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Middlesex Condominium Corp. No. 185 v. Roney Construction Ltd.

**Middlesex Condominium Corporation No. 185, (Appellant) and Roney Construction Ltd. cob as Homecastle,
(Respondent)**

Ontario Superior Court of Justice (Divisional Court)

D.R. Aston J., E.W. Stach J., F.P. Kiteley J.

Heard: November 16, 2007

Judgment: November 16, 2007

Docket: London 1609/06

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Counsel: S. Mackay, for Appellant

J. LeBer, for Respondent

Subject: Civil Practice and Procedure; Corporate and Commercial; Public; Contracts

Alternative dispute resolution --- Judicial review of arbitration awards --- Jurisdiction of court to review.

Cases considered by *D.R. Aston J.*:

Kucyi v. Kucyi (2005), 2005 CarswellOnt 7579, 206 O.A.C. 113, 25 R.F.L. (6th) 49 (Ont. Div. Ct.) — considered

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17

s. 3 — considered

s. 46 — considered

s. 46(1) ¶ 3 — considered

s. 46(1) ¶ 6 — considered

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s. 46(1) ¶ 7 — considered

s. 46(1) ¶ 8 — considered

s. 50(3)(a) — considered

D.R. Aston J., (orally):

1 This is an application for judicial review of the decisions of arbitrator Ken Selby, dated November 2, 2005, June, 2006 and October 23, 2006.

2 The arbitration was governed by contractual terms of reference in a binding Arbitration Agreement and amending agreement. The subject matter of the arbitration stems from a contract between the parties, wherein the respondent agreed to replace windows and doors on 63 units of the applicant's condominium complex. There were issues with respect to deficiencies and the costs to correct supply and installation problems.

3 The Arbitration Agreement specifically provides;

The orders of the arbitrator, including decisions on any issues brought to the arbitrator by the engineer, shall be final and binding and there shall be no appeal either on matters of fact or law.

4 Parties are free to contract out of any right of appeal, but s. 3 of the Arbitration Act provides;

The parties to an arbitration agreement may agree expressly or by implication to vary or exclude any provision of this act except...

and then it lists certain provisions, one of those being s. 46, which governs a procedure for setting aside an arbitration award.

5 The salient parts of s. 46 of the Act, for the purposes of this case, read as follows:

On a party's application, the court may set aside an award on any of the following grounds:...

3. The award deals with a dispute that the arbitration agreement does not cover or contains a decision on a matter that is beyond the scope of the agreement...

6. The applicant was not treated equally and fairly, was not given an opportunity to present a case or to respond to another party's case...

7. The procedures followed in the arbitration did not comply with this Act, or

8. ...there is a reasonable apprehension of bias.

6 An application under s. 46 of the Act is to a single judge of the Superior Court of Justice.

7 The threshold issue before this Court today is whether the Court can, or should, entertain an application for judicial review given the alternative procedure available to the applicant under s. 46.

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8 As observed in *Kucyi v. Kucyi*, [2005] O.J. No. 5626 (Ont. Div. Ct.) at paragraphs six and seven:

There is an issue as to whether an arbitrator acting upon the authority of a private contract is exercising a statutory power of decision; this has not yet been authoritatively decided. It is clear however that the court has a discretion to decline to entertain an application for judicial review, particularly where there is an alternative remedy.

9 Assuming, without deciding, that we have the jurisdiction to entertain an application for judicial review, we decline to do so.

10 In the circumstances before us, s. 46 of the Arbitration Act provides an adequate alternative remedy. To allow the applicant to avoid the provisions of s. 46 and the agreed upon method for the resolution of the dispute between the parties would undermine the goals that arbitration is designed to accomplish and the Act itself.

11 Although we have the jurisdiction to transfer this matter to a single judge of this court, to be heard as an application under s. 46, we decline to do so. The applicant agrees a fresh application and factum would be required in any event. In our view the issues must be reframed in a fresh application.

12 The application for judicial review is dismissed, but the time for bringing an application under s. 46 of the Arbitration Act is extended to 30 days from today's date.

13 As a consequence of the extension of time, the respondent's claim, in paragraph 69 of its factum, for judgment in accordance with the terms of the arbitrator's award, cannot be granted, because of s. 50(3) of the Arbitration Act, which reads:

The court shall give a judgment enforcing an award unless;

a) the thirty-day period for commencing an application to set the award aside has not yet elapsed.

14 I am not sure that there was any Notice of Motion with respect to the relief you sought in paragraph 69, so I am not sure that it needs to be included in the formal endorsement, but it is clear that we have addressed that issue.

15 I have endorsed the record, so far; "for oral reasons given the application is dismissed, but the time for bringing an application under s. 46 of the Arbitration Act is extended to thirty-days from today's date."

16 ...Submissions by counsel on costs, (not required)

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