CITATION: Canada Bread v. Mallot Creek, 2019 ONSC 2578
COURT FILE NO.: CV-18-00601085-00CL
DATE: 20190808

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF an Arbitration under the *Arbitration Act, 1991*, S.O. 1991, c.17

BETWEEN:	)	
	)	
CANADA BREAD COMPANY LIMITED	)	*Jonathan Lisus* and *Andrew Winton*, for the Plaintiff (Respondent)
	)	
Plaintiff (Respondent)	)	
	)	
– and –	)	
	)	
MALLOT CREEK ASSOCIATES INC., AMEC FOSTER WHEELER AMERICAS LIMITED, D.D. MAC ELECTRIC LTD., FIRST GULF DEVELOPMENTS DESIGN BUILD INC., HYDRO ONE LIMITED, HYDRO ONE NETWORKS INC., ELECTRICAL SAFETY AUTHORITY, ALLEN & SHERRIFF ARCHITECTS INC., MANUEL JARDAO AND ASSOCIATES LIMITED, FIRST GULF INC., THOR POWER CONTRACTING, PBW HIGH VOLTAGE LTD., NEW ELECTRICAL ENTERPRISES INC., ASCENT SOLUTIONS INC. and ASCENT GROUP INC.	)	*Peter Griffin* and *Sam Johansen*, for the Defendants (Appellants)
	)	
Defendants (Appellants)	)	
	)	**HEARD:** March 21, 2019

DIETRICH J.

Overview

[1] This appeal concerns the interpretation of the scope of a Mutual Full and Final Release (the "Release"). The Release brought to an end litigation arising out of the disputed performance of a design-build contract dated December 1, 2009 (the "Contract"). The Contract provided for the

construction of a new industrial bakery premises for the Canada Bread Company Limited ("Canada Bread") by First Gulf Developments Design Build Inc. ("First Gulf").

[2] The new bakery went into production in June 2011. Litigation broke out almost immediately thereafter, in October 2011, between the parties to the Contract. First Gulf sued, alleging non-payment of the full Contract price. Canada Bread counter-sued for damages resulting from alleged negligent performance in both the design and the construction aspects of the Contract and from alleged breach of contract. This initial dispute was known as the "first action" in the subsequent arbitration matter now before this court.

[3] The first action was litigated for some two and a half years and eventually proceeded to a consent mediation in April 2015. The mediation, conducted by the Honourable Warren K. Winkler, Q.C., was held on February 25, 2015 and April 2, 2015. It led to an agreement incorporated into Minutes of Settlement, executed on April 2, 2015, and the Release, executed on July 15, 2015. Both the First Gulf action and the Canada Bread counter-action were accordingly dismissed on consent and without costs.

[4] Prior to the mediation, on November 24, 2014, a serious fire had broken out at the bakery, resulting in extensive damage. Although both parties and the mediator knew this fact at the time of settlement, it is common ground that there was no allegation made suggesting that First Gulf had any further liability or exposure because of the fire.

[5] Brosz Forensic Services Inc. completed an initial investigation of the fire on December 12, 2014. Its report did not suggest exposure for First Gulf. Canada Bread's insurer communicated this report to its insured. A later forensic engineering report, by Griffin Koerth Forensic Engineering, dated February 9, 2015, contained a new allegation of negligence against First Gulf. This information was not communicated to Canada Bread until months after the settlement of all claims in the first action.

[6] In the Minutes of Settlement, the parties agreed to submit to the exclusive jurisdiction of the Honourable Mr. Winkler, Q.C. to arbitrate any dispute arising out of the interpretation of and/or the legal obligations created by the Minutes of Settlement.

[7] Such a dispute did arise, some 14 months after the Minutes of Settlement were executed, when Canada Bread commenced a new action against First Gulf, by Statement of Claim, on June 28, 2016. The cause of action in this second action is a further allegation of negligence and breach of contract arising out of the Contract. The claim is based on an additional theory of negligent design and a possible resulting claim for the aggravation of fire-loss damages. It is alleged that the damages suffered are as a consequence of, among other things, a failure to install and/or implement certain aspects of the electrical system and a failure to construct the electrical system in accordance with generally accepted practices. None of these allegations was specifically pleaded in the first action. The genesis for the new claim was found in a second report prepared by Griffin Koerth Forensic Engineering, dated August 5, 2015.

[8] Upon receipt of the Statement of Claim in the second action, First Gulf brought a summary judgment motion before the Honourable Mr. Winkler, Q.C., as arbitrator, to have the second action

dismissed. First Gulf raised the Release as a complete defence. The arbitrator dismissed the motion and allowed the second action to proceed. In doing so, he construed the Release as limited in scope to claims and causes of action which were "known" to the parties at the time the settlement was reached. He found that a potential claim against First Gulf for damages arising from the fire was not "known" to Canada Bread.

[9] First Gulf seeks leave to appeal the arbitrator's final award of a dismissal of its summary judgment motion and the resulting costs award. If leave is granted, First Gulf seeks a review of the arbitrator's interpretation of the Release and his dismissal of the summary judgment motion.

Issues

[10] The issues in this appeal are as follows:

(1) Should leave to appeal the arbitrator's decision be granted?

(2) If leave to appeal is granted:

(a) what is the standard of review?

(b) did the arbitrator err in his determination that the Release did not bar the second action?

(c) did the arbitrator err in failing to treat the identity, interests and knowledge of Canada Bread as co-extensive with those of its insurer?

(d) did the arbitrator err in finding that there was a genuine issue for trial but, nonetheless, deciding the issue and dismissing the Appellants' motion for summary judgment?

A. Leave to Appeal

[11] The *Arbitration Act, 1991*, S.O. 1991, c.17, at s. 45(1) provides that if the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant if it is satisfied that: a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and b) the determination of the question of law at issue will significantly affect the rights of the parties.

1. Does the appeal raise a question of law?

[12] The arbitration agreement between the parties does not deal with appeals on questions of law. Accordingly, leave of this court is required to proceed. The parties disagree on whether the appeal raises a question of law.

[13] The Appellants submit that the arbitrator made the following errors in law:

(1) he determined that the Release did not bar the second action;

(2) he failed to interpret the Release as a whole and to ascribe meaning to words used by the parties in the Release, and to interpret the general release language;

(3) he failed to identify any causes of action asserted in the second action that were different than those alleged in the first action;

(4) he failed to treat the identity, interests and knowledge of Canada Bread as co-extensive with those of its insurer; and

(5) he found that there was a genuine issue for trial but then decided the issue and dismissed the Appellants' motion for summary judgment.

[14] The Appellants further submit that a review of the arbitrator's interpretation of the Release, specifically, whether the Release extinguishes the cause of action to which it relates, is an important matter that will have an effect beyond the immediate parties. They submit that it will be of interest to the legal profession generally and could influence how releases are drafted going forward.

[15] The Respondent submits that the arbitrator committed no error of law and that all of the Appellants' grounds of appeal concern questions of fact or mixed fact and law from which there is no right of appeal. It further submits that leave should not be granted to appeal the interpretation of a release, which is a question of mixed fact and law. In this submission, it relies on *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 ("*Sattva*") at para. 50, where Rothstein J. states that contractual interpretation involves issues of mixed fact and law as it is an exercise in which the principles of contractual interpretation are applied to the words of the written contract, considered in light of the factual matrix. Accordingly, the Respondent submits, leave should be denied.

Analysis

[16] As noted in *Sattva* at para. 51, "one central purpose of drawing a distinction between questions of law and those of mixed fact and law is to limit the intervention of an appellate court to cases where the result can be expected to have an impact beyond the parties to the particular dispute. It reflects the role of courts of appeal in ensuring the consistency of the law, rather than providing a new forum for parties to continue their private litigation." In other words, a key difference between the two questions is that there is a "degree of generality" or some "precedential value" to the former, which is not found in the latter, as identified in *Canada (Director of Investigation and Research) v. Southam Inc.*, [1997] 1 S.C.R. 748. Further, in the same decision, at para. 37, it is suggested that the court ought to assess whether the dispute is over a general proposition that might qualify as a principle of law or over a very particular set of circumstances that is not apt to be of much interest to judges and lawyers in the future.

[17] The court in *Sattva,* at para. 53, held that it may be possible to identify an extricable question of law from what was initially characterized as a question of mixed fact and law, including legal errors made in the course of contractual interpretation, such as the application of an incorrect

principle, the failure to consider a required element of a legal test or the failure to consider a relevant factor.

[18] I find that three of the alleged errors identified by the Appellants have a measure of generality such that they may have an impact beyond the immediate parties. They are: a) the failure to find that the Release operated as a bar to the second action; b) the failure to treat the identity, interests and knowledge of Canada Bread as co-extensive with those of its insurer; and c) the finding that there was a genuine issue for trial followed immediately by deciding the issue and dismissing the Appellants' summary judgment motion. Accordingly, these three issues raise questions of law. However, the alleged errors relating to the interpretation of the Release generally (*i.e.*, failing to interpret the Release as a whole and not identifying new and different causes of action) are questions of fact or questions of mixed fact and law out of which no extricable question of law arises and from which there is no right of appeal. These issues relate to the particular circumstances of this case and are not likely to be of significant interest beyond the parties.

2. The importance of the matters and the effect on the rights of the parties

[19] Having found that the Appellants have raised questions of law, in granting leave, I must now consider: a) whether the importance to the parties of the matters at stake in the arbitration justifies an appeal; and b) whether the determination of the questions of law at issue will significantly affect the rights of the parties.

[20] The parties do not dispute that this appeal is very important to each of them. If the Appellants succeed in setting aside the dismissal of their summary judgment motion, they could avoid incurring the expense of defending the second action brought by Canada Bread through trial. For Canada Bread, the resolution of the issue will determine whether it can pursue its second action against First Gulf relating to the Contract. If Canada Bread is permitted to bring its new action and it succeeds, it could potentially recover an award in damages from First Gulf. Accordingly, I find that the importance of the matters at stake in the arbitration justifies an appeal and the determination of the questions of law at issue will significantly affect the rights of the parties. I am, therefore, prepared to grant the Appellants leave to appeal.

B. The Appeal

1. The standard of review

[21] Before addressing the issues on the appeal, I must consider the standard of review. In *Sattva* at para. 106, the Supreme Court of Canada held that in the context of commercial arbitration, where appeals are restricted to questions of law, the standard of review will be reasonableness unless the question is one that would attract the correctness standard, such as constitutional questions or questions of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

[22] The Appellants submit that the standard of review is correctness. They submit that this appeal involves the proper application of general legal principles to the interpretation of a release and the concomitant effect of such a release on the cause of action to which it relates. They further

submit that these issues are of great importance to the legal system and are outside of any specialized area of expertise of the arbitrator. They argue that the enforceability of a standard release is of central importance to the legal system and commercial litigants. Further, they argue that the arbitrator's jurisdiction arose out of a contractual arrangement between the parties that required them to revert to him to arbitrate any dispute over the interpretation of and/or the legal obligations created by the Minutes of Settlement. Accordingly, they submit, the Honourable Mr. Winkler, Q.C. was not sought out as one with a specialized expertise in interpreting releases.

[23] The Respondent submits that the standard of review is reasonableness. It relies on *Sattva* and asserts that the appeal arises in the context of a commercial arbitration, where the standard of review should be reasonableness. It further submits that the appeal involves a straightforward contractual interpretation that does not raise a question of law of central importance to the legal system as whole and outside the adjudicator's expertise. They argue that the Release is not a "standard" release, but one specifically crafted to deal with the particular facts and issues in dispute that are unique to the parties. They further submit that the Honourable Mr. Winkler, Q.C., the former Chief Justice of Ontario, was specifically chosen by the parties as the arbitrator and was well within his area of expertise in interpreting the Release.

Analysis

[24] I agree with the Respondent that the standard of review is reasonableness. As Justice Rothstein stated at para. 75 of *Sattva*:

> [R]easonableness will almost always apply to commercial arbitrations conducted pursuant to the *AA*, except in rare circumstances where the question is one that would attract a correctness standard, such as a constitutional question or a question of law of central importance to the legal system as a whole and outside the adjudicator's expertise.

[25] In *Teal Cedar Products Ltd. v. British Columbia*, 2017 SCC 32 ("*Teal Cedar Products*") at paras. 74-76, the Supreme Court of Canada held that a reasonableness standard serves the paramount policy objectives of commercial arbitration, namely efficiency and finality.

[26] The arbitrator's determination of the effect of the Release may have some impact beyond the parties. However, I am not persuaded that the arbitrator's interpretation of the Release in this case, in which the Release was specifically customized by the parties to suit their purpose, is an issue of great importance to the legal system as a whole. The appeal raises no constitutional question.

[27] I am also not persuaded that the arbitrator was outside of his area of expertise in interpreting the Release and hearing the summary judgment motion concerning the effect of the Release on the second action. The arbitrator was selected by the parties, following the mediation conducted by him, to adjudicate disputes concerning the interpretation of and/or the legal obligations created by the Minutes of Settlement. There is no evidence before the court of any lack of relevant expertise in the arbitrator. Further, as set out in *Sattva* at para. 105, the expertise of an arbitrator should be presumed because the parties have chosen the arbitrator. In *Teal Cedar Products*, the Supreme

Court of Canada again emphasized that the expertise of the arbitrator should be assumed where the arbitration was voluntary, and the parties chose arbitration and their arbitrator, rather than having the arbitration and an arbitrator statutorily imposed.

[28] In this appeal, the Appellants bear the onus to demonstrate that the arbitrator's decision is unreasonable: *1353837 Ontario Inc. v. City of Stratford (Corporation)*, 2018 ONSC 71 at paras. 20-25. A reasonable decision is one which is justifiable, transparent and intelligible: *Sattva*, at para. 119.

[29] A decision is justifiable if the result falls within a range of outcomes which are defensible in fact and law: *Intact Insurance Company v. Allstate Insurance Company of Canada*, 2016 ONCA 609 ("*Intact Insurance*") at para. 63. The court must determine whether the decision falls within a range of reasonable outcomes and not whether it is the same decision that the reviewing judge would have reached. The fact that there is an alternative interpretation that might have been preferred by the appellate judge does not make the initial decision unreasonable: *N.L.N.U. v. Newfoundland & Labrador (Treasury Board)*, 2011 SCC 62, at paras. 15-18.

2. Did the arbitrator err in his determination that the Release did not bar the second action?

[30] The principal issue in this appeal is whether the arbitrator erred in concluding that the Release was not a bar to the claims advanced by Canada Bread in the second action.

[31] Paragraph 1 of the Release provides as follows:

> 1. In consideration of the agreements and undertakings set out in the executed Minutes of Settlement in the proceedings discussed herein, the receipt and sufficiency of which are hereby expressly and irrevocably acknowledged:
>
> Canada Bread Company Limited and Canada Bread Company, Limited/Boulangerie Canada Bread, Limitée (collectively, "Canada Bread"),
>
> hereby forever releases and discharges
>
> First Gulf Inc. ("First Gulf"), its affiliates and all of its officers, directors and employees (collectively, the "First Gulf Releasees")
>
> and
>
> First Gulf
>
> hereby forever releases and discharges
>
> Canada Bread, its affiliates and all of its officers, directors and employees (collectively, the "Canada Bread Releasees")

> from any and all **known** actions, **causes of action**, claims, liens, complaints or demands for payment, whether at law or in equity, which First Gulf and Canada Bread have against the First Gulf Releasees and/or the Canada Bread Releasees, as the case may be, related to the construction and design of the Canada Bread Hamilton Bakery project (the "Project"), **and in particular, without limiting the generality of the foregoing, from any and all actions, causes of action, claims, liens, complaints or demands for payment asserted in any of the proceedings commenced in the Ontario Superior Court of Justice bearing Court File Nos.: CV-11-31637 (the "Lien Action") or CV-13-41778 (the "Misrepresentation Action")**. [emphasis added]

[32] Paragraph 7 of the Release provides as follows:

> First Gulf and Canada Bread hereby warrant that the terms of this Mutual Full and Final Release are fully understood by them and that this Mutual Full and Final Release is given voluntarily, after receiving independent legal advice, for the purpose of making a full and final compromise, adjustment and settlement of all claims and issues aforesaid.

[33] A close examination of the arbitrator's reasons makes it quite clear that he found that the parties, in discussing and negotiating their settlement of the first action, were aware of the fire at the bakery in 2014. However, a separate claim for extensive damages resulting from a further act of negligent design was not alleged, discussed or known to Canada Bread during the settlement process. In his view, it was not, therefore, a "known" claim and thus was not covered by the Release.

[34] In short, the arbitrator reasoned that because Canada Bread was unaware that there was a theory to expand their claim of damages as a result of the fire, such an additional claim (being unknown) was not released by the settlement of the prior litigation.

[35] The arbitrator found that the parties had intended to fully and finally resolve and settle their dispute on the Contract as articulated in the pleadings in the first action. In other words, the parties intended to "wipe the slate clean" in respect of their dispute over the performance of the Contract, but only in respect of the claims identified.

[36] In that regard, the arbitrator found that in the second action Canada Bread alleged negligence or breach of contract against First Gulf for failure to properly design, install and/or implement the installation of various aspects of the electrical system at the bakery. These allegations had not been made in the first action.

The Appellants' Position

[37] The Appellants take the position that the claims advanced by Canada Bread in the second action were covered by the cause of action initiated by Canada Bread in the first action, and that Canada Bread had fully released First Gulf in respect of those claims by executing the Release.

Specifically, they allege that the arbitrator erred in failing to distinguish between a "known" cause of action (Canada Bread's claim in negligence and breach of contract in the construction and design of the bakery in the first action) and a further, but unknown, incident of negligent design (e.g., the failure to install a fire wall as part of the electrical system) pleaded in the second action. They assert that the arbitrator misapplied a legal principle by conflating a cause of action with new but unknown evidence.

[38] The Appellants also assert that the arbitrator erred by focusing on the word "known" in the Release and on the specific provisions of the Release (that referred to the initial action and counter-action by reference to their respective Court File Numbers) to the exclusion of the general language of the Release (that covers all known causes of action). The Appellants allege that he incorrectly read out or ignored this critical general language.

[39] The Appellants submit that the arbitrator erred in his construction of "known" to permit a repeat of the litigation – a second claim for the same cause of action – based not on a new cause of action, but rather a new and additional set of perceived facts which sound in the original cause of action that, they argue, has been extinguished.

[40] The Appellants further submit that a construction of the word "known" that would exclude and therefore not release any new, unknown and independent cause of action not pleaded in the first action is both clear and consistent with the law's approach to the finality underlying settlements, and consistent with the remaining assertions in paragraph 1 of the Release. These assertions, they argue, have the legal effect of extinguishing all causes of action in the first action, with the result that First Gulf is liberated once and for all from any liability or obligation to Canada Bread arising out of the Contract for the new industrial bakery.

[41] Accordingly, the Appellants argue that the arbitrator erred in failing to apply the principle of finality to the Release to find that a final settlement of the prior litigation would operate to fully *extinguish* the various claims and causes of action pleaded in the first action. The Release would result in the expiry of the cause of action for negligence or breach of contract arising out of the Contract with the same legal effect as the expiry of a limitation period. In short, the Release "wiped the slate clean" by extinguishing the underlying cause of action; and consequently, it affords a complete defence to the second action.

[42] The Appellants argue that the law of interpretation of release agreements recognizes that an essential feature is compromise or settlement. Its purpose is to avoid the uncertainty and expense of a full trial or hearing. When a settlement occurs the parties essentially trade their uncertainty for certainty.

The Respondent's Position

[43] The Respondent takes the position that the arbitrator did not fail to apply the correct legal principles in interpreting the Release and in determining that it does not bar the second action. The Respondent submits that the arbitrator's interpretation of the Release is both reasonable and correct.

[44] The Respondent submits that over the course of the mediation, the issues of deficiencies and design flaws alleged by Canada Bread were dealt with item by item, assigned a value and set-off against First Gulf's claims. The itemized list did not include any liability for the fire. Glen Sivec, the Vice President of Finance for Canada Bread, testified that when he signed the Minutes of Settlement, he was unaware of whom was at fault for the fire. Ian MacPherson, the Vice President of HR and Corporate Affairs for Canada Bread, who signed the Release, testified that when he signed the Release, he was not aware of the cause of the fire.

[45] The Respondent further submits that, in his reasons, the arbitrator made the following findings of fact:

(1) The first report of Griffin Koerth Forensic Engineering was not shared with Canada Bread prior to the execution of the Release.

(2) The cause of the fire was not known to Canada Bread at the mediation or at the time it signed the Release.

(3) First Gulf and Canada Bread intended to define the scope of the Release in terms of the subject matter of the first action.

(4) The fire was not a subject included, directly or indirectly, in the first action; nor was the construction of the electrical system at the bakery impugned.

(5) It was not in the contemplation of the parties to include the fire within the scope of the Release, and the language of the Release was clear in its restriction of the Release to the subject matter of the first action.

[46] The Respondent disagrees with the Appellants' submission that the arbitrator did not properly interpret the phrase "any and all known actions, causes of action, claims, liens, complaints or demands for payment, whether at law or in equity, [...] related to the construction and design of the [facility]." It points to paragraphs 89-94 of the arbitrator's reasons where the Honourable Mr. Winkler, Q.C. quotes this phrase in his consideration of the Appellants' argument and his rejection of the argument that the Release was broadly worded to ensure that <u>all</u> claims and issues related to the design and construction of the bakery were settled.

[47] The Respondent submits that the arbitrator considered this phrase a second time at paragraph 98 of his reasons. There he referred to the Appellants' argument that the fire was a "known" claim and the arbitrator rejected this argument also.

Analysis

[48] The court must determine whether the arbitrator's decision falls within a range of reasonable outcomes irrespective of whether the reviewing judge would have reached the same conclusion. I find that it was open to the arbitrator to distinguish between a known cause of action and an unknown incident of negligent design or an unknown claim. In *Farmers Oil and Gas Inc. v. Ontario (Natural Resources)*, 2016 ONSC 6359 (Div. Ct.) ("*Farmers Oil and Gas*") at para. 14,

the court considered whether proposed amendments to pleadings gave greater clarity or particularity to an existing claim, or whether they advanced a new claim. Reference is made to the decision in *1309489 Ontario Inc. v. BMO Bank of Montreal*, 2011 ONSC 5505, where Lauwers J. (as he then was) referred to the two different approaches to determining whether a claim is a new cause of action. Lauwers J. concluded that the trend of the case law was to favour the broader factually-oriented approach to the meaning of cause of action. In *Farmers Oil and Gas*, Nordheimer J. (as he then was) finds that "under that broader approach, if the defendant has notice of the factual matrix underlying the claim being advanced, then amendments that arise out of, or do not depart from, that factual matrix do not constitute "new" causes of action that would not be allowed by way of amendment."

[49] In *Sweda Farms Ltd. v. Ontario Egg Producers*, 2011 ONSC 6146 at para. 25, Lauwers J. found that "the broader, factually oriented approach to the meaning of 'cause of action' in interpreting and applying rule 26.01 is the correct approach ... This means that the defendant's basic entitlement is to have notice of the factual matrix out of which the claim for relief arises."

[50] In the case at bar, the factual matrix, including the possibility that First Gulf may have some liability in negligence or breach of contract for damages caused by the fire at the bakery, was unknown to Canada Bread or First Gulf when the first action was settled. The facts giving rise to the second action only came to light vis-à-vis the parties after the Release was executed. Accordingly, I find that it was reasonable for the arbitrator to conclude that a claim against First Gulf in negligence or breach of the Contract with respect to the fire was not a known cause of action when the Release was executed, and this specific claim was not included in the first action.

[51] In determining that the Release did not bar the second action, the arbitrator also turned his mind to whether the parties intended to "wipe the slate clean" in respect of any and all possible claims relating to the Contract. In this regard, he relied on *Biancaniello v. DMCT LLP*, 2017 ONCA 386. At paragraph 1 of his reasons, the arbitrator states:

> As the Court of Appeal wrote in *Biancaniello*, while parties may use language that releases every claim that arises, both known and unknown, clear language will be required to demonstrate that a party intended to release all claims. In the present case the parties did not intend to release all claims. They precisely restricted the release to the subject matter of the prior proceedings which were enunciated with specificity. The instant case is exactly the type of case the Court had in mind when it stated "in the absence of clear language [the court] will be very slow to infer that a party intended to surrender rights and claims of which he was unaware and could not have been aware". The parties to the Release in issue employed "clear language" by restricting the Release to the subject matter of the Prior Litigation. The Fire did not meet that requirement.

[52] In the absence of clear language in the Release, which could have included unknown claims, the arbitrator's interpretation of the Release involved a determination of the intent of the parties and the scope of their understanding.

[53] It was reasonable for the arbitrator to conclude that the Release was intentionally drafted narrowly to include only "known" claims and not "known or unknown" claims. The Release could have been drafted to specifically preclude "any other claim arising out of the design-build Contract", or "any claims that have been raised or could have been raised", but it was not. Accordingly, it was not unreasonable for the arbitrator to interpret the Release narrowly and to come to the result that it did not bar future claims under the Contract, which were not known to the parties when they signed the Release.

[54] As noted, the arbitrator's interpretation of the Release must only be reasonable. That the Appellants, or even another arbitrator or judge, may have interpreted the Release differently is not the point. The Appellants disagree with the arbitrator's application of legal principles to his interpretation of the Release, but this disagreement does not make his conclusion unreasonable or unjustifiable.

[55] The arbitrator made certain findings of fact, which are not subject to review by this court. In addition, in his reasons, he addressed and rejected the Appellants' arguments concerning his interpretation of the Release and application of legal principles. Specifically, the arbitrator concluded in his reasons that: a) the Release, in particular paragraph 7, was not intended to "wipe the slate clean between the parties": paras. 89-94 of his reasons; b) the Release did not employ "clear language" to support the conclusion that the parties intended to surrender rights and claims of which they were unaware: para. 101 of his reasons; and c) this was a clear case where the Release did not apply to the fire: para. 102 of his reasons.

[56] I find that the arbitrator's conclusion that the Release did not act as a bar to the second action is justifiable and within the range of acceptable and rational outcomes. While another arbitrator or a judge may have come to a different conclusion, the arbitrator properly applied legal principles and based his decision on his findings of fact and relevant jurisprudence. He found the language of the Release to be narrow in scope and that the parties intended the Release to be narrow in its scope. It was reasonable for him to conclude that the Release only applied to claims known to the parties at the time the Release was executed. This interpretation did not preclude the possibility of additional claims arising out of the Contract, such as claims in negligence or breach of contract arising out of the fire. I find that the Appellants have not demonstrated that the arbitrator's conclusion is unreasonable.

3. Did the arbitrator err in failing to treat the identity, interests and knowledge of Canada Bread as co-extensive with those of its insurer?

[57] In finding that the possibility of a claim in negligence or breach of contract against First Gulf for damages arising from the fire was not "known", the Appellants submit that the arbitrator erred in not treating the identity, interests and knowledge of Canada Bread as co-extensive with those of its insurer. Had he done so, they assert, that claim would have been "known" to Canada Bread when it signed the Release and the Release would bar the second action.

[58] However, the evidence is that, following the fire, Canada Bread made a claim on its insurance policy and its insurers retained an adjuster, Nick Tucci, to adjust the loss at the bakery.

Mr. Tucci received the first Brosz Forensic Services Report on December 12, 2014. That report did not draw any conclusions concerning the cause of the fire that implicated First Gulf. Subsequently, Mr. Tucci received the February 9, 2015 report from Griffin Koerth Forensic Engineering, which disclosed electricity safety code violations relating to the installation of one of the transformers, which resulted in consequential damages to the bakery. Mr. Tucci's undisputed and unchallenged evidence is that he did not deliver a copy of this report to Canada Bread prior to July 16, 2015, when the Release had already been signed by both parties. Canada Bread had signed the Release on June 26, 2015.

[59] In paragraph 57 of his reasons, the arbitrator states: "While the Fire had occurred and was acknowledged by the parties at the time of the mediation, knowledge of the Fire by Canada Bread does not equate to knowledge of a claim as contemplated by the Release. At the time the Release was executed, the insurance company was still adjusting the loss from the Fire, the cause of the Fire was not yet known, and Canada Bread had not been informed of any specific subrogation targets."

[60] The Appellants assert that the arbitrator ought to have imputed to Canada Bread the knowledge of the insurance adjuster; in other words, that First Gulf may be liable to Canada Bread in respect of the fire. They urged the arbitrator to do so and he declined (at para. 83 of his reasons). Based on the record, I find that the arbitrator's decision falls within a range of reasonable outcomes. It was open to him to decline to impute knowledge to Canada Bread in the absence of any authority to support that result. The court was similarly not provided with any authority to support the imputation of such knowledge.

4. Did the arbitrator err in finding that there was a genuine issue for trial but nonetheless deciding the issue, and dismissing the Appellants' motion for summary judgment?

[61] The Appellants assert that it was not open to the arbitrator to find that there was a genuine issue requiring a trial and then to decide the issue in favour of the Respondent. The record shows that the arbitrator considered each of the arguments made by First Gulf in its motion. At paragraph 53 of his reasons, he states: "I do not accept the arguments made by First Gulf." He then, over the next 49 paragraphs in his reasons, explains why he agrees with Canada Bread that the terms of the Release do not preclude Canada Bread from proceeding with the second action.

[62] The arbitrator concludes, at paragraph 56 of his reasons, that the fire occurred well after the first action had been commenced. It was not one of the issues discussed at the mediation that was resolved by the Minutes of Settlement. The Minutes of Settlement specifically refer to resolving the first action, of which a claim for damages arising from the fire was not a part.

[63] Having dismissed the Appellants' motion for summary judgment, it remained open to the arbitrator to find in the Respondent's favour, even in the absence of a cross-motion by the Respondent: see *King Lofts Toronto Ltd. v. Emmons*, 2014 ONCA 215. I find that the arbitrator's decision in this regard was justifiable and also within the range of reasonable outcomes, notwithstanding that another arbitrator or judge may have come to a different conclusion.

[64] In *Kassburg v. Sun Life Assurance Co. of Canada*, 2014 ONCA 922 ("*Kassburg*") at para. 52, the court found that the motion judge did not err in making a declaration that the action was commenced within the applicable limitation period, even though the plaintiff did not bring a cross motion seeking that relief. The Court of Appeal held that it was open to the motion judge to determine the issue of the limitation defence on a final basis on the record before him.

[65] In the case at bar, as was done in the *Kassburg* case, the parties submitted a comprehensive record. It is assumed that the Appellants, in advancing their summary judgment motion, considered the record sufficient for the issues to be able to be determined. They did not cross-examine on the affidavits sworn in support of Canada Bread's claim. The Court of Appeal in *Kassburg* found it to be in the interests of justice that the issue be determined on a final basis by the motion judge at the summary judgment stage and found no error by the motion judge in making the declaration on the limitation period and not sending the case to trial.

[66] I find that the arbitrator did not err in dismissing the Appellants' motion for summary judgment. He did not exceed his jurisdiction by not sending the case to trial as argued by the Appellants. On a summary judgment motion, the Appellants are required to lead trump and put their best foot forward, which includes supplying a complete record relating to the issues at hand. If the sufficiency of the record permits the arbitrator to resolve the issue, using the tools available to him pursuant to the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194, it is axiomatic that the issues should be resolved, whether in favour of the moving party or the responding party. The arbitrator's determination of the issues on the motion for summary judgment is in line with the principle of proportionality in the application of rule 20 of the *Rules of Civil Procedure*.

Disposition

[67] For the above-noted reasons, the appeal is dismissed. The Respondent shall be entitled to its costs of the appeal. The parties are encouraged to agree on the matter of costs. If they cannot agree, the Respondent may serve and file written submissions on costs not exceeding three pages in length (not including a costs outline or bill of costs) within 14 days hereof. The Appellants may serve and file written submissions on costs not exceeding three pages in length (not including a costs outline or bill of costs) 14 days after receipt of the Respondent's submissions. The Respondent may serve and file a written reply not exceeding one page in length, if so advised, seven days after receipt of the Appellant's submissions.

Dietrich J.

Dietrich J.

Released: August 8, 2019

CITATION: Canada Bread v. Mallot Creek, 2019 ONSC 2578
COURT FILE NO.: CV-18-00601085-00CL
DATE: 20190808

ONTARIO

SUPERIOR COURT OF JUSTICE

IN THE MATTER OF an Arbitration under the *Arbitration Act, 1991*, S.O. 1991, c.17

BETWEEN:

CANADA BREAD COMPANY LIMITED

Plaintiff (Respondent)

– and –

MALLOT CREEK ASSOCIATES INC., AMEC FOSTER WHEELER AMERICAS LIMITED, D.D. MAC ELECTRIC LTD., FIRST GULF DEVELOPMENTS DESIGN BUILD INC., HYDRO ONE LIMITED, HYDRO ONE NETWORKS INC., ELECTRICAL SAFETY AUTHORITY, ALLEN & SHERRIFF ARCHITECTS INC., MANUEL JARDAO AND ASSOCIATES LIMITED, FIRST GULF INC., THOR POWER CONTRACTING, PBW HIGH VOLTAGE LTD., NEW ELECTRICAL ENTERPRISES INC., ASCENT SOLUTIONS INC. and ASCENT GROUP INC.

Defendants (Appellants)

REASONS FOR DECISION

Dietrich J.

Released: August 8, 2019