IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
COURT OF APPEAL

Citation: *Layman v. Layman Estate*, 2016 NLCA 13
Date: March 28, 2016
Docket: 201401H0050

BETWEEN:

BRUCE LAYMAN — APPELLANT

AND:

JUNE LAYMAN, AS ADMINISTRATOR, *C.T.A.*
OF THE ESTATE OF PATRICK LAYMAN — RESPONDENT

Coram: Welsh, White and Harrington JJ.A.

Court Appealed From: Supreme Court of Newfoundland and Labrador
Trial Division (G) 201301G3760
Neutral Citation 2014 NLTD (G) 66

Appeal Heard: November 18, 2015
Judgment Rendered: March 28, 2016

Reasons for Judgment by White J.A.
Concurred in by Welsh and Harrington JJ.A.

Counsel for the Appellant: A. Douglas Moores Q.C.
Counsel for the Respondent: M. John Mate

White J.A.:

[1] Bruce Layman, appeals from an order of the Supreme Court Trial Division (General), allowing a review of an arbitrator's award in a commercial arbitration pursuant to the *Arbitration Act*, RSNL 1990, c. A-14 (the "*Act*").

[2] The background of the case was concisely stated by the applications judge:

> [1] In 1998, Patrick Layman (now deceased) and Bruce Layman, his son, were fishermen. At that time, Patrick Layman held a fishing licence, which included 300 crab pots (the "Large Licence") and Bruce Layman held a fishing licence primarily used for cod fishing (the "Small Licence").
>
> [2] On October 2, 1998, Patrick Layman (and his company, Japala Enterprises Limited) signed a contract with Bruce Layman (and his company, B & J Fisheries Ltd.). I shall refer to this hereinafter as the "Contract". The effect of the Contract was an agreement to transfer (subject to the terms of the Contract) the Large Licence to Bruce Layman so that he would be able to fish using the vessel the "Digby Challenger" and Patrick Layman could fish using the Small Licence.
>
> [3] Patrick Layman died on July 11, 2012 and his wife was appointed administrator of his Estate on August 30, 2012. Following his death, a dispute arose respecting the interpretation of paragraph one of the Contract. I set out below all three paragraphs of the Contract:
>
> > 1. That if for any reason Bruce or Patrick die or are otherwise unable to fish the licences transferred in Schedules "A" and "B" hereto, the transferor shall be entitled to re-call the licences transferred so that they re-vest back in the transferor.
> >
> > 2. In return for transferring his licences to Bruce, Patrick and/or Japala shall be paid ten percent (10%) of the net income generated by the use if [*sic*] the licences transferred to Bruce whilst Bruce operates the Digby Challenger.
> >
> > 3. Any dispute arising under this Agreement shall be determined by Arbitration pursuant to the Arbitration Act R.S.N. 1990.
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> [4] Under the terms of Patrick Layman's Will, executed on January 23, 2012, his wife, June, was to inherit his entire Estate. In the event that she should predecease him, his Will left the Large Licence to his son, John, and the Small Licence to his son, Bruce.

> [5] Pursuant to paragraph three of the Contract, the dispute was referred to an arbitrator under the *Arbitration Act*, R.S.N.L. 1990 c. A-14. In a written Award released on July 3, 2013, Mr. Wayne Thistle, Q.C., C.Arb., C.Med (the "Arbitrator") determined that the Estate had no right to recall the Large Licence.

The Arbitrator's Decision

[3] The arbitration was consensual and the arbitrator was chosen by agreement of the parties. The arbitrator heard evidence on June 7, 2013. While the hearing was not recorded, the arbitrator made notes of the testimony of the witnesses and the submissions of counsel.

[4] The arbitrator rendered his decision on July 3, 2013. He reviewed the background facts and identified that the primary issue to be determined was whether the estate of Patrick Layman could, pursuant to the terms of the Contract, recall the Large License from Bruce Layman. The arbitrator also identified three ancillary issues, uncontested on appeal, which he found did not affect the determination of the primary issue.

[5] On the primary issue, the arbitrator concluded that:

> There is no interpretation of the language or any application of equitable principles which would allow the estate of Patrick Layman to recall the Large license. The wording of the Agreement confers no rights upon the estate of Patrick Layman or the estate of Bruce Layman. Bruce Layman does have, by virtue of section 1 the right to recall the Small license.

[6] In reaching this conclusion, the arbitrator appears to have accepted the submission of Bruce Layman's counsel that the word "transferor" in clause 1 of the Contract referred to the survivor of the two men and could not refer to their estates.

Review by the Supreme Court of Newfoundland and Labrador

[7] June Layman, the administrator, *C.T.A.* of the estate of Patrick Layman brought an application for review of the arbitrator's award, asking for it to be set aside and remitted to another arbitrator for reconsideration.

[8] The applications judge decided that the standard of review of the arbitrator's interpretation of the Contract was reasonableness and that the arbitrator's decision did not meet that standard.

[9] In the view of the applications judge the arbitrator's decision lacked the justification, transparency and intelligibility required to support his conclusions that: the Contract was unambiguous; there was no interpretation which would allow the estate of Patrick Layman to recall the Large Licence; and/or the wording of the Contract conferred no rights upon the estate of Patrick Layman.

[10] The applications judge set aside the award and remitted it for reconsideration by a new arbitrator.

[11] Bruce Layman appeals to this Court, arguing that the applications judge misapplied the standard of reasonableness and that the arbitrator's award was reasonable.

ANALYSIS

The Standard of Review

[12] In order to determine the applicable standard of review, the nature of the lower court's decision must be determined. The law applicable to a review of an arbitrator's award has recently evolved.

[13] In *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53, [2014] 2 S.C.R. 633, the Supreme Court of Canada considered a commercial arbitration statute which provided for a statutory appeal on questions of law. The Court decided that while a review of a commercial arbitration award is not always equivalent to judicial review of administrative tribunals, they are analogous is some respects:

> [104] Appellate review of commercial arbitration awards takes place under a tightly defined regime specifically tailored to the objectives of commercial arbitrations and is different from judicial review of a decision of a statutory tribunal. For example, for the most part, parties engage in arbitration by mutual choice, not by way of a statutory process. Additionally, unlike statutory tribunals, the parties to the arbitration select the number and identity of the arbitrators. These differences mean that the judicial review framework developed in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, and the cases that followed it, is not entirely applicable to the commercial arbitration context. For example, the *AA* forbids review of an arbitrator's factual findings. In the context of commercial arbitration, such a provision is absolute. Under the *Dunsmuir* judicial review framework, a privative clause does not prevent a court from reviewing a decision, it simply signals deference (*Dunsmuir*, at para. 31).

> [105] Nevertheless, judicial review of administrative tribunal decisions and appeals of arbitration awards are analogous in some respects. Both involve a court reviewing the decision of a non-judicial decision-maker. Additionally, as expertise is a factor in judicial review, it is a factor in commercial arbitrations: where parties choose their own decision-maker, it may be presumed that such decision-makers are chosen either based on their expertise in the area which is the subject of dispute or are otherwise qualified in a manner that is acceptable to the parties. For these reasons, aspects of the *Dunsmuir* framework are helpful in determining the appropriate standard of review to apply in the case of commercial arbitration awards.

[14] The scope of review provided by the *Act* in light of *Sattva* has not been previously discussed by this Court. The extent to which the comments in *Sattva* apply to this case depends on the provisions of the *Act*, which are different from those considered by the Supreme Court of Canada.

[15] Sections 14 and 36 of the *Act* provide that an arbitrator's award is final unless the "arbitrator or umpire has misconducted himself or herself, or an arbitration or award has been improperly procured," in which case the Supreme Court of Newfoundland and Labrador, Trial Division, may set it aside. The sections read:

> **Award final**
>
> 36. The award made by arbitrators or an umpire is final and binding on the parties and persons claiming under them.
>
> **Setting aside of award**
>
> 14. (1) Where an arbitrator or umpire has misconducted himself or herself, or an arbitration or award has been improperly procured, the court may set the award aside.
>
> (2) An application in respect of an arbitration or award referred to in subsection (1) may be made to the Trial Division within 60 days of the receipt of that arbitration or award by the parties to the application.

[16] Unlike in the statute at issue in *Sattva*, this formulation of the Court's power to set aside the award has not historically been interpreted as creating a right of appeal (*City of Saint John v. Irving Oil Co. Ltd.*, [1966] S.C.R. 581 at 585, 586; *City of Vancouver v. Brandram-Henderson of B.C. Ltd.*, [1960] S.C.R. 539 at 555), but rather as a power analogous to judicial review whereby the Court can review the arbitrator's decision respecting the facts and the law. This Court in *Newfoundland and Labrador (Treasury Board) v.*

Newfoundland and Labrador Nurses' Union, 2006 NLCA 42, 250 Nfld. & P.E.I.R. 21 at para. 24, cited with approval the comments of Green C.J.T.D., as he then was, in *O'Reilly's Irish Bar Inc. v. 10385 Nfld. Ltd.*, 2003 NLSCTD 143, 231 Nfld & PEIR 29 at para. 51 rev'd on other grounds 2006 NLCA 16, 254 Nfld. & P.E.I.R. 172, leave to appeal dismissed 31442 (August 24, 2006): "[t]he notions of misconducting oneself and of improper procurement of an award encompass, in the modern parlance of judicial review, absence of procedural fairness, acting in excess of jurisdiction and committing reviewable error on rulings of fact or law made within jurisdiction."

[17] While not the same as judicial review of administrative tribunals, the *Act* codifies an analogous power of judicial review of arbitrator's awards. Therefore, the comments in *Sattva* are applicable to the case at bar, save in respect of review of the facts found by the arbitrator which continues to be permitted under our *Act*.

[18] Consequently, as in an appeal of a judicial review of an administrative tribunal, the question on appeal of a review of an arbitrator's decision is whether the lower court selected and applied the correct standard of review (*Agraira v. Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, [2013] 2 S.C.R. 559 at paras. 45-47; *Dr. Q v. College of Physicians and Surgeons of British Columbia*, 2003 SCC 19, [2003] 1 S.C.R. 226 at para. 43; *Burke v. Newfoundland and Labrador Association of Public and Private Employees*, 2010 NLCA 12, 294 Nfld & PEIR 230 at paras. 49-50).

[19] The parties agree that the applications judge correctly selected reasonableness as the standard of review. I agree as well, especially in light of the comments of the Supreme Court in *Sattva*.

Application of the Reasonableness Standard

[20] As referenced by the applications judge, *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 continues to govern the definition of "reasonableness":

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for

> reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

Justified, Transparent and Intelligible Reasons

[21] The applications judge decided that the reasons given by the arbitrator did not meet the standard of being justified, transparent or intelligible. She stated:

> [56] The first three of these preliminary findings shed some light on the Arbitrator's conclusion on the primary issue (insofar as he determined each to be irrelevant). Further, his conclusion on the fourth preliminary issue is repeated in support of his conclusion on the primary issue itself. However, beyond these findings, the Award as a whole lacks the justification, transparency and intelligibility required for the conclusions reached (*Dunsmuir* at para. 47), namely:
>
> - that the Contract was unambiguous;
> - that there was no interpretation which would allow the Estate of Patrick Layman to recall the Large Licence; and/or
> - that the wording of the Contract conferred no rights upon the Estate of Patrick Layman.
>
> …
>
> [83] The Award does not suggest any consideration to:
>
> - what other provisions of the Contract assisted in interpreting paragraph one;
> - what mutually known facts aided in his identification of the meaning of the clause;
> - evidence of subsequent conduct of the parties (through John Layman) that shed light on their intention;
> - the fact that it was disputed whether a person could hold two licences at the one time and how this may be relevant to interpretation of the Contract; or

> • the subsequent registration at DFO of the Large Licence to the Estate of Patrick Layman after his death.
>
> [84] Each of these would have been significant to a search for the true intention and meaning of the clause, would be relevant to the choices the parties made in their Contract, and would have assisted the Arbitrator on settling upon an interpretation that made sense in the context of commercial fishing contracts.
>
> [85] I am aware that the "notion of deference to administrative tribunal decision-making requires 'a respectful attention to the reasons offered or which could be offered in support of a decision'…" (*Nurses' Union*, 2011 SCC 62 at para. 12) and that this extends to a duty to seek to supplement inadequate reasons before subverting them.
>
> [86] However, when I conduct this review of the Arbitrator's decision on the primary issue, I am only partially assisted. He made no reference to either the submissions of counsel for the Estate, the evidence he received or the process. He did not provide any means by which I could determine if his conclusion turned on either the credibility of the witnesses who testified or the weight to be given to the evidence of either.

[22] Although the applications judge made reference to the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 [*Nurses' Union*], I would conclude that she erred in applying it. The *Nurses' Union* decision directs a court to review the reasons given by the decision-maker in light of the record in order to determine whether the outcome is within a range of outcomes justified by the facts and the law:

> [14] Read as a whole, <u>I do not see *Dunsmuir* as standing for the proposition that the "adequacy" of reasons is a stand-alone basis for quashing a decision</u>, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result (Donald J. M. Brown and John M. Evans, *Judicial Review of Administrative Action in Canada* (loose-leaf), at §§12:5330 and 12:5510). It is a more organic exercise — the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes. This, it seems to me, is what the Court was saying in *Dunsmuir* when it told reviewing courts to look at "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes" (para. 47).
>
> [15] In assessing whether the decision is reasonable in light of the outcome and the reasons, courts must show "respect for the decision-making process of adjudicative bodies with regard to both the facts and the law" (*Dunsmuir*, at para. 48). <u>This means that courts should not substitute their own reasons, but they may,</u>

> if they find it necessary, look to the record for the purpose of assessing the reasonableness of the outcome.
>
> (Emphasis added.)

[23] The applications judge failed to undertake the analysis of the decision required by *Nurses' Union*. She listed a number of issues that the arbitrator did not address in his reasons, without asking herself whether the whole of the record could support his decision as reasonable. The applications judge found that the arbitrator did not explain why he concluded that the Contract was not ambiguous, or why no interpretation of the Contract could permit the estate of Patrick Layman to recall the Large License or confer any rights upon the estate. However, those were not the relevant questions that a judge must ask when applying a reasonableness standard on judicial review either of an administrative tribunal or of a commercial arbitrator, particularly in light of *Sattva*. The real questions the applications judge had to ask herself were:

1. Whether in light of the record before him, the reasons reveal that the arbitrator chose an interpretation of the Contract that its words could bear.

2. Whether the interpretation chosen by the arbitrator was justifiable in light of the facts and the law, even if there were competing interpretations.

[24] When considered from this perspective, it was unnecessary in this case for the arbitrator to explain whether he found the Contract unambiguous. First, it is not evident that he did so. He may have found the Contract ambiguous and chosen to resolve the ambiguity in favour of Bruce Layman. Even if we assume the Contract was ambiguous, as decided by the applications judge, one available interpretation of the Contract is that the word "transferor" refers to the survivor of the two men, here Bruce Layman. Nor was the arbitrator required to address every piece of evidence or submission of counsel in order to reach this interpretation, as the applications judge seems to have suggested. If the interpretation chosen by the arbitrator is supportable by the facts and the law, *Nurses' Union* instructs the judge to defer to it.

[25] This is not to suggest that the reasons of the tribunal should not be scrutinized. As Barry J.A. of this Court explained in *Workplace Health,*

Safety and Compensation Commission v. Allen, 2014 NLCA 42, leave to appeal refused 36265 (July 9, 2015):

> [40] I share the discomfort expressed by LeBlanc J. in *Power v. Newfoundland and Labrador (Workplace Health, Safety Compensation Review Division)*, 2012 NLTD(G) 4, 318 Nfld. & P.E.I.R. 222, at paras. 60-61:
>
>> [60] Having carefully read this decision in full, I must admit some degree of discomfort in concluding that the *Nurses' Union* case stands for the proposition that, if the outcome or result of the decision falls within the range of reasonable outcomes, the reasoning given to support such decision is of no concern. What appears to me to be the result of the decision in the *Nurses' Union* case is that reasons given to support a decision where reasonableness is the standard to be applied are to be considered more as an aid for the reviewing Court to understand the adjudicator's decision and there is no analysis to be made specifically into the reasonableness of those reasons. Because the *Nurses' Union* case seeks to uphold the *Dunsmuir* analysis, I am satisfied that obviously if no supportive reasons are provided or the reasons are flawed based upon the approach to the matter to be decided, the reviewing Court retains the ability to quash the decision under review. Otherwise, the Court would be doing little more than showing "blind reverence" to the administrative decision-maker, which in *Dunsmuir* was found to be an incorrect approach.
>>
>> [61] As a result, I read the *Nurses' Union* case as upholding the guiding principle of deference in cases where reasonableness is the appropriate standard of review. While there is to be no discrete analysis for the reasons and the result separately, the approach to be taken is to consider the reasons together with the outcome to determine whether the result falls within the range of possible outcomes. Inadequate or insufficient reasons, in the sense that there is a gap in them, would not support a reviewing Court's intervention where those reasons, along with other reasons which could have been offered, permit the reviewing court to understand why the decision-maker decided as it did and to determine if that decision is within the range of acceptable outcomes. Such, however, should not be seen as a direction for a reviewing court to merely be a "rubber stamp" of the original body, particularly where there is a fundamental flaw in the reasoning or the approach taken.
>
> See also the comments of Stratas J.A. in *Lemus v. Canada (Citizenship and Immigration)*, 2014 FCA 114, 372 D.L.R. (4th) 567:
>
>> [33] At paragraphs 11 and 12 of *Newfoundland Nurses*, the Court reiterated the need for reviewing courts to pay "respectful attention to the reasons…*which could be offered* in support of a decision" [my emphasis].

> In the same case, the Supreme Court adopted the following additional excerpt from Professor Dyzenhaus' article, in an unqualified manner without any rationale:
>
> For if it is right that among the reasons for deference are the appointment of the tribunal and not the court as the front line adjudicator, the tribunal's proximity to the dispute, its expertise, etc., then it is also the case that its decision should be presumed to be correct even if its reasons are in some respects defective.
>
> One might well query the idea that reviewing courts are to presume the correctness of administrators' decisions, even in the face of a defect. One might also query whether, in trying to sustain an outcome reached by flawed reasoning, the reviewing court might be coopering up an outcome that the administrator, knowing of its error, might not have itself reached. Finally, whether an outcome should be left in place because of the strength of the record or other considerations has traditionally been something for the remedial stage of the analysis, not an earlier stage: *MiningWatch Canada v. Canada (Fisheries and Oceans)*, 2010 SCC 2, [2010] 1 S.C.R. 6.

(Emphasis added.)

[26] However, the arbitrator having given some reasons, the real question therefore is whether the interpretation of the Contract adopted by the arbitrator is a reasonable one in light of the facts and the law.

[27] There is nothing in the law of contractual interpretation that prohibits the arbitrator from reaching the award that he did. Merely because the arbitrator did not set out case law, does not mean he did not follow it. As noted above, the arbitrator did not actually decide the Contract was unambiguous and then fail to explain why he did so. A review of his reasons and the law of contractual interpretation reveals that he could have decided that the Contract was ambiguous and then relied on extrinsic evidence to choose the interpretation he thought reflected the intentions of the parties. In fact, the decision shows this was likely the approach he adopted, as he referred to some examples of extrinsic evidence he was considering (mainly, the will of Patrick Layman) and explained why that evidence was not relevant to the meaning of the Contract. This approach is valid in law, and is reasonable. And while the arbitrator could have dealt with all the evidence of post-contractual behaviour that was before him in detail, this has never been required on judicial review. Significantly, none of the evidence of post-

contractual behaviour is fundamentally inconsistent with the arbitrator's interpretation of the Contract. Accordingly, it is not evident from the reasons and the record taken together that he could not have reached the conclusion that he did in light of that evidence.

[28] More troublesome is the estate's submission, and the applications judge's finding that in interpreting the Contract the arbitrator relied on inadmissible extrinsic evidence of the subjective intentions of the parties given by Bruce Layman. However, the estate's submission is inherently contradictory, as the estate submits that the Contract was ambiguous and admits at paragraph 70 of its Factum that "where a contract is ambiguous and capable of more than one reasonable construction, extrinsic evidence may be admitted to resolve the ambiguity…", while at the same time arguing that the arbitrator erred in relying on this evidence. Moreover, there is nothing to suggest that the arbitrator in fact relied on this evidence or that the conclusion that he reached was not available to him even if he did not rely on it. Therefore, I would conclude that the arbitrator's approach was not unreasonable.

[29] The interpretation given by the arbitrator was available on the face of the Contract and the evidence. The Contract itself indicates in the preamble that the purpose of the agreement is to enable Bruce to fish the Digby Challenger under a Charter Agreement with Principal Holdings Limited. Clause 1 provides for a right of recall when 'Bruce or Patrick die or are otherwise unable to fish". This indicates that the purpose of Clause 1 is to enable the full use of the licenses by the party who is able to do so and supports the interpretation that the survivor of the two men (Bruce) should be able to recall the license from Patrick if he is deceased or otherwise unable to fish, but the deceased Patrick should not be able to recall the license from Bruce who is still using it. The arbitrator also explained why Patrick's seemingly inconsistent will, which was made subsequent to the Contract and purported to bequeath the Large License to his wife, was irrelevant to the interpretation of the prior Contract. No facts on the record suggest that this interpretation could not reasonably be adopted by the arbitrator.

CONCLUSION

[30] While it would have been preferable if the arbitrator had given more detailed reasons, he was alive to the issues, did not err in application of the

law and reached a reasonable decision. I would, therefore, conclude that the applications judge erred by setting the award aside.

[31] I would allow the appeal and restore the arbitrator's award with party and party costs to the appellant on Column 3 of the Scale of Costs here and in the court below.

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C. W. White J.A.

I Concur: ____________________________________

B. G. Welsh J.A.

I Concur: ____________________________________

M. F. Harrington J.A.