IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: ***Wires Jolley LLP v. Wong,***
2010 BCSC 391

Date: 20100325
Docket: S098700
Registry: Vancouver

Between:

Wires Jolley LLP

Petitioner

And

Peter Wong, Estate Trustee of the Estate of Tung Jean, deceased, and Peter Wong

Respondents

Before: The Honourable Mr. Justice Willcock

Reasons for Judgment

Counsel for Petitioner:	R.J.C. Deane S. McEachern
Counsel for Respondents:	J. Kuroyama
Place and Date of Hearing:	Vancouver, B.C. February 12, 2010
Place and Date of Judgment:	Vancouver, B.C. March 25, 2010

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[1] Wires Jolley LLP, an Ontario law firm (the "Firm") applies for an order recognizing and enforcing the arbitral award made on November 2, 2009 in Toronto by the Honourable Fred Kaufman C.M., Q.C.,(the "Award") by granting judgment to the petitioner in the terms of the arbitral award and declaring that the arbitral award is enforceable in the same manner as a judgment or order of this court.

[2] Peter Wong ("Wong"), in his own right and as trustee of the estate of Jean Wong, opposes the application on the ground that he has applied to the Ontario Superior Court of Justice for an order setting aside the Award. Wong's notice of application to set aside the Award was filed on February 5, 2010. He seeks an order adjourning the application.

[3] The Firm says that if the application is adjourned, Wong should be ordered to pay into court as security the balance due on the Award, which is the amount of $1,054,949.68, plus the costs of arbitration in the amount of $129,643.41, plus interest of $144,494.65.

BACKGROUND

[4] The Firm was retained by Wong in 1999 to manage complex litigation in multiple countries involving a very large estate to which he was appointed as executor and sole beneficiary. The Firm was retained pursuant to a fee agreement which provided: "disputes arising from or in relation to the success fee will be resolved by arbitration in Toronto with a single arbitrator from ADR Chambers".

[5] When a dispute arose with respect to the fee, the Firm issued a notice of arbitration under the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9 [*ICAA (Ont.)*] requiring resolution of the dispute by arbitration. The dispute concerned the quantum of the "success" fee to which the Firm was entitled under the fee agreement.

[6] Wong applied to strike out the notice of arbitration. That application was heard in the Ontario Superior Court of Justice on March 3, 2008. The Ontario

Superior Court granted the application, holding that an agreement to arbitrate was an agreement to relinquish recourse to the court afforded by the *Solicitors Act*,, R.S.O. 1990, c. S.15, and ought not to be enforced: *Jean Estate v. Wires Jolley LLP* (2008), 90 O.R. (3d) 231 (Ont. S.C.J.), at para. 33:

> The arbitration clause in the fee agreement between the respondent and its client is inconsistent with the client's rights under the *Solicitors Act* to have an assessment of the fees charged to determine whether they are fair and reasonable. The client's right under the statute is not only a right to have an examination of the fees, but an examination by the court.

That decision was appealed. The Ontario Court of Appeal allowed the appeal (*Jean Estate v. Wires Jolley LLP*, 2009 ONCA 334). Weiler J.A. held, at para. 86:

> I would, accordingly, allow the appeal and set aside the order of the application judge striking the notice to arbitrate. However, any arbitrator appointed to make a decision regarding this dispute must make that decision in accordance with the substantive statutory rights contained in the *Solicitors Act*.

[7] Juriansz J.A. concurred in the result. He held, at para. 111:

> A question as to the fairness and reasonableness of the fee may not arise before the arbitrator. If it does arise, if the arbitrator addresses it, and if the arbitrator decides it incorrectly, the court can pronounce on matters of public policy in reviewing the arbitrator's award. On review, the court would have the findings of the arbitrator regarding the nature and complexity of services provided, any risks taken in retainer, the qualifications of the lawyers, their usual rates, the hours worked, and any other information that would be relevant to deciding if the final fee was fair and reasonable.

[8] The matter proceeded to arbitration. The arbitral awards have been certified and proven before me. They are as follows:

(1) Ruling on a Motion for Expedited Relief, dated August 13, 2009;

(2) Decision and Reasons, dated November 2, 2009; and

(3) Ruling on Costs, dated January 12, 2010.

[9] On January 12, 2010, the arbitrator issued a document entitled: "Award by the Honourable Fred Kaufman C.M., Q.C. ADR Chambers, November 2, 2009". That

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embodied the award described in the Decision and Reasons and the Ruling on Costs.

[10] On December 1, 2009, Wong issued a notice of appeal from the Award in the Court of Appeal for Ontario. That appeal was quashed on January 25, 2010. The note of disposition of the motion from the Ontario Court of Appeal reads as follows:

> The award under appeal was made by an arbitrator, not by a Superior Court judge. Accordingly, this Court has no jurisdiction to hear an appeal. The appeal is quashed, but without prejudice to the right of the responding parties to seek remedy elsewhere.

[11] On February 5, 2010, Wong filed a notice of application to the Ontario Superior Court of Justice under the *ICAA Ont.*, or in the alternative, the *Arbitration Act*, R.S.O. 1991, c. C.17, for an order setting aside the Award, and for leave to appeal to the Superior Court of Ontario, if required.

[12] On the hearing of that application, Wong intends to argue that the arbitrator erred in law and exceeded his jurisdiction in incorrectly holding that s. 28(1) of the *Solicitors Act* had not yet come into force, and that the requirements set out in Ontario regulations with respect to solicitors' fee accounts (Reg. 195/04) did not apply to retainer agreements entered into when the client engaged the solicitors.

[13] Wong will also argue that the arbitrator erred in law and exceeded his jurisdiction by failing to properly apply the *Solicitors Act* and regulations, and erred in law and exceeded his jurisdiction by failing to apply the proper considerations under the *Solicitors Act* in determining that the fee would be fair and reasonable in the circumstances.

ISSUES

[14] The Firm says that *International Commercial Arbitration Act*, R.S.B.C. 1996, c. 233 [*ICCA*] permits only three outcomes on an application for recognition of an arbitral award: an order for recognition and enforcement; an order dismissing the application; and an order adjourning the application. However, the Firm says only two of those outcomes should be considered because an application for recognition

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may only be dismissed in limited circumstances, none of which are applicable in the case at bar. Wong does not seek the dismissal of the application. The issues therefore are:

(a) whether the arbitral award ought to be recognized and enforced pending the Ontario appeal; and, if not

(b) whether there should be an order for security for costs as a term of the adjournment.

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APPLICABLE LAW

[15] The Firm's application is brought pursuant to pursuant to the provisions of the ICCA and the *Foreign Arbitral Awards Act*, R.S.B.C. 1996, c. 154 [*FAA*], which codify international standards for the recognition and enforcement of commercial arbitration awards.

[16] Sections 35 and 36 of *ICCA* provide, in part, as follows:

> Recognition and enforcement
>
> 35 (1) Subject to this section and section 36, an arbitral award, irrespective of the state in which it was made, must be recognized as binding and, on application to the Supreme Court, must be enforced...
>
> Grounds for refusing recognition or enforcement
>
> 36 (1) Recognition or enforcement of an arbitral award, irrespective of the state in which it was made, may be refused only
>
> > (a) at the request of the party against whom it is invoked, if that party furnishes to the competent court where recognition or enforcement is sought proof that
> >
> > > (i) a party to the arbitration agreement was under some incapacity,
> > >
> > > (ii) the arbitration agreement is not valid under the law to which the parties have subjected it or, failing any indication of that law, under the law of the state where the arbitral award was made,
> > >
> > > (iii) the party against whom the arbitral award is invoked was not given proper notice of the appointment of an arbitrator or of the arbitral proceedings or was otherwise unable to present the party's case,

> (iv) the arbitral award deals with a dispute not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the arbitral award which contains decisions on matters submitted to arbitration may be recognized and enforced,
>
> (v) the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties or, failing any agreement, was not in accordance with the law of the state where the arbitration took place, or
>
> (vi) the arbitral award has not yet become binding on the parties or has been set aside or suspended by a court of the state in which, or under the law of which, that arbitral award was made, or
>
> (b) if the court finds that
>
> (i) the subject matter of the dispute is not capable of settlement by arbitration under the law of British Columbia, or
>
> (ii) the recognition or enforcement of the arbitral award would be contrary to the public policy in British Columbia.
>
> (2) If an application for setting aside or suspension of an arbitral award has been made to a court referred to in subsection (1) (a) (vi), the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the arbitral award, order the other party to provide appropriate security.

[17] Article 6 of the *FAA* provides as follows:

> If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

[18] The Firm says that the *ICCA* does not permit the court to either weigh the merits of the Award or take any action other than to recognize and permit enforcement of the Award pursuant to s. 35, to dismiss the application pursuant to the limited scope of s. 36, or to adjourn the application. The legislation adopts a model that is intended to give effect to the parties' contractual intentions to refer disputes to arbitration and to achieve consistency among jurisdictions and

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predictability in the resolution of multi-jurisdictional commercial disputes. The model legislation permits exceptions to the general rule of recognition and enforceability but the grounds for refusal of recognition "should be given a narrow and limited construction*":* see *Adamas Management & Services Inc. v. Aurado Energy Inc.*, 2004 NBQB 342, 4 B.L.R.(4th) 1 at p. 11.

[19] Wong acknowledges an application for recognition should only be dismissed where there is a substantial concern going to the root of the arbitrator's jurisdiction or a substantial concern with respect to the procedure leading to the arbitral award.

[20] If the application is adjourned, the Firm says that there should, in most cases, be an order for security for the award.

Recognition and Enforcement

[21] An order for recognition and enforcement may be issued even when a foreign appeal is pending. The circumstances in which such an order may be issued were canvassed in *Europcar Italia S.p.A. v. Alba Tours International Inc.*, [1997] O.J. No. 133 (Ont. C.J.) and *Powerex Corp. v. Alcan Inc.*, 2004 BCSC 876.

[22] In *Powerex*, Madam Justice Brown considered the issue as a question of first instance in British Columbia. She considered and applied, with some elaboration, the test described in by Dilks J. as follows in *Europcar* at para. 44: "... the main test is that of the balance of convenience, with consideration as well for principles of irreparable harm and whether there is a serious issue to be tried. ... Special weight should be given to the fact that an adjudication on the merits has already taken place."

[23] The elaboration was set out in *Powerex*, after a review of recognition cases in other jurisdictions, at paras. 24-26:

> To my mind, the courts in the various jurisdictions have taken an approach similar to Justice Dilks in Ontario. In some jurisdictions, however, the factors to be considered in weighing the balance of convenience are set out in greater detail. In other words, the party seeking an adjournment must meet the threshold test of establishing that there is a serious issue to be tried. Then the court weighs the balance of convenience and irreparable harm.

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> The remedy is discretionary. The applicant must show that proceedings to set aside the award have been commenced in the appropriate court of the originating jurisdiction.
>
> In weighing the balance of convenience and irreparable harm, the court will give heed to judicial comity and the possibility of inconsistent judgments. The court will recognize that a party seeking to enforce the arbitration award will necessarily be prejudiced by delay. Also, there is a potential prejudice to the party seeking the adjournment should the court refuse the adjournment and enforce the award, only to have the original jurisdiction set aside the award.
>
> In assessing the balance of convenience, the court will consider a number of factors, including the estimated time to complete the case in the originating jurisdiction; whether the party opposing enforcement is merely delaying the inevitable; whether a court in the originating jurisdiction has already refused to set aside the award; the availability of security and the possibility of asset removal prior to enforcement; and the willingness of the party resisting enforcement to undertake diligent prosecution of the action in the originating jurisdiction.

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[24] The enumerated factors in the balance of convenience were then weighed by the *Powerex* Court. The motion for recognition and enforcement was adjourned on security being posted. Leave was granted to appeal the judgement (2004 BCCA 504) but only in relation to the terms of the order requiring the posting of security.

[25] In *Powerex*, Brown J. appeared to have some reservations with respect to the respondent's case but could not find there was "no prospect" of success. Although the Court relied upon the test described in *Europcar*, in examining the merits, the respondent was required only to establish there was "an issue to be tried". The Court did not closely scrutinize the merits of the case, ask whether there was a "serious issue" to be tried or adopt the "aggressive approach to enforcement" urged upon the courts by those who call for recognition and enforcement unless the respondent can establish there is "a real prospect that the foreign court will set aside or suspend the award": see G.W. Ghikas: "A Principled Approach to Adjourning the Decision to Enforce Under the Model Law and the New York Convention" (2006) 22 No. 1, Arbitration International 53, at 66-68.

Security for Costs

[26] When an adjournment is granted, security should be ordered where the foreign award is "manifestly valid " and where the order will not preclude the

respondent from prosecuting the appeal or itself cause irreparable harm: see *Soleh Boneh International Ltd. v. Government of the Republic of Uganda,* [1993] 2 Lloyd's L.R. 208.

[27] On granting an adjournment in *Europcar*, Dilks J. ordered the judgment to be secured in its entirety without further analysis of the grounds for requiring security. As Ghikas writes at para. 60: "It is noteworthy that full security was ordered because the court found that the respondent was financially able to post security, rather than because there was a risk of non-payment. The court observed that this would 'show *bona fides* on the part of the respondent in pursuing its remedy in the Italian courts in a timely fashion'".

[28] Similarly in *Powerex*, the security order appears to have simply been the *quid pro quo* for an adjournment of the enforcement application. Just as comity may require an adjournment so as to avoid prejudice while an appeal or application to set aside is pending, so may comity require the securing of the judgment so as to facilitate execution.

[29] Of course, security will not be ordered if the order will prejudice the appeal. While there is an enquiry into the effect of security on the respondent's position, the courts do not appear to require the applicant to show that the failure to post security will imperil the value of an award.

ANALYSIS

Recognition and Enforcement

a. Serious issue to be tried

[30] The Firm says appeals on questions of law are not available under the *ICAA* and that this was an international commercial arbitration subject to that legislation. The Firm further says that it will not assist Wong to establish this was a domestic arbitration as appeals on questions of law are limited by the legislation applicable to domestic arbitrations: *Arbitration Act,* S.O. 1991, c. 17. Section 45 of that *Act* reads as follows:

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> 45. (1) If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
>
> (b) determination of the question of law at issue will significantly affect the rights of the parties.

[31] The Firm says that the arbitration in this agreement expressly precluded appeals of any sort. The fee agreement provided that the arbitration would be conducted by ADR Chambers. The ADR Chambers Arbitration Rules provide:

> 2.1 These rules shall, subject to such modifications as the parties may agree upon, be deemed to have been made a part of any arbitration agreement which provides for arbitration to be administered by ADR Chambers, under these rules or under the rules of ADR Chambers or any similar expression.

[32] The ADR Rules also provide:

> 13.5 An award or interim award made under the provision of these rules shall be treated as a final award for the purposes of recognition and enforcement by a judicial authority, and shall not be subject to any appeal to the courts or otherwise unless the parties have otherwise agreed.

[33] The Firm says, having agreed to conduct the arbitration pursuant to the ADR Chambers Rules, Wong thereby agreed not to appeal the award at arbitration. As Wong cannot bring an appeal from the award on a question of law, there remain available to him, on his application to set aside the Award, only the very limited appeals on jurisdictional grounds described in the domestic and international arbitration legislation in Ontario.

[34] The Firm relies upon the proposition described in *Quintette Coal Ltd. v. Nippon Steel Corporation* [1991] W.W.R. 219, 50 B.C.L.R. (2d) 207 (C.A.) and restated in *Corporacion Transnacional de Inversiones S.A. de C.V. v. STET International, S.p.A.* (1999), 45 O.R. (3d) 183 (Ont. C.A.) that the applicant must overcome a “strong presumption” that the arbitral tribunal acted within its powers and an award is not invalid because the arbitral tribunal wrongly decided a point of law.

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[35] The Firm says that Wong has little chance of success on the pending application in Ontario, and that that should be borne in mind in weighing both the opposition to registration and enforcement but also, and perhaps most importantly, the application for security.

[36] Counsel for Wong argues that there is considerable merit in the Ontario application, and that that merit is so significant that I should not place any weight upon the argument that it is unlikely to succeed. She says that an appeal is available to Wong on questions of law because there is a good argument that the respondent did not enter into an arbitration agreement that precluded appeals on questions of law.

[37] This is both an argument that the ADR Rules are not clear and an argument that the ADR Rules are not applicable or binding upon Wong. The latter argument will be difficult to reconcile with the judgment of the Ontario Court of Appeal which permitted the arbitration to proceed. The arbitration apparently proceeded pursuant to the ADR Rules, and the ADR Rules were incorporated into the arbitration agreement between the parties. It will be difficult to establish that the above cited Rules do not, on their face preclude appeals on issues of law.

[38] Counsel for Wong further argues that the arbitrator exceeded his jurisdiction. The ADR Rules required the arbitration to be conducted under the *Law of Arbitration*. Wong says that the arbitrator's role was described and constrained by the *Solicitors Act* and that by failing to recognize and apply certain provisions of that *Act*, the arbitrator exceeded his jurisdiction. Wong says this was not only an apparent error on the part of the arbitrator in determining what law applied to the case, but an error going to the root of his jurisdiction.

[39] To the extent that I am required to address this question on the application before me, it appears that the Firm has a strong argument that appeals on questions of law generally are not available to Wong. It cannot be said, however, and I do not understand the Firm to suggest, that Wong's application to set aside the Award is

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apparently without merit. I find there is an issue to be tried and that it cannot be said the Ontario motion to set aside the Award has no prospect of success.

b. Balance of Convenience

[40] Wong appears to be proceeding with alacrity in Ontario. The quashing of the appeal to the Court of Appeal for Ontario was without prejudice and is no reflection on the merits of the pending application. There has not yet been any judgment in Ontario on the merits of the challenge to the Award.

[41] The Firm will, as in all cases where execution is deferred, be prejudiced by delay in access to the spoils of its judgment, however, the Firm has been paid its fees in part and is only being kept out of the specific fee it claims for success. The prejudice to the applicant in this case is not exceptional.

[42] There is potential prejudice to Wong in an enforcement order here, as in all cases where an appeal is pending, if the Superior Court later sets aside the Award. In considering that potential prejudice I give some weight to the fact that in the case at bar, there have been no enforcement proceedings taken in the original jurisdiction and the issue of an interim stay of the Award pending the Superior Court hearing has not been considered in that jurisdiction.

[43] While it is anticipated Wong's application will come on for hearing relatively quickly in Ontario, there is a prospect that Wong may further appeal the decision of the Superior Court if his application is dismissed.

[44] Security for the award is available. Wong has significant equity in real property in this jurisdiction. Although it is not suggested that there is a real threat of asset removal prior to enforcement of the judgment, the Firm seeks to avoid the necessity of monitoring the status of that property so as to preserve the equity for execution.

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c. Comity

[45] I must consider the effect of the proposed order on judicial comity in weighing the balance of convenience. Counsel have advised me that in Ontario the successful party must seek a court order in order to execute upon the arbitral award. On hearing an application for an enforcement order the court may consider whether enforcement should be stayed pending an appeal. In the case at bar, as in *Europcar*, the petitioner has not sought enforcement in the jurisdiction where the award was made because the respondent does not have significant assets there. Such an application would be expensive and of little value. The Firm is not in a position to enforce the Award in Ontario; nor, on the other hand, is there an order staying an application for enforcement of the Award pending the outcome of the application to set it aside.

[46] Wong says that comity favours the adjournment of the application for recognition and enforcement in British Columbia pending the outcome of the Superior Court application. Wong says that if an order is granted for recognition and enforcement, he will be precluded from seeking a stay of execution in British Columbia as the issue will be *res judicata*. He says that would be an unjust result while a challenge on the merits is still before the courts in Ontario and the question of enforcement pending the hearing of that application has not been considered in Ontario.

Security

[47] The Firm's submissions on the relative difficulty of the respondent's challenge to the Award establish that the Award from which Wong appeals is manifestly valid.

[48] The Firm clearly has a significant and legitimate interest in securing the judgment in British Columbia pending the Ontario hearing. Wong has assets here. He apparently does not have sufficient assets in Ontario to secure the judgment. The award has not otherwise been secured. Wong's other assets are apparently widely dispersed and execution on the award, if it is not set aside, may otherwise be a difficult and costly exercise.

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[49] There is no suggestion by Wong that an order for security will either effectively preclude an appeal or cause other irreparable harm.

[50] For these reasons I find that it is just and reasonable to require Wong to post security for the entire award.

ORDER

[51] The Firm's application for recognition and enforcement of the Award is adjourned pending the disposition of Ontario Superior Court of Justice, court file CV-10-396534, Wong's application to set aside the Award.

[52] As a term of the adjournment of the application, Wong is ordered to pay to his solicitors, Gowling Lafleur Henderson LLP in trust, $1,054,949.68 as security for the arbitral award, $129,643.41 as security for the costs of the arbitration, and $144,494.65 as security for interest to February 12, 2010.

[53] The sum of those amounts, $1,329,087.74, shall be held by his solicitors pending further order of this Court.

[54] The parties shall have liberty to apply for further directions respecting the form of security, if necessary.

[55] The Firm shall have leave to renew the application for registration and enforcement if Wong adjourns or delays in the prosecution of the Ontario application to set aside the Award.

[56] Costs are reserved, pending outcome of the Ontario proceedings.

"P. Willcock J."
The Honourable Mr. Justice Willcock

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