THE NAVIGATOR

IN THIS ISSUE

MEMBER OF GLOBALAW THE INTERNATIONAL LAW GROUP

Contractual Entire Agreement Clauses: Are They Enforceable?

Overview

Grandfield Homes (Kenton) Ltd. ("Grandfield") and Xue Ping Li ("Li") entered into an Agreement of Purchase and Sale (the "Sale Agreement") with respect to a new construction five-bedroom freehold luxury home in Toronto. The sale did not close. The purchaser, Li, claimed she withdrew from the deal in accordance with her rights. The vendor, Grandfield, claims that Li breached the Sale Agreement by not attending on the closing date to go through with the purchase. Grandfield kept Li's deposits, and claimed monetary damages from Li.

Grandfield sued. Li counter-sued, seeking a stay of Grandfield's claim and payment into court of her paid deposits. As alternative relief, Li sought a declaration that the Sale Agreement was rightly terminated by her, in addition to the return to her of her paid deposits.

At a court hearing dealing with the matter, the Ontario Superior Court held that Li breached the Sale Agreement by walking away from the deal and that Grandfield was entitled to retain Li's deposits. Grandfield's claim for further damages from Li was reserved for a conventional trial at a later date.

Background

After the Sale Agreement was signed, Li paid the prescribed deposits and met with Grandfield representatives to make colour and interior feature selections. Grandfield constructed the home. A closing date of April 15, 2019 was ultimately established.

On February 27, 2019 Li's lawyer wrote a letter to Grandfield, purporting to rescind (that is, walk away from) the Sale Agreement, with Li alleging that Grandfield had made a number of misrepresentations inducing Li into the deal, also claiming that the transaction was unconscionable, that Li was unable to understand the Sale Agreement and that Li was refused the opportunity obtain independent legal advice.

FIRM AND INDUSTRY NEWS

- The Firm is pleased to announce that **Francisca Sotelo** has joined Fernandes Hearn LLP as an Associate Lawyer. Francisca joins our team after having worked as in-house counsel at an established Canadian transportation service provider.

- The **Canadian Maritime Law Association** Annual General Meeting and Seminar will take place June 7-8, 2021 in Ottawa. **Rui Fernandes** as Central Region VP is organizing the Seminar. **Kim Stoll** will be in attendance.

- The **Toronto Commercial Arbitration Society's** Annual General Meeting and Conference will take place in Toronto, Ontario on May 27, 2021. **Rui Fernandes** and **Kim Stoll** will be in attendance.

- The **Transportation Lawyers Association** Annual Conference **/ Canadian Transport Lawyers Association** Midyear Meeting will take place in Lake Tahoe California June 23-26, 2021. **Gordon Hearn** will be chairing an "International Transportation Law Update" panel. **Kim Stoll** will be in attendance.

- The **International Conference on Admiralty and Maritime Law** will take place July 12-13, 2021 in Ottawa, Ontario.

- The **International Maritime Law Seminar** will take place October 28, 2021 in London England.

- Mark your calendars. The next **Fernandes Hearn LLP Annual Seminar** will take place on February 10, 2022. Send us an email to info@fhllp.ca to let us know what topics you would like us to cover.

Grandfield's lawyer replied, rejecting the purported recission of the deal by Li, also stating that Greenfield was prepared to close on the stipulated closing date.

As mentioned above the Sale Agreement did not close.

The Court Action

Li raised as a preliminary argument that it was Grandfield, and not her, that failed to close the deal; that is, Grandfield was not "ready, able and willing" to close the deal on the closing date on account of certain failures by Grandfield to timely provide warranty and other related sale documentation. The Court found despite the production by Grandfield of normal course pre-closing documentation, Grandfield was "ready, willing and able" to close the deal on the prescribed date. The Court also found that the home was substantially complete and ready for habitation on the date set for closing. Accordingly, all matters otherwise having been set for closing, the analysis turned to whether Li was entitled to rescind the deal on the basis of Grandview's alleged misrepresentations, unconscionability and undue influence.

Was Li entitled to rescind the Deal on the Basis of Misrepresentation, Unconscionability and Under Influence?

Li pursued a multi-pronged attack on the Sale Agreement and the entire real estate transaction by asserting that Grandfield had engaged in misrepresentation, inducement, unconscionability, undue influence, and unequal bargaining power at the time the contract was made.

The Court found little merit in Li's arguments.

With respect to the alleged misrepresentations causing Li to enter into, or to be induced to enter into the deal, the Court noted that the Sale Agreement contained an "Entire Agreement" clause, which operated to preclude representations external to that document. The Entire Agreement clause barred Li from relying on contract terms that were not reduced to writing in the Sale Agreement.

The Entire Agreement clause included the following relevant language:

> … It is agreed and understood that *there is no representation*, warranty, collateral term or condition affecting this Agreement or the Property, or for which the Vendor (or any sales representative representing the Vendor) can be held responsible or liable in any way, whether contained, portrayed, illustrated or represented by, or in, any plan, drawing, brochure, display, model or any other sales/marketing material(s), or alleged against any sales representative representing the Vendor, *other than as expressed herein in writing*. Without limiting the generality of the foregoing, it is understood and agreed by the parties hereto that *the Purchaser shall not make or pursue any claim* or proceeding against the Vendor, nor hold the Vendor responsible or liable, whether based or founded in contract law or in tort law, for innocent misrepresentation, negligent misrepresentation or otherwise, *in respect of, or arising from, any statement, representation, warranty, collateral term or condition* alleged to have been made by any sales representative or by any other person alleged to represent the Vendor on behalf of or purporting to be binding upon the Vendor, *save and except for those representations of the Vendor herein set forth in writing*. The Purchaser further confirms that in entering into this Agreement, he has not relied on any representation, warranty, collateral agreement or condition affecting this Agreement or the Property, or supported thereby, other than those specifically set out in this Agreement or in any of the schedules hereto, and specifically absolves the Vendor and/or any other

> party that may seek indemnification or contribution from the Vendor, of any obligation or liability to perform or comply with any promise or comply with any promise or representation that may have been made by any sales representative/agent or alleged against them, unless the same has been reduced to writing and is contained in this Agreement or in the schedules hereto.
>
> (Italics added for emphasis)

As would be expected, the above language is quite precise and nuanced, given the real estate context (*2).

Li countered that Grandfield could not rely on the Entire Agreement clause because the entire transaction was unconscionable, asserting, among other arguments, that:

> i) she was induced into a grossly unfair and improvident transaction in which she agreed to a purchase price for the home that was approximately $500,000 higher than its real market value, and
>
> ii) there was an inequality of bargaining power caused by Li's denied opportunity to seek independent legal advice, her lack of proficiency in the English language, her ignorance of purchasing a pre-construction home in Ontario (compared to Grandfield being a seasoned real estate developer in Ontario).

Can Unconscionability Trump an Entire Agreement Clause?

It can - where there was in fact unconscionability. The Ontario Court of Appeal has recognized that under the doctrine of unconscionability, an entire agreement clause will be unenforceable "where one party to the contract has abused its negotiating power to take undue advantage of the other". (*3).

The Court however found there to have been nothing unconscionable in the real estate transaction between Li and Grandfield. The purchase was in respect of a luxury new build five-bedroom home worth over $3 million dollars. One would expect the Sale Agreement to be complex and detailed. There was nothing unconscionable about its terms, which were standard, reasonable, and widely used terms in real estate transactions.

Further, the evidentiary record did not indicate that Li was precluded from seeking legal advice. The Court found that she simply declined the opportunity to do so. The Court also found find that Li was "closer to the sophisticated end of the spectrum of real estate purchasers". The evidence confirmed that Li was an "experienced and sophisticated businessperson in the sale and supply of materials to the building and construction industry and that she has good familiarity with business transactions".

While Li purportedly lacked proficiency in English, this did not create an inequality of bargaining power in the circumstances of this case.

Finding no unconscionability in the transaction, the Court returned to the Entire Agreement clause. The Court noted that the provisions of the Entire Agreement clause were restated, in part, on the first page of the Sale Agreement, which is also the execution page, just above the parties' signatures. This was accordingly not a case about a "buried" Entire Agreement clause. It was prominent in the agreement. Accordingly, the Entire Agreement clause was enforceable and precluded Li from relying on the various external representations purportedly made by Grandfield and that Li considered negligent or false.

Accordingly, Li was not entitled to rescind the Sale Agreement, there being no merit to her allegations of Grandfield's misrepresentations, unconscionability, and undue influence.

Could Grandfield Retain Li's Deposits?

The Court cited well-established case law that, when a purchaser repudiates (that is, without legal foundation, it walks away from) an agreement and fails to close the transaction, the

deposit is forfeited, without proof of any damage suffered by the vendor (*4). As such, where the vendor suffers no loss, the vendor may nevertheless retain the deposit, subject to "relief from forfeiture". The forfeiture of a deposit is subject to the equitable remedy of relief from forfeiture (*5) which provides that: "[a] court may grant relief against penalties and forfeitures, on such terms as to compensation or otherwise as are considered just."

The Court noted that Li paid $493,606 in deposits against a purchase price of $3,290,708, inclusive of HST being 15% of the purchase price. The Court found that the total deposit was not out of proportion to the purchase price. For the same reasons that the Court did not find the underlying real estate transaction to be unconscionable, it found that it would not be unconscionable for Grandfield to retain the deposit monies. Essentially, this was a luxury home new build construction where Li had unfortunately bought into a falling market. The Court found that Li attempted to walk away from the Sale Agreement primarily for that reason. There was no legal or equitable basis to deny Grandfield the ability to retain Li's deposits, to be set off against damages that may need to be determined at an eventual trial.

Conclusion

This case provides an illustration of how a court will look at a commercial transaction "gone bad" in a real-world context. Sophisticated parties are taken to have entered into their transaction with an appreciation for the terms of a written agreement. Absent a situation of unconscionability – which will generally be difficult to establish between parties each having at least a degree of bargaining power - an Entire Agreement clause may effectively preclude the admission into evidence of foreign or "extrinsic" terms or considerations intended to sway the outcome of a case.

Gordon Hearn

Endnotes

(*1) 2021 ONSC 2670
(*2) Entire Agreement clauses are very common in commercial contracts. Outside of the real estate context, the language tends to be simplified in comparison to the wording seen in this case. In its simplest sense, the standard language found in most contracts is along the lines of the following: "It is agreed and understood that there is no representation, warranty, collateral term or condition affecting this Agreement other than as expressed herein in writing". Of course, contract language and terms will vary.
(*3) This doctrine is generally applied in the context of a consumer contract or contracts of "adhesion"; that is, where one party is effectively left with no negotiating power, being presented with a "sign here" type of contract: *Singh v. Trump*, 2016 ONCA 747, at para. 114, citing *ABB Inc. v. Domtar Inc.*, 2007 SCC 50, [2007] 3 S.C.R. 461, at para. 82; *Curtis Chandler v. Karl Hollett*, 2017 ONSC 2969, at para. 61.
(*4) See *Tang v. Zhang*, 2013 BCCA 52, 359 D.L.R. (4th) 104, at para. 30 and *Redstone Enterprises Ltd., v. Simple Technology Inc.*, 2017 ONCA

2. Common Law Notice Periods: Is There Still a 24-Month Cap?

When an employee loses their job, the first question they ask is, how much notice are they entitled to? Several articles have been published in *The Navigator* about an employee's right to receive "common law notice" if there is no binding and enforceable employment contract containing a termination provision limiting their entitlement to certain payments under the applicable employment standards legislation. Common law notice is assessed by considering the following factors set out in *Bardal v. Globe & Mail Ltd.* (*1): the employee's age, length of service, position held and ability to find new employment. Common law notice is always greater than statutory notice, often significantly so.

In 2019 the Ontario Court of Appeal, in *Dawe v. The Equitable Life Insurance Company of Canada* ("*Dawe*") (*2), held that absent "exceptional circumstances" the common law notice period is capped at 24 months. Mr. Dawe was 62 years of age when his employment was terminated after 37 years of service. While the motion judge found that Mr. Dawe was entitled to 30 months notice of termination, the appeal court reduced the notice period to 24 months, stating that there was no basis to exceed this period as Mr. Dawe's age, length of service, senior position and difficulty in finding new employment had already been addressed by the consideration of the *Bardal* factors. Something more - something exceptional - was required to exceed 24 months.

The recent Ontario case of *Currie v. Nylene Canada Inc.* (*3) considers exceptional circumstances and the 24-month cap on common law notice. Ms. Currie left high school after Grade 11 to take a temporary twisting operator position at Nylene, the company where her father worked. She worked her way up to a supervisory role and, in December 2018, after 39 years of service, her employment was terminated. She was 58 years old. Nylene provided Ms. Currie with her statutory entitlement to 8 weeks of notice plus 26 weeks of severance pay Ms. Currie commenced an action seeking common law notice. There was no question that Ms. Currie was entitled to common law notice, but the issue was how much. At the time of trial, in January 2021, Ms.

Currie had not yet found a new job. The Court found that Ms. Currie's efforts in searching for new work adequately discharged her duty to mitigate her damages; that is, she had made sufficient efforts to minimize her losses.

In assessing the appropriate notice period, the court considered the *Bardal* factors, along with the decision in *Dawe*, and found that based on exceptional circumstances, Ms. Currie was entitled to 26 months of notice. The Court viewed all of the facts and identified the following as "exceptional": Ms. Currie left high school early to take on a temporary position that paid $4.50/hr; she eventually was promoted to supervisor and faithfully remained at Nylene for 39 years; her entire working life was with Nylene and she knew nothing else; at the time of termination, at age 58, she was in her "twilight working years"; she had very specialized skills having worked exclusively in fiber production and she had very limited computer skills. The Court found that the termination was equivalent to a "forced retirement" and, given Ms. Currie's unique situation and these exceptional circumstances, she was entitled to 26 months notice.

What is of concern for employers is the fact that what the Court described as "exceptional circumstances" were really already addressed in the assessment of the *Bardal* factors – it is not clear that such factors were truly "exceptional", and as such the *Currie* decision appears to contradict the Court of Appeal in *Dawe* and employers will argue in future cases that *Currie* should not be followed. Employees will interpret this case from a different perspective: where the termination effectively ends one's working life, and where the employee does not have the skills necessary to compete in today's job market, those circumstances are "exceptional" and the 24-month cap should not apply. What is clear is that this decision has opened the door for long term employees of a certain age to push for notice periods longer than 24 months.

Carole McAfee Wallace

Endnotes
(*1) 1960 ONSC 294 (CanLII)
(*2) 2019 ONCA 512 (CanLII)
(*3) 2021 ONSC 1922 (CanLII)

3. COVID Quarantine Hotels: Round One

In a recent attempt by Canadian international travelers to obtain an injunction against part of the current quarantine rules facing those returning to Canada by air, the applicant travelers were unsuccessful before the Federal Court in their bid to suspend immediately the operation of the mandatory stay in so-called quarantine hotels, or "government-authorized accommodation" (GAA), upon arrival in Canada. Current rules, to which only air travelers are subject, require those arriving to await the results of a negative COVID test, which can take up to 3 days, while staying in an approved hotel, rather than immediately self-quarantining at home, as those returning to Canada by land are permitted to do.

Both the rule and the government approved facilities have been the subject of considerable recent negative media attention. The preliminary decision of April 23, 2021, while going in favour of the government of Canada, does not finally decide the issue, however. The full merits of the challenge, in which the applicants claim unjustified interference in their liberty rights under the Charter, is only slated to be heard in early June this year. Despite the lack of a final decision, however, the reasons given by the court should not inspire much hope in the current quarantine rules being overturned by judicial process.

Background

The basic requirements of the new "quarantine hotel" rule are reasonably well known due to the well-publicized complaints of Canadians returning from abroad. In February 2021, under the authority of the *Quarantine Act* (*1), the government of Canada established new rules by Order-in-Council for those returning to Canada by air, ostensibly in response to international reports of new and allegedly more transmissible variant strains of the SARS-CoV-2 virus. The new requirement that stirred controversy is the requirement to book prepaid accommodation in a GAA for three nights upon arrival in order to await the result of a mandatory molecular test for COVID administered immediately upon entry into Canada. In the event of a negative test, the returning traveler would then proceed to self-quarantine for the remainder of a required 14 days according to a pre-approved plan, similar to the way those who return to Canada by land must do. In the event of a positive test, however, the traveler would be contacted by a Public Health Agency of Canada (PHAC) Quarantine Officer to verify compliance with an adequate isolation plan, or, if the traveler had no suitable place to isolate, to quarantine at a government designated quarantine facility (DQF) for the same 14-day period required of those who test negative.

A group of unrelated Canadians who found themselves subject to the new order on their return to Canada, despite having left the country under different rules, sought to challenge in particular the mandatory three-day pre-paid stay at a GAA as an undue infringement of their rights under Canada's *Charter of Rights and Freedoms* (*2). In particular, they alleged infringement of their liberty rights under section 7 and rights against arbitrary detention under section 9. The application was commenced in Federal Court as *Spencer v. Canada (Attorney General)* 3) in late February of this year as a judicial review of the constitutionality of the measures. Prior to the scheduled full hearing of the matter, however, in April of this year the Court heard the applicants' motion for an interim injunction seeking to suspend the hotel quarantine requirement with immediate effect and until the time of the June hearing.

Motion for interim injunction

The interim injunction motion of the applicants was heard on April 14, 2021, with the decision being rendered April 23, 2021. The applicants were likely to be unsuccessful in attempting to obtain the interim suspension of the Order-in-Council, given that interim relief of this nature (i.e. suspending government measures before a full hearing of the matter) is subject to a particularly high bar. As the Court noted when

denying the motion, it is only in the clearest of cases that a court will suspend the operation of a duly enacted law on constitutional grounds (*4). Nevertheless, the specific basis on which the Court dismissed the motion should be viewed as particularly discouraging to those hoping for an early end to this measure.

Applicants in this situation must satisfy a familiar three-part test applied in all injunctions; that is, they must (1) demonstrate that there is a serious issue to be tried, (2) show some "irreparable harm" if the injunction is refused, and (3) establish that the balance of convenience, in all the circumstances, favours the granting of the injunction. The first part of this test is almost always satisfied, as it was in this case. Here, the seriousness of the matter was particularly hard to question. It is not contested that the applicants were denied their basic liberties by the three-day mandatory stay in a GAA, and the Court further found an arguable case that the denial was arbitrary. Specifically, the Court was prepared to find that treating those arriving by land differently from those arriving by air may not necessarily be supported by any evidence that air travelers posed a more serious risk of importing more infectious strains of SARS-CoV-2 to Canada than did those arriving by land (*5).

The applicants failed at both of the further stages of the test for an interim injunction, however. In particular, the basis on which the Court declined to find any irreparable harm stood out. The applicants had argued, not without some justification, that the GAA facilities had "questionable safety and COVID-19 protocols" (*6). Nevertheless, the Court was not prepared to find that a short hotel stay followed by home quarantine would cause "devasting emotional, relational, and spiritual harm." This finding was made, even though confinement in a congregate setting for a few days would self-evidently amplify the risk of contracting COVID, and national reporting of a sexual assault occurring at one GAA pre-dated the hearing of the motion. In the case of the latter troubling event, the Court was prepared to view this as simply an "isolated incident" (*7). Further, the fact that the applicants should not have been surprised at increased restrictions being introduced from the time they left Canada to the time they returned, a point emphasized by the court at this stage of the test, seemed not logically connected to whether the harm of the confinement measures were themselves "irreparable" (*8). One might rather have thought that the traditional view that confinement against one's will, particularly for a period of days, expressly acknowledged by the Court as harmful at first blush, would not have been so readily waved aside (*9).

Finally, on the issue of the balance of convenience, the applicants inevitably faced an uphill battle. While the concerns regarding further exposure to COVID-19 and other dangers were at least acknowledged, it is difficult to see how a judicial officer would be prepared to elevate those risks faced by a few returning Canadians over even the low probability but high impact risks which the measures were designed to address; specifically, the introduction of new and perhaps more dangerous strains of coronavirus into Canada. Here the Court was prepared to rely expressly on the precautionary principle, which was described by the Court as "a foundational approach to decision-making under uncertainty, that points to the importance of acting on the best available information to protect the health of Canadians" (*10). The Court was unwilling to second-guess the government on a subject on which there was a high degree of uncertainty, and that there is great uncertainty regarding many aspects of COVID-19 could hardly be gainsaid. Considering the scale of the danger that the Court could imagine arising from the introduction of new variant strains of coronavirus, even in the absence of clear evidence, it is difficult to see any restrictions on personal liberty that would not be viewed as justifiable on a "balance of convenience."

From the perspective of this observer, however, it seems that Court abdicated its responsibility somewhat to actually weigh the possibility of

this imagined risk against the real harms that result from days-long detention of individuals that are neither alleged to have done any wrong nor to pose any proven risk to others. While the Court did point to the connection between one foreign air traveler and the tragedy of a new viral strain being introduced to a long-term care facility in Barrie, with devastating consequences, it appeared to find it unnecessary to show how the challenged detention policy might effectively mitigate the risk of the recurrence of such an incident in the future.

Conclusion

As remarked above, the failure of the interim motion here is not necessarily indicative as to how the court will assess the merits of the Charter challenge to Canada's quarantine hotels based on what one has every reason to expect to be a more comprehensive record of factual and scientific evidence. It can be further acknowledged that, at least in the case of interim relief of this kind, it is proper for the courts to be more wary of interfering with the status quo, particularly where there is a high degree of uncertainty. Unfortunately, as with most policy questions in this pandemic, the level of uncertainty is likely to remain high for some time to come, no matter how much additional evidence there is available for the courts to review and consider. In such cases, the tie will almost always go to the policy-makers that have imposed restrictions on liberty alleged to be for the public's own protection.

Oleg M. Roslak

Endnotes

(*1) *Quarantine Act*, S.C. 2005, c. 20.

(*2) *Canadian Charter of Rights and Freedoms*, s. 7, Part 1 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11.

(*3) *Spencer v. Canada (Attorney General)*, 2021 FC 361

4. **Death of *Forum Non Conveniens?***

In the recent decision of *Kore Meals LLC v. Freshii Developments LLC,* 2021 ONSC 2896 Justice Morgan of the Superior Court of Justice – Ontario commenced his reasons with the following question.

> " In the age of Zoom, is any forum more *non conveniens* than another? Has the venerable doctrine now gone the way of the VCR player or the action in Assumpsit?"

On October 31, 2009, the Defendant, Freshii Development LLC ("Freshii Development"), a Chicago, Illinois-based company, entered into a Development Agent Agreement (the "DAA") with the Plaintiff, a Houston, Texas-based company, to develop Freshii franchises in Texas. The Plaintiff claims breach of the DAA and unjust enrichment.

Article 22A of the DAA is an arbitration clause that requires disputes between the parties to be submitted for arbitration by the American Arbitration Association in the city where Freshii Development has its business address, which was identified as Chicago. In a move which the Plaintiff's counsel stated justified litigation in Toronto, the Plaintiff included Freshii Development's parent company, the Defendant, Freshii Inc., an Ontario corporation, in the lawsuit. Freshii Inc. was not a party to the DAA.

The Defendants Freshii Development and Freshii Inc. brought an application to stay the Ontario proceedings. They argued that that art. 22A of the DAA required that this matter be arbitrated in the United States and not litigated in Canada, and that any claim against Freshii Inc. is so intimately intertwined with the claim under the DAA against Freshii Development that they must be arbitrated together.

Justice Morgan noted that the Supreme Court of Canada has noted that in any case involving an arbitration clause, a challenge to the arbitrator's jurisdiction must be resolved first by the arbitrator. This approach reflects the so-called competence-competence principle, in accordance with which the arbitral tribunal is held to have the competence to determine its own competence for the arbitration.

Justice Morgan also noted that the Ontario Court of Appeal has held that the test for a stay of court proceedings in the face of an arbitration clause is a relatively low one – the governing principle is deference to the method contracted for by the parties. It is well established in Ontario that the court should grant a stay where it is "arguable" that the dispute falls within the terms of an arbitration agreement. Justice Morgan cited the proper approach as follows (at paragraph 15):

> It is not for the court on an application for a stay of proceedings to reach any final determination as to the scope of the arbitration agreement or whether a particular party to the legal proceedings is a party to the arbitration agreement because those are matters within the jurisdiction of the arbitral tribunal. Only where it is clear that the dispute is outside the terms of the arbitration agreement or that a party is not a party to the arbitration agreement or that the application is out of time should the court reach any final determination in respect of such matters on an application for a stay of proceedings.
>
> Where it is arguable that the dispute falls within the terms of the arbitration agreement or where it is arguable that a party to the legal proceedings is a party to the arbitration agreement then, in my view, the stay should be granted and those matters left to be determined by the arbitral tribunal.

The test has been set out as a five-step inquiry:

> (1) Is there an arbitration agreement?
> (2) What is the subject matter of the dispute?
> (3) What is the scope of the arbitration agreement?

(4) Does the dispute arguably fall within the scope of the arbitration agreement?
(5) Are there grounds on which the court should refuse to stay the action?

Plaintiff's counsel submitted that the question of whether and where to submit to arbitration cannot ignore the convenience factor, as the choice of venue is directly related to access to justice. They pointed out that the Ontario Court of Appeal has for some time been of the view that arbitral proceedings ought not be held "where it would be either unfair or impractical to refer the matter to arbitration." Counsel relied on the statement of principle by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 SCC 16, at para. 119, observing that, "…a measure intended to enhance access to justice is now to be used as a tool for cutting off access to justice. That cannot be right."

Counsel for the Plaintiff took these statements to import into the arbitrability analysis a *forum non conveniens* analysis – *i.e.* a tallying up of connective factors, or lack thereof, which makes the chosen forum otherwise appropriate or inappropriate for a hearing. They indicated that none of the potential witnesses or relevant documents were located in Chicago, and that from the point of view of both sides a hearing in Chicago represented a burdensome and costly way to proceed. They therefore submitted in their factum that, "This court cannot countenance an approach that would defeat the very purpose of arbitration clauses, i.e., ensuring efficiency and predictability for the parties in resolving disputes – the same goals that Freshii Inc. refers to in support of its forum selection by-law in favour of Ontario."

Justice Morgan then looked at whether Chicago was an "unfair or impractical" forum. In reaching his decision to stay the litigation in Ontario in favour of arbitration in Chicago, Justice Morgan made the following comments, which are in essence a death sentence for future *forum non conveniens* arguments:

> [28] … I inquired as to where the AAA is located; the DAA identifies Chicago as Freshii Development's address and the locale for the arbitration, but otherwise states that arbitration is to be submitted to the AAA without identifying a location for that organization. Defendants' counsel indicated that neither counsel was certain as to where the AAA is located, since submissions are made online. I then asked whether the hearing itself would be online, and counsel responded that they presume so since the pandemic has moved most proceedings of this nature to a digital forum.
>
> [29] All of which undermines the majority of *forum non conveniens* factors. If hearings are held by videoconference, documents filed in digital form, and witnesses examined from remote locations, what is left of any challenge based on the unfairness or impracticality of any given forum? To ask the question is to answer it. Freshii Developments may have a miniature post office box or an entire office tower in Chicago, and witnesses or documents may be located in Canada's Northwest Territories or in the deep south of the United States, and no location would be any more or less convenient than another.

Justice Morgan went on to note that it is by now an obvious point, that a digital-based adjudicative system with a videoconference hearing is as distant and as nearby as the World Wide Web. With this in mind, the considerable legal learning that has gone into contests of competing forums over the years is now all but obsolete. "Judges cannot say *forum non conveniens* we hardly knew you, but they can now say farewell to what was until recently a familiar doctrinal presence in the courthouse."

Justice Morgan concluded:

> [32] And what is true for *forum non conveniens* is equally true for the access to justice approach to the arbitration question. Chicago and Toronto are all on the same cyber street. They are accessed in the identical way with a voice command or the click of a finger. No one venue is more or less unfair or impractical than another.

Justice Morgan found that the arbitration provision in the DAA was valid and enforceable. The Defendants' motion for a stay of proceedings was granted.

The last sentence in the reasons is also illustrative of the new reality – the law has finally embraced the technological revolution. Justice Morgan instructed:

> The cost submissions may be sent to my assistant by email. There is no need to provide me with copies of authorities cited therein, provided that all authorities are accessible online and the submissions contain proper citations or links to those authorities.

It will be interesting to see if other courts will follow suit.

Rui Fernandes

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