SUPREME COURT OF NOVA SCOTIA

Citation: Sharecare Homes Inc. v. Cormier, 2010 NSSC 252

Date: 20100629
Docket: Hfx. No. 308173
Registry: Halifax

Between:

Sharecare Homes Incorporated

Applicant

v.

Catherine Cormier

Respondent

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: July 7th, 2009 in Halifax, Nova Scotia

Final Written Submissions: By the Applicant: April 20th, 2010
By the Respondent: April 16th, 2010

Counsel: David G. Coles, Q.C. and Rebecca L. Hiltz LeBlanc for the Applicant

Lisa Richards for the Respondent

By the Court:

[1] This matter involves an application by Sharecare Homes Incorporated for judicial review of a decision of a consensual arbitrator dated January 29th, 2009. The Respondent is Catherine Cormier.

FACTS

[2] Sharecare Homes Incorporated (hereinafter referred to as "the Company") is in the business of running small option homes for disadvantaged individuals. Sharon Nordqvist, Kurt Nordqvist and the Respondent, Catherine Cormier, were all shareholders in the Company. In addition, Ms. Cormier was an employee of the Company. In particular, she was the manager responsible for the daily operation of the business including the hiring of staff.

[3] The Respondent was employed by the Company pursuant to the terms of a Manager Employment Agreement dated March 29th, 1999. Pursuant to the terms of that Agreement, Sharecare had the right to terminate Ms. Cormier's employment for cause which was defined, *inter alia*, as including "any material breach of the provisions of this agreement". Upon such termination, Ms. Cormier was required to immediately tender her shares in the Company and she was to receive payment for these shares in accordance with a Buy-Sell Agreement of the same date. This latter Agreement provided a mechanism for establishing the value of her shares. In addition, clause 7.03 of the Buy–Sell Agreement provided that if a shareholder committed an act of "default" then the price to be paid for that person's shares would be reduced by 20%. "Default" was defined in the Buy-Sell Agreement to include a

failure to observe, perform or carry out any of the obligations under the employment contract referred to previously.

[4] In the fall of 2004 and in 2005 negotiations took place for Ms. Cormier to purchase the Nordqvists' shares in the Company. These negotiations eventually broke down and on October 17th, 2005 a letter was sent from the Nordqvists' solicitor to Ms. Cormier's solicitor indicating that the Nordqvists now wished to purchase Ms. Cormier's shares in the Company. It does not appear from the materials that have been filed that Ms. Cormier was interested in this.

[5] On October 28th, 2005 a meeting was held for Ms. Cormier to review the Company's financial records. A dispute arose between Ms. Nordqvist and Ms. Cormier at this meeting and it was terminated. Shortly thereafter, Ms. Cormier received notice of a directors' meeting dated October 28th, 2005. This notice indicated that a meeting of the Board of Directors of the Company would be held on October 31st, 2005 to discuss the performance of Ms. Cormier as an employee and to determine whether her employment should be terminated. Ms. Cormier attended that meeting and was advised by the Nordqvists that her employment was being terminated for cause. Shortly thereafter, the Nordqvists' solicitor wrote to Ms. Cormier's solicitor stating "As Ms. Cormier's employment with the Company has been terminated, our clients intend to invoke their right to purchase her shares pursuant to Article 9 of the Shareholders' Agreement (the "Agreement")."

[6] After Ms. Cormier's employment was terminated the Nordqvists became aware of an employment arrangement that Ms. Cormier had put in place with one of the

Company's employees which, they submitted, justified her termination. The employee in question was a Nigerian immigrant by the name of Simeon Fagbile. In May of 2005, Ms. Cormier hired Mr. Fagbile to be a live-in caregiver at one of the Company's homes. One of the residents of that home was an elderly gentleman by the name of Forrest Dorey. At the time, Mr. Dorey was 90 years of age, was demanding and required a great deal of care. Mr. Dorey liked Mr. Fagbile and they got along well.

[7] Shortly after Mr. Fagbile commenced his employment with the Company he learned that he was not permitted to work in Canada for a "for profit" organization and that his employment with the small options home was in violation of the terms of his immigration. Mr. Fagbile reported this to Ms. Cormier. Mr. Fagbile wanted to keep his job and Ms. Cormier did not want to lose him as an employee due to his positive relationship with Mr. Dorey. Accordingly, Ms. Cormier and Mr. Fagbile spoke with Mr. Fagbile's immigration lawyer, Mr. Gilpin, to see if there was a solution to the problem. Mr. Gilpin advised Ms. Cormier about a live-in care worker program that permitted immigrants to work in Canada as caregivers provided that they were employed by someone other than a "for profit" business.

[8] Ms. Cormier then arranged a plan to have Mr. Fagbile continue to be employed and paid by the Company but make it look like he had been hired by Mr. Dorey's daughter. Full details of this arrangement are set out in the arbitrator's decision (which is appended as Schedule "A") and will not be repeated here. Suffice it to say that the Applicant takes the position that Ms. Cormier's actions were illegal and fraudulent and that they put the Company in jeopardy of prosecution for serious

offences under the *Immigration and Refugee Protection Act.* As indicated, the Applicant took the position that this conduct justified Ms. Cormier's termination from her job.

[9] Ms. Cormier disputed that the Company had cause to terminate her employment and threatened to bring an action for wrongful dismissal. Subsequently, the parties agreed to submit the matter to arbitration.

[10] John P. Merrick, Q.C. heard the case as a sole arbitrator on July 23rd - 25th, 2008. He had previously arbitrated the issue of the value of Ms. Cormier's shares in the Company pursuant to the Buy-Sell Agreement and the parties asked him to conduct a further arbitration to determine whether the Company had cause to terminate Ms. Cormier's employment and, if not, what the appropriate remedies were. All parties agreed that if the Company had cause to terminate Ms. Cormier's employment then the conduct which constituted cause would also constitute an act of "default" under the Buy-Sell Agreement such that the value of Ms. Cormier's shares would be reduced by 20%.

[11] At the arbitration hearing the Company relied upon seven issues that they submitted constituted "cause" for Ms. Cormier's job to be terminated. They were as follows:

> (1) Ms. Cormier knowingly continued the employment of Simeon Fagbile who was ineligible to work for Sharecare Homes Inc., from the time the worker informed Ms. Cormier of his ineligibility up until receipt of a work permit obtained through the instrumentality of Ms. Cormier by means of misrepresentation, thus exposing Sharecare Homes Inc. and its Directors to possible prosecution and penalty;

(2) Ms. Cormier, having misrepresented to the authorities the nature of Mr. Fagbile's employment continued his employment until Ms. Cormier's termination exposing Sharecare Homes Inc. and its Directors to possible prosecution and penalties;

(3) Ms. Cormier failed to ".....devote the whole of her working time and attention to the business of the corporation";

(4) Ms. Cormier engaged in carrying on another business without prior written approval of the Company;

(5) Ms. Cormier failed to keep accurate reports and records and observe directions from the Board of Directors;

(6) Ms. Cormier failed to satisfy confidential obligations;

(7) Ms. Cormier was grossly insubordinate.

[12] On January 29th, 2009 the arbitrator released his decision. He reviewed each of the allegations against Ms. Cormier in detail and concluded as follows:

(1) The Company had no entitlement to terminate the employment of Ms. Cormier and in doing so was in breach of the Employment Agreement.

(2) Ms. Cormier did not commit an act of default under clause 7.03 of the Buy-Sell Agreement and, accordingly, the purchase price payable in relation to Ms. Cormier's shares was not to be reduced by 20%.

(3) Ms. Cormier was entitled to the sum of $27,000.00 from the Company by way of damages for wrongful termination.

(4) The Company owed Ms. Cormier a further $6,000.00 for wages due and owing.

> (5) Interest was payable on the two amounts referred to in # 3 and 4 above at a rate of 5% per year (not compounded) from the date of wrongful termination until payment.

[13] In addition, the arbitrator reserved on the issue of costs and retained jurisdiction to deal with any other issues that might arise out of the award.

[14] As part of the adjudicator's award he indicated that he was not satisfied that Ms. Cormier understood that what she was doing in relation to Mr. Fagbile was illegal. He concluded that her actions did not constitute a breach of her employment duties and, accordingly, did not warrant her dismissal.

[15] On March 4th, 2009 the Applicant filed a Notice for Judicial Review in the Supreme Court. In that document the Applicant states that it is seeking judicial review on the following grounds.

> (1) The arbitrator's decision that Catherine Cormier ("Cormier") did not know her conduct was illegal is unreasonable and contrary to all the evidence;
>
> (2) The arbitrator made an error of law on the face of the record in concluding that Cormier's illegal conduct was not just cause for her dismissal;
>
> (3) The arbitrator made an error of law on the face of the record in concluding that Cormier's serious breach of trust was not just cause for her dismissal.

[16] In the materials filed in response to the application the Respondent took the position that the "governing legislation" precluded intervention by the courts on the grounds relied on by the Applicant. However, both the Applicant and the Respondent

approached the hearing and made their arguments on the basis that it was an ordinary judicial review. Each party proceeded with a *Dunsmuir* analysis (*Dunsmuir v. New Brunswick*, 2008 SCC 9) with the Applicant submitting that the appropriate standard of review is correctness and the Respondent submitting that the appropriate standard of review is reasonableness.

[17] Following the hearing, I brought to counsel's attention the issue of whether judicial review is available with respect to a decision of a private consensual arbitrator. I referred counsel to the decisions in *Ellsworth v. Ness Homes Ltd.*, [1999] A.J. No. 439; *Knox v. Conservative Party of Canada*, 2007 ABCA 295; *Alaimo v. Di Maio*, [2008] O.J. No. 3570 (Ont. S.C.J.); *Bansal v. Stringam*, 2009 ABCA 87; *3Genius Corp. v. White*, 2009 CarswellOnt 3454 (Ont S.C.J. (Com. List)) and *Inforica Inc. v. CGI Information Systems & Management Consultants Inc.*, 2009 ONCA 642 and requested further submissions.

ANALYSIS AND CONCLUSIONS

[18] For reasons which follow, I have concluded that the arbitration in question is governed by the Nova Scotia *Commercial Arbitration Act* and that judicial review and court intervention is not available beyond the scope of that *Act*.

[19] As indicated previously, the parties executed a Buy-Sell Agreement and a Manager Employment Agreement both dated March 29th, 1999. Clause 10.08 of the Buy-Sell Agreement contains an arbitration clause which reads:

> 10.08 Should there be a disagreement or a dispute between the parties hereto with respect to this Agreement or the interpretation hereof, the same shall be referred to a single arbitrator pursuant to the Arbitration Act of Nova Scotia, and the determination of such arbitrator shall be final and binding upon the parties hereto.

[20] There is no such arbitration clause in the Manager Employment Agreement. Nevertheless, the parties agreed to submit the issue of Ms. Cormier's job termination to an arbitrator to determine whether the Company had cause to terminate her employment and, if so, the remedy that should be awarded in the circumstances.

[21] At the time that the Buy-Sell Agreement and the Manager Employment Agreement were signed, the *Commercial Arbitration Act* was not in force. It came into force on December 3rd, 1999 (approximately eight months after these Agreements were executed).

[22] Clause 4(1) of the *Commercial Arbitration Act* provides:

> **Application of Act**
>
> **4 (1)** This Act applies to an arbitration conducted under an arbitration agreement or authorized or required pursuant to an enactment unless
>
> (a) the application of this Act is excluded by an agreement of the parties or by law; or
>
> (b) Part II of the *International Commercial Arbitration Act* applies to the arbitration.
>
> **(2)** Where there is a conflict between this Act and another enactment that authorizes or requires the arbitration, the other enactment prevails.
>
> **(3)** This Act does not apply to an arbitration authorized or required pursuant to any of the following:
>
> (a) the *Trade Union Act*;
>
> (b) a collective agreement under the *Trade Union Act*;

(c) any enactment set out in the regulations.

(4) This Act binds Her Majesty in right of the Province. 1999, c. 5, s. 4.

[Emphasis added]

[23] Section 59 of the said *Act* provides:

Applicable law

59 (1) Subject to Section 4 and clause 60(1)(a), this Act applies to an arbitration conducted under an arbitration agreement entered into before the coming into force of this Act if the arbitration is commenced on or after the coming into force of this Act.

(2) The *Arbitration Act* applies to arbitrations commenced before the coming into force of this Act. 1999, c. 5, s. 59.

[24] It appears from the information provided to the Court that counsel involved in arranging for this arbitration did not specifically agree that the arbitration would take place pursuant to the provisions of the *Commercial Arbitration Act*. Nor was there an agreement, however, that the *Commercial Arbitration Act* would not apply. Both counsel acknowledged at the hearing before me, however, that the arbitration did take place pursuant to an arbitration agreement (an arbitration agreement is not required to be in writing – see s. 7(1) of the *Commercial Arbitration Act*).

[25] In my view, it is clear from s. 4 of the *Commercial Arbitration Act* that that *Act* presumptively applies to an arbitration unless its application is excluded by an agreement of the parties or by law. In the case at bar, there was no agreement to exclude the *Act* nor is there any basis to exclude it by law. Accordingly, I am satisfied

that the arbitration in question is governed by the provisions of the *Commercial Arbitration Act*.

[26] Interestingly, the Applicant itself appears to have recognized the applicability of the *Commercial Arbitration Act* to the circumstances of this case. In the costs submissions filed with the arbitrator on March 20th, 2009 the Applicant referred to and relied on s. 56 of the *Commercial Arbitration Act*. Further, in the pre-hearing submissions filed with this Court in support of this application reference is made to s. 2 of the said *Act*. This indicates that the Applicant itself recognized that the arbitration took place pursuant to the provisions of that *Act*.

[27] That takes me to the issue of whether, in the circumstances of this case, the arbitrator's decision is subject to the public law remedy of judicial review or whether it is only subject to review in accordance with the provisions of the *Commercial Arbitration Act*.

[28] The matter before me involves a private consensual arbitration. The Parties were not bound by statute to proceed with arbitration and the arbitrator that they selected was not appointed pursuant to any legislation. The parties entered into a private consensual agreement to resolve their dispute outside of the courts. In my view, it would be inappropriate in the circumstances of this case to proceed with a judicial review. In particular, it would undermine the stated purpose of the *Commercial Arbitration Act* (that being to encourage and promote the use of arbitration as "an alternative to court proceedings" (s. 2)). In addition, it would, in

effect, ignore the provisions of the *Act* that govern and restrict court intervention in the arbitration process.

[29] In *Ellsworth v. Ness Homes Ltd., supra*, the applicant sought judicial review of an arbitrator's award respecting a dispute with a contractor over deficiencies in a house. The respondent made a preliminary objection that judicial review was not available unless the arbitrator was "under a public duty to perform a certain duty or refrain from committing a certain act" and that the Alberta *Arbitration Act* provided an alternate appeal procedure. Girgulis, J. stated at ¶ 13:

> .....This is a purely consensual arbitration; it is not a case where, by statute, arbitration is compulsory or imposed upon the parties, directly or indirectly; nor is it a tribunal the members of which are appointed under provincial legislation or regulation to whom persons desiring arbitration must submit. The *Arbitration Act* is a convenient mode or guide for parties who wish to utilize this method of settling their private disputes. The parties decide who will arbitrate and on what issues and on what procedure. They decide, generally, which sections of the *Arbitration Act* as varied, or at all, will apply to their arbitration. There are only a few sections of the Act which cannot be excluded or varied by the agreement of the parties. ***Judicial review procedure under the Rules and the prerogative remedies do not apply to consensual arbitration but apply to statutory bodies or persons carrying out duties under statute to whom parties must submit their dispute. Accordingly, the Applicants are not entitled to relief under the procedure of the judicial review rules, and certainly not to certiorari or mandamus.*** However, the substance of their complaints supporting their application for judicial review is generally the same for an application to quash, set aside or appeal an arbitrator's award.
>
> [Emphasis added]

[30] While the Applicant in that case had applied for judicial review the Court went on to consider the matter as a motion to set aside or appeal the arbitrator's award under the *Arbitration Act*.

[31] In *Knox v. Conservative Party of Canada, supra*, the Alberta Court of Appeal considered whether a decision of a political party under its constitution was subject to the public law remedy of judicial review or whether review by the Court of Queens Bench was limited by the provisions of the Alberta *Arbitration Act*. The Court stated at ¶ 14:

> Judicial review is a feature of public law whereby the superior courts under s.96 of the ***Constitution Act 1867*** engage in surveillance of lower tribunals to ensure that the fundamentals of legality and jurisdiction are respected by those tribunals. The tribunals which are subject to judicial review are, for the most part, those which are court-like in their nature, or administer a function for the benefit of the public on behalf of a level of government. Those which are empowered by legislation to supervise and regulate a trade, profession, industry or employment, those which are empowered by legislation to supervise an element of commerce, business, finance, property or legal rights for the benefit of the public generally, or which set standards for the benefit of the public may also be subject to judicial review. Issues of contractual or property rights as between individuals or as between individuals and organizations, are generally addressed through ordinary court processes at common law, or by statute or through arbitration or alternative dispute resolution as agreed by the parties.

[32] The Court continued at ¶ 20 - 21:

> It follows that if a tribunal is exercising powers that do not accrue to private organizations, and that are only vested on the tribunal by statute for the benefit of the public, then it is subject to judicial review. Otherwise it is a private consensual tribunal and *prima facie* subject only to private law remedies.
>
> An examination of the ***Pushpanathan*** test, which is used to set the standard of judicial review, shows that it is largely inapplicable to private consensual tribunals. The first part of the test is the existence of a privative clause, which is purely a matter of statute. The second part of the test is the expertise of the tribunal. However, where the parties have consented to a particular dispute resolution mechanism, it hardly lies in their mouths to say that the tribunal that they have selected themselves

> lacks expertise. The third factor, the intention of the statute as a whole, also does not apply to private tribunals. While analogies to each of these factors can undoubtedly be found when the Court is asked to adjudicate on the activities of a private tribunal, the absence of any public dimension to those activities undermines the *raison d'etre* of the ***Pushpanathan*** test.

[33] The Court in that case noted that the Chambers judge had found that the parties had submitted their dispute to arbitration and that the Court should be reluctant to intervene in such circumstances. The court concluded at ¶ 29:

> .....We agree with the Appellant that once this finding was made, the chambers judge was bound to apply the provisions of the ***Arbitration Act***. We see no jurisdictional distinction between the two applications for judicial review. Instead of limiting his review to the provisions of the ***Arbitration Act***, the chambers judge applied an administrative law analysis in the second judicial review to the Arbitration Panel's decision. This was an error of law: the Court cannot modify the language of the Act to add grounds of review beyond those permitted in s. 37.

[34] In *Alaimo v. Di Maio*, *supra,* the Court addressed the issue of whether judicial review is available in respect of a consensual arbitrator's decision and stated at ¶ 61 - 65:

> The parties agreed to the appointment of the Arbitrator.....They agreed to a private dispute resolution mechanism, through the use of the Arbitrator, to resolve any ongoing issues that developed with respect to the manner in which the election proceeded. The authority of the Arbitrator flowed from their private agreement and not from any delegation of a statutory or public power.
>
> In my opinion, judicial review is not available where an arbitrator is proceeding on the basis of a private agreement and is not exercising a statutory power of decision, as was the case in this instance.

> The Applicants should not be permitted to sidestep their private arrangements. They agreed that the Act would apply. Section 6 of the Act establishes the philosophy that a court is generally not to intervene in an arbitration conducted under that Act. Furthermore the Act contains express provisions at sections 45 and 46 regarding appeals and reviews that govern the rights of the parties.
>
> In my view, it would be inappropriate to apply judicial review in the circumstances of this case.....
>
> The unavailability of judicial review does not, however, mean that arbitral decisions in Ontario are not subject to judicial scrutiny. There remain rights of appeal as specified in the Act.

[35] In the case of *Bansal v. Stringam*, *supra*, the court dealt with the issue of whether judicial review is available in relation to a private tribunal decision and also explained why labour arbitrators have traditionally been subject to judicial review. The court stated at ¶ 16 - 18:

> .....Judicial review of decisions of private tribunals constituted by contract is ordinarily impossible. Normally judicial review does not lie against private arbitrators (subject to the statutory exceptions referred to above). The only reason that judicial review lies against many labor arbitrators is as follows. Ordinarily the arbitration is under a collective agreement, and the governing labor legislation in Canada usually provides that a collective agreement must provide for some means of finally settling disputes in a binding manner outside the courts. Ninety-nine percent of the time, that is so provided by an arbitration clause in the collective agreement. So the theory is that such labor arbitrators are not consensual private tribunals, but statutory bodies. See ***Port Arthur Shipbuilding Co. v. Arthurs*** 1968 CanLII 29 (S.C.C.), [1969] S.C.R. 85, 90-94.
>
> None of that applies to this employment agreement, to this Policy, or to this legislation.
>
> Therefore, judicial review is hopeless. It is unavailable at common law and barred several times over by legislation.

[36] More recently, the Ontario Court of Appeal dealt with this issue in *Inforica Inc. v. CGI Information Systems & Management Consultants Inc., supra*. The court in that case was interpreting the Ontario *Arbitration Act* and stated ¶ 14:

> It is clear from the structure and purpose of the Act in general, and from the wording of s. 6 in particular, that judicial intervention in the arbitral process is to be strictly limited to those situations contemplated by the Act. This is in keeping with the modern approach that sees arbitration as an autonomous, self-contained, self-sufficient process pursuant to which the parties agree to have their disputes resolved by an arbitrator, not by the courts. As Inforica states in its factum, "arbitral proceedings are presumptively immune from judicial review and oversight."The Act encourages parties to resort to arbitration, "require [s] them to hold to that course once they have agreed to do so", and "entrenches the primacy of arbitration over judicial proceedings.....by directing the court, generally, not to intervene": *Ontario Hydro v. Denison Mines Ltd.*, [1992] O.J. No. 2948 (Gen Div), Blair, J.

[37] Section 6 of the Ontario *Arbitration Act* (referred to in *Inforica, supra*) is essentially the same as s. 8 of the Nova Scotia *Commercial Arbitration Act*.

[38] The Applicant submits that these cases are not applicable in Nova Scotia in light of the differences between the Ontario *Arbitration Act*, the *Alberta Arbitration Act* and the Nova Scotia *Commercial Arbitration Act*. In particular, the Applicant submits that the Ontario *Arbitration Act* and the Alberta *Arbitration Act* "contain an express right of appeal ..... even where the parties' arbitration agreement is silent on this issue." In Nova Scotia, however, there is no right of appeal of an arbitrator's decision unless the parties agree otherwise (see s. 48 of the *Commercial Arbitration Act*). In the Applicant's most recent submissions it is stated at ¶ 18:

> Due to the availability of an adequate, alternate remedy, the courts of Ontario and Alberta can take a more restrictive view of the availability of judicial review than Nova Scotia courts. In Nova Scotia there is no adequate, alternate remedy, and, if

> the court refuses to review the arbitrator's decision, the parties would be left with an unreasonable arbitral decision.....

[39] As a preliminary matter, I disagree with the suggestion by the Applicant that the Ontario and Alberta *Acts* contain an "express right of appeal" from an arbitrator's award. Section 45 of the Ontario *Arbitration Act* and s. 44(2) of the Alberta *Arbitration Act* allow a party to seek leave to appeal an award on a question of law if an arbitration agreement does not contemplate a right of appeal. Leave will only be granted if a court is satisfied that "the importance to the parties of the matters at stake in the arbitration justifies an appeal" and that "determination of the question of law at issue will significantly affect the rights of the parties". This, in my view, is not a right of appeal. It is a right to seek leave to appeal on a question of law if certain prerequisites are satisfied.

[40] In addition, the fact that the Nova Scotia *Commercial Arbitration Act* is more restrictive than the Ontario or Alberta *Acts* on the issue of appeals does not, in my view, support the argument that judicial review of a private arbitrator's award should be permitted in this province. In fact, the more restrictive rights of appeal and intervention in our legislation lead me to the opposite conclusion. That is – our legislature intended to limit the ability of the court to intervene in a consensual arbitration and intended to restrict court intervention to those circumstances set out in the *Act*.

[41] The purpose of the *Commercial Arbitration Act* is described at s. 2 as follows:

> **Purpose of Act**

> **2** The purpose of this Act is to revise and update the law respecting commercial arbitration and thereby encourage and promote the use of arbitration as an alternative to court proceedings in resolving disputes between parties to a contract. 1999, c. 5, s. 2.

[42] Section 8 of the *Act* restricts the power of the Court to intervene in matters governed by the *Act* and provides:

> **Restriction on power of court to intervene**
>
> **8** No court may intervene in matters governed by this Act, except for the following purposes as provided by this Act:
>
> (a) to assist the arbitration process;
>
> (b) to ensure that an arbitration is carried out in accordance with the arbitration agreement;
>
> (c) to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement;
>
> (d) to enforce awards. 1999, c. 5, s. 8.

[43] Sections 48 and 49 of the *Act* deal with the issue of appeals and applications to set aside an award and provide:

> **Prerequisite to right to appeal**
>
> **48 (1)** Unless the parties otherwise agree, there is no appeal of an award.
>
> **(2)** Where an arbitration agreement so provides, a party may appeal an award to the court on a question of law, on a question of fact or on a question of mixed law and fact. 1999, c. 5, s. 48.
>
> **Setting aside by court**
>
> **49 (1)** On the application of a party, the court may set aside an award on any of the following grounds:
>
> (a) a party entered into the arbitration agreement while under a legal incapacity;
>
> (b) the arbitration agreement is invalid or has ceased to exist;
>
> (c) the award deals with a matter in dispute that the arbitration agreement does not cover or contains a decision on a matter in dispute that is beyond the scope of the agreement;

> (d) the composition of the arbitral tribunal was not in accordance with the arbitration agreement or, where the agreement did not deal with the matter, was not in accordance with this Act;
>
> (e) the subject-matter of the arbitration is not capable of being the subject of arbitration pursuant to the law of the Province;
>
> (f) the applicant was treated manifestly unfairly and unequally, was not given an opportunity to present a case or to respond to the case of another party or was not given proper notice of the arbitration or of the appointment of an arbitrator;
>
> (g) the procedures followed in the arbitration did not comply with this Act or the arbitration agreement;
>
> (h) an arbitrator committed a corrupt or fraudulent act or there is a reasonable apprehension of bias;
>
> (i) the award was obtained by fraud.
>
> .....

[44] In my view, these provisions of the *Act* support the suggestion that the court should take a restrictive approach to judicial intervention of a consensual arbitrator's award.

[45] Further, I do not agree with the Applicant's suggestion that in Nova Scotia there is no adequate, alternate remedy to judicial review. Section 48 of the *Commercial Arbitration Act* clearly allows the parties to agree to a right of appeal. If the parties agree – an award may be appealed on a question of law, on a question of fact or on a question of mixed law and fact. The only prerequisite is that the parties agree to a right of appeal. In the case at bar, no such agreement was reached. That does not mean that an alternate, adequate remedy is not available in Nova Scotia. It simply means that this remedy was not taken advantage of in the circumstances of this case.

[46] In the post hearing submissions filed on behalf of the Applicant reference was made to the Nova Scotia Court of Appeal decision in *Ripley v. Investment Dealers Association of Canada et al.* (No. 2) (1991), 108 N.S.R. (2d) 38 (N.S.S.C. A.D.) in

which the Court dealt, *inter alia*, with the issue of whether *certiorari* for error of law on the face of the record was available in relation to decisions of a private body. Freeman J.A. stated at ¶ 28:

> .....Madam Justice Roscoe found that certiorari for error of law on the face of the record was not available because the Business Conduct Committee panel was a non-statutory tribunal, but that it was open to her to review the panel's proceedings for want of jurisdiction or breach of natural justice. She relied on **Chyz v. Appraisal Institute of Canada** (1985), 44 Sask. R.165, in which the Saskatchewan Court of Appeal was considering the finding of the trial judge that "certiorari and prohibition, generally speaking, will not lie against a private body which derives its jurisdiction from the consent of its members banded together in a voluntary organization". After a comprehensive review of the case law Tallis, J.A., found that "domestic tribunals (are) subject to the principles of natural justice and procedural fairness". Remedies including [sic] declaratory or injunctive relief.

[47] His Lordship went on to state at ¶ 31:

> While prerogative writs do not lie against the panel as a domestic tribunal, its proceedings are reviewable for want of jurisdiction or breaches of natural justice, which would include bias, as Madam Justice Roscoe found. The remedy, as in Saskatchewan, would be declaratory or injunctive relief.

[48] As a preliminary matter, the Applicant submits that the *Ripley* decision, *supra*, is not binding upon me as it was decided almost 20 years ago and prior to the enactment of the *Commercial Arbitration Act.* In the alternative, the Applicant submits that if I determine that judicial review is generally not available in the circumstances of this case, that based on *Ripley*, *supra*, the award in question is, nevertheless, reviewable if the arbitrator exceeded his jurisdiction or breached the principles of natural justice.

[49] The Applicant states that in the circumstances of this case the arbitrator breached the principles of natural justice by failing to consider or ignoring relevant evidence. It further suggests that "the arbitrator's holdings in law were made in the absence of any foundation in the facts in evidence".

[50] The Applicant also submits that the arbitrator's decision was "flagrantly unjust, absurd, and contrary to common sense" (¶ 43 of the Applicant's April 20th, 2010 brief filed with the court). The Applicant states that as a result, the arbitrator exceeded his jurisdiction. The Applicant invites the court to overturn or set aside the arbitrator's award based on these alleged breaches of natural justice and loss of jurisdiction.

[51] In my view, the law as set out in *Ripley*, *supra*, is still valid today. That is, the prerogative writs do not lie against a non-statutory tribunal, however, its proceedings are reviewable for want of jurisdiction and breaches of natural justice. Issues of jurisdiction and breaches of natural justice are now codified, however, by the *Commercial Arbitration Act* and, in particular, s. 49 of that *Act*. Any relief that the Applicant may seek must be found in the provisions of the *Commercial Arbitration Act*.

[52] The Applicant further submits that if the court fails to intervene in these circumstances parties will be discouraged from seeking arbitration. This, in my view, is not a valid concern. While the *Commercial Arbitration Act* limits judicial intervention in relation to a consensual arbitrator's award, the *Act* does permit the parties to extend the court's involvement should they see fit. In particular, s. 48 of the *Act* allows broad rights of appeal (on questions of both law and fact or mixed law

and fact) provided that the parties agree to these rights being available. Further, ss. 8 and 49 of the *Act* allow court intervention on matters of process, jurisdiction and natural justice. With these remedies being available pursuant to the *Act*, I am not satisfied that the fact that judicial intervention is not available beyond the scope of the *Act* will discourage parties from participating in this process.

[53] As indicated above, I have concluded that judicial review and court intervention in this arbitrator's award is not available beyond the scope of the *Commercial Arbitration Act*. In the Notice filed with the court in support of this application the Applicant sought judicial review. No relief was requested pursuant to the *Commercial Arbitration Act.* In particular, an appeal was not filed pursuant to s. 48 of the *Act* nor was an application made to set aside the award pursuant to s. 49 of the *Act.*

[54] The Respondent submits that the Applicant has failed to file an appeal in a timely manner and is no longer entitled to apply for an appeal or to set aside the award in question. The Respondent relies on s. 50 of the *Commercial Arbitration Act* which reads:

> **Limitation Periods**
>
> **50(1)** The following actions shall be commenced within thirty days after an appellant or applicant receives the award, correction, explanation, change or statements of reasons on which the appeal or application is based:
>
> (a) an appeal pursuant to subsection 48(2);
>
> (b) an application to set aside an award pursuant to Section 49.
>
> .....

[55] In addition, the Respondent relies on s. 41 of the *Act* which provides:

> **Effect of award**
>
> **41** An award made by an arbitral tribunal binds the parties unless the award is set aside or varied pursuant to Section 48 or 49. 1999, c. 5, s. 41.

[56] It is not necessary for me to decide whether the Applicant can now file a notice of appeal. It has not attempted to do so. Nor has it applied to amend the Notice filed with the Court in support of this application. I will indicate, however, that even if an appeal or an application to set aside the award had been filed or an amendment to the previous notice had been sought and granted, I would not allow an appeal under s. 48 of the *Act* nor would I be prepared to set aside the award pursuant to s. 49 of the *Act*.

[57] As indicated previously, there is no appeal of an award unless the parties agree otherwise (s. 48(1)). There was no such agreement in this case.

[58] In addition, I am not satisfied that there is an appropriate basis to set aside the award on any of the grounds enumerated in s. 49 of the *Act*.

[59] During the course of the proceeding the Applicant suggested that if it is determined that the *Commercial Arbitration Act* applies to this case then s. 8(c) of the said *Act* would allow the court to intervene in order "to prevent manifestly unfair or unequal treatment of a party to an arbitration agreement". The Applicant stated "It is the Applicant's submission that a fundamental error in the application of the law by the arbitrator resulting in the decision rendered represents a manifest unfairness".

[60] As indicated above, the Applicant did not apply to appeal or set aside this award pursuant to the *Commercial Arbitration Act*. Even if it had done so, in my view, s.

8(c) of the *Act* (or s. 49(1)(f) which also refers to a party being treated unfairly or unequally) would not provide the Applicant with any relief in the circumstances of this case. There is nothing, in my opinion, which supports the suggestion that the Applicant was the subject of manifestly unfair or unequal treatment. With respect, it is my view that by raising this section of the *Act* the Applicant is attempting to do through the back door (s. 8(c)) that which it is unable to do through the front door (s. 48).

[61] The Applicant has also suggested that s. 6 of the *Commercial Arbitration Act* prevents the Respondent from relying on s. 48 of the said *Act*. In my view, this argument also has no merit.

[62] The application of Sharecare Homes Incorporated for judicial review of the decision of John P. Merrick, Q.C. will be dismissed.

COSTS

[63] The Applicant has requested costs of both the arbitration and this proceeding. The Respondent seeks costs of this proceeding. As the Respondent has been successful in this application she shall be awarded costs.

[64] Civil Procedure Rule 77.06 applies in the circumstances of this case and provides:

> **Assessment of costs under tariff at end of proceeding**

> **77.06** (1) Party and party costs of a proceeding must, unless a judge orders otherwise, be fixed by the judge in accordance with tariffs of costs and fees determined under the *Costs and Fees Act*, a copy of which is reproduced at the end of this Rule 77.
>
> (2) Party and party costs of an application must, unless the judge who hears the application orders otherwise, be assessed by the judge in accordance with Tariff A as if the hearing were a trial.
>
> (3) Party and party costs of a proceeding for judicial review or an appeal to the Supreme Court of Nova Scotia must, unless the presiding judge orders otherwise, be assessed in accordance with Tariff C.

[65] In my view, costs of this proceeding should be assessed in accordance with Tariff C.

[66] The hearing of this matter took more than half a day but less than a full day. Tariff C provides for costs for this length of hearing in the range of $1,000.00 - $2,000.00. Tariff C also provides:

> For applications heard in Chambers the following guidelines shall apply:
> .....
>
> (3) In the exercise of discretion to award costs following an application, a Judge presiding in Chambers, notwithstanding this Tariff C, may award costs that are just and appropriate in the circumstances of the application.
>
> (4) When an order following an application in Chambers is determinative of the entire matter at issue in the proceeding, the Judge presiding in Chambers may multiply the maximum amounts in the range of costs set out in this Tariff C by 2, 3 or 4 times, depending upon the following factors:
>
> (a) the complexity of the matter,

> (b) the importance of the matter to the parties,
>
> (c) the amount of effort involved in preparing for and conducting the application.

[67] In my view, the factors referred to in Tariff C (4)(b) and (c) (the importance of the matter to the parties and the amount of effort involved in preparing for and conducting the application) are relevant in the circumstances of this case and warrant an increase in the basic Tariff.

[68] On the other hand, I must consider the fact that while this is not the first time that a Nova Scotia court has dealt with the issue of whether prerogative writs will lie against a non-statutory tribunal – it does appear to be the first time in this province that this issue has been dealt with in the context of the Nova Scotia *Commercial Arbitration Act.*

[69] Taking all matters into consideration, I have determined that the Respondent will be awarded costs of $4,000.00 plus her reasonable disbursements as taxed or agreed. These costs shall be payable forthwith.

[70] An Order shall issue accordingly.

Deborah K. Smith
Associate Chief Justice