United Laboratories, Inc. v. Abraham et al.

[United Laboratories, Inc. v. Abraham]

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62 O.R. (3d) 26
[2002] O.J. No. 3985
Court File No. 99-CV-178058

Ontario Superior Court of Justice
Pepall J.
October 8, 2002

Conflict of laws -- Foreign judgments -- Enforcement -- Independent contractor agreement between plaintiff and defendant contained arbitration clause -- Agreement terminated -- Plaintiff brought action in Illinois for remedies under U.S. statute -- Defendant did not defend Illinois action and plaintiff obtained default judgment -- Plaintiff and defendant both brought proceedings in Ontario -- Ontario proceedings settled following arbitration but minutes of settlement expressly excluded actions or causes of action arising from judgment obtained in U.S. action -- Plaintiff's action to enforce U.S. judgment in Ontario allowed -- Issues of res judicata and issue estoppel should have been raised by defendant in U.S. action -- Defendant cannot now claim that arbitration clause ousted jurisdiction of U.S. court when it did not challenge jurisdiction of that court in course of U.S. action -- U.S. judgment not in nature of penalty -- U.S. action has real and substantial connection with Illinois -- U.S. judgment final and conclusive and not subject to impeachment.

The defendant A entered into an independent contractor agreement with the plaintiff which provided that in the event of a dispute, the parties would use their best endeavours to settle the matter, and that if they did not reach a solution, their disputes were to be finally settled by arbitration, with

the governing law to be that of Ontario. A dispute arose between the parties over alleged breaches by A of contractual and fiduciary obligations. The independent contractor agreement was terminated. A served a notice of arbitration on the plaintiff, but the plaintiff responded by stating that the notice was premature and ineffective because the disputes were not specified and because the precondition requiring best endeavours to settle [page27] disputes and to consult had not been met. The plaintiff commenced a lawsuit in Illinois against A and several companies based on an allegation that after his termination, A and the other defendants accessed the plaintiff's voicemail system without authorization for commercial advantage and private commercial gain, in violation of the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. 2701-2711. The defendants did not defend the action. A did not think that the claim would be damaging and understood that all disputes were to be resolved in Ontario through arbitration. The court in the U.S. action issued an order for the defendants to show cause why default judgment should not be entered. A received a copy of this order but did not respond. The plaintiff commenced an action in Ontario against M Ltd., one of the defendants in the U.S. action, for damages for malicious falsehood and punitive damages. A did not request that the action be stayed based on the agreement to arbitrate as M Ltd. was not a party to the independent contractor agreement. A, M Ltd. and the defendant P Inc. commenced an action in Ontario against the plaintiff and others claiming injunctive relief and damages. No one sought a stay of these actions. Ultimately, the plaintiff applied in Ontario for the appointment of an arbitrator. The arbitration turned into a mediation and Minutes of Settlement were entered into. A and the other defendants agreed to pay the plaintiff $50,000 in exchange for a release by the plaintiff of all actions and causes of action except actions and causes of action arising out of any judgment obtained in the U.S. action. Default judgment having in the meantime been entered in the U.S. action, the trial judge in that action awarded over $500,000 in damages, including $200,000 in punitive damages. The plaintiff brought an action to enforce this judgment in Ontario.

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Held, the action should be allowed.

A judgment of a foreign court creates a new right in the plaintiff and an obligation by the defendant to obey and pay the amount awarded. The applicable test for enforcement of a foreign judgment is that the foreign money judgment must be final and res judicata in the foreign jurisdiction and must also pass the test of conclusiveness in the sense that it is one that may not at common law be impeached in an action to enforce it in Ontario. The judgment may not be impeached for any error of fact or law. The grounds of impeachment are well-defined and narrow: (a) the court actually had no jurisdiction over the subject-matter and the parties, in which case its judgment is a nullity; (b) lack of identity of the defendant, that is, the defendant was not a party to the foreign suit; (c) the judgment was procured by fraud on the court; (d) a failure of natural justice which relates to procedural matters, i.e. the mode by which the judgment was reached; and (e) to enforce the judgment would be contrary to public policy in Ontario.

Neither res judicata nor abuse of process was applicable in the circumstances of this case. Firstly, it was the U.S. judgment which gave rise to the claim in this case. Res judicata and abuse of process do not stay proceedings automatically; a judicial determination is required. If the defendants wished to make an argument relating to res judicata or abuse of process, they should have made that argument at the time the U.S. action was pending, not after the judgment had become final and conclusive. Secondly, the Minutes of Settlement did not settle the U.S. action. The parties understood that the settlement of the arbitration proceedings and the dismissal of the Ontario actions in the Minutes of Settlement were subject to the obvious exclusion of the U.S. action and any judgment arising therefrom.

The agreement to arbitrate did not oust the jurisdiction of the U.S. court. It was the plaintiff's view that the arbitration provision contained in the independent contractor agreement did not apply to the substance of its U.S. action. In the [page28] absence of an application to stay or oust the

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court's jurisdiction, a court may take jurisdiction. Accordingly, it was incumbent on the defendants to bring proceedings to assert that the U.S. court had no jurisdiction due to the parties' agreement to arbitrate. The defendants acted at their peril by doing nothing. It was too late to now advance the argument that the parties' agreement to arbitrate ousted the U.S. court's jurisdiction.

The defendants could not avoid enforcement of the judgment on the basis that the judgment was in the nature of a penalty. A penal law is one which imposes punishment for some breach of a duty owed to the state, as opposed to a remedial law which secures compensation for a breach of a duty owed to a private person. The damages awarded by the U.S. court in this case were not awarded to the U.S. government or at the suit of the U.S. government. Furthermore, the award was compensatory in nature. The judgment did not fall within the penal law exception.

The plaintiff's U.S. action had a real and substantial connection with Illinois. The U.S. judgment sought to be enforced was final and conclusive and was not subject to impeachment on any of the grounds advanced by the defendants.

Four Embarcadero Center Venture v. Kalen (1988), 65 O.R. (2d) 551, 27 C.P.C. (2d) 260 (H.C.J.), apld

Other cases referred to

639622 Ontario Ltd. v. International Semi-Tech Microelectronics Inc., [1996] O.J. No. 3538 (Quicklaw) (C.A.); ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH (1996), 135 D.L.R. (4th) 130, 49 C.P.C. (3d) 212 (Ont. Div. Ct.), revg (1994), 21 O.R. (3d) 511 (Gen. Div.); Abraham, Mega-Lab and Paragon v. United, United Canada, Mitchell Dubros and Dubros and Associates Inc., unreported, Action No. 98-CV-143495 (Ont. Gen. Div.); Arrowmaster Inc. v. Unique Forming Ltd. (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Gen. Div.); Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty. Ltd. (1988), 165 C.L.R. 30 F.C. 88/023; Beals v. Saldanha (2001), 54 O.R. (3d) 641, 202 D.L.R. (4th) 630, 10 C.P.C. (5th) 191 (C.A.),

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revg in part (1998), 42 O.R. (3d) 127, 27 C.P.C. (4th) 144 (Gen. Div.); Bott v. Sorley, [1998] B.C.J. No. 2023 (Quicklaw) (S.C.); Canam Enterprises Inc. v. Coles (2000), 51 O.R. (3d) 481, 194 D.L.R. (4th) 648, 5 C.P.C. (5th) 218 (C.A.), affg (2000), 47 O.R. (3d) 446 (S.C.J.); Eli Lilly and Co. v. Novopharm Ltd. (1998), 152 F.T.R. 160n, [1998] 2 S.C.R. 129, 161 D.L.R. (4th) 1, 227 N.R. 201, 80 C.P.R. (3d) 321; Fenerty v. The City of Halifax (1920), 53 N.S.R. 457, [1920] 50 D.L.R. 435 (S.C.); Huntington v. Attrill, [1983] A.C. 150; Morguard Investments Ltd. v. De Savoye, [1990] 3 S.C.R. 1077, 52 B.C.L.R. (2d) 160, 76 D.L.R. (4th) 256, 122 N.R. 81, [1991] 2 W.W.R. 217, 46 C.P.C. (2d) 1, 15 R.P.R. (2d) 1; Ontario Sugar Co. (Re) (1911), 44 S.C.R. 659, (1911), 24 O.L.R. 332 (C.A.), affg (1910), 220 O.L.R. 621 (C.P.); Rosenberg v. Goldbert, [1960] O.R. 162, 23 D.L.R. (2d) 283 (H.C.J.); United and United Canada v. James Jeffrey Stapleton, John Almeida and Paragon, unreported, Action No. 96-CU-113717 (Ont. Gen. Div.); United States of America v. Ivey (1996), 30 O.R. (3d) 370, 139 D.L.R. (4th) 570, 27 B.L.R. (2d) 243 (C.A.) [Leave to appeal to S.C.C. refused (1997), 218 N.R. 159n], affg (1995), 26 O.R. (3d) 533, 130 D.L.R. (4th) 674, 27 B.L.R. (2d) 221 (Gen. Div.); United v. Mega-Lab, unreported, Action No. 98-CU-140798 (Ont. Gen. Div.)

Statutes referred to

International Commercial Arbitration Act, R.S.O. 1990, c. I.9
Model Law on International Commercial Arbitration (as adopted by the United Nations Commission on International Trade Law on June 21, 1985), R.S.O. 1990, c. I.9, Sched. ("International Commercial Arbitration Act"), Arts. 5-8
[page29]
Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. 2701-2711

Authorities referred to

Turner, A.K., The Doctrine of Res Judicata: The Original Text by George Spencer Bower, 2nd ed. (London: Butterworths, 1969)
Castel, J.G., Canadian Conflicts of Law, 4th ed. (Toronto: Butterworths, 1997)

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ACTION to enforce a foreign judgment.

Blair W.M. Bowen, for plaintiff.
Michael S.F. Watson, for defendants.

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[1] PEPALL J.: -- On September 27, 1999, the United States District Court, Northern District of Illinois, Eastern Division, entered judgment jointly and severally against the defendants, Michael Abraham, Paragon Commercial Enterprises, Inc. ("Paragon"), and Mega-Lab Manufacturing Co., Ltd. ("Mega-Lab"), in favour of the plaintiff, United Laboratories, Inc. ("United") in the amount of $507,618.95 US including $200,000 in compensatory damages, $200,000 in punitive damages, and $107,618.95 for attorney's fees and costs. United now seeks to enforce this judgment in Canada.

FACTS

The Parties

[2] United manufactures and distributes chemical products for industrial maintenance and cleaning. Its head office is in St. Charles, Illinois. Mr. Abraham resides in Ontario and was employed by United as Vice-President of International Sales Canada. Paragon and Mega-Lab are Ontario corporations. At various times, Mr. Abraham was an officer, director or shareholder of these two corporations. In 1993, Mr. Abraham entered an employment contract with United. In 1996, the nature of the parties' relationship changed and Mr. Abraham entered into an independent contractor agreement with United.

The Agreements

[3] In both agreements, Mr. Abraham asked that there be clauses which provided for arbitration in the event of a dispute and that the law of Ontario be the governing law. Mr. Abraham believed that American companies with in-house counsel tended to aggressively pursue legal issues and he did not have

the resources to go to court or to go to the United States. United had in-house counsel. The parties agreed to the inclusion of both of [page30]these provisions in both the original employment contract and in the independent contractor agreement. Mr. Abraham refused to enter the independent contractor agreement until an arbitration provision was included.

[4] The independent contractor agreement explicitly provided that in the event of a dispute, United and Abraham would use their best endeavours to settle the matter. If they did not reach a solution, their disputes were to be finally settled by arbitration in accordance with the rules and procedures of the Province of Ontario and of Canada. The arbitration panel was to consist of one arbitrator appointed by mutual agreement of United and Mr. Abraham, or in the event of a failure to agree on an arbitrator within five business days, the arbitrator was to be appointed by "the said Association". The only reference to an association in the agreement was the American Arbitration Association in Chicago, Illinois, however, this reference had been deleted by the parties. A clause whereby Mr. Abraham would submit to the personal jurisdiction of the Illinois court was also deleted. Mr. Abraham agreed not to solicit United customers or employees for a period of 12 months after termination of the agreement and was bound by confidentiality provisions which extended for a period of 60 months after termination of the agreement. Mr. Savaiano on behalf of United testified that the arbitration clause would survive termination of the agreement as well.

Termination of Relationship

[5] In the late summer and early fall of 1997, the relationship between the parties ended. Three letters were exchanged. On August 29, 1997, lawyers acting on behalf of United wrote to Mr. Abraham outlining breaches of contractual and fiduciary obligations and other wrongful acts committed by Mr. Abraham. They asserted that, amongst other things, he was promoting the business of Paragon, an undisclosed relationship; he was soliciting United's customers and employees; he was improperly disclosing United's confidential and proprietary

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information; and he was delivering United's intellectual property to Paragon. Counsel stated that the independent contractor agreement would be terminated within 30 days if Mr. Abraham did not confirm that he had no interest in Paragon and did not remedy the breaches. United stated that it would treat the independent contractor agreement as terminated if it did not receive a satisfactory response. A further letter inquiring as to whether Mr. Abraham would cure the breaches was sent by United on September 10, 1997. Again, if a satisfactory response was not received by 5:00 p.m. [page31]that day, United would treat the independent contractor agreement as at an end. On September 10, 1997, Mr. Abraham's Canadian counsel responded to United's lawyer's August 29, 1997 letter and denied the allegations made against Mr. Abraham but accepted the repudiation of the relationship between the parties. Reference was made to the fact that United had disconnected Mr. Abraham's voicemail. Clearly by September 10, 1997, the independent contractor agreement was at an end.

[6] On October 1, 1997, Mr. Abraham served a notice of arbitration on United pursuant to the terms of the independent contractor agreement. The notice referenced the parties' intention to settle by arbitration all disputes, claims, questions and differences arising between them, including those disputes, claims, questions and differences which were identified in the aforesaid three letters. United responded by stating that the notice of arbitration was premature and ineffective because the disputes were not specified and because the precondition requiring best endeavours to settle disputes and to consult had not occurred. In turn, Mr. Abraham's counsel in Ontario proposed the names of three possible arbitrators in Ontario. United's lawyers countered by reiterating that best endeavours were required to resolve the dispute before arbitration and proposing a meeting of the parties in Illinois for that purpose. Mr. Abraham's counsel suggested that the meeting take place in Toronto. The parties were at an impasse. No meeting took place at that time and neither did the arbitration.

The Lawsuits

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[7] Numerous lawsuits were commenced.

[8] In early December 1997, United learned that Mr. Abraham and others were accessing its voicemail system. On January 30, 1998, United commenced proceedings in the United States District Court, Northern District of Illinois, Eastern Division, against Mr. Abraham, Paragon, Mega-Lab, Martin Rukin and Step Kare Corporation. Martin Rukin had been the chief chemist at United. He, too, had been terminated. Step Kare was a company formed by him, and he and his wife were its sole shareholders. Mr. Abraham was described in the complaint as the employee, officer and principal of both Paragon and Mega-Lab. The complaint stated that after Mr. Abraham's employment with United terminated, he was no longer authorized to access United's voicemail system. United put broadcast messages on its voicemail system which included information on the state of United's business, proprietary and confidential sales tips, and product information. The complaint stated that the defendants, [page32]who were described as competitors of United, accessed United's voicemail system without authorization for commercial advantage and private commercial gain. The relief requested by United was based on violations of the Stored Wire and Electronic Communications and Transactional Records Access Act, 18 U.S.C. 2701-2711. Section 31 of the complaint stated "[u]nder s. 2701(a)(1) of the Act, whoever 'intentionally accesses without authorization a facility through which an electronic communication service is provided . . . and thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished as provided in subsection (b) of this section'."

[9] Paragraph 32 stated "[t]he punishment provided for in subsection (b) is as follows":

> If the offense [under subsection (a)] is committed for purposes of commercial advantage, malicious destruction or damage, or private commercial gain [the punishment is] (A) a fine under this title or imprisonment for not more than one year or both, in the case of a first offense under this subparagraph; and (B) a fine under this title or imprisonment

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for not more than two years, or both, for any subsequent offense under this subparagraph.

[10] The complaint went on to state that 2707(a) of the Act provided that any "person aggrieved by any violation of this chapter in which the conduct constituting the violation is engaged in with a knowing or intentional state of mind may, in a civil action, recover from the person or entity which engaged in that violation such relief as may be appropriate". Under the Act, appropriate relief included preliminary and other equitable relief, damages, and reasonable attorney fees and other litigation costs. Paragraph 34 of the complaint stated "[t]he Act further provides that damages include actual damages suffered by the plaintiff and any profits made by the violator as a result of the violation and that in no case shall a person entitled to recover receive less than the sum of $1,000." In its complaint, United requested injunctive relief and damages. The defendants did not defend this action. In the trial before me, Mr. Abraham testified that no damages were suffered by United and he did not think its claim would be damaging. He also had understood that proceedings had to be brought in Ontario and that disputes were to be resolved by arbitration. He did not have the money to defend himself in the United States. The American lawyer wanted a $25,000 US retainer and he did not have these funds. Mr. Savaiano testified that he believed that the U.S. action was unrelated to the subject matter of the arbitration. It was based on a U.S. statute which enabled United to bring an action against parties regardless of whether they had been employed by United. In [page33] addition, the U.S. action was against parties other than those who were parties to the arbitration proceedings.

[11] Martin Rukin died suddenly and United did not continue its action against him and Step Kare Corporation. In the U.S. action, the court issued an order on March 20, 1998 for the defendants to show cause why default judgment should not be entered. Mr. Abraham received a copy of this order but did not respond. United requested document production of Mr. Abraham, Paragon and Mega-Lab on June 1, 1998. The defendants received this request as well but did not respond. United also attempted, without success, to arrange for a deposition to be

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taken of Mr. Abraham. On July 10, 1998, the court issued an order compelling the defendants to comply with the discovery requests. The defendants were served with a copy of this order but did not respond. Default judgment was granted against the defendants on February 8, 1999.

[12] On February 2, 1998, United commenced an action in Ontario against Mega-Lab. This claim was for damages in the amount of $100,000 for malicious falsehood and punitive damages in the amount of $50,000. Again, Mr. Abraham was referred to in the pleadings; however, he was not named as a party. Mega-Lab filed a statement of defence on March 4, 1998. Mr. Abraham said he did not request that this action be stayed based on an agreement to arbitrate as Mega-Lab was not a party to the independent contractor agreement.

[13] On February 19, 1998, United and its wholly owned subsidiary, United Laboratories of Canada Inc., obtained an order in Ontario amending the statement of claim it had issued in Ontario against a James Jeffrey Stapleton to include John Almeida and Paragon (Action No. 96-CU-113717). In that statement of claim, Paragon was described as an Ontario company which employed Messrs. Stapleton and Almeida as sales representatives. Damages of $400,000 for inducing breach of contract and intentional interference with contractual relations and punitive damages of $100,000 were claimed against Paragon. Mr. Abraham was not named as a party but he was referred to in some detail in the statement of claim. The indirect allegations made against him were that Paragon wrongfully induced and procured Mr. Abraham to breach the terms of his independent contractor agreement and to commit numerous wrongful acts. On April 3, 1998, Paragon counterclaimed against United and others.

[14] On March 12, 1998, Mr. Abraham, Paragon, and Mega-Lab commenced proceedings against United and others in Ontario claiming injunctive relief and damages arising from allegations of trespass and removal of confidential information from Mr. Abraham's garbage. [page34]

[15] No one sought a stay of any of these actions.

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The Arbitration

[16] There was much correspondence between the parties' counsel on the appointment of an arbitrator. Ultimately, United applied in Ontario for the appointment of an arbitrator and on the consent of the parties, the former Mr. Justice R.E. Holland was appointed as arbitrator by court order dated January 12, 1999. The parties filed materials in support of that arbitration. The materials included a claim of Mr. Abraham and another company dated April 13, 1999 and a statement of defence and counterclaim dated May 3, 1999, filed by United. The claim requested, amongst other things, a declaration that United had improperly terminated Mr. Abraham's access to the voicemail system. The statement of defence and counterclaim claimed that Mr. Abraham gained unauthorized access to United's voicemail system, placed calls on the business of Paragon and Mega-Lab, and used United's confidential business information broadcasts to compete against United. These breaches were continued through the operations of Paragon and Mega-Lab. Paragraph 45 stated:

> (a) Abraham was actively involved in the formation of both Paragon and Mega-Lab. Abraham owns and is entitled to a percentage of profits of both companies. Both companies are used by him to earn his livelihood, both during the term and subsequent to the term of his agreements with United;
>
> . . . . .
>
> (c) Abraham was actively involved in running the operations of both companies, and was presented as the President of Paragon to third parties;
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> (d) Abraham received direct compensation and remuneration from both companies, and;
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> (e) Abraham personally diverted business from United customers to both companies.

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In cross-examination, Mr. Savaiano acknowledged that the aforesaid complaints arose as a result of a breach of the confidentiality provisions of the independent contractor agreement. It was for this reason that arbitration was appropriate. The breach was subject to the arbitration clause. The materials filed at the arbitration included an affidavit sworn August 13, 1998 by Mr. Abraham. In that affidavit, he stated that it was his belief that United's "real interest in pursuing this application is to force me to appear in the State of Illinois in order that I can be served with papers there in an unrelated matter". In cross-examination, Mr. Abraham acknowledged that he believed that the U.S. action was unrelated [page35] to the arbitration because the claims against him were in breach of an American statute. He noted that Paragon and Mega-Lab were not parties to the independent contractor agreement and the claims in the U.S. action against them were unrelated to that contract. Mr. Abraham testified that the primary reason that he did not defend the U.S. action was because of the parties' agreement to arbitrate their differences. Cost was another factor. In re-examination, he stated that the words "unrelated matter" contained in his affidavit referred to the criminal component of the American statute United relied upon and not to its civil claim.

The Settlement

[17] The arbitration was turned into a mediation and Minutes of Settlement were entered into on July 22, 1999, and signed by Mr. Abraham, Paragon, Mega-Lab, United and others. The Minutes of Settlement noted that Mr. Abraham and United were parties to an arbitration pursuant to the terms of the independent contractor agreement. The various actions in Ontario were defined as the "Ontario Lawsuits" and were listed as follows:

(a) United v. Mega-Lab (Ontario Court General Division Action No. 98-CU-140798);

(b) Abraham, Mega-Lab and Paragon v. United, United Canada, Mitchell Dubros and Dubros and Associates Inc. (Ontario Court General Division Action No. 98-CV-143495);

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(c) United and United Canada v. James Jeffrey Stapleton, John Almeida and Paragon (Ontario Court General Division Action No. 96-CU-113717).

The Minutes stated that United had brought an action against Mr. Abraham, Mega-Lab, Paragon and others in the United States District Court for the Northern District of Illinois Eastern Division. It was defined as the "US Action". The Minutes went on to say: "Whereas the parties hereto wish, by the terms of these Minutes of Settlement, to resolve all of their differences existing as of the present day, known or unknown, whether or not alleged in the Ontario Lawsuits and whether or not arising out of or related to the Agreement, the Amendments or the Ontario Lawsuits, other than those related to the US Action." At the mediation, Mr. Abraham was told that United had obtained default judgment against the defendants and was awaiting the U.S. court's ruling on damages. Mr. Abraham offered to settle the U.S. action but United would not agree to settle it.

[18] The parties agreed that the Ontario Lawsuits would be dismissed without costs. The arbitration was to be considered settled and finally resolved on the basis of the Minutes of Settlement [page36] although nothing contained therein was to affect in any manner any "argument or position any party may take in the U.S. Action either in the United States or in Canada". Mr. Abraham et al. were to pay United the sum of $50,000 on or before September 15, 1999. The release by United was of all actions and causes of action including "claims related to or arising under or connected with the independent contractor agreement except all actions, causes of action etc. arising from or out of any Judgment obtained in the US Action". The release was in consideration of "payments and covenants herein". Mr. Abraham paid the $50,000 on August 27, 1999.

The U.S. Judgment

[19] On August 3, 1999, Magistrate Judge Keys rendered a report and recommendation that Mr. Abraham, Paragon and Mega-Lab be jointly and severally responsible for damages in the amount of $507,618.95 US. Detailed reasons were released. She

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based her decision on a violation of The Stored Wire and Electronic Communications and Transactional Records Access Act and noted that pursuant to 2707(c), each violation of the Act attracted damages of no less than $1,000. She stated,

> One possible justification for a floor on damages of $1,000 per violation is the difficulty in proving actual damages caused by any particular instance of an unauthorized access. That difficulty is especially apparent in this case, where the Canadian defendants have made a calculated decision to refuse to produce their business records and other documents. Without that discovery, plaintiff cannot demonstrate the amount of sales it has lost to the Canadian defendants or the Canadian defendants' profits as a result of misappropriating plaintiff's product, marketing and personnel information. Similarly, Mr. Abraham's intransigence in the face of this Court's Order compelling him to attend to his deposition has seriously impeded plaintiff's ability to discover the extent of the harm caused by his post employment activities described above. Under these circumstances, compensatory damages in the amount of $1,000 per violation is appropriate.

She noted that Mr. Abraham had accessed United's voicemail systems virtually every day for a period of at least five months and assessed the compensatory damages as being $1,000 multiplied by 200 violations or $200,000 US.

[20] She also recommended punitive damages. She stated that the unauthorized access of the voicemail system was willful and intentional. She also noted the defendants' failure to comply with the court's discovery orders. She wrote,

> Because of the ease with which such a scheme can be carried out and concealed, especially when it is devised and executed from another country, deterrence is a serious problem. This problem is exacerbated when the motivation to engage in such unlawful activities is economic, such as here. Therefore, punitive damages must be sufficient to deter such conduct by the [page37] Canadian defendants and others in their situation. Considering those issues and the Canadian defendants' wealth (their collective annual revenue exceeds

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several million dollars), an appropriate punishment for engaging in this unlawful scheme is an award of punitive damages in an amount equal to at least the compensatory damages, or $200,000. It is noted that the Canadian defendants have not contested plaintiff's request in this regard.

She also awarded attorney's fees of $100,310 US and costs of $7,308.95 US.

[21] On September 27, 1999, Judge Elaine Bucklo released her decision. She wrote that she had reviewed de novo Magistrate Judge Keys' report and recommendation and stated that she agreed with Judge Keys' well reasoned opinion. Judgment was entered against the Canadian defendants in the amounts previously noted by Magistrate Judge Keys.

THE PARTIES' PPOSITIONS

[22] It is the plaintiff's position that all the preconditions for the enforcement of its judgment have been met. The judgment was final and the U.S. court properly took jurisdiction. The defences outlined in Four Embarcadero Center Venture v. Kalen [See Note 1 at end of document] were inapplicable. The settlement entered into by the parties expressly excluded the U.S. action from its ambit. This is a case where the defendants made the wrong choice. They were properly served but elected not to defend. They must now face the consequences of that decision.

[23] The defendants make a number of admissions. They concede that the U.S. judgment was final; it was not procured by fraud; and there was no failure of natural justice. In addition, the defendants concede that Illinois had a real and substantial connection to the subject matter of the litigation. The defendants contest the judgment on essentially three grounds:

(1) the factual foundation for the claim in the United States was res judicata on completion of the Minutes of Settlement and settlement of the arbitration proceedings. Put differently, the facts which formed

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the basis of the U.S. action were identical to the facts in the arbitration proceedings and the arbitration proceedings were settled. Alternatively, the doctrine [of] abuse of process is applicable;

(2) the U.S. court had no jurisdiction due to the parties' agreement to arbitrate their differences; and [page38]

(3) enforcement of the judgment would be contrary to public policy because it amounts to enforcement of a foreign penal law or alternatively, a judgment which is penal in nature.

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THE LAW

[24] It is well settled that a judgment of a foreign court creates a new right in the plaintiff and an obligation by the defendant to obey and pay the amount awarded. Four Embarcadero, supra, describes this principle and sets out the applicable test for enforcement of a foreign judgment.

(a) The foreign money judgment must be final and res judicata in the foreign jurisdiction. This occurs when the judgment of the foreign court is final in the sense that the court that made it no longer has the power to rescind or vary it; this test is not altered by reason that the judgment is under appeal . . . a default judgment so long as it remains unreversed is to be treated as final . . . ;

(b) The foreign money judgment must also pass the test of conclusiveness in the sense it is one that may not at common law be impeached in an action to enforce it in Ontario. [See Note 2 at end of document]

[25] The judgment may not be impeached for any error of fact or law, a principle reiterated by the Ontario Court of Appeal in Beals v. Saldanha. [See Note 3 at end of document] That case involved a dispute in Florida over an $8,000 US land transaction which resulted in a judgment of approximately $800,000, $50,000 US of which represented punitive damages. In Four Embarcadero,

Henry J. went on to note that the grounds of impeachment were well-defined and narrow.

[26] He enumerated the following:

(a) the court actually had no jurisdiction over the subject-matter and the parties in which case its judgment is a nullity;

(b) lack of identity of the defendant, that is the defendant was not a party to the foreign suit;

(c) the judgment was procured by a fraud on the court;

(d) a failure of natural justice which relates to procedural matters -- the mode by which the judgment was reached; and

(e) to enforce the judgment would be contrary to public policy in Ontario. [See Note 4 at end of document] [page39]

[27] The Supreme Court of Canada in Morguard Investments Ltd. v. De Savoye, [See Note 5 at end of document] a case involving interprovincial enforcement of court orders, stated that a court "properly" or "appropriately" exercised jurisdiction where it was "inherently reasonable" for the action to be brought in that jurisdiction or where there was "a real and substantial connection" between the jurisdiction and the wrongdoing. While not an absolute rule, this principle applies equally to enforcement of foreign judgments: Arrowmaster Inc. v. Unique Forming Ltd. [See Note 6 at end of document]

DISCUSSION

[28] The defendants submit that none of the principles set out in the aforementioned case law conflicts with each of the arguments they advance. I will deal with each of the defendants' three arguments in turn.

(a) Res Judicata and Abuse of Process

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[29] In essence, the defendants submit that the factual basis of the U.S. action and the arbitration were identical, namely the unauthorized use of the plaintiff's voicemail system. Counsel for the defendants submits that the right and form of action should not be confused with the cause of action. Here, it is argued that while the right to bring the action arose as a result of The Stored Wire and Electronic Communications and Transactional Records Access Act, the cause of action was the set of facts. The common factual identity resulted in the application of res judicata or alternatively, abuse of process. The unauthorized use of the voice mail system was an issue in the arbitration proceedings and was settled, binding both Mr. Abraham, and his privies, Paragon and Mega-Lab.

[30] In Canam Enterprises Inc. v. Coles, [See Note 7 at end of document] Finlayson J.A. addressed the doctrines of res judicata and abuse of process. He referred to the rationale behind the doctrine of res judicata as described by Ritchie J. in Fenerty v. The City of Halifax: [See Note 8 at end of document]

> The doctrine of res judicata is founded on public policy so that there may be an end of litigation, and also to prevent the hardship to the individual of being twice vexed for the same cause. The rule which I deduce from the authorities is that a judgment between the same parties is final and conclusive, not only [page40]as to the matters dealt with, but also as to questions which the parties had an opportunity of raising.

[31] Finlayson J. described abuse of process [at p. 490 O.R.] as a discretionary principle "used to bar proceedings that are inconsistent with the objectives of public policy."

[32] Parties and their privies are both captured by the application of the doctrine. "Privies include any person who succeeds to the rights or liabilities of the party upon his death or insolvency or who is otherwise identified with his or her estate or interests, but it is essential that he who is later to be held estopped must have had some kind of interest in the previous litigation or subject matter." [See Note 9

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at end of document]

[33] I am not persuaded that either res judicata or abuse of process is applicable in the circumstances of this case.

[34] Firstly, it is the U.S. judgment which gives rise to the claim before me. Res judicata and abuse of process do not stay proceedings automatically; a judicial determination is required. If the defendants wished to make an argument relating to res judicata or abuse of process, they should have made that argument at the time the U.S. action was pending, not after the judgment had become final and conclusive.

[35] Secondly, it is the case that in its statement of defence and counterclaim filed in the arbitration proceedings, United pleaded that Mr. Abraham was engaged in unauthorized use of United's voicemail system and wrongfully used the confidential information obtained. In addition, United pleaded that Mr. Abraham continued his breaches through the operations of Paragon and Mega-Lab. I accept that Paragon and Mega-Lab were privies of Mr. Abraham. This is consistent with United's pleadings and with the evidence given by Mr. Savaiano on behalf of United that he considered these parties to be one. I also have no difficulty with the defendants' proposition that the doctrines of res judicata and abuse of process may apply to consent orders. See Re Ontario Sugar Co. [See Note 10 at end of document] and 639622 Ontario Ltd. v. International Semi-Tech Microelectronics Inc. [See Note 11 at end of document] Reading the Minutes of Settlement as a whole, however, it is clear that all actions except the U.S. action were settled. The recitals in the Minutes of Settlement expressly stated that the parties wished to resolve their differences "other than those related to the US action". While the Ontario actions [page41] were dismissed, the Minutes stated that "nothing contained herein shall affect, in any manner, any argument or position any party may take in the US action either in the United States or in Canada". Lastly, in consideration of payments and covenants contained in the Minutes of Settlement, United released Mr. Abraham, Paragon and Mega-Lab from all actions "except all actions, causes of action, etc. arising from or out of any judgment obtained in the US action or otherwise".

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[36] The appropriate process to determine the meaning of words in a document was set out in Eli Lilly and Co. v. Novopharm Ltd.: [See Note 12 at end of document] "Bearing in mind the relevant background, the purpose of the document, and considering the entirety of the document, what would the parties to the document reasonably have understood the contested words to mean?" In my view, the parties understood that the settlement of the arbitration proceedings and the dismissal of the Ontario actions in the Minutes of Settlement were subject to the obvious exclusion of the U.S. action and any judgment arising therefrom. Any other interpretation or result would be artificial and circumvent the parties' obvious intentions. In these circumstances res judicata is inapplicable and abuse of process is similarly inappropriate. The proceedings were not inconsistent with public policy.

(b) Jurisdiction and Arbitration Provision

[37] The defendants' second argument is that while there was a real and substantial connection between Illinois and the action, the agreement to arbitrate ousted the jurisdiction of the U.S. court. It is the defendants' position that the International Commercial Arbitration Act, R.S.O. 1990, c. I.9 and the Model Law are applicable. In particular, the defendants rely on Articles 5 and 8 of the Model Law.

[38] Article 5 states that in matters governed by the Model Law, no court shall intervene except where so provided in the Model Law.

[39] Article 8 states:

> (1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed. [page42]
>
> (2) Where an action referred to in paragraph (1) of this

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> article has been brought, arbitral proceedings may nevertheless be commenced or continued, and an award may be made, while the issue is pending before the court.

[40] Counsel for the defendants argues that Article 8 of the Model Law should be interpreted as requiring the consent of the parties to proceed to court in the face of an agreement to arbitrate. Furthermore, because this was a jurisdictional issue, there was no obligation on the defendants to raise this issue in the U.S. court.

[41] Again, I have no difficulty with the proposition advanced by the defendants that the trend in the jurisprudence and in applicable legislation is to hold parties who have agreed to arbitrate to the terms of their agreement. Here, however, it was United's view that the arbitration provision contained in the independent contractor agreement did not apply to the substance of its U.S. action. In the absence of an application to stay or oust the court's jurisdiction, a court may take jurisdiction. Accordingly, it was incumbent on the defendants to bring proceedings to assert that the U.S. court had no jurisdiction due to the parties' agreement to arbitrate. I do not interpret any of the cases relied upon by the defendants or the Model Law to suggest otherwise. Indeed ABN Amro Bank Canada v. Krupp Mak Maschinenbau GmbH [See Note 13 at end of document] addressed the interpretation of Article 8 of the Model Law and the Analytical Commentary contained in the report of the Secretary General to the 18th Session of the United Nations Commission on International Trade Law. It states:

> As under the 1958 New York Convention, the court would refer the parties to arbitration, i.e. decline (the exercise of its) jurisdiction, only upon request of a party and, thus, not on its own motion. A time element has been added that the request be made at the latest with or in the first statement on the substance of the dispute.[See Note 14 at end of document]

See also Rosenberg v. Goldbert [See Note 15 at end of document] and Bott v. Sorley. [See Note 16 at end of document]

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[42] Having been properly served with the Illinois proceedings, having received copies of numerous orders in the U.S. action and having full knowledge of the continued progress of the action, the defendants acted at their peril by doing nothing. It is too late to now advance the argument that the parties' agreement to arbitrate ousted the U.S. court's jurisdiction. [page43]

(c) Penal Law

[43] The defendants' last argument is that the judgment should not be enforced because it is in the nature of a penalty. Counsel submits that, consistent with Attorney-General (United Kingdom) v. Heinemann Publishers Australia Pty. Ltd., [See Note 17 at end of document] I should look to the substance of the interest being enforced and not the form of the action.

[44] A penal law is one which imposes punishment for some breach of a duty owed to the state as opposed to a remedial law which secures compensation for a breach of a duty owed to a private person. As stated by Professor J.G. Castel in Canadian Conflicts of Law,

> . . . a sum of money claimed to be due to a plaintiff in a Canadian court under the provisions of a foreign law is not considered to be a penalty unless it is recoverable only at the instance of the foreign state concerned or by one of its officials as such or by a common informer. Liability that is restitutionary in nature not imposed with a view to punishment of the party responsible cannot be classified as penal in nature. [See Note 18 at end of document]

In United States of America v. Ivey, [See Note 19 at end of document] Sharpe J. quoted with approval the scope of the category of penal law as defined by the Privy Council in Huntington v. Attrill: [See Note 20 at end of document]

> . . . all suits in favour of the State for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all

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judgments for such penalties.

[45] The damages awarded by the U.S. court were not awarded to the U.S. government or at the suit of the U.S. government. Furthermore, the award was compensatory in nature. In my view, the judgment does not fall within the penal law exception.

CONCLUSION

[46] United's complaint set out in some detail the precise relief it was seeking. Again, the defendants chose to do nothing. Unfortunately, they must now live with the consequences of that decision.

[47] It is conceded and I accept that United's U.S. action had a real and substantial connection with Illinois. I am also satisfied that the U.S. judgment sought to be enforced is final and conclusive and is not subject to impeachment on any of the grounds [page44] advanced by the defendants. As such, judgment is granted to the plaintiff as set out in paras. 1(b) and (c) together with prejudgment interest of its statement of claim. If the parties are unable to agree on the particulars relating to prejudgment interest or costs, brief written submission[s] are to be made.

Action allowed.

Notes

Note 1: (1988), 65 O.R. (2d) 551, 27 C.P.C. (2d) 260 (H.C.J.).

Note 2: Ibid, at p. 563 O.R.

Note 3: (2001), 54 O.R. (3d) 641, 202 D.L.R. (4th) 630 (C.A.), leave to appeal to S.C.C. granted May 16, 2002.

Note 4: Supra, note 1 at p. 571 O.R.

Note 5: [1990] 3 S.C.R. 1077, 76 D.L.R. (4th) 256.

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Note 6: (1993), 17 O.R. (3d) 407, 29 C.P.C. (3d) 65 (Gen. Div.).

Note 7: (2000), 51 O.R. (3d) 481, 194 D.L.R. (4th) 648 (C.A.).

Note 8: (1920), 53 N.S.R. 457 at p. 463, [1920] 50 D.L.R. 435 (S.C.).

Note 9: A.K. Turner, The Doctrine of Res Judicata: The Original Text by George Spencer Bower, 2nd ed. (London: Butterworths, 1969) at pp. 209-10.

Note 10: (1910), 220 O.L.R. 621 (C.P.), affd (1911), 24 O.L.R. 332 (C.A.)

Note 11: [1996] O.J. No. 3538 (Quicklaw) (C.A.).

Note 12: [1998] 2 S.C.R. 129 at pp. 166-69, 161 D.L.R. (4th) 1.

Note 13: (1996) 135 D.L.R. (4th) 130, 49 C.P.C. (3d) 212 (Ont. Div. Ct.).

Note 14: Ibid, at p. 135 D.L.R.

Note 15: [1960] O.R. 162, 23 D.L.R. (2d) 283 (H.C.J.).

Note 16: [1998] B.C.J. No. 2023 (Quicklaw) (S.C.).

Note 17: (1988), 165 C.L.R., 30 F.C. 88/023.

Note 18: 4th ed. (Toronto: Butterworths, 1997), at pp. 168 and 169.

Note 19: (1995), 26 O.R. (3d) 533, 130 D.L.R. (4th) 674 (Gen. Div.).

Note 20: [1983] A.C. 150 at p. 157.

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