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Court of Appeal Decides Against Overruling its Prior Decisions on s. 7(6) of the Arbitration Act

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By Raj Datt

In *Toronto Standard Condominium Corporation No. 1628 v. Toronto Standard Condominium Corporation No. 1636*, 2020 ONCA 612, an appeal was brought from the order of a motion judge refusing to stay a court proceeding in favour of arbitration. The respondent moved to quash the appeal on the basis of jurisdiction, and asked a five-judge panel of the Ontario Court of Appeal to overrule 20 years of its jurisprudence on when s. 7(6) of the *Arbitration Act, 1991*, S.O. 1991, c. 17 bars an appeal. The Court dismissed the motion.

Background

The motion and the appeal arose in litigation about amounts owing under a cost-sharing agreement ("**Reciprocal Agreement**") for the costs of certain common facilities in two adjoining condominium projects on Wellington Street West in Toronto. The Reciprocal Agreement contained an arbitration provision. In addition, s. 132 of the *Condominium Act*, 1998, S.O. 1998, c. 19 provides that an agreement — such as the Reciprocal Agreement — between a declarant and a corporation created under the *Condominium Act* shall be deemed to contain a provision to submit any disagreement between the parties to mediation and, if mediation fails, to arbitration under the *Arbitration Act*.

The moving party, Condo 1628, paid its share of the common facilities costs for the years 2005–2008 and 2015-2018, but disputed the amounts for the years 2009-2014. Condo 1628 and the responding party, Condo 1636, mediated the dispute, as required by s. 132 of the *Condominium Act*. However, when mediation failed, Condo 1628 refused to arbitrate the dispute and instead began an application before the Superior Court of Justice against Condo 1636. Condo 1636 responded by moving before the Superior Court to stay the court application in favour of arbitration. The motion judge dismissed the motion and ruled that the entire matter should proceed in the form of an application before the court.

Jurisprudence on s. 7(6) of the *Arbitration Act* and Motion to Quash

In *Huras v. Primerica Financial Services Ltd.* (2000), 2000 CanLII 16892 (ON CA), 137 O.A.C. 79 (C.A.), which was followed in a subsequent line of cases, the Court of Appeal held that if a motion judge decides that an arbitration agreement does not apply to the dispute before the court, then the *Arbitration Act* also does not apply, including the bar on appeals in s. 7(6).

The moving party invited the Court to overrule the *Huras* line of cases and quash the appeal based on the Supreme Court of Canada's decision in *TELUS Communications Inc. v. Wellman*, 2019 SCC 19, [2019] 2 S.C.R. 144. In *Wellman*, Moldaver J., writing for the majority, held that s. 7(5) of the *Arbitration Act* "does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement": at para. 8. He ruled that s. 7(5) "does not … permit the court to ignore a valid and binding arbitration agreement": at para. 103. *Wellman* overturned the Court of Appeal's contrary interpretation of s. 7(5) in *Griffin v. Dell Canada Inc.*, 2010 ONCA 29, 98 O.R. (3d) 481, leave to appeal refused, [2010] S.C.C.A. No. 75, which had construed s. 7(5) as granting a motion

judge discretion to refuse to stay claims dealt with in an arbitration agreement.

In dismissing the motion to quash, the Court of Appeal held that although *Wellman* overturned *Griffin* on the interpretation of s. 7(5), it did not disturb *Huras* on the interpretation of s. 7(6). In the Court's view, the *Huras* line of cases were correctly decided.

Further, the Court held that s. 7(6) did not bar an appeal from the motion judge's order in the subject case. The motion judge found that the proceeding before the court combined matters that are dealt with in the arbitration agreement with other matters that are not dealt with in the arbitration agreement. Because the motion judge did not have the benefit of *Wellman* at the time of his decision, he applied the court's decision in *Griffin*, refused to stay any part of the proceeding under s. 7(5), and allowed the entire proceeding to continue before the court. But as *Wellman* later confirmed, s. 7(5) does not grant the court discretion to refuse to stay claims that are dealt with in an arbitration agreement, and does not permit a court to ignore a valid and binding arbitration agreement. Because the motion judge granted relief that was unavailable under s. 7(5) or elsewhere in s. 7, the Court of Appeal found that the motion judge's decision was not a decision under s. 7 and that, as a result, an appeal was not barred by s. 7(6). The Court also found that an appeal lied to the Court of Appeal under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43 because this was a final order — terminating potential proceedings before the arbitrator and overriding a substantive contractual right to arbitrate.

Conclusion

In refusing to overrule its decision in *Huras*, the Court of Appeal held that *Wellman* was mainly concerned with the proper interpretation of s. 7(5) of the *Arbitration Act* and did not expressly make a ruling on s. 7(6). Hence, the majority's discussion of s. 7(6) in *Wellman* should be viewed as *obiter dicta*. The Court of Appeal also found that *Huras* respects the two principles animating the *Arbitration Act* — party autonomy and limited court intervention in arbitration matters. When, for example, a motion judge finds that an arbitration agreement and thus the *Arbitration Act* do not apply, neither principle is undercut. But if on appeal the Court concludes that the arbitration agreement and thus the *Arbitration Act* do apply and that the dispute should be referred to arbitration, the Court's decision promotes party autonomy by holding the parties to their agreement to arbitrate. It also promotes limited court intervention in arbitration matters, because the court intervenes only to ensure that the dispute is arbitrated as agreed.

For more information or inquiries:

Raj Datt

Toronto
416.947.5038

Email:
rdatt@weirfoulds.com

Raj Datt is a Partner and the Chair of the firm's Subrogation & Recovery practice. His practice is focused on prosecuting large commercial and residential property losses arising from fires, floods, product liability, oil & gas operations, water/sewer main failures, construction projects, and many other complex loss scenarios.

WeirFoulds LLP

www.weirfoulds.com

Toronto Office
4100 – 66 Wellington Street West
PO Box 35, TD Bank Tower
Toronto, ON M5K 1B7

Tel: 416.365.1110
Fax: 416.365.1876

Oakville Office
1320 Cornwall Rd., Suite 201
Oakville, ON L6J 7W5

Tel: 416.365.1110
Fax: 905.829.2035