COURT OF APPEAL FOR ONTARIO

CITATION: Toronto Standard Condominium Corporation No. 2299 v. Distillery SE Development Corp., 2024 ONCA 712
DATE: 20240927
DOCKET: M54706 & COA-23-CV-1174

Zarnett, Monahan and Pomerance JJ.A.

BETWEEN

Toronto Standard Condominium Corporation No. 2299

Applicant
(Respondent in Appeal)

and

Distillery SE Development Corp.

Respondent
(Appellant)

Richard Macklin, for the appellant

Rahool P. Agarwal and Brendan Bohn, for the respondent

Heard: September 12, 2024

On appeal from the order of Justice Julia Shin Doi of the Superior Court of Justice, dated September 21, 2023, with reasons reported at 2023 ONSC 5340.

Zarnett J.A.:

Introduction

[1] The *Arbitration Act, 1991*, S.O. 1991, c. 17 restricts court intervention in matters parties have agreed to arbitrate. In defined circumstances the Act permits

the court to appoint an arbitrator for the parties' dispute. But it does not permit an appeal from a court-ordered appointment.

[2] Whether this appeal from an order appointing an arbitrator is properly brought principally turns on the breadth of the power to appoint an arbitrator under the Act and therefore of its corresponding preclusion of appeals. Was the arbitrator appointed under the power to do so in s. 10 of the Act, or was there another source of jurisdiction for it which is free of any restriction on appeal rights?

[3] For the reasons below, I conclude that the power of the court to appoint an arbitrator under s. 10 of the Act exists when parties jointly have the power to appoint an arbitrator and they either fail to agree on the arbitrator or, having reached an agreement, one party then refuses to follow through on it. That was the situation the application judge found existed. Her order appointing an arbitrator in those circumstances was made under s. 10 of the Act. No appeal from it lies by reason of s. 10(2) of the Act.

Background

[4] The respondent, Toronto Standard Condominium Corporation No. 2299 (the "Condo Corp."), and the appellant, Distillery SE Development Corp. ("Distillery"), are parties to a Shared Facilities Agreement (the "SFA"). The SFA provides for a dispute resolution process, with timelines for negotiations and mediation. Failing settlement of a dispute, the SFA provides for resolution of disputes by binding

arbitration, and contemplates that the parties may agree on a single arbitrator or may each appoint an arbitrator who would agree to appoint a single arbitrator.

[5] In 2018, after negotiation and mediation failed to resolve disputes that had arisen under the SFA, the Condo Corp. served a notice of arbitration (the "2018 Notice"). The parties reached an agreement that the Honourable Colin Campbell, K.C. would serve as arbitrator. The arbitration did not proceed at that time.

[6] In 2022, the Condo Corp. served a Fresh as Amended Notice of Arbitration (the "2022 Notice"), generating disagreements about who would be the arbitrator and the scope of the arbitration.

[7] Initially, the Condo Corp. proposed an arbitrator other than Mr. Campbell. Distillery reminded it of the existence of the agreement to appoint Mr. Campbell, while objecting to the 2022 Notice. The Condo Corp. would not confirm the agreement to appoint Mr. Campbell but stated its willingness to proceed before him if the arbitration were to include the matters in the 2022 Notice. Distillery purported to agree that there was no agreement to appoint Mr. Campbell while maintaining its objection to the 2022 Notice.

The Application to Appoint an Arbitrator and the Application Judge's Decision

[8] The Condo Corp. brought an application seeking, among other things, an order from the application judge appointing Mr. Campbell as arbitrator and confirming that all issues raised in the 2022 Notice were within his jurisdiction. The application was styled as being made under ss. 6, 7 and 17 of the Act, and r. 14 of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[9] By the time it brought this application, the Condo Corp. had revised its position to one that asserted there was an agreement to appoint Mr. Campbell. The notice of application stated that it sought relief "to ensure the arbitration between [it] and [Distillery] is conducted in accordance with the terms of [the SFA and] the July 24, 2018 agreement between the parties to appoint [Mr. Campbell] to arbitrate the issues in dispute between the parties".

[10] Distillery took the position that the agreement to appoint Mr. Campbell had been repudiated by the Condo Corp., and in any event did not extend to appointing Mr. Campbell to decide the disputes under the 2022 Notice, which it said were expanded from those in the 2018 Notice. Distillery asked that the 2022 Notice be quashed because it raised claims which were not yet eligible for arbitration as the SFA's negotiation and mediation process concerning them had not taken place.

[11] The application judge found that the parties agreed in 2018 that Mr. Campbell would serve as the arbitrator. She rejected Distillery's argument that the respondent had repudiated the agreement for Mr. Campbell to be arbitrator. She did not determine that the issues in the 2022 Notice (to the extent they went beyond those in the 2018 Notice) were properly before him but left that to Mr. Campbell to decide. She dismissed the motion to quash the 2022 Notice, and ordered that Mr. Campbell was to determine his jurisdiction and mandate and whether another entity, in addition to the Condo Corp. and Distillery, should be a party to the arbitration.

The Appeal and the Motion to Quash

[12] Distillery appeals, essentially raising two grounds. First, it submits that the application judge erred in law in failing to find that the agreement to appoint Mr. Campbell was repudiated. Second, it argues that even if there was a subsisting agreement to appoint Mr. Campbell for the disputes in the 2018 Notice, the application judge was wrong not to limit his appointment to those issues. Distillery maintains that it has a contractual right under the SFA to insist on negotiation and mediation as preconditions to arbitration of the disputes in the 2022 Notice that go beyond those in the 2018 Notice, and the application judge's decision essentially deprives it of that right.

[13] The Condo Corp. resists the appeal and moves to quash it, arguing that there is no right to appeal an order that appoints an arbitrator in these circumstances.

Analysis

[14] I address the motion to quash first. Given my disposition of it, I do not reach the merits of the appeal.

[15] The Condo Corp. submits that the application judge's order was made under s. 10(1) of the Act, and that an appeal from it is precluded by s. 10(2). Section 10 provides, in relevant part, as follows:

> **10** (1) The court may appoint the arbitral tribunal, on a party's application, if,
>
> (a) the arbitration agreement provides no procedure for appointing the arbitral tribunal; or
>
> (b) a person with power to appoint the arbitral tribunal has not done so after a party has given the person seven days notice to do so.
>
> (2) There is no appeal from the court's appointment of the arbitral tribunal.

[16] Distillery argues that s. 10(2) of the Act does not apply to preclude the appeal, because the order sought to be appealed was not made under s. 10(1). It says this for two reasons. First, it asserts that the Condo Corp. did not specify that it was applying under s. 10(1), nor did the application judge cite it as the basis for

her authority. Second, it submits that the order could not have been made under ss. 10(1)(a) or (b) as they only pertain to narrow circumstances not applicable here.

[17] Distillery submits that the order was made under r. 14.05(3)(d) of the *Rules*, which permits a court, on application to determine rights under a contract – the contract in this case being the agreement to appoint Mr. Campbell. As such, Distillery submits that the order is appealable as of right to this court under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

[18] Distillery's first point can be dealt with briefly. Although the Condo Corp. did not expressly cite s. 10 of the Act, the notice of application stated that it was made under the Act. It stated it was seeking directions (including the appointment) to ensure the arbitration was conducted in accordance with the SFA and the agreement to appoint Mr. Campbell. Section 6 of the Act, which the application did cite, permits court intervention for such purposes "in accordance with the Act". Section 10 is the only arguably applicable provision of the Act that contemplates the court appointing an arbitrator.[1]

[19] I do not read the notice of application's reference to r. 14.05 as invoking another source of jurisdiction. Rule 14.05 is not a jurisdiction-conferring provision. It prescribes a permissible procedure – application, as opposed to an action – for

[1] In certain situations, the court may appoint a substitute arbitrator if the arbitrator's mandate has terminated: s. 16(3). The court may also appoint an arbitral tribunal when it orders that multiple arbitrations be consolidated: s. 8(5).

the determination of certain matters that are otherwise within the jurisdiction of the Superior Court.

[20] Nor is it significant that the application judge did not cite the source of her authority to make the appointment. If the authority to appoint came from the Act, it came from s. 10, whether or not the application judge referred to it.

[21] I also reject Distillery's second point, that the order could not have been made under s. 10(1) as the facts did not fit within it. I accept the Condo Corp.'s argument that the case fits within s. 10(1)(b).

[22] The issue is one of statutory interpretation. In "accordance with the modern approach to statutory interpretation, the meaning of [the provision in issue – here s. 10 of the Act] must be determined by considering its text, context and purpose": *R. v. Basque*, 2023 SCC 18, 482 D.L.R. (4th) 203, at para. 63; *Bell ExpressVu Limited Partnership v. Rex*, 2002 SCC 42, [2002] 2 S.C.R. 559, at para. 26; *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27, at para. 21.

[23] Following that approach, I conclude that where parties jointly have the power to appoint an arbitrator and they either fail to agree, or they reach an agreement but one then refuses to follow through on it, "a person with power to appoint the arbitral tribunal has not done so", triggering the court's discretionary power to appoint within the meaning of s. 10(1)(b).

[24] The text of the section supports this reading. The phrase “person with power to appoint an arbitrator” is not limited to a person with the sole or exclusive authority to make the appointment. It clearly extends to a person whose power resides in the requirement for their agreement to an appointment. A person with that power will have “not done so” within the language of the section when they either fail to agree or, after agreeing, back away from the agreement and resist its implementation.

[25] The context and purpose of the Act also support this reading.

[26] First, the Act contemplates an important, but limited, role for the court in matters that are the subject of an arbitration agreement. It forbids court intervention in arbitrations except in accordance with the Act for specific purposes, among them “[t]o assist the conducting of arbitrations” and “[t]o ensure that arbitrations are conducted in accordance with arbitration agreements”: s. 6.

[27] An interpretation that allows the court to appoint an arbitrator where the appointment is frustrated by the failure of the parties to agree or carry out an agreement about who will be the arbitrator furthers the important role of the court to “assist in the conduct of arbitration”. And since an agreement about who the arbitrator will be is deemed part of the arbitration agreement (as a “further agreement in connection with the arbitration” – see s. 5(2) of the Act), an interpretation that allows the court to make an appointment where the parties have

agreed on the appointment and one side has backed away furthers the court's important role of ensuring "that arbitrations are conducted in accordance with arbitration agreements".

[28] Second, the Act contemplates a limited role for the court. One way it does this is by limiting appeal rights even where court intervention is permitted.[2] An interpretation of s. 10(1) that permits the court to meaningfully respond to a log jam in the appointment of an arbitrator is consistent with that limited role, because the corollary to finding the authority to make the appointment in s. 10(1) means that there is no appeal from an appointment order by reason of s. 10(2).

[29] This interpretation is also consistent with that suggested by a leading authority on arbitration as being applicable to a broad range of similarly worded arbitration legislation. In J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 4th ed. (Huntington, N.Y.: Juris, 2022), at p. 362, the author states:

> Under most of the Domestic Acts, the court, on a party's application, may appoint the arbitral tribunal if an arbitration agreement provides no procedure for the appointment of the arbitral tribunal or the person with power to appoint the tribunal has not done so after being given proper notice. There is no appeal from the court's appointment. […] Where the parties are to agree on a single arbitrator, they collectively are the "person with the power to appoint" and the same procedure would be

[2] Other examples of limited appeal rights are found in ss. 7(6) – no appeal from an order staying a proceeding in favour of arbitration; s. 15(6) – no appeal from an order removing an arbitrator; s. 16(4) no appeal from an order appointing a substitute arbitrator; and 17(9) – no appeal from an order made on review of an arbitrator's ruling on a preliminary question.

> followed if they collectively fail to appoint. [Internal citations omitted; emphasis added.]

[30] In the situation found by the application judge – an agreement to appoint Mr. Campbell that continued in force as it had not been repudiated – the authority to make an appointment under s. 10(1) of the Act was clearly engaged.

[31] It is important to note that Distillery does not argue that the court is powerless to make an appointment in the situation the application judge found. It argues, however, that the court's authority is simply the Superior Court's general jurisdiction to enforce an agreement, rather than any provision of the Act.

[32] With respect, there are several flaws in this argument. First, s. 6 of the Act provides that "[n]o court shall intervene in matters governed by this Act, except for the following purposes, in accordance with this Act" (emphasis added). Subject to exceptions which are inapplicable here, the Act governs arbitrations under arbitration agreements, which includes the SFA's arbitration provisions and the further agreement to appoint an arbitrator under it: ss. 2(1) and 5(2). Positing a free-standing jurisdiction, outside the Act, for the court to appoint an arbitrator is inconsistent with the Act's restriction on court intervention except "in accordance with this Act".[3]

[3] This not a case, such as *Brennan v. Dole* (2005), 11 B.L.R. (4th) 169 (Ont. C.A.), in which the question was whether the underlying arbitration agreement itself was enforceable against the party sought to be brought before the court-appointed arbitrator. Here, there is no dispute that the SFA is enforceable. Section 10 was not discussed in *Brennan.*

[33] Second, placing the jurisdiction to appoint outside the Act does an end around the restrictions on appeal rights that the Act has so carefully crafted. Restricted appeal rights are a feature of the Act.

[34] As the application judge's authority to make the appointment arose under s. 10(1), an appeal is precluded by s. 10(2): *Toronto Standard Condominium Corporation No. 2130 v. York Bremner Developments Limited*, 2014 ONCA 809, at para. 23.

[35] Distillery argues that even if the appeal from the appointment is precluded, the portion of the order that provides that Mr. Campbell would determine issues about his jurisdiction, his mandate, and the addition of a party is not part of the appointment order and therefore falls outside the appeal prohibition.

[36] I disagree. An appointment order will always relate to a dispute to be arbitrated. In giving effect to the principle in s. 17 of the Act,[4] which contemplates the arbitrator first ruling on his own jurisdiction and thus the scope of the dispute to be arbitrated, the application judge did not step outside the authority to make an appointment under the Act. It would be inconsistent with the Act to construe that part of the order as somehow severable from the appointment and subject to its own appeal regime.

[4] Section 17(1) of the Act provides: "An arbitral tribunal may rule on its own jurisdiction to conduct the arbitration".

Conclusion

[37] For these reasons I would quash the appeal.

[38] In accordance with the agreement of the parties, costs are awarded to the Condo Corp., payable by Distillery, in the amount of $20,000, inclusive of disbursements and applicable taxes.

Released: September 27, 2024 “B.Z.”

“B. Zarnett J.A.”
“I agree. P.J. Monahan J.A.”
“I agree. R. Pomerance J.A.”