COURT OF APPEAL FOR ONTARIO

CITATION: Popack v. Lipszyc, 2016 ONCA 135
DATE: 20160218
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Doherty, Pardu and Benotto JJ.A.

BETWEEN

Joseph Popack, United Burlington Retail Portfolio Inc. and United Northeastern Retail Portfolio Inc.

Applicants (Appellants)

and

Moshe Lipszyc and Sara Lipszyc

Respondents (Respondents)

Marlys A. Edwardh and Daniel Sheppard, for the appellants

Colin P. Stevenson and Neil G. Wilson, for the respondents

Heard: January 20, 2016

On appeal from the order of Justice Matheson of the Superior Court of Justice, dated June 1, 2015, with reasons reported at 2015 ONSC 3460.

Doherty J.A.:

I

OVERVIEW

[1] The appellant, Joseph Popack, and the respondent, Moshe Lipszyc, agreed to submit their dispute concerning certain properties in Ontario to arbitration by a New York Rabbinical Court (the "panel"). Under the arbitration agreement, the panel was free to choose the appropriate procedures by which to conduct the arbitration, no record was to be kept of the evidence or the submissions, and no reasons for decision were required from the panel. The arbitration agreement did, however, stipulate that the parties had a right to appear before the panel at all "scheduled hearings" of the panel.

[2] During the hearing, Mr. Lipszyc's representative suggested that the panel should hear from the arbitrator in a previous attempted arbitration, Rabbi Schwei. Mr. Popack's representative advised the panel that Mr. Popack did not object to the panel hearing from Rabbi Schwei. It would appear that nothing more was said by the parties or the panel about the possibility of Rabbi Schwei giving evidence.

[3] Without notice to either Mr. Lipszyc or Mr. Popack, the panel met *ex parte* with Rabbi Schwei on July 8, 2013. There is no record of this meeting.

[4] The panel issued its award in August 2013.

[5] Mr. Popack brought an application pursuant to the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 (the "*ICAA*"), to set aside the award on the ground that the panel, by conducting the *ex parte* meeting with Rabbi Schwei without notice to the appellant, had breached the procedure agreed upon by the parties. Mr. Popack argued that the failure to follow the procedure agreed upon by the parties necessitated the setting aside of the award under Article 34(2)(a)(iv) of the UNCITRAL Model Law on International Commercial Arbitration (a schedule to the *ICAA*).

[6] The application judge found that the *ex parte* meeting with Rabbi Schwei without notice to the parties breached the procedure the parties had agreed upon. She also accepted that the breach provided a ground upon which she could set aside the award under Article 34(2)(a)(iv) of the Model Law. The application judge went on, however, to hold that under Article 34(2)(a)(iv) she had a discretion as to whether to set the award aside. After referring to several factors relevant to the exercise of that discretion, the application judge concluded she would not set aside the award despite the procedural error by the panel. She dismissed Mr. Popack's application. He appeals.

[7] On the appeal, the parties accept that Article 34(2)(a)(iv) applies and that the application judge correctly determined that the *ex parte* meeting with Rabbi Schwei without notice to the parties breached the procedure agreed upon by the parties. The appeal focuses exclusively on the application judge's decision not to

set aside the award despite the failure to comply with the agreed upon procedure.

[8] Mr. Popack acknowledges that Article 34(2)(a)(iv) gave the trial judge a discretion as to whether the award should be set aside. He contends, however, that the application judge drew the boundaries of that discretion far too widely and, in any event, considered immaterial factors in arriving at her decision. Mr. Popack argues that the application judge having determined that the procedural breach was "significant" (para. 73), and that there was a "possibility of prejudice" to Mr. Popack (para. 69), should have set aside the award.

[9] Mr. Lipszyc contends that all of the factors identified by the application judge were properly considered by her in the exercise of her discretion. He further submits that the application judge's exercise of her discretion, particularly in the context of a review of a private arbitral award, attracts the highest degree of deference in this court. Mr. Lipszyc argues that, viewed through the deference lens, the application judge's order should stand.

II

THE TWO LETTERS

(a) Mr. Popack's letter to the panel

[10] Before examining the application judge's reasons, it is necessary to describe two documents that were part of the record before her. The first is a

letter dated July 15, 2013 from Mr. Popack's representative to the arbitration panel. This letter was sent to the panel about a week after its meeting with Rabbi Schwei and while the arbitration was still ongoing. The letter was sent to the panel without any notice to Mr. Lipszyc or his representative. Mr. Lipszyc became aware of both the *ex parte* meeting with Rabbi Schwei and the *ex parte* communication with the panel by Mr. Popack's representative sometime after this application was commenced.

[11] In the July 15, 2013 letter, Mr. Popack's representative began by setting out his position as to the terms of the award that the panel should make. He then turned to the meeting with Rabbi Schwei. That part of the letter began: "we heard a rumor that the Rabbinical Court went to Rabbi Schwei to discuss a certain release, etc." (emphasis in original).

[12] Mr. Popack's representative went on to set out Mr. Popack's version of the events relevant to the release and Rabbi Schwei's involvement in those events. This part of the letter concluded:

> We do not know what Rabbi Schwei recalls or does not recall; however, his testimony against a contract written and signed between the parties is worthless.
>
> In light of the above, it does not diminish Popack's right, because had Rabbi Schwei testified in his presence, he would have shown him the signed agreement that was written at the time; perhaps Rabbi Schwei's recollection would have been different than that which he said, (especially since Rabbi Schwei already told the Rabbinical Court many years ago at the beginning of

> the Rabbinical Court arbitration, saying "that he does not recall anything").

[13] Having set out Mr. Popack's position in respect of Rabbi Schwei's involvement in this *ex parte* communication with the panel, Mr. Popack's representative made the following request:

> It is therefore our request that if the Rabbinical Court considers Rabbi Schwei's testimony (which was without our knowledge) we request a Rabbinical Court hearing about this, in the defendant's presence, and the Rabbinical Court should consider this as well. [Emphasis added.]

[14] The letter concluded with an indication that Mr. Popack's representative had further arguments to make about the release. He added "please let me know about this, because we are not prepared to lose many millions based on *ex parte* testimony; therefore, we want a Rabbinical Court hearing about this."

[15] Counsel for Mr. Popack reads the July 15, 2013 letter as an unqualified objection by Mr. Popack to the *ex parte* proceeding and a declaration that he would have exercised his right to be present and question Rabbi Schwei had he been aware of the hearing. Counsel for Mr. Lipszyc reads this letter as a waiver of any complaint about the *ex parte* proceeding and a demand for a hearing before the panel only if the panel was of the view that it considered Rabbi Schwei's testimony relevant to the award it would make.

[16] The application judge referred to the July 15, 2013 letter in the course of listing the factors relevant to the exercise of her discretion (para. 71). She

treated the letter as a qualified request for a hearing if the panel regarded Rabbi Schwei's evidence as relevant and as an improper *ex parte* communication made on Mr. Popack's behalf to the panel without Mr. Lipszyc's knowledge.

(b) The panel's letter

[17] The second document is a letter from the panel prepared in response to inquiries made by counsel for Mr. Lipszyc after this application was commenced. In their letter, the panel indicated that Mr. Lipszyc's representative had requested that Rabbi Schwei give evidence and the panel had granted the request. The letter indicated that neither party "objected to our decision, or requested the opportunity to be present at the meeting". The panel further indicated in the letter that had either party wanted to attend the meeting with Rabbi Schwei, they would have been allowed to do so.

[18] The panel stated in the letter that the information provided by Rabbi Schwei had no impact on their award. The panel referred to Mr. Popack's request in his letter that the panel conduct a hearing if it viewed Rabbi Schwei's evidence as germane. The panel indicated that it did not hold a hearing as it was satisfied that Rabbi Schwei's evidence "didn't make any change in our ruling".

[19] Counsel for Mr. Popack argued that the letter from the panel should be given no weight by the application judge for three reasons. First, as acknowledged by counsel for Mr. Lipszyc, the letter did not accurately describe

the events that occurred when Mr. Lipszyc raised the possibility of Rabbi Schwei testifying before the panel. Second, the letter was a self-serving attempt by the panel to justify its failure to follow the procedure the parties had agreed upon. Third, the contents of the letter breached the panel's obligation to maintain the secrecy of its deliberations.

[20] The application judge appreciated Mr. Popack's arguments that the letter should be given no weight. She ultimately indicated she would take the letter into account in exercising her discretion (para. 68). The application judge, however, did not accept the contents of the letter as an accurate account of the dialogue between the parties and the panel when the possibility of Rabbi Schwei testifying arose. She also did not accept as determinative the panel's indication that Rabbi Schwei's testimony had no impact on the award.

III

THE APPLICATION JUDGE'S REASONS

[21] The parties agree that the *ICAA* applies to the award of the panel. That Act brings the Model Law into Ontario domestic law. Pursuant to Article 34(2)(a)(iv), a court "may" set aside an award if "the arbitral procedure was not in accordance with the agreement of the parties".

[22] Under the terms of the arbitration agreement, the parties were entitled to be "informed by the arbitrators of the scheduled hearing(s)". Neither Mr. Popack,

nor Mr. Lipszyc was informed of the panel's meeting with Rabbi Schwei. This *ex parte* without notice meeting meant that the procedure followed by the panel "was not in accordance with the agreement of the parties" and triggered the power under Article 34(2)(a)(iv) to set aside the award.

[23] In concluding that the award should not be set aside, the application judge considered several factors:

i. The panel did not meet with Rabbi Schwei on its own initiative, but only after Mr. Lipszyc had requested that Rabbi Schwei's evidence be heard and Mr. Popack agreed that the panel could hear Rabbi Schwei's evidence (para. 66);

ii. While the absence of a transcript of the proceedings before the panel made it difficult to know exactly what had happened, based on the material filed on the application, the panel could well have been under an honest misapprehension that the parties were satisfied that it could take Rabbi Schwei's evidence in their absence (para. 67);

iii. Rabbi Schwei was not aligned with either party and had served as a neutral arbitrator in the earlier attempt at arbitration (para. 69);

iv. Mr. Popack could not show actual prejudice, however, there was "the possibility of prejudice for both sides" flowing from the *ex parte* meeting with Rabbi Schwei (para. 69);

v. Setting aside the award would mean added costs as the expenses associated with the eight-week arbitration would be lost and a new arbitration required. The application judge referred to this as not "especially significant" (para. 70);

vi. Mr. Popack's father had given evidence before the panel. He had since died. If the award were to be set aside, a new hearing would be required and Mr. Popack Sr.'s evidence would not be available to the parties (para. 70);

vii. When Mr. Popack became aware of the meeting with Rabbi Schwei, he made only a qualified objection to the procedure followed and requested a hearing only if the panel regarded Rabbi Schwei's evidence as relevant to its decision (para. 71); and

viii. In communicating *ex parte* with the panel and without notice to Mr. Lipszyc, Mr. Popack had himself contravened procedural rules and raised fairness concerns (para. 71).

[24] The first two factors pertain to the seriousness of the procedural breach in the specific circumstances. Factors three and four relate to the potential impact of the breach on the award made. Factors five and six address the potential prejudice to the ultimate effective arbitration of the dispute should the award be set aside. Factors seven and eight go to the conduct before the panel of the complaining party (Mr. Popack) after he became aware of the procedural error.

IV

SHOULD THIS COURT SET ASIDE THE AWARD?

[25] The order under appeal is discretionary. Virtually all discretionary orders involve the balancing of competing interests. In most cases, the existence of a discretion implies that different judges can reasonably arrive at different results. Consequently, appellate courts will defer to the exercise of discretion at first instance absent a clearly identifiable error in the application of the law, a material misapprehension of the relevant evidence, or a result that is clearly wrong in the sense that it is not defensible on an application of the relevant law to the facts: see *Penner v. Regional Municipality of Niagara (Regional Police Services Board)*, 2013 SCC 19, [2013] 2 S.C.R. 125, at para. 27.

[26] In addition to the generally applicable principles that urge deference in the review of all discretionary decisions, the nature of the specific order under appeal can also enhance the deference rationale. The application judge exercised her discretion in the context of a review of an award rendered in a private arbitration before a panel chosen by the parties to determine the dispute between them. The parties' selection of their forum implies both a preference for the outcome arrived at in that forum and a limited role for judicial oversight of the award made in the arbitral forum: see *Quintette Coal Ltd. v. Nippon Steel Corp.* (1990), [1991] 1 W.W.R. 219, at p. 229 (B.C.C.A.), leave to appeal refused, [1990] S.C.C.A. No.

431; *Rhéaume v. Société d'investissements l'Excellence inc.*, 2010 QCCA 2269, at paras. 52-62, leave to appeal refused, [2011] S.C.C.A. No. 57. The application judge's decision to not set aside the award is consistent with the well-established preference in favour of maintaining arbitral awards rendered in consensual private arbitrations.

[27] Counsel for the appellant accepts that deference is a central feature of appellate review of discretionary decisions. He submits, however, that deference must end when the exercise of discretion is tainted by the application of an erroneous legal principle. Counsel argues that the application judge erred in principle in failing to conform the exercise of her discretion under Article 34(2) of the Model Law to the manner in which that discretion has been exercised by courts in other jurisdictions that also apply the Model Law.

[28] Counsel submits that conformity with the case law from other jurisdictions rises to the level of a legal principle because the *ICAA*, and specifically the adoption of the Model Law, is a clear legislative signal to Ontario courts that they must recognize and enforce awards made in international arbitrations in a manner that is consistent with the way in which courts in other jurisdictions that apply the Model Law recognize and enforce awards: see *Automatic Systems Inc. v. Bracknell Corp.* (1994), 18 O.R. (3d) 257, at p. 264 (C.A.). Counsel contends that the discretion captured in in Article 34(2) is an important feature of the enforcement and recognition scheme established under the Model Law. As

such, that discretion must be interpreted consistently among various jurisdictions that apply the Model Law if the desired consistency and predictability is to be achieved. Counsel submits that the application judge, in declining to set aside the award despite the significant procedural error and the potential prejudice to Mr. Popack, failed to adhere to the broadly accepted approaches to Article 34(2) followed in other jurisdictions.

[29] Counsel for both parties have helpfully put before the court several cases from many jurisdictions that have considered the discretion in Article 34(2). Counsel for Mr. Popack submits that while the cases suggest three different approaches to the exercise of the discretion provided in Article 34(2), none would countenance the exercise of the discretion in favour of upholding the award in the circumstances of this case.

[30] I do not find any bright line rule in the cases that address the nature of the discretion in Article 34(2). Article 34(2) provides several grounds upon which awards may be set aside. It is clear from the case law that the scope of the discretion under Article 34(2) is significantly affected by the ground upon which the award could be set aside. For example, Article 34(2)(a)(i) provides that the award may be set aside if there is no valid arbitration agreement between the parties. It seems self-evident that if a party establishes that there was no valid arbitration agreement, a judge would have considerably less discretion to uphold the award despite the absence of a valid arbitration agreement, than a judge

would have if the error lay in the arbitration panel's failure to comply with a specific procedural provision in the course of an otherwise proper arbitration: see *Carr v. Gallaway Cook Allan*, [2014] NZSC 75, at paras. 76-80, rev'g on other grounds [2013] NZCA 11; *Dallah Real Estate and Tourism Holding Company v. the Ministry of Religious Affairs, Government of Pakistan*, [2010] UKSC 46, at paras. 67-69. In considering whether the application judge's exercise of her discretion is out of step with decisions from other jurisdictions, it is important to focus on those cases in which courts have been asked to set aside arbitral awards on grounds involving procedural errors in the arbitration process.

[31] The Canadian cases reveal an approach that looks both to the extent that the breach undermines the fairness or the appearance of the fairness of the arbitration and the effect of the breach on the award itself: see *Rhéaume*, at paras. 50-61; *The United Mexican States v. Metalclad Corporation*, 2001 BCSC 664, 14 B.L.R. (3d) 285, at paras. 127-29. In *Rhéaume*, at para. 61, after reviewing the Canadian case law, the court observed:

> [I]t would be wholly inconsistent with the intention of the legislature and the current jurisprudential trend to treat every breach of the applicable procedure, however minor and however inconsequential, as requiring a court to refuse to homologate an award or to annul it if so requested. A court called upon to adjudicate such a proceeding must balance the nature of the breach in the context of the arbitral process that was engaged, determine whether the breach is of such a nature to undermine the integrity of the process, and assess the

> extent to which the breach had any bearing on the award itself.

[32] More recent decisions in other jurisdictions reflect the same kind of balancing as described in *Rhéaume*. *Kyburn Investments Limited v. Beca Corporate Holdings Limited*, [2015] NZCA 290 is instructive. In *Kyburn*, the applicant moved to set aside an award on the basis that the arbitration panel had improperly met with a witness from one side in the absence of the other side while conducting a site inspection. Not surprisingly, the application judge held that the panel's conduct had breached the rules of natural justice and gave rise to an award that conflicted with the public policy of New Zealand. Conflict with public policy is a ground for setting aside an award under Article 34(2). The application judge, however, exercised his discretion against setting aside the award. The Court of Appeal upheld the exercise of that discretion.

[33] The Court of Appeal described the discretion in Article 34(2) in broad terms, para. 28:

> [W]hile the discretion in [Article] 34 is of a wide and apparently unfettered nature, it must be exercised in accordance with the purposes and policy of the Act which emphasize the finality of arbitral awards and reduce the scope for curial intervention in accordance with the intentions of the parties to arbitration.

[34] The court explained, at para. 47, that the exercise of the discretion under Article 34(2) required an evaluation of the nature of the breach and its impact on the proceedings:

> No single factor is decisive or necessary for an award to be set aside. Sometimes, the breach will be sufficiently serious as to speak for itself. In other cases, the Court will need to consider the materiality of the breach and evaluate whether it was likely to have affected the outcome. Other factors may be relevant to the exercise of the discretion, such as the likely costs of holding a rehearing.

[35] The Federal Court of Australia, in *TCL Air Conditioner (Zhongshan) Co. Ltd. v. Castel Electronics Pty. Ltd.*, [2014] FCAFC 83, also takes an approach that balances a broad array of factors in deciding whether to set aside an arbitration award on account of procedural errors at the arbitration. The court, at para. 111, identified the purpose of the discretion in Article 34(2) as the prevention of "real unfairness and real practical injustice" flowing from the failure to conduct the proceedings in accordance with the proper procedure. The court went on, at para. 154:

> [T]he notion of prejudice or unfairness does not involve re-running the arbitration and quantifying the causal effect of the breach of some rule. The task of the Court in assessing prejudice or unfairness or practical injustice is not to require proof of a different result. If a party has been denied a hearing on an issue, for instance, it is relevant to enquire whether, in a real and not fanciful way that could reasonably have made a difference. It should be recalled that the proper framework of analysis for the IAA is the setting aside or non-recognition or enforcement of an international commercial arbitration. In that context, it is essential to demonstrate real unfairness or real practical injustice. [Citations omitted.]

[36] In my view, all of the factors identified by the application judge as relevant to the exercise of her discretion (listed above, at para. 23) were properly considered in deciding whether the improper *ex parte* meeting with Rabbi Schwei produced "real unfairness" or "real practical injustice". The relevance of the seriousness of the breach (factors one and two) and the potential impact of that breach on the result (factors three and four) to the fairness of the arbitral proceedings are obvious. The potential prejudice flowing from the need to redo the arbitration if the order is set aside can also be relevant in assessing "real practical injustice" (factors five and six). I think Mr. Popack's conduct after learning of the procedural breach (factors seven and eight) is also significant in this case.

[37] When Mr. Popack learned of the possibility that the panel had improperly interviewed Rabbi Schwei in the absence of the parties, he chose not to advise Mr. Lipszyc of any possible concern and he chose not to make any formal complaint about the procedure followed by the panel. Instead, Mr. Popack chose to communicate *ex parte* with the panel. In that communication he put forward his position with respect to Rabbi Schwei's involvement and a forceful argument that anything Rabbi Schwei might say was "worthless".

[38] Mr. Popack did not request a hearing at which he could raise his concerns about the *ex parte* meeting with Rabbi Schwei and share his view of Rabbi Schwei's evidence with the other side. Instead, he asked for a hearing only if the

panel did not agree with his assessment that Rabbi Schwei's evidence had no value.

[39] Mr. Popack sought to gain an advantage in the arbitration proceedings when he learned of the *ex parte* meeting with Rabbi Schwei. He was content to attempt to exploit that advantage by putting his position to the panel without any notice to Mr. Lipszyc. His conduct strongly suggests a tactical decision whereby Mr. Popack was content to allow the panel to finish its adjudication and make its award despite the improper *ex parte* meeting with Rabbi Schwei. Mr. Popack positioned himself so that he could decide to raise the issue formally and on notice to Mr. Lipszyc only if he was not satisfied with the award given by the panel. To reward that tactic by setting aside the award would eviscerate the finality principle that drives judicial review of arbitral awards and would cause "a real practical injustice". Mr. Popack's conduct after he learned of the *ex parte* meeting speaks loudly against setting aside this award.

[40] Mr. Popack's *ex parte* communication with the panel is also relevant to the consideration of the panel's letter explaining its conduct (above, at paras. 17-20). Mr. Popack demanded a hearing in respect of Rabbi Schwei's evidence only if it was going to affect the panel's decision. Having taken that position in an *ex parte* communication with the panel, only to subsequently challenge the panel's award, it does not lay in Mr. Popack's mouth to argue that the panel could not provide insight as to the significance of Rabbi Schwei's evidence. The panel's

letter is in effect, at least in part, a response to the request made in the *ex parte* communication made on behalf of Mr. Popack. The panel's letter explains that it did not convene a hearing over Rabbi Schwei's evidence because that evidence had no impact on its ruling. Mr. Popack had made it clear that he did not want a hearing if the evidence had no impact on the panel. In these circumstances, I think the panel's explanation for not convening a hearing after it received Mr. Popack's *ex parte* communication was relevant to the application judge's exercise of her discretion.

[41] One other factor referred to by the application judge in exercising her discretion deserves some comment. The application judge considered the death of a material witness and thus his unavailability at any subsequent hearing as a significant consideration. She did not do so on the basis that this witness helped one side or the other, but rather on the basis that the absence of this witness would inevitably detract from the effective and fair resolution of the dispute.

[42] Concerns about the effect of procedural errors on the "integrity of the process" (*Rhéaume*) or the "practical injustice" of the proceeding (*TCL Air Conditioner*) will normally focus on the arbitration proceeding giving rise to the award. In the context of private arbitrations, I think the ability of the parties to effectively and fairly redo the arbitration process should the award be set aside can also be a factor in the exercise of the Article 34(2) discretion, at least in cases where neither party bears any responsibility for the procedural error said to

justify the setting aside of the initial order. Neither Mr. Popack nor Mr. Lipszyc can be blamed in any way for the panel's decision to take Rabbi Schwei's evidence *ex parte* and without notice.

[43] Counsel for the appellant also argued that the application judge should have considered Article 34(2)(a)(ii) and Article 34(2)(b)(ii). The former addresses violations of the right of a party to be present at the arbitration process. The latter is concerned with public policy violations.

[44] Counsel submits that although a single procedural error underlies each of the three complaints, the appropriate exercise of discretion under Article 34(2) may be different depending upon the characterization of the procedural error.

[45] I agree with the application judge that each of the different alleged violations comes down to the same conduct and the same balancing exercise. I do not see how the outcome of that balancing exercise can depend on the specific label placed on the procedural error giving rise to the Article 34(2) complaint. For example, characterizing the procedural failure as a breach of Ontario "public policy" if it could be so characterized, would not, in my view, automatically make the breach more serious or tip the scale in favour of setting aside the award. Whatever label is placed on the procedural error, and whichever subsection of Article 34(2) is invoked, the essential question remains

the same – what did the procedural error do to the reliability of the result, or to the fairness, or the appearance of the fairness of the process?

[46] The application judge made no error in choosing not to give separate consideration to each of the provisions of Article 34 advanced on behalf of Mr. Popack.

V

CONCLUSION

[47] I would dismiss the appeal.

[48] I would award costs to the respondents in the amount of $25,000, inclusive of disbursements and relevant taxes.

Released: "DD" "FEB 18 2016"

"Doherty J.A."
"I agree G. Pardu J.A."
"I agree M.L. Benotto J.A."