

CITATION: Edith Anne Craddock v. Progressive Air Group Ltd., 2019 ONSC 5997  
COURT FILE NO.: CV 19-125  
DATE: 2019-10-16

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN: )  
 )  
Edith Anne Craddock )  
 )  
Appellant/Claimant ) Brian R. Kelly, for the Appellant/Claimant  
 )  
- and - )  
 )  
Progressive Air Group Ltd., Brantford Air )  
Centre Limited, Todd Collins and Robin )  
Wharf )  
 )  
Respondents )  
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 )  
J. Daniel McConville, for the Respondents  
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 )  
 )  
HEARD: October 16, 2019

THE HONOURABLE JUSTICE R. J. HARPER

ENDORSEMENT

Issues

- [1] This is a Motion for Leave to Appeal the Arbitration Award of Costs delivered by the Arbitrator, Colin Campbell on January 15, 2019.

## **Background**

- [2] The Appellant Edith Anne Craddock (Craddock) entered into a Shareholders Agreement with the Respondents, Progressive Air Group Ltd. (PAG), and its other shareholders, namely Todd Collings (Collins) and Robin Wharf (Wharf), dated September 30, 2015.
- [3] The Agreement related to Craddock and PAG's rights and obligations with respect to their shareholdings in Brantford Air Centre Limited. (BACL)

## **Disclosure**

- [4] A material covenant in the Shareholders' Agreement provided:

(a) Article 2.11:

2.11 Accounting Records: Proper books of account shall be kept by the Company [BACL] and entries shall be made in them of all matters, terms, transactions and other things as are usually written and entered in books of account kept by others engaged in an enterprise of a similar nature and each of the Shareholders shall have free access at all times to inspect, examine and copy them.

(b) Article 4.3(a) Provided for a Right of First refusal in respect of a share transfer, same being that:

No Shareholder shall Transfer or otherwise dispose of any of the Shareholder's interest unless that Shareholder (the "Offeror") first offers by notice in writing (the "offer") to the other Shareholders (the "Others") in accordance with their Proportionate Share, the prior rights to purchase, receive or otherwise acquire the Offeror's Interest.

## **Dispute Resolution**

- [5] The Agreement also provided the following:

Article 13.8:

Should there be a disagreement or a dispute between the parties hereto with respect to this Agreement or interpretation thereof, the same shall, unless the parties to the dispute agree otherwise, be referred to a single arbitrator pursuant to the *Arbitration Act* Ontario and the determination of such arbitrator shall be final and binding upon the parties hereto.

- [6] Craddock submitted two (2) disputes to an Arbitrator, Colin Campbell. Arbitration #1 sought an interpretation of the above noted disclosure obligations and an order for disclosure pursuant to that obligation. Reasons for the Arbitrators decision for Arbitration #1 are dated October 19, 2017.
- [7] At around the time of the decision in Arbitration #1, the Appellant commenced Arbitration #2. The second Arbitration was brought in an effort to overturn a sale of shares by PAG to Hanger 83 on the basis that Craddock's right of first refusal under the shareholders agreement was not respected.
- [8] The Arbitrator reserved costs of Arbitration #1 until the completion of Arbitration #2. Subsequent to Arbitration #2, the Arbitrator ordered costs against the Appellant in the amount of \$71,904.97. It is this costs order that the Appellant is seeking leave to Appeal.
- [9] At the outset of the submissions on this motion, the Appellant's counsel conceded that he agreed with the law as set out in the submissions of the Respondents with respect to the ability to appeal from an arbitration award when the governing agreement includes an arbitration clause that provides that the Arbitrators decision is "final and binding."
- [10] To be clear, I set out Justice Faieta's decision in *108 Media Corporation v. BGOI Films Inc.*, 2019 ONSC 880 (CanLII) where he considered the issue of whether there is a right of Appeal from an Arbitration Award when the initial contract of the arbitration contained a clause that provided that the decision of the Arbitrator was "final and binding".
- [11] Commencing at paragraph. 20:

"Final and binding"?

[20] Unless the context indicates otherwise, it is generally accepted that where a legislative provision provides that an order is "final" there is no appeal from that order. The phrase "final and binding" would have no meaning whatsoever if it did not exclude a right of appeal that had been given by statute: *Yorkville North Development Ltd. v. North York*, 1988 CanLII 4701 (ON CA), [1988] O.J. No. 410, paras. 7 and 8 (C.A.).

[21] It is now well-established that an arbitration agreement which states that the parties agree to "final and binding" arbitration does not necessarily preclude judicial review, but it does reflect an intention to exclude a right of appeal: *Labourers' International Union of North America, Local 183 v. Carpenters and Allied Workers Local 27 et al.*, para. 22; *Kucyi v. Kucyi*, 2005 CanLII 48539 (ON SCDC), [2005] O.J. No. 5626 (Div. Ct.) para.14; *Weisz v. Four Seasons Holdings Inc.*, 2010 ONSC 4456 (CanLII), paras. 22-25, 37-39; *Nasjiec Investments Ltd. v. Nuyork Investments Ltd.*, 2015 ONSC 4978 (CanLII), paras. 30-35;

- [12] Having conceded that the appellant had no right of appeal in this matter on the substantive issues, the Appellant argued that the costs award could be appealed since the Arbitrator, in

his decision dealt with a question that was not asked of him and as a result he erred in his application of the law relative to his exercise of discretion on costs.

- [13] The Appellant argued that the Arbitrator was never asked what impact the disclosure may have had with respect to any decision that may have been made with respect to the first right of refusal. She submits that the finding of a lack of evidence with respect to this issue was material to his decision with respect to cost. As a result, the Arbitrator acted outside of the confines of the Agreement and s. 46 of the *Arbitrations Act* would operate to allow for a right of Appeal.
- [14] I agree with the submissions of the Respondents.
- [15] First, the Appellant set out a number of sections of the *Arbitration Act* that she was relying on in this Appeal. There is no reference to Section 46.
- [16] Secondly, the Appellant is not correct in her assertion that the question of the impact of disclosure on her determination as to the use of her first right of refusal was not before the Arbitrator. The Appellant clearly placed that issue before the Arbitrator as set out in her factum that she provided to the Arbitrator. This is clearly shown at Page 7, Para (d) and Page 8, Para (e) of the Factum dated March 8, 2017.
- [17] Under the circumstances, I find that all of the issues placed before the Arbitrator were the proper subject of the Arbitration before him pursuant to the Shareholders Agreement.
- [18] There his no right of appeal since the agreement provided that the decision on the Arbitrator is final and binding.
- [19] The Motion for Leave to Appeal is dismissed.

### **Costs**

- [20] In this matter, the Respondents were completely successful.
- [21] The motion material was extensive, and it was not until the commencement of the motion submissions that the Appellant conceded that there was no right of appeal in the circumstances of this case on the substantive issues.
- [22] The Appellant's argument that this case fell within Section 46 of the *Arbitrations Act* was not claimed and despite this the Appellant was allowed to make submissions. Nevertheless, the Appellant was not successful in this argument.
- [23] The Respondents filed an offer to settle that provided for a dismissal to the motion without costs if the matter was settled by March 6, 2019, and on a partial indemnity basis if settled after that date.

- [24] Both parties submitted an outline of their costs. Both outlines were almost identical. The Respondents' outline claimed costs, inclusive of disbursements, in the amount of \$13,742.57. the Appellant's outline sought costs of \$13,109.65.
- [25] Under the circumstances of this case, it is a reasonable expectation of the Appellant that they might be ordered to pay the costs as set out by the Respondents.
- [26] The Appellant shall pay to the Respondents the total costs of \$13,742.57 inclusive of fees, disbursements and HST.

  
Justice R.J. Harper

**Released:** October 16, 2019

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**ENDORSEMENT**

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RJH

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