CITATION: Toronto District School Board et. al. v. Ontario School Boards' Insurance Exchange, 2023 ONSC 2117
COURT FILE NO.: CV-22-689326-00CL
DATE: 20230404

ONTARIO

SUPERIOR COURT OF JUSTICE – COMMERCIAL LIST

BETWEEN:	
TORONTO DISTRICT SCHOOL BOARD and SIMCOE COUNTY DISTRICT SCHOOL BOARD Applicants	Andrew A. Evangelista, Karyn Shapira and Deema Elshourfa, for the Applicants
– and –	Arthur Hamilton and Ara Basmadjian, for the Respondent
ONTARIO SCHOOL BOARDS' INSURANCE EXCHANGE Respondent	
	HEARD: March 21, 2023

J. STEELE J.

[1] This is an application by the Toronto District School Board ("TDSB") and the Simcoe County District School Board ("SCDSB") (TDSB and SCDSB collectively, the "Boards") for leave to appeal from the decision of the Arbitrator, the Honourable J. Douglas Cunningham, Q. C. (the "Arbitrator"), made on May 4, 2022, dismissing the applicants' arbitration (the "Decision").

[2] For the reasons set out below, leave to appeal is granted.

Background

[3] The respondent, Ontario School Boards' Insurance Exchange ("OSBIE") is an unincorporated association and a non-profit insurance reciprocal. OSBIE has 119 members, representing 79 school boards and 40 joint ventures.

[4] OSBIE is licensed and regulated by the *Insurance Act*, R.S.O. 1990, c. I.8, (the "*Insurance Act*") and the *Reciprocal Insurance Exchanges*, O. Reg. 637/00 (the "Insurance Regulation") (the

Insurance Act and the Insurance Regulation, collectively, the "Insurance Legislation"). OSBIE is a reciprocal exchange, made pursuant to the provisions of the *Insurance Act* that enable subscribers to exchange insurance contracts. The participants effectively insure each other.

[5] TDSB and SCDSB are each a "board" as defined by the *Education Act*, R.S.O. 1990, c. E.2. The Boards subscribed to OSBIE between 1987 and 2016. As members of OSBIE, the Boards paid insurance premiums. Other than premiums, the only other contributions made by the Boards to OSBIE were capital contributions between 1995 and 2000. The capital contributions were separately tracked for each member. OSBIE repaid all capital contributions made by the Boards by 2007.

[6] The Insurance Legislation requires OSBIE to hold a reserve fund that is at least 50% of the net written premiums reported in OSBIE's most recent statement to the regulator.

[7] OSBIE holds a guarantee fund (the "Guarantee Fund") which represents the excess of premiums collected and investment income on such premiums over the claims paid and expenses. The Guarantee Fund may be used to cover potential future catastrophic claims or reduce future premiums. There is over $130,000,000 in the Guarantee Fund.

[8] The exchange of insurance contracts between the school boards that are part of the OSBIE Exchange is subject to the terms and conditions of a Reciprocal Insurance Exchange Agreement originally made effective August 15, 1986, as amended and restated as of November 30, 2001, and effective January 1, 2002 (the "Reciprocal Agreement"). This is a standard form contract. Each participant in the exchange is not permitted to negotiate specific contractual terms different from the other participants.

[9] When the Boards terminated their membership in OSBIE, they made a demand for a "share of equity" in the sizable Guarantee Fund. TDSB claimed it ought to be entitled to almost $22 million on its termination of participation in OSBIE. SCDSB claimed it ought to be entitled to almost $4 million.

[10] OSBIE took the position that the Boards were not entitled to any payment out of the Guarantee Fund on termination of membership. OSBIE's position was that under the Reciprocal Agreement there were only two circumstances whereby subscribers could have assets returned to them: section 30 of the Reciprocal Agreement, which dealt with policy holder dividends, paid at the OSBIE Board's discretion, or section 38(d), which contemplates the return of assets upon the termination of the exchange of contracts within an underwriting group in accordance with each subscribers' participation ratio.

[11] The matter went to arbitration.

[12] The Arbitrator case managed the proceeding for over three years. The hearing took place on March 7, 8, and 11, 2022. It involved a documentary record of over 6,000 pages and oral testimony from six witnesses.

[13] The Arbitrator, in an award dated May 22, 2022 (the "Award"), dismissed the applicants' claim, with costs.

Analysis

[14] Subsections 45(1) and (2) of the *Arbitration Act*, 1991, S.O. 1991, c. 17 provide:

> (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> a) The importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> b) Determination of the question of law at issue will significantly affect the rights of the parties.
>
> (2) If the arbitration agreement so provides, a party may appeal to the court on a question of law.

[15] Section 5 of the arbitration agreement provides that "[t]he decision of the Arbitrator in any matter shall be final and binding on the parties to the dispute subject to the parties' right to appeal any decision of the Arbitrator to the court on a question of law with leave."

[16] Accordingly, for the Court to grant leave, the following three criteria must be satisfied:

I. The Boards must identify one or more arguable errors of law;

II. The importance to the parties of the matters at stake in the arbitration must justify an appeal; and

III. The identified questions of law must significantly affect the rights of the parties.

Was there an arguable error of law?

[17] The threshold issue in this hearing was whether there was an arguable error of law made by the Arbitrator. At this stage, the Court does not consider whether the potential appeal will succeed. As stated by Perell J. in *BBL. Con Design Build Solutions Limited v. Varcon Construction Limited Corporation*, 2022 ONSC 5714, at para. 86:

> In deciding whether to grant leave to appeal, there is no requirement that the court doubt the correctness of the arbitrator's award; in considering whether to grant leave, the court decides only whether the matter warrants granting leave,

> not whether the appeal will succeed. At the leave stage, the court does not make a final determination of whether an error of law was made, but the court determines whether the appeal has the potential to succeed and thus to change the result of the case. [Footnotes omitted]

[18] As the Supreme Court of Canada has stated, judges exercising their appellate powers under the *Arbitration Act* should be cautious about extricating questions of law from the interpretation process: *Sattva Capital Corp. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, at paras. 54-55; and *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at paras. 45-47.

[19] The applicants acknowledge that generally questions of contract interpretation are questions of mixed fact and law. However, where the contract is a standard form contract, as is the case with the Reciprocal Agreement, questions of contract interpretation may be questions of law: *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23.

[20] The applicants submit that the Arbitrator erred in law in determining that their ownership/equity rights in the Guarantee Fund were forfeited when their membership in OSBIE terminated, as the Guarantee Fund is not referenced in the Reciprocal Agreement. The applicants submit, in the alternative, that if the Court is of the view that the Guarantee Fund is referenced in the Reciprocal Agreement, there is ambiguity in the agreement.

[21] The respondents submit that the Arbitrator's interpretation of the Reciprocal Agreement is a question of mixed fact and law. The respondents argue that the factual matrix is inextricably linked in the Arbitrator's analysis of the Reciprocal Agreement. The respondents cite the extensive history with the Arbitrator culminating in his decision. That history included a summary judgment motion and a Rule 21 type motion. The respondents state that the Arbitrator dealt with the Guarantee Fund and correctly interpreted the agreement taking into consideration the factual matrix, including the intentions of the parties at the time of formation of the Reciprocal Agreement.

[22] In *Ledcor*, the Supreme Court of Canada considered and clarified how *Sattva* applies to the interpretation of standard form contracts. The Supreme Court stated, at para. 24, that "where an appeal involves the interpretation of a standard form contract, the interpretation at issue is of precedential value, and there is no meaningful factual matrix that is specific to the parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review." However, the Supreme Court confirmed that even standard form contracts may involve issues of mixed fact and law, at para. 48:

> Depending on the circumstances, however, the interpretation of a standard form contract may be a question of mixed fact and law, subject to deferential review on appeal. For instance, deference will be warranted if the factual matrix of a standard

> form contract that is specific to the particular parties assists in the interpretation...

[23] The Arbitrator, at paras. 48 and 56 of his Decision, recognized that although the Reciprocal Agreement was a standard form contract, "the circumstances surrounding the making of the contract, or the factual matrix, may be considered."

[24] The Arbitrator found that the participants in the Reciprocal Exchange were owners. The applicants argue that the Arbitrator's finding that the Boards, who were owners, forfeited their rights to their portion of the Guarantee Fund on termination of participation is contrary to the Reciprocal Agreement, as there was no provision in the agreement regarding the Guarantee Fund or ownership of it. They submit that the applicable factual matrix applies to all subscribers to the exchange (i.e., it is not specific to the TDSB and SCDSB). Accordingly, their position is that, based on *Ledcor*, the Arbitrator's interpretation of the Reciprocal Agreement is a question of law subject to correctness review.

[25] The Arbitrator interpreted the Reciprocal Agreement in reaching his conclusion that although the Boards hold an ownership interest in OSBIE, when they leave the exchange, they are not entitled to a proportionate share of the Guarantee Fund – they forfeit any equity rights. The Arbitrator considered the various contractual provisions. He addressed section 7 of the Reciprocal Agreement in paragraphs 63 and 64 of his Award:

> 63. That leads the Tribunal to an analysis of another provision of the Agreement, s. 7, entitled Termination of Subscription. This section of the Agreement reads:
>
> > (a) A Subscriber may terminate participation in the exchange of contracts of insurance within an Underwriting Group by written notice of intention to terminate subscription, given prior to July 1 in the last year of the related Group Subscription Period and, unless such notice is given, the Subscriber's participation in the exchange of contracts of insurance shall continue within the Underwriting Group for successive Group Subscription Periods until terminated by such notice.
> >
> > (b) A Subscriber may terminate subscription in the Exchange by terminated in accordance with (a) participation in the exchange of contracts of insurance in each Underwriting Group of which the Subscriber is a member. After terminating subscription to the Exchange, the Subscriber has no rights or obligations under this Agreement except in regard to Section 1, Section 27,

> Section 28, Section 31, Section 35, and Section 37, and is only a Subscriber for purposes of these sections.
>
> 64. In the Tribunal's view, this unambiguous section of the Agreement clearly establishes the rights and obligations of departing subscribers and couldn't be more clear. Nothing in that section provides any requirement that OSBIE pay any amounts to subscribers who have terminated their membership in the Exchange. Indeed, as OSBIE points out, there continue to be obligations, a liability a departing member may buy out. Neither of the Applicant boards have taken advantage of that provision.

[26] The Arbitrator, at paras. 30 and 31, also concluded that pursuant to paragraph 2 of the Reciprocal Agreement, the *Insurance Act* was incorporated by reference into the agreement. Paragraph 2 of the Reciprocal Agreement states:

> This Agreement is made pursuant to the provisions of Part XIII of the Insurance Act. R.S.O 1990, c. I-8 as amended and the Regulations thereunder for the purpose of enabling the Subscribers to exchange reciprocal contracts of indemnity or insurance for any classes of insurance other than life, accident, sickness and surety insurance as specified in Section 378. The classes of insurance to be exchanged shall be "liability", "automobile", "property", "boiler and machinery," "fidelity", "legal expense", "marine", "aircraft", "credit, "hail", mortgage", and "title" and such other classes may be approved by vote requiring the approval of not less than two-thirds of all Subscribers. Subject to the granting of a licence under the Insurance Act and subject to the provisions of this Agreement, the Subscribers agree to exchange such contracts within such Underwriting Groups to which they may from time to time subscribe.

[27] The *Insurance Act* requires, in s. 386(1) that an exchange must at all times maintain a sum in cash amounting to not less than an amount prescribed by regulation. In addition, under s. 386(2), an exchange must maintain a surplus of assets in excess of liabilities in an amount that is not less than that prescribed by regulation. Under the Insurance Regulation:

> - The minimum amount that must be maintained under s. 386(1) of the *Insurance Act* is the amount of cash or investments equal to 50 per cent of the net written premiums reported in the most recent statement delivered by the exchange.

- The minimum surplus that must be maintained under s. 386(2) of the *Insurance Act* is $50,000.

[28] The Guarantee Fund is well in excess of these minimums.

[29] The Guarantee Fund is not referenced as such in the Reciprocal Agreement. The Reciprocal Agreement does not speak to the distribution of the Guarantee Fund, if any, and/or equity when a member leaves the exchange. The Arbitrator concluded at paras. 60-63 that although the concept of ownership in the Guarantee Fund has been a major selling point, subscribing boards' ownership in the Guarantee Fund is subject to the terms of the Reciprocal Agreement. He determined that there were only two provisions in the agreement that gave subscribers access to the Guarantee Fund: section 30 (potential reduction of premiums at OSBIE's discretion) and section 38 (distribution on termination of an underwriting group). In making this determination, he considered section 2 of the Reciprocal Agreement (reproduced above), which sets out the purpose. He stated, at para. 59:

> This iteration of the purpose [in s. 2 of the Reciprocal Agreement] is entirely consistent with s. 2 of the original 1986 Agreement. The Guarantee Fund has been the subject of report and comment annually in reports by OSBIE beginning in 1987 where it was noted that the Guarantee Fund represented "... the excess of income over expenses, and may be used to cover future catastrophe (*sic*) claims or reduce future premiums if appropriate."

[30] In *Ledcor*, at para. 34, the Supreme Court stated: "while contractual interpretation is generally a question of mixed fact and law, in situations involving standard form contracts, it is more appropriately classified as a question of law in most circumstances." At paragraph 39, the Supreme Court explained that: "It would be undesirable for courts to interpret identical or very similar standard form provisions inconsistently, without good reason. The mandate of appellate courts – "ensuring the consistency of the law" (*Sattva*, at para. 51) – is advanced by permitting appellate courts to review the interpretation of standard form contracts for correctness."

[31] The Arbitrator interpreted the Reciprocal Agreement, which is a standard form contract. The applicable factual matrix, including the history of OSBIE and how prior departing members have been treated, would be relevant to any of the participating boards and generally is not specific to TDSB and SCDSB. The Supreme Court in *Ledcor* stated, at para. 46:

> *Sattva* should not be read as holding that contractual interpretation is always a question of mixed fact and law, and always owed deference on appeal. I would recognize an exception to *Sattva*'s holding on the standard of review of contractual interpretation. Where, like here, the appeal involves the interpretation of a standard form contract, the

> interpretation at issue is of precedential value, and there is no meaningful factual matrix specific to the particular parties to assist the interpretation process, this interpretation is better characterized as a question of law subject to correctness review.

[32] Given the direction from the Supreme Court of Canada in *Ledcor*, it is my view that the Arbitrator's interpretation of the standard form Reciprocal Agreement is a question of law. The interpretation of the Reciprocal Agreement will be of precedential value to other OSBIE participants who terminate their membership in OSBIE.

Importance to the Parties of the Matters at Stake and Rights Affected

[33] The issue is clearly important to the parties. The Boards, as members who have terminated their participation in OSBIE, where they were owners, claim entitlement to significant funds. OSBIE is concerned with ensuring that adequate funds are held on reserve to cover extraordinary claims, among other things.

[34] Similarly, the determination of the question of law will significantly affect the rights of the parties. The Arbitrator agreed with OSBIE's interpretation of the Reciprocal Agreement that departing boards forfeit any equity ownership and are not entitled to a share of the Guarantee Fund. As noted above, the Guarantee Fund is in excess of $130 million and TDSB and SCDSB claim entitlement to almost $22 million and almost $4 million, respectively. As noted by the applicants the questions of law go to the heart of the matters at issue at arbitration, namely whether the applicants are entitled to a share of the Guarantee Fund on termination of their subscriptions in OSBIE.

Disposition and Costs

[35] The applicants' request for leave to appeal is granted.

[36] Costs, if any, are reserved to the judge hearing the appeal.

J. Steele J.

Released: April 4, 2023

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Applicants

– and –

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Respondent

REASONS FOR JUDGMENT

J. Steele J.

Released: April 4, 2023