to Ms. Bourret.

The applicants position

[10] The applicants do not challenge any of the liability findings. They do not contest the dismissal of the counterclaim. They acknowledge that, because of the shareholders agreement, the Arbitrator's decision is final and binding and cannot be appealed.

[11] However, they submit that I can, and should, set aside the awards based on s. 46(1)6 of the *Arbitration Act* which provides that an award may be set aside if "The applicant was not treated equally and fairly, was not

2023 ONSC 3873 (CanLII)

given an opportunity to present a case or to respond to another party's case, or was not given proper notice of the arbitration or of the appointment of an arbitrator." They also rely on s. 38 which requires that an award be made in writing and state the reasons on which it is made.

2023 ONSC 3873 (CanLII)

[12] They focus on three aspects of her decision:

i. The damages awarded for impairment of goodwill. According to the applicants, the Arbitrator relied on out-of-date financial information and accepted opinion evidence she should not have. Further, she did not adequately explain her quantification of the damages.

ii. The damages awarded for loss of revenue. The Arbitrator did not explain why she rejected the applicants' submission that the correct measure of damages was loss of profit.

iii. The Arbitrator did not allow the applicants to call one of their proposed witnesses, Neil Puri.

[13] In each of these rulings, the Arbitrator did not treat the applicants fairly and, because she did not, I have the authority to intervene and set aside the awards. If I agree that her decision should be set aside, it follows that the award of costs should also be set aside.

The respondents position

[14] Seaway and OEM assert that, for the applicants to be successful, they have to establish procedural unfairness and there was none. The parties knew the case they had to meet and were given ample opportunity to present their evidence and make submissions. There is no allegation that the Arbitrator was biased. They submit the Arbitrator's reasons were

grounded in the evidence and her legal conclusions sound. Even if they were not, the alleged flaws in her decision are legal errors that are immune from review.

2023 ONSC 3873 (CanLII)

[15] Ms. Bourett concurs and adds that, with respect to the Arbitrator's decision concerning Mr. Puri's testimony, it was an evidentiary ruling made in the course of the arbitration and the court has no jurisdiction to intervene with respect to an interlocutory order of this nature.

The applicable legal principles

[16] In *Tall Ships Developments Inc. v. Brockville (City)*, 2022 ONCA 861, Harvison Young, J.A. reiterated the proper judicial approach to arbitral decisions at paragraphs 2 – 3:

> Central to this appeal is the fact that the parties agreed that the decision of the arbitrator was to be final, subject only to appeals on questions of law under s. 45(2) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 ("*Arbitration Act*"). The application judge erred by characterizing questions of mixed fact and law as extricable questions of law. Moreover, in characterizing the same arguments as breaches of procedural fairness falling under s. 46 of the *Arbitration Act*, the application judge effectively bootstrapped the substantive arguments. This court has recently emphasized the narrow basis for setting aside an arbitral award under s. 46 of the *Arbitration Act*, which is not concerned with the substance of the parties' dispute and is not to be treated as an alternate appeal route: *Alectra Utilities Corporation v. Solar Power Network Inc.*, 2019 ONCA 254, 145 O.R. (3d) 481, at paras. 20-27, 40-44, leave to appeal refused, [2019] S.C.C.A. No. 202; *Mensula Bancorp Inc. v. Halton Condominium Corporation No. 137*, 2022 ONCA 769, at paras. 5, 40.
>
> In this case, the parties selected an arbitrator to deal with a number of issues arising out of a large project with a number of

> interrelated contracts and agreements. Moreover, they specifically chose to agree that only questions of law would be subject to appeal. As a matter of policy, and as the Supreme Court of Canada has stated repeatedly, judges exercising their appellate powers under s. 45 of the *Arbitration Act* should be cautious about extricating questions of law from the interpretation process: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 54-55; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 45-47. Failing to exercise such caution will result in the very inefficiencies, delays and added expense that choosing an arbitral process seeks to avoid. As I will explain in detail below, I conclude that none of the alleged errors made by the arbitrator could properly be considered extricable errors of law. Nor were there any breaches of procedural fairness that could attract review pursuant to s. 46 of the *Arbitration Act*.

[17] I do not review the correctness or reasonableness of an Arbitrator's decision nor engage in a substantive review of it: *Aquanta v. Lightbox Enterprises Ltd,* 2023 ONSC 971 at paras. 16-17 and *Highbury Estates Inc. v. Bre-Ex Limited*, 2015 ONSC 4966 at paras. 21-25.

[18] Pattillo, J. summarized the obligation to treat the parties equally and fairly in *Nasjjec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978 at paras. 38-40:

> The obligation to treat the parties "equally and fairly" in both s. 19(1) and s. 46(1) 6 of the Act incorporates the requirements of natural justice and procedural fairness into arbitrations. See: *National Ballet of Canada v. Glasco* (2000), 2000 CanLII 22385 (ON SC), 49 O.R. (3d) 230 (S.C.J.). At a minimum, as provided by those sections, it includes the opportunity to present a case and respond to the other party's case as well as the right to have notice of the arbitration and the appointment of the arbitrator (s. 19(2) and s. 46(1) 6).

2023 ONSC 3873 (CanLII)

> In *Hercus v. Hercus,* [2001] O.J. No. 534 (S.C.J.), which involved an application to set aside an award of a mediator/arbitrator in a family matter, the court addressed what the Act's requirement of treating the parties equally and fairly consists of. At para. 75 of the decision, the learned judge stated:
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>> It is settled law that the right to a fair hearing is an independent and unqualified right. Arbitrators must listen fairly to both sides, give parties a fair opportunity to contradict or correct prejudicial statements, not receive evidence from one party behind the back of the other and ensure that the parties know the case they have to meet. An unbiased appearance is, in itself an essential component of procedural fairness.
>>
>> While the requirements of natural justice extend beyond the basic principles set out in the Act, it is important to remember that an arbitration is a more informal process than a court proceeding. Furthermore, it is usually final. In such circumstances, the issue of fairness and equality must be considered having regard to the context of the proceeding. Furthermore, it is important to ensure that the integrity of the arbitration process is maintained.

[19] As Akbarali, J. pithily noted in *Aquanta* at para. 28: "Section 46(1) 6 of the *Arbitration Act, 1991* is not a do-over to protect a party from its own choices, but rather to protect the party from unfair or inequitable conduct by an arbitrator."

Analysis

[20] The applicants place substantial reliance on the decision of Perell, J. in *Alberta Cricket Association v. Alberta Cricket Council*, 2021 ONSC 8451. In that case, the arbitration award was set aside after Justice Perell found that the arbitrator's reasons were inadequate. He said at para. 54:

> Written reasons show the parties that the adjudicator has paid attention to their arguments and treated them fairly and with due

2023 ONSC 3873 (CanLII)

> process. Providing reasons for a decision removes the appearance of arbitrariness, makes the process transparent, and makes the decision-maker accountable because he or she is called on to explain and justify the decision. The question of the adequacy of reasons for decision is whether the reasons, viewed in light of the record and counsel's submissions on the live issues presented by the case, explain why the decision was reached, by establishing a logical connection between the evidence and the law on the one hand, and the decision on the other. The critical question is whether in the context of the record, the issues and the submissions of the parties, the judgment is sufficiently intelligible to show that the adjudicator understood the substance of the matter and addressed the necessary and critical issues. In the immediate case, the Arbitrator did not meet the standard.

2023 ONSC 3873 (CanLII)

[21] The applicants submit that an arbitrator's statutory obligation to treat a party fairly and equally should be given a broad ambit to include not just the adequacy of reasons but also the failure to properly perform their "gatekeeper" function.

[22] In this case, the Arbitrator failed to properly act as a gatekeeper because she accepted the evidence of Ms. Bourett and François Sanner about the amount of damages that should be ascribed to the impairment of goodwill. Mr. Sanner was OEM's financial controller. According to the applicants, it was unfair for the Arbitrator to accept their opinion and she did not explain why she assessed the damages at 80% of the amount claimed by the respondents. They point out that neither was qualified to express such an opinion and the information they were relying upon was out-of-date since it was based on OEM's 2020 financial statement.

[23] The Arbitrator rejected their position, stating:

> Mr. Sanner as the Financial Controller walked all present at the hearing through how the calculation was reached, the lead up, the difficult decision and its practical long-term impact [i.e. that it is

> now there and cannot be reversed until the business is sold]. He gave credible evidence of the value of the impairment was arrived at in consultation with the dealerships management and its accountants when the financial statements were prepared. Adding to the evidence of the Financial Controller, Caroline as the General Manager gave her added knowledge as the "the dealership's management". The Grants led no evidence to suggest this evidence was unreasonable.
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> Thus in making my assessment I have considered all the evidence [the line in the GBA statements, Mr. Sanner and Caroline] on the point. It is reasonable in my view to include that at least 80% of the impairment, so $124,000, can be attributed to the actions of the Grants.

2023 ONSC 3873 (CanLII)

[24] Goodwill is an intangible asset and its value (or loss in value) is controvertible. Expert opinion evidence can be helpful but is not necessary, particularly in an arbitration which is intended to be a more informal process than a trial, with less rigorous rules for the admissibility of evidence.

[25] The applicants acknowledge that they knew the respondents were making this claim, had the opportunity to cross-examine their witnesses, to call their own witnesses and they made submissions to the Arbitrator about why she should reject the claim.

[26] Another arbitrator might have come to a different conclusion. The applicants' challenge to the claim was a cogent one. But, in the end, the Arbitrator accepted the respondents' position. She gave reasons for why she did and treated the parties fairly and equally. If she was wrong in her

assessment of the damages under this heading, it was a legal error and that is not a ground to set aside the award.

2023 ONSC 3873 (CanLII)

[27] I next turn to damages for loss of revenue. The applicants' complaint is slightly different on this issue. They contend that the Arbitrator's failure to delineate why she rejected the applicants' position – that the appropriate measure of damages was loss of profit, not loss of revenue – is a fatal deficiency. Without an explanation, how do the applicants know that the Arbitrator even considered their submission and, just as importantly, why she preferred the respondents' position over theirs?

[28] A similar challenge was made in *Orion Travel Insurance Co. v. CMN Global Inc.,* 2023 ONSC 1527. In that case, the applicant described the arbitrator's reasons as "woefully inadequate" and "manifestly unfit". Morgan, J. stated at paras. 40-42:

> The question is whether, in the context of the evidentiary record, the Arbitrator's two interim decisions, his procedural orders and directions, the issues in dispute, and the submissions of the parties, the reasons for decision were sufficient to show that he understood the substance of the matter and addressed the key issues: *Hill v. Hamilton-Wentworth Regional Police Services Board*, 2007 SCC 41 (CanLII), [2007] 3 SCR 129, at para 101.
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> The courts have said that the applicable test is a functional one – i.e. do the reasons express enough to inform the parties of why the decision was made: *R. v. Sheppard*, 2002 SCC 26 (CanLII), [2002] 1 SCR 869, at para 55. The question is one of intelligibility, not exhaustiveness or eloquence of expression: *Ibid.*, at para 26.
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> Reading the Arbitrator's reasons as a whole, I do not find them unintelligible. They are relatively short, but when it comes to legal writing that is more of a blessing than a curse.

[29] The parties presented distinct, competing arguments on this heading of damages. They had the opportunity to present whatever evidence they wanted and made detailed legal submissions at the conclusion of the hearing. It cannot be seriously argued that the Arbitrator was unaware of the applicants' position on the measure of damages and did not consider their argument. It might have been preferable if the Arbitrator explained why she accepted one theory of damages over the other but she was not obligated to do so: see *Orion* at paras. 45-47.

[30] Her reasons are succinct but explain why she reached her conclusion on the damages caused by the applicants' wrongful conduct. Again, I do not intervene because the Arbitrator's assessment of the damages could be considered unreasonable or incorrect. The issue was properly before her and the requirements of procedural fairness were met.

[31] The final objection of the applicants is the Arbitrator's ruling on Mr. Puri's testimony. Both sides made submissions to the Arbitrator on the relevance and materiality of the proposed evidence and she gave an oral ruling after hearing from them. Arguably, the exclusion of testimony from a key witness could be reviewable but Mr. Puri was far from that.

[32] The application is dismissed. The parties filed costs outlines. If they are unable to reach an agreement on costs after making reasonable efforts to do so, the respondents may file written submissions not to exceed two

2023 ONSC 3873 (CanLII)

pages within 20 days of the release of this decision and the applicants have 10 days in which to respond with submissions of equal length. In addition to filing the submissions, copies of them should also be emailed to my judicial assistant at violet.kocevski-theriault@ontario.ca.

2023 ONSC 3873 (CanLII)

The applications to enforce the awards

[33] Counsel advised me at the hearing that they have reached an agreement in principle but were still working on the terms of the draft order. They were optimistic that there will be a consent order. As a result, I did not hear argument and I am not seized with the applications. However, given my familiarity with the case, counsel can request that the draft order be sent to me for my review and signature.

HURLEY, J.

Released: June 28, 2023