

Once Bitten, Twice Shy? Not so, says the Ontario Court of Appeal

January 16, 2018

By and Les O'Connor



In the April, 2017 case of *Deslaurier Custom Cabinets v. 1728106 Ontario Inc.*, 2017 ONCA 293, the Ontario Court of Appeal had occasion to revisit an issue that it had previously dealt with in the same case one year earlier, that is, the standard of appellate review applicable to contractual interpretation cases. After one of the parties sought leave to appeal to the Supreme Court of Canada, the Supreme Court remanded the case back to the Court of Appeal, to be decided in accordance with the Supreme Court's decision in *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37 ("**Ledcor**").

Background

The Court of Appeal had found in the original appellate decision (2016 ONCA 246) that the decision of the motions judge who had granted summary judgment to the tenant Plaintiff Deslaurier against the landlord Defendant was to be set aside, and that the tenant's action was to be dismissed. The Court then was dealing with the standard of appellate review applicable to that earlier decision and whether the motions judge had erred in her interpretation of the lease in issue.

The findings of the Court of Appeal were that the motions judge had erred in her decision on several extricable questions of law, such that review of her decision on those was to be on the standard of correctness, not the deferential standard of palpable and overriding error.

The Court of Appeal also held that the motions judge had erred in:

1. failing to hold that the tenant had assumed the risk of damage to its property by fire;
2. admitting extrinsic evidence of other leases by the landlord without evidence that those leases formed part of the factual matrix of the tenant's lease and despite evidence to the contrary; and
3. finding that the tenant's failure to add the landlord as an additional insured to its property policy did not bar its claim against the landlord resulting from the fire.

As stated above, the tenant had sought leave to appeal to the Supreme Court of Canada, but while that leave motion was outstanding, the Supreme Court issued its decision in *Ledcor*.

The Supreme Court then remanded the case back to the Ontario Court of Appeal for disposition "in accordance with *Ledcor*".

The Supreme Court's decision in *Ledcor*

In *Ledcor*, readers will recall, the Supreme Court discussed the standard of appellate review applicable to the interpretation of standard form contracts. The Supreme Court held that the standard of review applicable to the trial judge's decision in that case was correctness, as an exception to the rule set out in *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 that interpretation of contracts is a question of mixed fact and law, because the document in issue was a standard form contract.

The Supreme Court expressed the view that for standard form contracts, the surrounding circumstances generally play less of a role in the interpretation process, and where they are relevant, they tend not to be specific to the particular parties. Therefore, one of the main reasons given in *Sattva* for concluding that contractual interpretation is a question of mixed fact and law — the importance of the factual matrix — carries less weight in cases involving standard form contracts.¹

Further, according to the Supreme Court, the interpretation of a standard form contract itself has precedential value and can therefore fit under the definition of a pure question of law. Establishing the proper interpretation of a standard form contract amounts to establishing the correct legal test, as the interpretation may be applied in future cases involving identical or similarly-worded provisions. In addition, the mandate of appellate courts of ensuring consistency in the law is advanced by permitting them to review the interpretation of standard form contracts for correctness.²

Thus, *Ledcor* formally recognized, in relation to standard form contracts, an exception to the Supreme Court's holding in *Sattva* that contractual interpretation is a question of mixed fact and law subject to deferential review on appeal.³

Court of Appeal's Decision #2

Given the detailed analysis by the Supreme Court in *Ledcor*, one might have thought that a court of appeal facing a remand, as here, to decide the case on the basis of *Ledcor* principles might have had occasion to be influenced by that to revise its decision, given that direction from above — but not so here.

In fact, although the Court of Appeal (Cronk, Peppall and Miller JJ.A.) does acknowledge the remand and deals with the *Ledcor* decision in the Reasons written "By the Court", it ultimately affirms its previous decision in its entirety.

The Court of Appeal does this on the basis that, although the lease in this case was not a standard form document, it did not have to fall back to have to use the deferential "palpable and overriding error" standard, because the Court found that the errors of the motions judge were themselves extricable questions of law that could be extracted from the matrix of mixed fact and law, normally requiring a deferential standard of review.

Therefore, the Court arrived at a correctness standard of review for this appeal itself, and did not need to revise its previous thinking to pay homage to the *Ledcor* decision that it was directed to take into account in deciding the case.

The Court explains its decision to apply the correctness standard as follows:

[22] The Lease in this case is not a standard form contract but, rather, was negotiated by the parties. In the first instance, therefore, the palpable and overriding error standard of review applied to the motions judge's interpretation of the Lease.

[23] However, in the Appeal Decision, this court held that the motions judge's interpretation of the Lease was tainted by several legal errors involving extricable questions of law. Consequently, applying *Sattva* standard of review principles, the correctness standard was engaged. [...]

The Court further bolsters its view of the landscape, post-*Ledcor*, by adverting to a fundamental precept:

[33] Of critical importance, nothing in *Ledcor* deviates from the holding in *Sattva* that the correctness standard of review applies to extricable questions of law arising within what is initially characterized as a question of mixed fact and law.

Therefore, in the Court of Appeal's view, the application of the correctness standard of review to an extricable question of law accords with both *Sattva* and *Ledcor*.

After noting the warning in *Sattva* that courts should be cautious in identifying extricable questions of law in contract disputes, the Court of Appeal states:

[55] *Sattva* and *Ledcor* also instruct that certain legal errors constitute extricable questions of law for standard of review purposes. These include: the application of an incorrect principle; the failure to consider a required element of a legal test; the failure to consider a relevant factor; the substantive requirements for the formation of a valid contract [...]; and the content of a given legal principle of contractual interpretation.

Ultimately, the Court of Appeal concluded as follows:

[58] In this case, having carefully considered the teachings of *Sattva* and *Ledcor*, we remain of the view that the motions judge's interpretation of the Lease is tainted by legal errors involving extricable questions of law subject to review on the correctness standard.

Last Word

The tenant applied for leave to appeal to the Supreme Court of Canada but, despite the remand, the Supreme Court denied leave on October 19, 2017. Score: Ontario Court of Appeal—1, Supreme Court of Canada—0.

[1] *Ledcor* at para. 32.

[2] *Ibid.* at paras. 39, 43.

[3] *Ibid.* at para. 24.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

[For more information or inquiries:](#)

Toronto

Email:



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