CITATION: The Joseph Lebovic Charitable Foundation et al. v. Jewish Foundation of Greater Toronto, 2024 ONSC 4400
COURT FILE NO.: CV-23-00697793-0000
DATE: 20240808

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: The Joseph Lebovic Charitable Foundation, The Dr. Wolf Lebovic Charitable Foundation, The Estate of Joseph Lebovic and Wolf Lebovic

AND:

Jewish Foundation of Greater Toronto and Joseph and Wolf Lebovic Jewish Community Campus

BEFORE: J.T. Akbarali J.

COUNSEL: *Krista Chaytor and Lia Boritz*, for the applicants

Matthew P. Gottlieb and Andrew Winton, for the respondents

HEARD: August 6, 2024

ENDORSEMENT

Overview

[1] The applicants seek a determination that the Arbitrator, the Hon. Colin L. Campbell, Q.C., erred in finding that he had jurisdiction over the relief claimed by the respondents in a Fresh as Amended Statement of Issues dated June 24, 2022.

Brief Background

[2] In 2005, the applicants in this proceeding, to whom I refer collectively as Lebovic, entered into a donor agreement with the respondents in this proceeding, to whom I refer collectively as UJA. Joseph and Dr. Wolf Lebovic agreed to donate, through their charitable foundations, $20 million to the Jewish Foundation of Greater Toronto (the "Foundation"), in exchange for which the Foundation agreed to name a campus in Vaughan after the individual Lebovics. The funds were to be paid in installments.

[3] The donor agreement includes an arbitration clause. The clause provides that a dispute arising out of, or in connection with, the agreement, shall be submitted to a panel of three arbitrators, one of which is appointed by Lebovic, one by UJA, and a third chosen by the first two. It also provides that following the appointment of one arbitrator, the party who has not appointed an arbitrator shall do so within seven days, failing which "the first appointed arbitrator shall act as

a single arbitrator and such single arbitrator's decision shall be final and binding on all of the parties."

[4] In May 2015, the UJA commenced an arbitration concerning a dispute with Lebovic in connection with UJA's proposal to sell a portion of the campus lands named after the Lebovics, to which Lebovic objected. In addition, the Joseph Lebovic Charitable Foundation had failed to pay three $1 million installments owing under the donor agreement.

[5] The parties appointed a single arbitrator, the Hon. C. L. Campbell, who also acted as a mediator. The arbitration was resolved by way of a consent order of the Hon. C. L. Campbell, dated August 5, 2015, which included a clause referring "any disputes regarding the matters referred to in this Order" back to him for resolution.

[6] UJA commenced an arbitration in 2016, seeking an order that Lebovic make certain payments set out in the consent order, but the arbitration never progressed. UJA states that it was not necessary to continue the arbitration, because subsequent events and discussions between the parties overtook that arbitration.

[7] UJA commenced a third arbitration in April 2021, which is the arbitration that underlies this application. It did so by way of Notice of Demand for Arbitration, referencing: (i) the consent order; (ii) the donation agreement; and (iii) the *Arbitration Act, 1991*, S.O. 1991, c. 17. The Notice referred two issues to the Hon. C. L. Campbell, one relating to refinancing of the campus property, and the other relating to the naming rights to the campus.

[8] Lebovic argues that the April 2021 arbitration, despite naming the donation agreement, grounded the arbitrator's jurisdiction only in paras. 22, 23, and 24 of the consent order, dated August 5, 2015, because only those paragraphs were specifically invoked, and not the arbitration clause in the donation agreement, although they offer no authority for this proposition.

[9] No second arbitrator was named. The arbitration proceeded before The Hon. C. Campbell as a single arbitrator.

[10] As I review below, significant steps were taken by both parties to bring the arbitration to a hearing on the merits, including the delivery of a counterclaim by Lebovic engaging the same issues raised by UJA, and a Notice of Demand for Arbitration raising the same issues, and invoking the arbitrator's jurisdiction under both, paras. 22-24 of the consent order, and the arbitration clause in the donor agreement. Of note, Lebovic brought a motion seeking that their counterclaim be heard together with the claim, arguing that its (Lebovic's) claims were arbitrable under the donor agreement and the consent order, and arguing that the Arbitrator had the jurisdiction to make the orders requested.

[11] On September 12, 2022, the Hon. C. L. Campbell directed that UJA's claim would be heard beginning September 29, 2022 until October 6, 2022, and that the counterclaim would be heard the week of October 24, 2022.

[12] On September 23, 2022, less than a week before the scheduled commencement of the arbitration, the Lebovics retained new counsel. Counsel sought an adjournment of the arbitration, and also renewed the motion I refer to above in para. 10, reiterating its grounds, and continuing to seek an order that Lebovic's claims be heard together with UJA's claims, and arguing that the arbitrator had jurisdiction to hear them.

[13] The Hon. C. L. Campbell adjourned the hearing of UJA's claim to the week of October 24, 2022, and held that if additional dates were required to hear the counterclaim, that matter would be addressed during the week of October 24, 2022.

[14] On October 17, 2022, Lebovic for the first time mounted an objection to the arbitrator's jurisdiction. In accordance with the Hon. C. L. Campbell's directions, Lebovic brought a jurisdictional motion to be addressed on October 24, 2022.

[15] In a decision dated March 15, 2023, the Arbitrator concluded he had jurisdiction over the relief claimed because:

a. The continuity of process is recognized in the consent order under which the Hon. C. L. Campbell is to deal with "any disputes regarding matters referred to in this Order." Given his prior involvement in the arbitration brought pursuant to the donor agreement, "any dispute" under the consent order "would necessarily involve factual consideration of the terms, and obligations and conduct of the parties under both the [donor agreement and consent order]."

b. The issues raised by UJA are all grounded in rights and obligations which are initiated by the terms of the donor agreement. In the Notice of Demand and the pleadings delivered by both parties, "there is clearly a factual relationship to be considered between the [donor agreement and the consent order]."

c. The arbitrator was satisfied that it was in law and in equity reasonable and practical not to parse the language of each of the agreements in a way that would preclude consideration of the evidence that clearly bind the parties in a continuing relationship under both agreements.

d. Prior to bringing the jurisdiction motion, Lebovic's conduct assumed the jurisdiction of the arbitrator for both parties' claims.

[16] In an Arbitral Award and Reasons for Decision dated July 27, 2023, the Arbitrator found in favour of UJA. Lebovic has appealed that award, and the related costs award, in a separate proceeding that is pending before this court, but is not part of this application.

Relevant Legal Principles to a Determination of an Arbitrator's Jurisdiction

[17] An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration: s. 17(1) of the *Arbitration Act*. A party may apply under s. 17(8) of the *Arbitration Act* for review by the court to decide the matter.

[18] A hearing to decide the matter of the arbitral tribunal's jurisdiction is a hearing *de novo*: *Hornepayne First Nation v. Ontario First Nations (2008) Ltd.*, 2021 ONSC 5534, at paras. 2-6, citing *Russian Federation v. Luxtona*, 2021 ONSC 4604 (Div. Ct.), at para. 22.

[19] The standard to be applied on a question of the arbitrator's jurisdiction is correctness: *Smyth v. Perth & Smith Falls District Hospital*, 2008 ONCA 794, at para. 17.

Analysis

[20] In my view, this application must fail. I accept UJA's argument that Lebovic agreed to refer all matters in dispute to the arbitrator, and waived any jurisdictional objection it could raise.

[21] As Major J. held in *Saskatchewan River Bungalows Ltd. v. Maritime Life Assurance Co.*, [1994] S.C.R. 490, at pp. 499-500, waiver occurs "when one party to a contract or to proceedings takes steps which amount to forgoing reliance on some right or defect in the performance of the other party." The essentials of waiver are: (i) full knowledge of the deficiency which might be relied upon; and (ii) the unequivocal intention to relinquish the right to rely on it. Waiver may be express, or inferred from conduct.

[22] The record lays out numerous ways in which, prior to the retention of new counsel, Lebovic, through its experienced and competent prior counsel, repeatedly demonstrated its agreement to remit all matters in dispute to the Hon. C. L. Campbell, and concomitantly, its waiver of any jurisdictional challenge.

[23] By way of example, this conduct includes counterclaiming for relief which they argued the arbitrator had jurisdiction to address, arising out of the issues that Lebovic now argues the Arbitrator had no jurisdiction to address. It also includes issuing a Notice of Demand for Arbitration raising the same issues raised by UJA, in which it invoked not just the consent order, but the arbitration clause in the donor agreement.

[24] I do not accept Lebovic's argument that the counterclaim was a fallback position in the event its jurisdictional challenge was unsuccessful; the counterclaim (and Notice of Demand for Arbitration) and their concurrent assertion of the Arbitrator's jurisdiction predated Lebovic's late-breaking jurisdictional position by almost three months.

[25] Moreover, Lebovic's jurisdictional challenge was not asserted until about 18 months after UJA's Notice of Demand for Arbitration was issued. The jurisdictional challenge arose well after Lebovic had already explicitly confirmed the Arbitrator's jurisdiction.

[26] Lebovic argues that under the *Arbitration Act*, a party is entitled to object to an arbitral tribunal's jurisdiction no later than the beginning of the hearing.

[27] Section 17(3) of the *Arbitration Act* provides that:

> A party who has an objection to the arbitral tribunal's jurisdiction to conduct the arbitration shall make the objection no later than the beginning of the hearing or, if

> there is no hearing, no later than the first occasion on which the party submits a statement to the tribunal.

[28] Section 4(1) of the *Arbitration Act* provides that:

> A party who participates in an arbitration despite being aware of non-compliance with a provision of this Act, except one mentioned in section 3, or with the arbitration agreement, and does not object to the non-compliance within the time limit provided or, if none is provided, within a reasonable time, shall be deemed to have waived the right to object.

[29] Lebovic argues that the impact of these provisions is that they had until the commencement of the hearing on October 24, 2022 to object to the Arbitrator's jurisdiction, and that any other finding would render the quoted provisions of the *Arbitration Act* meaningless.

[30] I disagree. Section 4(1) speaks to when waiver of the right to object will be deemed. It does not restrict a court's, or an arbitrator's, ability to conclude that the right to object was actually waived at some time prior than it would have been deemed to be waived under the provisions of the *Arbitration Act*. Nor does it restrict a court's or an arbitrator's ability to conclude that the party agreed to remit certain issues to the arbitrator which would necessitate waiving any jurisdictional challenge.

[31] I am bolstered in this conclusion by s. 46 of the *Arbitration Act*. It provides that the court may set aside an arbitral award on grounds including, in s. 46(1)3, that the award deals with a dispute that the arbitration agreement does not cover, or a matter beyond the scope of the agreement, but limits this power in s. 46(3), which provides, among other things, that the court shall not set aside an award on those grounds if the parties has agreed to the inclusion of the dispute or matter, waived the right to object to its inclusion.

[32] Section 46 thus suggests that jurisdiction is not as simple as Lebovic argues. Rather, reflecting the nature of arbitration as a party-driven, practical dispute mechanism, the parties have agency to make decisions about the nature of the process, and can rely on each other's conduct to advance the arbitration to an efficient and fair conclusion.

[33] On Lebovic's argument, it was free to refer an issue to the arbitrator itself, under jurisdiction it agrees is effective and appropriate, and then contest jurisdiction as long as it did so before the start of the hearing. This makes no logical or commercial sense.

[34] The ridiculousness of the position is placed in stark relief when one notes that the result of Lebovic's argument, on the facts of this case, would be that the Hon. C. L. Campbell would have jurisdiction to deal with certain issues between the parties, but another arbitration would have to be convened to deal with related issues, even though they are mentioned in the consent order, because although they are connected to the subject matter of the consent order, they are not closely connected enough (according to Lebovic). Inevitably, two parallel arbitrations would be addressing the same facts, leading to delay, excess costs, confusion, and the potential for inconsistent findings: *PCL Constructors v. Johnson Controls*, 2022 ONSC 1642, at para. 41.

[35] Moreover, sanctioning a process in which significant time and economic resources could be spent on an arbitration only for a jurisdictional challenge to be mounted at the last minute would drive up costs unnecessarily. It would add complexity to arbitral processes. It would create a process that would be devoid of the benefits of arbitration.

[36] In my view, Lebovic's last-minute jurisdictional challenge was strategic, not genuine. It had already consented to the jurisdiction of the Arbitrator, and waived any ability to challenge that jurisdiction over the 18 months preceding its motion. It went so far as to commence its own arbitration invoking arbitral jurisdiction it agrees exists.

[37] For this reason, I dismiss the application.

[38] Having reached this conclusion, it is not necessary to consider whether the relief sought fell within the scope of the consent order, and was thus properly before the Arbitrator. Nor is it necessary to consider whether the Hon. C. L. Campbell was appointed in accordance with the provisions of the donor agreement with respect to the 2021 arbitration. However, I note that the respondents' agreements on those questions were compelling.

Costs

[39] The parties agreed that the successful party on this application would be entitled to costs in the amount of $26,610.61. The respondents are the successful parties. The applicants shall pay the respondents their all-inclusive costs of $26,610.61 within thirty days.

J.T. Akbarali J.

Date: August 8, 2024