IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Ford Motor Company of Canada Limited v. Sheriff,* 2012 BCSC 891

Date: 20120618
Docket: S 116292
Registry: Vancouver

Between:

Ford Motor Company of Canada, Limited

Petitioner

And

Robert Sheriff and Rhiannon Sheriff

Respondents

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Petitioner:	I. Giroday
Counsel for Respondents:	D. Lunny
Place and Date of Trial/Hearing:	Vancouver, B.C. April 5, 2012
Place and Date of Judgment:	Vancouver, B.C. June 18, 2012

[1] In August 2009, Robert and Rhiannon Sheriff purchased a 2008 Ford F-150 pickup truck that subsequently required repairs for a variety of problems. One of those problems—an alleged engine defect—became the subject of a private arbitration in which the Sheriffs sought an order that the manufacturer, Ford Motor Company of Canada, buy back the truck.

[2] The arbitrator initially dismissed that claim, but later issued "supplementary reasons" that reversed her decision and ordered Ford to buy back the vehicle for $28,505. Ford now asks the court to set aside those supplementary reasons, saying the arbitrator had no jurisdiction to change her final and binding decision.

[3] The arbitration was conducted pursuant to the Canadian Motor Vehicle Arbitration Plan (CAMVAP). The process was governed by a standard form Agreement to Arbitrate, which describes CAMVAP as:

> a voluntary alternative dispute resolution program where qualifying disputes between automobile Manufacturers and their customers can be resolved through arbitration.

[4] The Agreement to Arbitrate sets out the procedures for arbitration and the powers of the arbitrator, including the power to order a manufacturer to buy back a vehicle from the customer. The agreement also states that the arbitration is subject to applicable laws, including legislation governing arbitrations, of the province or territory where the customer lives. The relevant law to be considered in this case is the *Commercial Arbitration Act*, R.S.B.C. 1996, c. 55 (the "Act"). Section 12.1 of the agreement states that the arbitrator's decision will be final and binding, subject only to whatever judicial review or appeal is permitted by the applicable provincial legislation.

[5] Although not explicitly stated, the agreement appears to contemplate that most arbitrations will be conducted without counsel for the parties. Section 7.5.2 states that a customer who intends to be represented by counsel must give notice of that in the original claim form and is responsible for all expenses associated with counsel's attendance. In other words, the customer cannot recover any portion of his or her legal costs even if successful in the arbitration. In view of the amounts likely to be involved, that constitutes a strong disincentive to the use of counsel. In this case, the Sheriffs represented themselves at the arbitration and Ford was represented by a technical employee.

[6] This application is brought under s. 30 of the Act, which reads:

> 30 (1) If an award has been improperly procured or an arbitrator has committed an arbitral error, the court may
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> (a) set aside the award, or
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> (b) remit the award to the arbitrator for reconsideration.

> (2) The court may refuse to set aside an award on the grounds of arbitral error if
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> (a) the error consists of a defect in form or a technical irregularity, and
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> (b) the refusal would not constitute a substantial wrong or miscarriage of justice.
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> (3) Except as provided in section 31, the court must not set aside or remit an award on the grounds of an error of fact or law on the face of the award.

[7] The term “arbitral error” is defined in s. 1 as follows:

> "arbitral error" means an error that is made by an arbitrator in the course of an arbitration and that consists of one or more of the following:
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> (a) corrupt or fraudulent conduct;
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> (b) bias;
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> (c) exceeding the arbitrator's powers;
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> (d) failure to observe the rules of natural justice;

[8] The arbitration dealt with the Sheriffs’ complaint of a “banging” noise coming from the engine. The arbitrator held a hearing on May 20, 2011 and, in her subsequent reasons, noted that:

> At the time of the hearing, the vehicle had been at the dealership for almost one month in order to replace the exhaust and to determine cause of noise under the hood.

[9] The arbitrator ordered a technical inspection, which was conducted by a B.C. Automobile Association inspector on May 31. The arbitrator summarized the result of the inspection as follows:

> (14) Mr. Becker removed and inspect the spark plugs, conducted a compression test and road tested the vehicle. Mr. Becker found a very slight engine rattle or ‘clatter type’ noise that occurred at 75 KPM.
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> (15) Mr. Becker was of the opinion that the banging noise was caused by carbon build up:
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> ... in modern day engines, the fuel management system controls this by adjusting engine timing and/or fuel delivery. This is referred to as fuel mapping. This special edition performance engine is engineered differently from the regular F-150 with unique fuel mapping by Roush.
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> (16) Mr. Becker was of the opinion that engine spark knock or “pinging” can cause engine damage under high engine load conditions, but stated that the symptoms occurred in this vehicle only at very light engine loads. In his view, since the vehicle had been de-carbonized, the noise was hardly noticeable. Mr. Becker also stated that his inspection revealed no signs of piston, ring or cylinder wall damage. In his opinion, the durability and reliability of the vehicle had not been affected by this condition.

[10] Pursuant to the terms of the Agreement to Arbitrate, the Sheriffs were given the opportunity to respond to the inspection report and made written comments, which the arbitrator considered, along with the inspector’s reply to those comments. The arbitrator concluded:

> (25) I accept that the Consumers have experience significant problems and associated inconvenience with the vehicle since the date of purchase. However, I accept the Inspector's comments that there is no engine damage and whatever difficulties the Consumers had with the vehicle's engine that precipitated the claim have now been resolved.

[11] The arbitrator's decision released on June 27, 2011 was headed "Final Award," but to avoid confusion I will now be referring to as the "original decision." Following release of the original decision, the Sheriffs picked up the vehicle from the dealership which had performed repairs. They then reported continued and/or additional problems to the CAMVAP administrator. In a letter to the parties dated July 11, 2011, the arbitrator said:

> Since the award was issued, it has come to my attention that the Consumers are of the view that the repairs made by the Manufacturer were not done, or not done satisfactorily, and that there are, in fact, additional problems with the vehicle. I would ask whether or not the Manufacturer consents to re-opening the claim to address the concerns raised by the Consumers, whether those concerns relating to the original problems identified or the new concerns, or both.

[12] Ford responded with a letter dated July 13, 2011, stating that it considered the arbitrator's decision to be final and binding and that the Sheriffs were raising new issues that had not been before the arbitrator. The letter said:

> For all the above, we do not feel is necessary to re-open this claim. Any new issues with the vehicle are yet to be investigated and were not part of the original claim. We have, however, referred the consumer's file to one of our Consumer Service Managers for review and to hopefully bring those to a satisfactory close, providing that the consumer brings the vehicle to an authorized dealer for inspection.

[13] In "supplementary reasons" dated July 22, 2011, the arbitrator said:

> (14) As I understand the Consumer's submission, I erred in concluding that the vehicle was either fixed or operating normally and also in dismissing the claim. Implicit in this submission is that the Consumers did not know the condition of the vehicle when they responded to the Inspector's report, since they did not pick up the vehicle until after the award had been issued.

[14] The arbitrator accepted that any continuing jurisdiction she had in the matter arose under s. 27(1) of the Act, which reads:

> 27 (1) On the application of a party or on the arbitrator's own initiative, an arbitrator may amend an award to correct
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> (a) a clerical or typographical error,
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> (b) an accidental error, slip, omission or other similar mistake, or
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> (c) an arithmetical error made in a computation.

[15] The arbitrator referred to the decision of the Court of Appeal in *Westnav Container*

Services v. Freeport Properties Ltd., 2010 BCCA 33, which will be discussed later in these reasons, and concluded:

> (19) In my view, there is nothing in *Westnav* that prevents me from considering the new evidence. Although the Consumers questioned the Inspectors report, they had not picked up the vehicle before I issued my decision. As such, the Consumers did not have full opportunity to respond to the Report before I issued my award. Had they responded sooner, I would have arrived at a different decision on the facts before me.
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> (20) In my view, any correction I make to my award is not a case of having second thoughts based on the original evidence. Rather, it is a situation of having arrived at an erroneous decision based on my failure to allow sufficient time for the Consumers to respond to the Inspection report. As a result of my accidental slip, which was an error on my part, I did not have complete evidence before me.
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> (21) Therefore, based on all of the evidence, I am persuaded that the vehicle suffers from a defect that the Manufacturer has been unable to repair. Although a repair order is also a remedy I am able to order, I do not find a repair order to be appropriate in the circumstances. Given all of the difficulties the Consumers have experienced with the vehicle since the date of purchase as well as the latest failed attempt to repair the engine problems, I find that a buy back order is justified.

[16] Ford argues that once the final award was issued the arbitrator was *functus officio* and the limited continuing jurisdiction granted by s. 27 does not permit the arbitrator to consider further evidence or change the result of the award. In attempting to change the award on the basis of new evidence, it says the arbitrator committed arbitral error and the original award must stand unaltered.

[17] The Sheriffs say that the question of when the arbitrator becomes *functus officio* must be approached with some flexibility. They say the arbitrator, in amending her decision, sought to do justice between the parties after recognizing that she had acted on incomplete or erroneous facts and without the benefit of full submissions.

[18] The scope of an arbitrator's jurisdiction under s. 27 was discussed by the Court of Appeal in *Westnav*, at para. 28:

> Section 27, in permitting correction of accidental errors and slips, and in permitting clarification, contemplates amendment of an original award through change to the reasons for the decision, whether or not the change affects the result. Yet there is a line between permitted correction and clarification, and alteration that strays into the thought processes. The distinction drawn in *Mutual Shipping Corp.* and *Gannet Shipping Ltd.* between expression of the tribunal's first thoughts, and corrections that reflect second thoughts, is equally applicable here. While the expanded language in s. 27 from the provisions of the former legislation is intended to assist with finality of the arbitration process and limit applications that bounce the final determination between the arbitrator and the courts, it does not contemplate any shift of the well understood prohibition, founded in the concept of *functus officio*, against subsequent alterations in either the thought processes or the basis of the award. Such amendments step beyond correction of an accidental slip or error, and beyond clarification. Indeed the word "clarification" implies adherence to the same thought processes, but with more precise expression of the thought.

[19] *Westnav* concerned an arbitration to determine the fair market rent for certain commercial property. The award made an error in describing the rental rate for a comparable property and, in supplementary reasons, the arbitrator eliminated reference to that property and added reference to other comparable properties, leaving the result unchanged. The Court of Appeal, at para. 47, found that the arbitrator had exceeded his jurisdiction under s. 27 and committed arbitral error:

> I consider an objective review of the award reveals a correction in reasoning through exclusion from the reasons of a factor previously considered material, creating objectively an impression the corrected award was an alternate explanation for the result rather than clarification of the original reasoning.

[20] The Sheriffs rely on *Nova Scotia Government and General Employees Union v. Capital District Health Authority,* 2006 NSCA 85, in which Cromwell J.A., (as he then was) noted that the principles of *functus officio* were developed in relation to court proceedings and must be applied with greater flexibility in relation to administrative tribunals, where the opportunity to correct errors on appeal is more limited:

> [38] The same general principles of *functus officio* apply to adjudicative administrative tribunals. However, as there are generally no full rights of appeal from such tribunals, the principles in this context rest solely on the rationale of finality. This difference in the underlying rationale has led the courts to say that, in the administrative law sphere, the principles of *functus officio* must be applied with greater flexibility and less formalism than in relation to court orders: *Chandler v Alberta Association of Architects*, [1989] 2 S.C.R. 848. As Sopinka, J. put it at p. 862 of *Chandler*: "... Justice may require the reopening of administrative proceedings in order to provide relief which would otherwise be available on appeal."

[21] The court concluded that a statutory provision comparable to s. 27 did not limit an arbitration tribunal's ability to "correct errors in expressing its manifest intent." That may indicate a broader approach than what is open to arbitrators in this province on the basis of *Westnav*. To the extent there is any flexibility in giving application to legal concepts such as *functus officio*, that flexibility would be particularly important in a process that is designed to be conducted in person by lay parties unfamiliar with those concepts.

[22] In any event, what the arbitrator did in this case went far beyond the kind of flexibility contemplated by Cromwell J.A. With respect, she did not correct an error in expressing her manifest intent. Her manifest intent was to dismiss the claim based on the evidence before her. The supplemental reasons reversed that intent and the result, based on consideration of further evidence. No amount of flexibility can fit that into the limited power given by s. 27 as interpreted by the Court of Appeal in *Westnav*.

[23] I am therefore bound to conclude that, in issuing supplemental reasons, the arbitrator committed arbitral error within the meaning of paragraph (c) of the definition—the arbitrator

exceeded her powers. However, that does not end the matter. That arbitral error was committed because the arbitrator determined that she had not given the Sheriffs a full opportunity to present their case and to fully respond to the evidence.

[24] In effect, the arbitrator was concerned that she may have made an arbitral error within the meaning of paragraph (d)—a failure to observe the rules of natural justice. If she had not issued supplemental reasons, the Sheriffs may have had grounds to make their own application under s. 30. I do not need to decide whether such an application would have been successful, but the presence of the issue and the arbitrator's stated concern cannot be ignored.

[25] The orders the court may make after finding that an arbitral error occurred are set out in s. 30. Those options are to either set aside the award or to remit the matter to the arbitrator for reconsideration. There is a third option of doing nothing, but only if the conditions set out in s. 30(2) are met. What has happened here cannot be described as merely a defect in form or technical irregularity, as required by s. 30(2)(a) and the "do nothing" option is not available.

[26] Ford wishes only to set aside the award as it was changed by the supplemental reasons, leaving the original award in place. I do not find jurisdiction to do that within s. 30. I agree with counsel for the Sheriffs that there can be only one award and that is the decision finally reached by the arbitrator. If that decision is to be set aside for arbitral error, the entire arbitration process is set aside and the parties are returned to the position they were in before they agreed to submit the matter to arbitration (*Ian MacDonald Library Services Ltd. v. P.Z. Resort Systems Inc.*, [1985] B.C.J. No. 1758 (B.C.C.A. Chambers)). The statute does not give the court jurisdiction to substitute its own decision for that of the arbitrator or to set aside only part of an award.

[27] Even if I am wrong on that point, it would clearly be unjust to set aside the arbitrator's reconsideration while leaving in place a result that the arbitrator herself believes to be wrong. As for setting aside the entire award, that would leave the parties in the position of either starting the whole arbitration process again or beginning litigation in another forum. I find that would result in a duplication of time and expense that cannot be justified in view of the amount involved.

[28] I therefore conclude that the matter should be remitted to the arbitrator for reconsideration based on all the evidence, including any further evidence she considers relevant and further submissions that she considers necessary.

[29] The parties will each bear their own costs on this application.

"N. Smith J."