

SUPREME COURT OF NOVA SCOTIA

Citation: *IWK Health Centre v. Northfield Glass Group Ltd.*, 2016 NSSC 281

Date: 20161020

Docket: *Halifax*, No. 448741

Registry: Halifax

Between:

IWK HEALTH CENTER

Applicant

v.

NORTHFIELD GLASS GROUP LTD.

Respondent

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Judge: Justice Pierre L. Muise

Heard: May 25, 2016

Written Decision: October 20, 2016

Subject: Application to appoint an arbitrator; interpretation of an arbitration clause.

Summary: Northfield installed a curtain wall system at the IWK Hospital, pursuant to a trade contract which provides for escalating ADR mechanisms culminating in arbitration.

The project was completed in 2008. An issue arose regarding delay, with associated water infiltration and condensation complaints. It was settled July 24, 2008 through mediation. The parties exchanged mutual releases covering claims known to that date.

IWK advised Northfield in September 2012 that it had discovered a major problem with leaking in the curtain wall. An investigation revealed purported defects and deficiencies. Northfield did not offer to rectify them. IWK effected repairs and, in November 2013, wrote Northfield claiming repair and future costs.

Northfield's insurer, Intact Insurance, also became involved. In subsequent correspondence with Northfield and Intact, IWK continued to repeatedly request Northfield's position in relation to the claim and whether some stages of the ADR process should be skipped.

On September 8, 2015, Northfield finally provided its position that the 2008 settlement and release might bar the new claim. It requested disclosure. It did not agree to waive any stage of the ADR process. It refused to provide its position on proceeding to mediation without that disclosure. IWK disputed the release defence and the disclosure request. It posited that they needed to proceed directly to arbitration to avoid wasting further time and resources.

As nothing was happening, on March 2, 2016, IWK filed the within application to appoint an arbitrator pursuant to the Trade Contract.

Issues:

1. Can an arbitrator, under the terms of the Trade Contract, determine the issue of the release defence?
2. Is arbitration mandatory considering that: IWK waited until November 2013 to give written notice of its claim; IWK delayed pursuing its claim after giving notice of it; and, IWK proceeded directly to giving the Notice of Arbitration without involving the consultant and/or the project mediator in the ADR process?

3. Would the arbitration process result in manifestly unfair or unequal treatment of Northfield?
4. Should the disclosure issues that have arisen between the parties be determined by an arbitrator?
5. If an arbitrator or arbitrators should be appointed, who should be appointed?

Result:

The release defence is arbitrable. In the circumstances, IWK's delay in giving its notice of claim and pursuing its claim was reasonable and did not remove its right to have it determined through arbitration. The late disclosed position of Northfield made it clear that consultant and the mediation stages were futile. The lengthy delay resulted from accommodating Northfield's requests. Northfield did not wish to engage the consultant and mediation stages. It did not raise any issue regarding the applicability of the ADR process until this application. IWK made it clear from December 2013 that it was proceeding by way of the ADR process. It never wavered from that position. In the circumstances, it would be manifestly unfair to IWK to require it to go through the futile formalities of the first two non-binding ADR stages. An order for appointment of arbitrators was granted despite the first two stages not having been engaged. The arbitration process would not result in the manifestly unfair or unequal treatment of Northfield. The arbitration is to be conducted by three arbitrators appointed in accordance with the Rules for Arbitration. They should determine the disclosure issues.