CITATION: Toronto Standard v. Distillery SE, 2023 ONSC 5340
COURT FILE NO.: CV-22-00687733-0000
DATE: 20230921

ONTARIO SUPERIOR COURT OF JUSTICE

RE: Toronto Standard Condominium Corporation No. 2299, Applicant

-and-

Distillery SE Development Corp., Respondent

BEFORE: Justice Shin Doi

COUNSEL: *Lars Brusven* and *Cole A. Pizzo,* for the Applicant

Ed Hiutin and *Maureen Whelton,* for the Respondent

HEARD: June 15 and 23, 2023

ENDORSEMENT

[1] The Applicant condominium is seeking an order appointing an arbitrator and confirming that all issues raised in its Fresh as Amended Notice of Arbitration are within the jurisdiction of the arbitrator.

[2] The Respondent developer seeks to quash the Fresh as Amended Notice of Arbitration. The Respondent argues that the Applicant repudiated an agreement to appoint a specific arbitrator. It is the Respondent's position that the Applicant must follow the alternative dispute resolution process set out in the Three-Way Shared Facilities Agreement dated as of May 14, 2012 between the Applicant, the Respondent, and another condominium known as Gooderham (the "Shared Facilities Agreement"). The Respondent further argues that Gooderham should be a party to the arbitration because there are new matters in the Fresh as Amended Notice of Arbitration.

[3] I grant the Applicant's application to appoint The Honourable Colin L. Campbell, K.C. ("Mr. Campbell") as the arbitrator because there was an agreement between the parties to appoint Mr. Campbell and there is no objection by the Respondent as to the choice of Mr. Campbell. I do not quash the Fresh as Amended Notice of Arbitration. I defer to Mr. Campbell to determine his jurisdiction, mandate, and the arbitration agreement, including whether Gooderham should be a party to the arbitration.

Background Facts

[4] The Applicant is a condominium corporation which controls, manages, and administers the condominium property described as Toronto Standard Condominium Plan No. 2299 and

municipally known as 70 Distillery Lane, Toronto, Ontario. The Respondent is the developer of that condominium and the neighbouring condominium, Gooderham. The Respondent is the owner of portions of the underground parking garage and commercial/retail areas.

[5] On March 14, 2012, the Applicant and the Respondent entered into the Shared Facilities Agreement which governs the mutual use, maintenance, cost-sharing and other matters relating to the service of units, servicing systems and facilities. The Shared Facilities Agreement, article 17 set outs the alternative dispute resolution process.

[6] In 2018, disputes arose in respect of cost-sharing and building access, among other matters. The Respondent delivered a notice of mediation, but the parties did not resolve their disputes through mediation. On April 16, 2018, the Applicant delivered a notice of arbitration and on May 16, 2018, the Respondent delivered its notice of arbitration appointing Mr. Campbell as the arbitrator. On July 24, 2018, the parties settled and agreed that Mr. Campbell would be the arbitrator. Neither party took any further steps.

[7] In December 2021, the Applicant retained new counsel. On June 13, 2022, the Applicant delivered a Fresh as Amended Notice of Arbitration and proposed an arbitrator other than Mr. Campbell. The Respondent informed the Applicant that the parties agreed in 2018 to conduct their arbitration before Mr. Campbell and raised objections to the Fresh as Amended Notice of Arbitration.

[8] There was a series of emails exchanged between the parties about whether there was, in fact, an agreement. It is the Respondent's position that the Applicant repudiated the agreement and the Fresh As Amended Notice of Arbitration should be quashed. If there was no repudiation, then the Respondent argues that new matters are raised in the Fresh As Amended Notice of Arbitration and those matters require Gooderham's participation.

Arbitrator

[9] It was the Applicant counsel's position based on the materials forwarded by the Respondent's counsel that there did not appear to be an executed agreement to appoint Mr. Campbell as arbitrator. However, the Applicant confirmed its agreement to move ahead with Mr. Campbell as arbitrator. Notably, the Respondent has no objection to Mr. Campbell.

[10] The Applicant's counsel submits that he was unaware of the parties' previous agreement to arbitrate with Mr. Campbell. In a review of the emails exchanged between counsel, I note that the Respondent's counsel did initially believe that the Applicant's counsel, who was new to the file, was not aware of the agreement to appoint Mr. Campbell. The Respondent's counsel advised the Applicant's counsel in an email dated June 10, 2022 that, "our respective clients already have an existing arbitration proceeding between them wherein they agreed that Mr. Colin Campbell would be the arbitrator…" The Applicant's counsel then advised in an email dated June 13, 2022 that he is not aware that the parties entered into an agreement to appoint Mr. Campbell as the arbitrator. It is reasonable that

given the change in counsel, the Applicant's counsel may not have been aware of the agreement appointing Mr. Campbell as the arbitrator. Four years had passed since the agreement and those years included the circumstances of the pandemic.

[11] The Applicant's counsel was incorrect in law that there was no binding agreement between the parties appointing Mr. Campbell as arbitrator. The Applicant's counsel now argues correctly that a binding agreement is reached where there is agreement on the essential terms – it need not be incorporated in a formal executed document in order to be binding**:** *UBS Securities Canada, Inc. v. Sands Brothers Canada Ltd.*, 2009 ONCA 328 at para. 47.

[12] The Respondent's position is that the binding agreement was repudiated by the Applicant. The Respondent describes the Applicant's conduct as "flip-flopping" and "back-pedalling". The Respondent argues that it accepted the repudiation on July 6, 2022 and the settlement agreement at that time terminated.

[13] "The test for anticipatory repudiation is an objective one" and "the court must ask whether a reasonable person would conclude that the breaching party no longer intends to be bound by it": *Remedy Drug Store Co. Inc. v. Farnham*, 2015 ONCA 576 at para. 45. I am not persuaded that a reasonable person would conclude that the Applicant no longer intended to be bound by the agreement to appoint Mr. Campbell. The Applicant's conduct, over the course of weeks, is more likely confusion and lack of awareness as opposed to repudiation given that the agreement to appoint Mr. Campbell had subsisted for years and the Applicant's counsel was new.

[14] Further, appointing Mr. Campbell as the arbitrator moves the parties forward. Not appointing Mr. Campbell as the arbitrator would push back the parties to a time prior to 2018. Accordingly, I find that the parties did agree in 2018 and again, in 2022, that Mr. Campbell be the arbitrator. I order that Mr. Campbell be confirmed as the arbitrator.

Jurisdiction and Mandate

[15] The Applicant relies on the June 13, 2022 Fresh as Amended Notice of Arbitration as outlining the issues for the arbitration. The Respondent provides a detailed document outlining the new matters in the Fresh as Amended Notice of Arbitration that were not raised by the Applicant in its 2018 Notice of Arbitration. It is clear that the parties agreed in 2018 as to the issues to proceed to arbitration. Whether the issues set out in the Fresh as Amended Notice of Arbitration fall within the jurisdiction of the arbitrator, the arbitrator's mandate, and the arbitration agreement are now questions for the arbitrator.

[16] As the arbitrator, Mr. Campbell, may rule on his own jurisdiction to conduct the arbitration and may in that connection rule on objections with respect to the existence or validity of the arbitration agreement (*Arbitration Act*, s. 17(1)). The court has held that "arbitrators should be allowed to exercise their power to rule first on their own jurisdiction" (*Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, [2007] 1 S.C.J. No. 34, 2007 SCC34 at 70).

[17] Moreover, the Supreme Court of Canada held in *Desputeaux v. Editions Chouette (1987) Inc.*, 2003 SCC 17 (CanLII), [2003] 1 SCR 178 at para. 35:

> **The arbitrator's mandate must not be interpreted restrictively by limiting it to what is expressly set out in the arbitration agreement. The mandate also includes everything that is closely connected with that agreement**, or, in other words, questions that have "a connection with the question to be disposed of by the arbitrators with the dispute submitted to them"((S. Thuilleaux, *L'arbitrage commercial au Québec: droit interne — droit international privé* (1991), at p. 115). Since the 1986 arbitration reforms, the scope of arbitration agreements has been interpreted liberally (N. N. Antaki, *Le règlement amiable des litiges* (1998), at p. 103; *Guns N'Roses Missouri Storm Inc. v. Productions Musicales Donald K. Donald Inc.*, 1994 CanLII 5694 (QC CA), [1994] R.J.Q. 1183 (C.A.), at pp. 1185-86, *per* Rothman J.A.).

Hence, whether the matters in the Fresh as Amended Notice of Arbitration are closely connected with the agreement to arbitrate should be decided by the arbitrator. It is not appropriate to limit the arbitrator's mandate at this stage.

[18] Lastly, whether Gooderham is a necessary a party to the arbitration as argued by the Respondent should also be an issue that is determined by Mr. Campbell as the arbitrator once he determines his jurisdiction, mandate, and the arbitration agreement. The Respondent argues that the items to be arbitrated in the July 2018 Notice of Arbitration did not involve Gooderham but there are items in the Fresh As Amended Notice of Arbitration that require Gooderham. The necessity of Gooderham as a party turns on the substantive issues that would be heard by the arbitrator under his jurisdiction and mandate, and pursuant to the agreement between the parties.

[19] I note that the parties agreed on the amount of costs to be paid to the successful party. However, I am not inclined to award costs to either party given the somewhat divided success in the outcome of the application.

JUSTICE SHIN DOI

Released: September 21, 2023