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CASE SUMMARY: ONCA DISMISSES TENANT'S APPEAL FROM ARBITRAL AWARD AS RAISING QUESTIONS OF MIXED FACT AND LAW

Appeal by Brookfield from the dismissal of its appeal from an arbitrator's decision, setting the fair market rent payable to the City of Toronto pursuant to a ground lease.

Administrative law; Arbitration and award; Judicial review; Natural justice; Appeals; Evidence; Landlord and tenant

6524443 Canada Inc. v. Toronto (City), [2017] O.J. No. 3045, 2017 ONCA 486, Ontario Court of Appeal, June 13, 2017, H.S LaForme, K.M. van Rensburg and G. Huscroft JJ.A.

The appellant, 6524443 Canada Inc. ("Brookfield") and the respondent, the City of Toronto (the "City"), were parties to a 99-year ground lease agreement dated December 1, 1971 (the "Lease"). The Lease provided a fixed annual rent for the first 40 years of the lease. The second rental period was to be agreed between the parties, failing which either party could submit the issue to arbitration. Article 7 of the Lease provided: "The decision of the arbitrators shall be subject to appeal in accordance with the provisions of *The Arbitration Act*, R.S.O. 1970, as amended, or any successor Act".

The parties proceeded to arbitration over the determination of the market rent for the second rental period. As part of this, the parties entered into a separate comprehensive agreement, the Terms of Appointment of Arbitral Tribunal and Arbitration Agreement, which outlined the process for the arbitration (the "Arbitration Agreement"). Section 10 of the Arbitration Agreement provided for an appeal from the decision of the arbitrator as follows: "The decision of the arbitrators shall be subject to an appeal in accordance with the provisions of *The Arbitration Act*, 1991, S.O. 1991, c. 17, as amended, or any successor Act."

The matter ultimately proceeded to arbitration and an award was rendered. Brookfield filed a notice of appeal in the Superior Court alleging numerous errors and a breach of natural justice. The City responded by seeking to quash the appeal, relying on section 10 of the Arbitration Agreement saying that the *Arbitration Act*, 1991, applied and, under its provisions, there was no right of appeal, except on a question of law, with leave. Brookfield argued it had broader rights of appeal and sought to rely on certain affidavit evidence to this end, as well as the terms of the Lease.

The motion judge refused to consider the affidavit evidence and held that the Arbitration Agreement conclusively determined the issue, which limited appeals to questions of law, with leave (pursuant to the *Arbitration Act*). She therefore quashed the appeal. Brookfield appealed the order, citing two key grounds of appeal.

First, Brookfield argued that the motion judge erred by refusing to consider the affidavit evidence which it said was part of the critical “factual matrix” related to the parties intentions. The affidavit evidence set out the chronology and manner in which the Arbitration Agreement was prepared and what was intended when it was drafted. However, the Court of Appeal disagreed with Brookfield’s characterization of the affidavits (following the motion judge), confirming that the affidavit evidence did not, as Brookfiield submitted, offer “evidence of the parties mutual objectives”. Rather, the evidence was solely about the subjective intentions of Brookfield and accordingly was inadmissible for the purpose of determining the meaning of the language under the Arbitration Agreement. The Court of Appeal characterized the motion judge’s reasoning on this point as reasonable and based on the correct legal principles.

Second, Brookfield argued that the motion judge erred by failing to adequately consider section 7 of the Lease, which it said embodied the parties intentions as to how disputes were to be addressed. In essence, Brookfield sought to argue that it had broader rights of appeal, beyond those outlined in section 10 of the Arbitration Agreement that is subsequently agreed to. This argument too was rejected. The Court of Appeal confirmed that the Arbitration Agreement was a “stand alone” agreement that governed the arbitration and any appeals. Additionally, the Court of Appeal held that Brookfield’s argument was inconsistent with the fact that parties had set out in some detail the procedure for arbitration via the Arbitration Agreement. Given this, it was inconceivable to say that the Lease would govern the rights of appeal from the arbitrator’s decision. To this end, the Court of Appeal observed that had the parties intended broader rights of appeal, these could have simply been set out in the Arbitration Agreement, which they were not.

The Court of Appeal therefore dismissed Brookfield’s appeal.

This case was digested by Adam R. Way of Harper Grey LLP. If you would like to discuss this case further, please feel free to contact him directly at away@harpergrey.com or review his biography at http://www.harpergrey.com.