

COURT OF APPEAL FOR ONTARIO

CITATION: PQ Licensing S.A. v. LPQ Central Canada Inc., 2018 ONCA 331

DATE: 20180405

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Sharpe, LaForme and van Rensburg JJ.A.

BETWEEN

PQ Licensing S.A., Vincent Herbert and Jean-Marie Josi

Applicants (Appellants)

and

LPQ Central Canada Inc.

Respondent (Respondent)

Geoffrey B. Shaw and Eric Mayzel, for the appellants

David M. Golden and Marco P. Falco, for the respondent

Heard: January 30, 2018

On appeal from the judgment of Justice Victoria R. Chiappetta of the Superior Court of Justice, dated January 17, 2017, dismissing an appeal from the preliminary award of Arbitrator Ronald G. Slaght, dated June 10, 2016.

van Rensburg J.A.:

A. OVERVIEW

[1] This is an appeal from a judgment of a judge of the Superior Court dismissing an appeal from an arbitrator's decision on a preliminary issue. The

parties are engaged in a dispute about a franchisee's purported rescission of their franchise agreement. The agreement provided for the mediation, then arbitration, of disputes. On the franchisor's preliminary motion, the arbitrator determined that the limitation period of two years under the *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B had not expired, and that the arbitration of the parties' dispute could therefore proceed. The franchisor's appeal to the Superior Court was dismissed. The further appeal to this court is by leave.

[2] For the reasons that follow, I would dismiss the appeal. The standard of review from the decision of the arbitrator is reasonableness. The arbitrator was engaged in the determination of an issue that depended on the interpretation of the parties' contract, and the application of relevant legal principles, to determine whether the time for commencement of the arbitration process had expired. There is nothing about the issue decided by the arbitrator that would displace the presumptive standard of reasonableness in appeals of arbitral decisions.

[3] The arbitrator's decision that the arbitration was not time-barred was reasonable. It was based on his reasonable conclusions that (i) the parties' agreement provided for mediation as a precondition to arbitration; (ii) the requirement to mediate "in Delaware" could be severed from the parties' agreement; and (iii) applying s. 5(1)(a)(iv) of the *Limitations Act*, the two year limitation period for arbitration commenced on the date that mediation was deemed completed.

B. THE DISPUTE

[4] The parties to the appeal are the appellants (together, the “franchisor”) and the respondent, a franchisee. In 2008 they entered into an Area Development Agreement (the “franchise agreement”) for the development by the franchisee of 13 “Le Pain Quotidien” locations in the provinces of Ontario and Québec. On August 11, 2009 the respondent delivered a notice of rescission, asserting that the franchisor had breached its disclosure obligations under s. 5 of the *Arthur Wishart Act (Franchise Disclosure)*, 2000, S.O. 2000, c. 3 (the “AWA”). On October 8, 2009 the franchisor disputed the validity of the franchisee’s notice of rescission.

[5] On October 6, 2011, almost two years later, the franchisee commenced an action in the Superior Court. The franchisor objected, relying on ss. 31.03 and 31.04 of the franchise agreement, which required disputes between the parties to be arbitrated after mediation (the “ADR Provisions”). By letter dated January 16, 2012 the franchisee asserted that the mediation requirement was void because it required mediation in the State of Delaware and that, in any event, the entire franchise agreement was voided by the franchisor’s breaches. The franchisor responded by letter dated January 23, 2012 stating that the mediation clause was not void, proposing a mediation in Toronto, and indicating that it would bring a stay motion if the franchisee did not agree to first mediate and then submit to arbitration any claims not resolved by mediation.

[6] The court action remained dormant until it was administratively dismissed for delay in 2013. When the franchisee tried to revive the action, the franchisor relied on the franchisee's failure to commence an arbitration, which it asserted was out of time. Penny J. stayed the court action in July 2013 on the basis of the ADR Provisions. He directed that the limitation period issue be determined by the arbitrator. The franchisee then served a notice of arbitration on October 7, 2013.

[7] The parties agreed to the appointment of Ronald G. Slaght as arbitrator. As a preliminary issue, he had to determine whether the arbitration was out of time because it was not commenced within two years of October 8, 2009, the date the franchisor disputed the franchisee's notice of rescission. The arbitrator decided this issue against the appellant franchisor.

C. RELEVANT CONTRACTUAL AND STATUTORY PROVISIONS

[8] At the center of the dispute are ss. 31.03 and 31.04 of the franchise agreement, comprising the ADR Provisions, s. 10 of the AWA, and the relevant provisions of the *Limitations Act*.

[9] Sections 31.03 and 31.04 of the franchise agreement provide in part:

31.03 Except for disputes [relating to intellectual property], the parties agree that before resorting to arbitration, litigation or any other dispute resolution procedure, if any dispute between them ... cannot be settled through negotiation by diligent effort, they will first attempt in good faith to settle the dispute or claim by non-binding mediation conducted in the state of Delaware under the auspices and then-prevailing commercial mediation rules of the American Arbitration Association.... The parties' obligation to mediate will be deemed to be

satisfied when six hours of mediation have been completed (whether or not the parties have resolved their differences) or sixty days after a mediation demand has been made if any party fails to appear or participate in good faith in the mediation.

31.04 Except for disputes [relating to intellectual property], all controversies, disputes or claims arising between us ... and you ... based on any theory or facts, and whether or not arising out of this Agreement and which have not been resolved through mediation as provided in Section 31.03 above will be submitted for arbitration as provided in this Section 31.04 including (without limitation) any claim for equitable or interlocutory relief and any dispute as to the arbitrability of the controversy, dispute or claim.

[10] Section 10 of the AWA provides:

Any provision in a franchise agreement purporting to restrict the application of the law of Ontario or to restrict jurisdiction or venue to a forum outside Ontario is void with respect to a claim otherwise enforceable under this Act in Ontario.

[11] The parties agree that the *Limitations Act* applies, and that the applicable limitation period for arbitration in this case is two years from when the claim was “discovered”. Section 5 of the *Limitations Act* provides in part:

5.(1) A claim is discovered on the earlier of,

(a) the day on which the person with the claim first knew,

(i) that the injury, loss or damage had occurred,

(ii) that the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) that the act or omission was that of the person against whom the claim is made, and

(iv) that, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) the day on which a reasonable person with the abilities and in the circumstances of the person with the claim first ought to have known of the matters referred to in clause (a).

(2) A person with a claim shall be presumed to have known of the matters referred to in clause (1) (a) on the day the act or omission on which the claim is based took place, unless the contrary is proved.

D. THE ARBITRATOR'S DECISION

[12] The arbitrator held that the arbitration of the parties' dispute was not time-barred. He noted that the parties plainly agreed in their franchise agreement to a comprehensive scheme for the resolution of their disputes, which included both mediation and arbitration. He interpreted the ADR Provisions to require mediation of the parties' dispute as a precondition to arbitration.

[13] The arbitrator rejected the franchisor's argument that the entire mediation provision was void because, in requiring the parties to mediate in Delaware rather than Ontario, it infringed s. 10 of the *AWA*. He held that the reference to Delaware was severable from the rest of the mediation provision. He reasoned that this approach was consistent with the remedial purpose of the *AWA*, and it would be contrary to that purpose to void the entire provision and deny the franchisee its otherwise valid rights to mediate its claim. He rejected the franchisor's argument that severance, as a matter of law, was not available.

[14] In determining the limitations issue, the arbitrator concluded that arbitration was not “appropriate” within the meaning of s. 5(1)(a)(iv) of the *Limitations Act* until after the mediation regime in s. 31.03 had been complied with.

[15] The arbitrator explained, at para. 164:

I find that a condition precedent to litigation has the effect of suspending the running of the limitation period under Section 5(1)(a)(iv) of the *Limitations Act* with the result in this case that because Section 31.03 of the party’s agreement creates such a condition precedent, the limitation period was suspended until the party’s obligations under that clause were met. In this instance, the Franchisee refused to engage in Mediation at or about January 16, 2012. Thus, the Mediation requirement had been completed within the meaning of Section 31.03 60 days after that date. The result is that the limitation period commenced to run then and the Franchisee’s Notice to Arbitrate dated October 7, 2013, was within the two-year limitation period....

[16] The arbitrator disagreed with the franchisor’s argument that such an interpretation would create an open-ended limitation period, permitting the franchisee to delay arbitration indefinitely. He described s. 31.03 as “bilateral” in the sense that either party could have started the limitations clock running by requesting mediation. This is what the franchisor eventually did when it insisted on mediation. The mediation requirement was satisfied 60 days after mediation was rejected by the franchisee.

[17] The arbitrator addressed other arguments of the parties, including the question of waiver and the effect of their conduct on the limitations issue. It is

unnecessary to refer to his reasons on these issues, which are not relevant to this appeal.

E. THE APPEAL DECISION

[18] The appeal judge rejected the franchisor's submission that the arbitrator's decision was subject to review on a correctness standard. Instead, she held that the applicable standard was reasonableness, consistent with *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633.

[19] The appeal judge concluded that the arbitrator's finding that mediation was a precondition to arbitration was based on a reasonable interpretation of the franchise agreement that reflected the parties' intentions about how to resolve their disputes.

[20] The franchisor argued that the arbitrator erred by finding that a proceeding was not "appropriate" until after mediation had failed because the franchisee must have known a proceeding was appropriate when it started a legal action in October 2011.

[21] The appeal judge disagreed. She referred to this court's decision in *407 ETR Concession Co. v. Day*, 2016 ONCA 709, 133 O.R. (3d) 762, leave to appeal refused, [2016] S.C.C.A. No. 509, at para. 40, where Laskin J.A. stated:

[U]nder s. 5(1)(a)(iv) of the *Limitations Act, 2002*, the date a proceeding would be an appropriate means to recover a loss must have "regard to the nature of the ... loss". So,

in fixing the appropriate date, it may not be enough that the loss exists and the claim is actionable. If the claim is the kind of claim that can be remedied by another and more effective method provided for in the statute, then a civil action will not be appropriate until that other method has been used. [Emphasis added.]

[22] Applying this principle, the appeal judge held that the franchisee's commencement of an action in 2011 was "part of the narrative", but not relevant to the application of s. 5(1)(a)(iv) of the *Limitations Act*. Rather, the determination of when a proceeding was "appropriate" turned on "the parties' choice to have their disputes resolved by arbitration if mediation as a precondition [was] unsuccessful."

[23] The appeal judge also upheld the arbitrator's decision to sever the reference to Delaware in the ADR Provisions, rather than to declare the entire mediation provision void. She agreed with the arbitrator that doing so served the remedial purpose of the AWA while encouraging mediation in commercial disputes.

F. ISSUES AND ANALYSIS

[24] The appellant asserts that both the arbitrator and the appeal judge erred in the interpretation of the franchise agreement and relevant statutory provisions in refusing to allow its preliminary motion to dismiss the arbitration as out of time.

(1) Standard of Review

[25] The appellant submits that the appropriate standard of review of the arbitrator's decision was correctness, and that the appeal judge therefore erred when she dismissed the appeal after finding the decision to be reasonable.

[26] The standard of review of a decision of an arbitrator is "almost always" reasonableness. This includes when the arbitrator is determining questions of law, except in rare circumstances, such as where a constitutional question, or a question of law of central importance to the legal system and outside the adjudicator's expertise, is at issue: *Sattva*, at para. 106; *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32, [2017] 1 S.C.R. 688, at para. 74.

[27] The appellant makes two arguments in favour of a correctness standard of review. I would not give effect to either argument.

[28] First, the appellant relies on the Supreme Court's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37, [2016] 2 S.C.R. 23. In particular, the appellant refers to the statement of Wagner J. (as he then was), at para. 4, that where an appeal involves the interpretation of a standard form contract, where the interpretation issue is of precedential value, and there is no meaningful factual matrix, the interpretation of the contract is "better characterized as a question of law subject to correctness review".

[29] The appellant asserts that, while the franchise agreement is not technically a “standard form” contract, dispute resolution provisions that provide for arbitration after mediation are commonplace, and that a standard interpretive approach would be of precedential value to other parties with similar contractual dispute resolution provisions. The appellant also points to the arbitrator’s observation in this case (at paras. 66 and 67 of his reasons) that the interpretation of the franchise agreement did not depend on the factual matrix.

[30] The appellant’s reliance on the analysis in *Ledcor* is misplaced. *Ledcor* involved an appeal in a court action, and not the review of the decision of an arbitrator. The characterization of the interpretation of a standard form contract of precedential value as a question of law (rather than as a question of mixed fact and law) drove the determination of the standard of review in the civil litigation context, where pure questions of law are reviewable on a correctness standard. As the Supreme Court noted in *Teal Cedar Products*, at para. 78, while the nature of the question (whether legal, factual or mixed) is dispositive of the standard of review in appeals from civil litigation judgments of the courts, it is not dispositive in the context of commercial arbitral awards by specialized arbitrators. “The mere presence of a legal question does not, on its own, preclude the application of a reasonableness review in a commercial arbitration context”: *Teal Cedar Products*, at para. 75.

[31] The appellant's second argument in favour of a correctness standard of review is that the arbitrator was called upon to interpret the *Limitations Act* and s. 10 of the *AWA*, which engaged discrete questions of law of general application outside the arbitral context, and warrant a correctness standard of review.

[32] Again, *Sattva* instructs otherwise. A correctness standard of review may apply where the issue before an arbitrator is a rare or exceptional question of law requiring a correctness standard to be applied, such as a constitutional question, or a general question of law that is both of central importance to the legal system as a whole and outside the adjudicator's specialized area of expertise: *Sattva*, at para. 106; *Ottawa (City) v. Coliseum Inc.*, 2016 ONCA 363, 352 O.A.C. 199, at para. 31; *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609, 131 O.R. (3d) 625, leave to appeal refused, [2016] S.C.C.A. No. 392, at paras. 41 and 42. No such exceptional legal question was determined by the arbitrator in this case.

[33] Here, the arbitrator, a specialized decision-maker who was selected by the parties, decided a preliminary issue within his jurisdiction that involved the interpretation of the parties' contract, the franchise agreement, and the application of the law to the particular facts of the case. To the extent that the arbitrator interpreted and applied the law to the questions he had to determine, the reasonableness standard would still apply.

[34] The reasonableness standard of review therefore applies to the appeal of the arbitrator's decision on the preliminary issue.

(2) The Arbitrator's Decision Was Reasonable

[35] Applying a reasonableness standard of review requires the court to determine whether the arbitrator's decision fell "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at para. 47.

[36] In considering whether the limitation period for arbitration of the dispute had expired, the arbitrator had to determine when the franchisee's claim was "discovered". This required his interpretation of the franchise agreement, in particular the ADR Provisions, and the application of the "discoverability" provisions of the *Limitations Act* to the franchisee's claim. The arbitrator characterized fulfillment of the mediation condition as a precondition to arbitration. He found that under s. 5(1)(a)(iv), arbitration was not an "appropriate means" to resolve the dispute until after the mediation condition was fulfilled. He gave effect to the mediation clause after severing the requirement that mediation take place in Delaware, as it was contrary to s. 10 of the AWA.

[37] In oral argument the appellant characterized the question on appeal as "whether a limitation period can be tolled for almost four years from the accrual of

a cause of action on the basis that the claimant did not notionally discover its claim until a mediation clause it had eschewed and denied had been pursued”.

[38] This characterization is inaccurate. What happened here was not a “tolling” of a limitation period, but the application of the criteria of discoverability under s. 5 of the *Limitations Act*, and in particular s. 5(1)(a)(iv), to the parties’ circumstances, including the franchise agreement which provided the mechanism for the resolution of their disputes. As Laskin J.A. stated in the *407 ETR* case, at paras. 33 and 34, the appropriateness criterion in s. 5(1)(a)(iv) “can have the effect ... of postponing the start date of the two-year limitation period beyond the date when a plaintiff knows it has incurred a loss because of the defendant’s actions”, and “when an action is “appropriate” [under s. 5(1)(a)(iv) of the *Limitations Act*], depends on the specific factual or statutory setting of each individual case”.

[39] The appellant makes four arguments, none of which persuade me that the arbitrator’s decision was unreasonable.

[40] First, the appellant says that the arbitrator erred when he found that the mediation provision “tolled” the applicable limitation period after specifically finding that s. 22 of the *Limitations Act*, which governs tolling agreements, did not apply. That section requires an express and bilateral agreement between the parties that contains a clear and unambiguous request by one party to toll a limitation period and an equally clear and unambiguous affirmative response by the other: G. Mew,

D. Rolph and D. Zacks, *The Law of Limitations*, 3rd ed. (Toronto: LexisNexis Canada, 2016), at p. 246. The appellant argues that, after observing that these requirements were not met, the arbitrator went on to find that the mediation provision in the ADR Provisions was a tolling agreement.

[41] This submission has no merit. The arbitrator was clear that the franchisee did *not* rely on s. 22, and that there was no argument to be made based on this section (at paras. 172 and 180). Although the arbitrator used the term “tolling” on more than one occasion in his discussion of when the claim was discovered and the limitation period began to run, it is clear from his reasons that he was not applying s. 22 of the *Limitations Act*, nor was he invited to do so. Rather, his conclusion was that mediation was a condition precedent to litigation that had the effect of “suspending” (para. 164) or “tolling” (para. 140) the running of the limitation period under s. 5(1)(a)(iv).

[42] Second, the appellant asserts that mediation could not reasonably be a precondition to the arbitration for disputes under the franchise agreement because it would result in the franchisee being able to indefinitely extend the period for the commencement of arbitration. The argument here is about a lack of certainty for the running of any limitation period.

[43] The arbitrator reasonably rejected this argument. As he fairly observed, either party could have put in motion the ADR process under their agreement, to

start the running of the limitation period. As for the franchisor's argument to this court that it would have no incentive to initiate the mediation of a dispute that might simply go away, the mediation process to which the parties have agreed is no less certain or available simply because a party for one reason or another might choose not to invoke it. Indeed, it was the franchisor's demand for mediation, in response to the franchisee's commencement of a legal proceeding, that started the running of the limitation period.

[44] The appellant contends that the mediation before arbitration precondition would make the limitation period uncertain because a franchisee could unilaterally postpone the "discovery" of a claim it chooses not to reveal and then pursue mediation years later. Where this happens, the franchisor will have no way of knowing about the claim, or initiating mediation to start the running of the limitation period. Again, the appellant's argument is without merit. Section 23.01 of the franchise agreement requires the franchisee to provide immediate notice of any alleged breach or violation of the agreement and contains its own time limit of one year for notice, failing which any action is permanently barred. And, as for claims based on non-disclosure, s. 6 of the *AWA* contains its own time limits in which the franchisee must give notice of rescission. Accordingly, once notice is given, the franchisor will be aware of the dispute and in a position to invoke the mediation precondition to start the running of the limitation period.

[45] The appellant's third argument is that the arbitrator's discoverability analysis was wrong, or unreasonable, because he ignored s. 5(2) of the *Limitations Act*. Section 5(2) is a presumption that a claim is discovered where the facts giving rise to the claim occur and places the onus on a plaintiff to rebut the presumption. The appellant says that the franchisee could not have rebutted the presumption because, it must have known that a "proceeding" would be appropriate when it started its court action. The appellant relies on this court's decision in *Hamilton (City) v. Metcalfe & Mansfield Capital Corporation*, 2012 ONCA 156, 290 O.A.C. 42, upholding a motion judge's rejection of an argument based on s. 5(1)(a)(iv) of the *Limitations Act*, where a plaintiff's commencement of an earlier court proceeding demonstrated its awareness of the possible expiry of a limitation period.

[46] Here, the presumption in s. 5(2) had no role to play in the analysis the arbitrator was required to perform. No one disputed that, apart from the question of mediation as a first step, the claim would otherwise have been discovered when the notice disputing the rescission was delivered on October 8, 2009. The arbitrator recognized that it was up to the franchisee to establish that the limitation period for commencing arbitration was suspended by the mediation requirement in the ADR Provisions. Ultimately, he was satisfied that this was the case.

[47] The question was not when the appellant knew it had a claim, or even that legal action was appropriate (the issue in *Hamilton*), but when the franchisee knew

or ought reasonably to have known that arbitration, which was the dispute resolution proceeding the parties had bargained for, was the appropriate means to resolve the dispute. The arbitrator reasonably concluded that the answer to this question depended on the ADR Provisions and the parties' agreement to a dispute resolution mechanism which required an attempt at mediation before arbitration could be commenced. As the appeal judge noted, the determination of when a proceeding was "appropriate" turned on "the parties' choice to have their disputes resolved by arbitration if mediation as a precondition [was] unsuccessful." Under this interpretation, the parties would only know that arbitration was appropriate when the mediation requirement had been exhausted. As such, the date of commencement of the franchisee's misguided legal action was not determinative of the s. 5(1)(a)(iv) "appropriateness" inquiry.

[48] Finally, the appellant asserts that the arbitrator erred in excising only that part of the mediation clause that referred to the requirement to mediate in Delaware, when he ought to have concluded that the entire mediation provision was void. If the entire mediation provision was void, then there would be no precondition to arbitration that would suspend the running of the limitation period.

[49] Section 10 of the *AWA* provides that a provision in a franchise agreement is void when it purports to, among other things, restrict a venue to a forum outside Ontario. The only part of the mediation clause that offends s. 10 is the requirement

that the mediation, which the parties agreed would precede any arbitration, will take place in Delaware.

[50] The arbitrator adopted a “blue pencil” approach, drawing a line through the reference to the State of Delaware. This approach, which severs or removes any illegal features of a contract, is available where it would further the parties’ contractual intentions: *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157, at paras. 29 and 32; *2176693 Ontario Ltd. v. Cora Franchise Group Inc.*, 2015 ONCA 152, 124 O.R. (3d) 776, (“*Cora Franchise*”), at paras. 35 to 37.

[51] Contrary to the appellant’s submission, the arbitrator’s severance of the “Delaware” location for mediation was not precluded by anything stated by this court in *Cora Franchise*. There the court refused to “read down” an unenforceable provision in a franchise agreement that required the delivery of a release that would have been void under s. 11 of the AWA because to do so would have defeated the purpose of s. 11. The case discusses both “void” provisions and those that are “unenforceable” because they require something to be done that would be void, but does not, as the appellant contends, preclude severance of provisions that are void. The issue here was what part of the mediation provision was void. The arbitrator reasonably rejected the appellant’s argument that the entire mediation provision was void, and severed only the “provision” for mediation in Delaware, that s. 10 of the AWA rendered void.

[52] The parties' franchise agreement expressly contemplated what the arbitrator did here. Section 30.02 provides that, in the event of any conflict between any provision of the agreement and any law, any affected provision will be "curtailed and limited only to the extent necessary to bring it within the requirement of the law". Removal of the requirement to mediate in Delaware served to uphold the ADR process the parties agreed to, that anticipated mediation before arbitration. It would "cure the illegality" while remaining as close as possible to the intentions of the parties: *Cora Franchise*, at para. 36.

[53] Accordingly, the arbitrator's severance of the Delaware requirement to meet s. 10 of the AWA was reasonable. Indeed, it would have been unreasonable for him to have accepted the franchisor's argument to exclude the entire mediation clause, which was an integral component of the ADR Provisions, especially in circumstances where the franchisor had expressly relied on the obligation to mediate, and had proposed that a mediation take place in Toronto.

[54] For all of these reasons, I agree with the appeal judge that the arbitrator's decision on the preliminary issue of whether the limitation period had expired for the arbitration of the parties' dispute, was reasonable.

G. DISPOSITION

[55] Having concluded that the standard of review of the arbitrator's decision was reasonableness and that the decision was reasonable, I would dismiss the appeal.

I would award costs of the appeal, including the costs of the motion for leave to appeal, to the respondent in the sum of \$28,000, which amount is inclusive of disbursements and HST.

“K. van Rensburg J.A.”

“I agree Robert J. Sharpe J.A.”

“I agree H.S. LaForme J.A.”

Released: April 5, 2018