Scott Rollwagen
416-865-2896
srollwagen@litigate.com

February 17, 2015

A change in law, but not in fact?

Law and fact, deference and correctness seem no less muddled than ever, as judges begin to interpret the Supreme Court's decision in *Sattva Capital Corp v. Creston Moly Corp* , 2014 SCC 53. In *Sattva Capital*, the Court held that pure contractual interpretation matters generally raise issues of mixed fact and law requiring deference, unless it is possible to clearly identify extricable issues of law.

Five days after *Sattva Capital* was released, the Ontario Court of Appeal, apparently unaware of it, applied a correctness standard to certain contractual interpretation issues in *First Elgin Mills Developments Inc. v. Romandale Farms Limited* 2014 ONCA 573.

The *First Elgin* respondents sought a rehearing of the appeal on the basis that the Court applied the wrong standard of review. The panel dismissed the motion, holding that its analysis would not have changed regardless of *Sattva Capital*, and regardless of the standard applied. (See 2015 ONCA 54) In the view of the Court, the application judge "misapprehended the evidence, reached an interpretation of the agreement that was commercially unreasonable, and improperly implied a term of the agreement when the legal standard for doing so was not met".

But of the errors the Court identified the application judge as having made, which fall into the "mixed fact and law" box and which are packaged up as "extricable issues of law"?

The first error, misapprehension of the evidence, appears to describe a factual error that was not entitled to deference because it was infected by palpable and overriding error. But the Court doesn't say that expressly.

The third alleged error, misapplying the test for implication of terms, is probably an extricable error of law. However, the application judge in *First Elgin* never expressly implied a term into the agreement. Rather, he interpreted the agreement as requiring the price adjustment clause to be determined and executed as of a certain time. The Court of Appeal criticised this as "effectively" implying a term. This pattern of reasoning is apt to blow a hole in *Sattva Capital*, potentially allowing for any interpretation issue to be repackaged as an extricable issue of law, requiring the correctness standard.

The second error is even more problematic. The Court of Appeal indicated that the trial judge in *First Elgin* "reached an

interpretation of the agreement that was commercially unreasonable." But it is unclear whether the Court is saying that a trial court's assessment of the commercial reasonableness of an interpretation is reviewable on a standard of correctness, or that it is reviewable on a deferential standard, but that *this* judge made a palpable and overriding error in assessing commercial reasonableness.

Either way, it is difficult to square with the plain intention of *Sattva Capital* to affirm that issues of pure interpretation are fact-specific and entitled to deference.