

## Contractual Disputes: Is That the Final Answer

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The case of *Deslaurier Custom Cabinets Inc. v. 1728106 Ontario Inc.* has wound its way up and down several levels of court.

The plaintiff, a commercial tenant, claimed over \$4 million in uninsured losses arising out of a fire. This was on top of over \$10 million already recovered by the tenant from its insurer. The fire was accidentally started by a welding contractor retained by the landlord.

The tenant sought recovery for damage to its property, as well as business interruption losses. Under a lease, the tenant was required to maintain fire insurance. The tenant was also supposed to have the landlord listed as an additional named insured, which it failed to do. The lease required the landlord to indemnify the tenant for damage caused by the negligence of the landlord and its employees and contractors.

The tenant successfully obtained summary judgment against the landlord. Our firm was retained to appeal the judgment on behalf of the landlord. The Court of Appeal allowed the appeal, indicating that the landlord bargained under the lease to be free of responsibility for the risk of loss or damage to the tenant's property or business caused by fire. The tenant's claim was dismissed.

The tenant sought leave to appeal to the Supreme Court of Canada. By order of the Supreme Court of Canada, dated October 20, 2016, the matter was remanded back to the Court of Appeal. The Supreme Court directed the Court of Appeal to consider the

effect of a recent decision which addressed the standard of review in matters involving contractual interpretation, *Ledcor Construction Ltd. v. Northbridge Indemnity Insurance Co.*, 2016 SCC 37.

On April 12, 2017, the Court of Appeal released its decision on the remand order, affirming its original decision. The Court of Appeal reiterated that the applicable standard of review to be applied to the motion judge's interpretation of the lease is correctness, as the errors made involved extricable questions of law.

The remand decision provides a detailed review of the application of *Sattva Capital Corp. v. Creston Moly Corp.*, [2014] 2 SCR 633, and subsequently *Ledcor*, in determining what standard of review is to be applied to appeals involving contractual interpretation.

As enunciated in *Sattva*, contractual interpretation involves issues of mixed fact and law, and therefore is to be reviewed on a deferential standard of palpable and overriding error. A correctness standard of review may still apply to the rare case involving questions of mixed fact and law, when an error is made involving an extricable question of law.

The Supreme Court in *Ledcor* discussed the applicable standard of review when dealing specifically with standard form contracts. That decision established an exception to the general rule as enunciated in *Sattva*, by finding that the applicable standard of review is generally correctness for the interpretation of standard form contracts. A standard form contract is an agreement offered on a take it or leave it basis, in which all or most of the terms cannot be negotiated separately. Examples include rental car agreements and gym memberships.

In the remand decision, the Court of Appeal noted that the lease at issue did not involve a standard form contract and, as such, the *Ledcor* exception to *Sattva* did not

apply. However, the Court of Appeal affirmed its original decision that the applicable standard of review is correctness because the motion judge erred in law.

Specifically, the legal errors included the failure to apply binding appellate authority on contractual allocation of risk, the failure to assign meaning to all contested terms of the lease, and adopting a construction of the lease that failed to accord with the governing principles of contractual interpretation.

The *Deslaurier* decision represents an example of the “rare” case in which the correctness standard of review will be applied on appeals involving the interpretation of contracts that are not in standard form. Absent an error of law, appellate courts are required to give a great deal of deference to a motion judge or trial judge who decides contractual matters. This makes appealing a lower court judgment difficult, but not impossible.