Court of Queen's Bench of Alberta

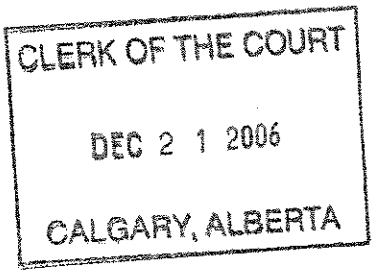
Citation: Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc., 2006 ABQB 933

Date: 20061221
Docket: 0301-13595
Registry: Calgary

Between:

Jardine Lloyd Thompson Canada Inc. and
JLT Risk Solutions Limited

Applicants



- and -

Western Oil Sands Inc. and
Western Oil Sands LP

Respondents

Reasons for Judgment
of the
Associate Chief Justice
Neil Wittmann

INTRODUCTION

[1] This is a motion for a stay of proceedings in this Court, pending the outcome of related arbitration proceedings.

BACKGROUND

[2] The Respondents, Western Oil Sands Inc. and Western Oil Sands L.P. (collectively, "Western") are joint venture partners, with Shell Canada Limited ("Shell") and Chevron Canada Limited ("ChevronTexaco") in a project for the construction and operation of a mine extraction plant, upgrader and ancillary facilities, known as the Athabasca Oil Sands Project (the "Project"). Western, lacking the more robust financial resources of its joint venture partners, was required by those partners, as well as its lenders, to obtain specialized insurance coverage ("Non-Traditional

Coverage") as a condition precedent to obtaining financing and participating in the Project. The Non-Traditional Coverage would insure against escalation of Project costs beyond the budgeted costs, delays in project completion resulting in loss of revenue, costs and/or delays arising in connection with design, repair or replacement of equipment and/or materials attributable to achieving budgeted production for the Project.

[3] Shell, as Project Operator, issued a Request for Proposal to a number of insurance brokers. The Applicants, Jardine Lloyd Thompson Canada Inc. and JLT Risk Solutions Limited (collectively, "JLT") were selected. JLT approached a large number of Underwriters. Ultimately, a group of Underwriters issued a Course of Construction/Erection All-Risks Package Policy (the "Policy"). Section IV of the Policy provided Non-Traditional Coverage to Western, with a limit of $200 million.

[4] In the summer of 2001, it became apparent that there would be cost overruns associated with the Project, and the Underwriters were notified. The process of adjusting the loss commenced early in 2002. In June and August, 2002, Western submitted proofs of loss in the total amount of $200 million. The Underwriters denied coverage.

[5] A number of the Underwriters served Notices of Intention to Arbitrate upon Western in June, 2003. On August 28, 2003, Western commenced Action No. 0301-13595 (the "Action") in the Court of Queen's Bench of Alberta against the Underwriters and JLT. Western served a Notice of Intention to Arbitrate upon a number of the Underwriters against whom it brought the Action on October 20, 2003. The various Notices of Intention to Arbitrate, filed by Western and the Underwriters, were effectively consolidated into one proceeding and subsequently Western issued a Statement of Claim against the Underwriters in the Arbitration Proceeding for an amount in excess of $200 million. The Underwriters have defended. The Arbitration Proceeding deals solely with the dispute in respect of Non-Traditional Coverage under Section IV of the Policy. The arbitration hearing is set to commence in June, 2007, in Calgary.

[6] The Action also deals with the dispute in respect of Non-Traditional Coverage under Section IV of the Policy. Also, in the Action, Western advances an alternative claim against JLT, not only for failing to obtain Non-Traditional Coverage for Western, but also for the expenses of the coverage dispute with Underwriters even if Western is successful in the Arbitration Proceedings.

[7] JLT was not made a party to the insurance contract. It is not bound by the mandatory arbitration clause under Section IV of the policy. JLT has been invited to participate in the Arbitration Proceeding but has declined. On January 18, 2006, in *Jardine Lloyd Thompson Canada Inc. v. SJO Catlin*, 2006 ABCA 18, the Court of Appeal determined that JLT employees were subject to discovery in the Arbitration Proceeding. Consequently, three JLT employees in Alberta have already been discovered, and three employees based in London, England are scheduled for discovery in January, 2007. JLT has also produced its documents in the arbitration, although not in the same way they would be required to produce them in the Action where an Affidavit of Records is required.

[8] A form of stay, by way of a standstill agreement, is currently in place between Western and the Underwriters in the Action, pending the outcome of the Arbitration Proceeding. Neither the Underwriters nor JLT have filed a defence in the Action, but in the Arbitration Proceeding the Underwriters have taken the position that misrepresentations were made by JLT as agent for Western.

ANALYSIS

[9] The parties are agreed that this Court has jurisdiction to grant a stay of proceedings, that the remedy is discretionary and that it must be exercised in accordance with established principles. Those principles were described by Belzil J.A. in *Alberta, Province of v. Alberta, Union Provincial Employees* (1984), 53 A.R. 277 (C.A.) (*"AUPE"*), at paras. 9-10:

> The first and basic question to be addressed in such cases is whether the issues in the action sought to be stayed are substantially the same as those in the 'test action'. If they are not, a stay will not be ordered... If the issues are substantially the same, a stay may and should be ordered if other tests are satisfied.
>
> Having thus concluded that the issues in the two proceedings are substantially the same, the remaining principles to be considered in determining whether this was a proper case for a stay are those set out by Scott, L.J., in St. Pierre v. South American Stores Ltd., [1935] All E.R. 408 (C.A.), at p.414:(I) a mere balance of convenience is not a sufficient ground for depriving a plaintiff of the advantages of prosecuting his action in English Court if it is otherwise properly brought. The right of access to the King's Court must not be lightly refused; (ii) in order to justify a stay two conditions must be satisfied, one positive and the other negative; (a) the defendant must satisfy the court that the continuance of the action would work an injustice because it would be oppressive, or vexatious to him, or would be an abuse of the powers of the court in some other way, and (b) the stay must not cause an injustice to the plaintiff. On both the burden of proof is on the defendant.

[10] In *Bank of British Columbia v. Sitko* (1986), 68 A.R. 65 (Q.B.), Master Funduk considered *AUPE* and held, at paras.38-39:

> If an adjudication in the first action does not necessarily dispose of the issues in the second action it cannot be said there is a true duplication of proceedings in all respects.
>
> What is mandatory is that the issues be the same in both actions and that an adjudication in one action regardless of what that adjudication is, automatically disposes of the issues in the second action.

[11] Consequently, Master Funduk was of the view that claims pleaded in the alternative are not appropriate for a stay.

[12] A different approach was taken by the Ontario High Court in *Boart Sweden Ab v. Nya Stromnes Ab.*, [1988] O.J. No.2839 (H.C.). *Boart* concerned an action for breach of contract, as well as conspiracy to induce breach of contract and unlawful interference with economic relations arising out of the alleged breach of an exclusive distribution agreement. The parties to the agreement were bound by an arbitration clause, but the Ontario action added parties and causes of action that did not strictly arise out of the agreement itself. Campbell J. did not apply the test set out in *AUPE*. In fact, he cited no authority directly on the point but concluded at paras. 20-22 that it was appropriate to grant the stay. He said:

> The factual basis of all the issues in the Ontario action has to do with the conduct of the parties under the international agreement which is the subject of arbitration.
>
> To the extent that Boart Canada is an assignee of the rights of Boart Sweden under the international agreement it is bound by the arbitration agreement.
>
> It would be idle to proceed with the tort claims in Canada at the very same time that the arbitration proceeds in Sweden, even though the causes of action and the parties are not identical, when the factual basis of the tort claims is so tied up together with the matters being decided in the arbitration and when there is an obvious overlap between the witnesses required for the different proceedings in the two different countries.

Campbell J. further noted, at para.28:

> The matters in dispute in the Ontario action are inextricably bound up with the matter which the parties agreed to arbitrate. It would be mischievous to continue to litigate, pending arbitration, matters which depend so much on the facts which form the basis of the arbitration.

[13] *Boart* was cited with approval by the Saskatchewan Court of Appeal in *BWV Investments Ltd. v. Saskferco Products Inc.*, [1994] S.J. No.629 (C.A.). The central issue in that case was whether the parties could be required to pursue arbitration under a mandatory arbitration clause when the same claim was the subject of a builders' lien action. The Court of Appeal concluded that the trial judge had erred in refusing to refer the claim to arbitration. Gerwing J.A. went on to consider whether the claims of sub-subcontractors, who were not parties to the arbitration clause, should be stayed pending the outcome of arbitration. He held that the claims of the subcontractors, should be stayed, noting at para.57.

> ...This will avoid the problem of multiple concurrent proceedings and there is every reason to expect that issues will be clarified through arbitration to the benefit of subsequent proceedings. [emphasis supplied]

[14] The proposition that a somewhat more flexible approach than that taken in *AUPE*, at least as interpreted in *Sitko*, might be available in Alberta was hinted at by Kerans J.A. in *Kaverit Steel and Crane Ltd. v. Kone Corp.*, [1992] A.J. No. 40 (C.A.), which was not cited by the parties. In *Kaverit*, the plaintiff distributor brought an action in this Court against the defendant manufacturer for breach of an exclusive distribution agreement. That agreement contained an arbitration clause. The chambers judge denied the application for a stay of proceedings on the basis that the entire dispute could not conveniently be resolved by arbitration. Kerans J.A. noted that the action added parties, both plaintiffs and defendants, who were not parties to the agreement containing the arbitration clause, and that the claim by the distributor contained allegations beyond breach of the contract. He suggested, however, that there was a more flexible alternative available to denying the motion for a stay altogether (at paras.13-14):

> ...I agree with the learned chambers judge that he has no authority to order these other plaintiffs to submit their claims to arbitration. (I do observe that he can stay claims pending arbitration if indeed they are derivative and must await the arbitration decision.)
>
> Similarly, I agree with the learned Queen's Bench judge that he cannot send the distributor's claims against the licensor's subsidiaries to arbitration in the absence of consent by all the parties. Again, Counsel for the licensor accepted this point during argument. (Again I note that a judge might stay a suit against them if the arbitration will effectively resolve the claim against them.)

Shortly thereafter, Kerans J.A. emphasized the point, at para.21:

> I agree with the learned Queen's Bench judge that he cannot refer any of the claims of any of the "extra" parties to arbitration. I add only that he might nevertheless stay claims pending arbitration when it would appear just and equitable to do so.

[15] In the result, Kerans J.A. held that all of the issues between the parties to the arbitration clause that relied upon the existence of the contract be stayed. He remitted to Queen's Bench any issues about "consequent temporary stays of other aspects of the proceedings".

[16] *Kaverit* was cited with approval by the Federal Court of Appeal in *Nanisivik Mines Ltd. v. F.C.R.S. Shipping Ltd.*, [1994] F.C.J. No.171 (C.A.). In that case, Nanisivik had entered into a charterparty agreement with the defendant Canarctic Shipping Company Limited, which provided for mandatory arbitration. The claim arose when a cargo vessel was lost at sea. Zinc Corporation, the second plaintiff in the action, was not privy to the charterparty but was privy to a bill of lading with Nanisivik. The Court of Appeal concluded that the motions judge had erred in referring its claim to arbitration. Nevertheless, the Court of Appeal concluded that it was appropriate to stay Zinc's claim pending the outcome of arbitration (at paras. 22-24):

> ...The Motions Judge recognized the possibility that Zinc Corp. was not bound by the arbitration agreement and, while he did not resolve that doubt and, in my opinion, erred by referring its claim to arbitration, he did stay its action in the Court in an exercise of discretion under subsection 50(1) of the Federal Court Act.
>
> In *Kaverit*, at page 349, Kerans J.A. observed:
>
> > I agree with the learned Queen's Bench judge that he cannot refer any of the claims of the "extra" parties to arbitration. I add only that he might nevertheless stay claims pending arbitration when it would appear just and equitable to do so.
>
> Paragraph 50(1)(b) of the Federal Court Act encompasses that possibility.
>
> Zinc Corp.'s cause of action based on the bill of lading appears clear also, in the words of Lord Robson, "to arise out of the conditions of the charter". In my opinion, the Motions Judge cannot be said to have erred in the exercise of his discretion by staying Zinc Corp.'s action against Canarctic pending arbitration of Nanisivik's claim.

[17] Both the applicants and the respondents have cited *Canada (Attorney General) v. Marineserve.MG. Inc.*, [2003] N.S.J. No.26 (S.C.), a decision that, in referring to both *Sitko* and *Boart*, well illustrates the difference between what could be characterized as the strict approach taken in the former and the more flexible approach in the latter. In *Marineserve*, the Government of Canada had entered into an agreement with the Maritime Harbours Society to privatize the port of Digby. That agreement provided for mandatory arbitration. The Society contracted with Marineserve to provide services necessary to the operation of the port. Some time thereafter, the Government brought an action in breach of contract against the Society on the basis that it had misused Government funds in its dealings with Marineserve, and brought a separate action against Marineserve in conspiracy, inducing breach of contract and interference with economic relations. *Sitko* was cited by the Government, but the reasoning therein did not meet with the approval of Moir J., who held, at para. 9:

> ...Unless the power to grant a stay is categorically restricted, I see no reason to accept that "the principles governing the grant of a stay are much the same as those to be considered in applications for the consolidation of actions"... such as, the issues must be identical... or substantially the same... Further, borrowing from the former law of forum non conveniens, Alberta appears to require that the proponent of the stay establish an abuse of process and that a stay will not cause an injustice to the plaintiff, the burden being on the defendant in both instances... Respectfully, this approach is both artificial and confused. It is artificial because a discretion is being reduced to a set of rules insensitive to various circumstances for which the discretion exists. It is confused because it selects these rules from judicial commentary, some of which is no longer good law, arising from the

> desperate circumstances of concurrent suits in different jurisdictions and numerous suits for which a test case needs selecting. I much favour the practical approach of the Ontario Supreme Court in *Boart Sweden*.

[18] Nevertheless, Moir J. declined to grant the stay and distinguished the case from *Boart*. He noted that the individuals in *Boart* who were not parties to the arbitration were shareholders of the contracting party, and that the stay requested in *Boart* was short and of a specific duration. He also noted that if the Government succeeded in the arbitration, Marineserve would not be bound by the findings, and if the government failed in the arbitration, that would not necessarily put an end to the claims against Marineserve. Moir J. also considered the failure of Marineserve to bring its application for a stay in a timely manner, and the fact that the application was brought only after an order was made compelling Marineserve to disclose its financial records as factors weighing against granting a stay.

[19] The most recent Alberta decision on point appears to be *Chevron v. Canada (Executive Director of Indian Oil and Gas Canada)*, [2005] A.J. No.379 (Q.B.), wherein Romaine J. considered an application by the Crown to strike or stay all or part of the counterclaims and third party claims brought against it. Actions had also been commenced against the Crown in respect of the same cause of action in Federal Court. The actions were not identical, but it was apparent to Romaine J. that the validity of the 1946 surrender of mineral interests by the plaintiff Indian Bands to the Crown would be an issue of crucial importance in both cases, and would be determined by the Federal Court long before trial at Queen's Bench. She found prejudice in the necessity of proceeding with duplicative proceedings (at paras.63-64):

> In this case, the Federal Court has not yet made a decision that may give rise to questions of res judicata or issue estoppel. However, it is clear to me from the pleadings in both courts and the evidence and position of the Bands put forward in the Buffalo trial that these questions are likely to arise when a decision is rendered. Given this and the prejudice that would be suffered by the Crown in having to pursue expensive and complicated litigation that may well be moot when a decision in the Federal Court action has been rendered, I find that it would be vexatious and an abuse of the court's process to require the duplicative and contrary allegations against the Crown to continue at this time.
>
> It is more appropriate to stay, rather than to strike these allegations, and I do so, with leave to the applicants to reinstate their application to strike once a decision of the Federal Court is available.

Interestingly, Romaine J. did not cite *AUPE* or clearly apply the test for a stay of proceedings set out therein.

[20] The applicants have directed the Court to two English authorities on point. In *Reichhold Norway ASA and Another v. Goldman Sachs International*, [1999] 2 Lloyd's Rep 567 (C.A.), Goldman Sachs had been approached by a corporation called Jotun AS for the purpose of

locating a purchaser for one of its subsidiaries. After being approached by Goldman Sachs, Reichhold expressed interest in and ultimately purchased the subsidiary. Reichhold subsequently came to the view that certain representations made by Jotun AS and/or Goldman Sachs had been inaccurate. The agreement between Reichhold and Jotun contained an arbitration clause, and arbitration proceedings between Reichhold and Jotun commenced. Reichhold also brought an action in the English courts against Goldman Sachs for misrepresentation. For reasons that are not set out in the judgment, the arbitration was put on hold, but Reichhold continued to pursue the action against Goldman Sachs. Goldman Sachs sought a stay of that action pending the outcome of the arbitration. Interestingly, the chambers judge did not rely upon or even cite the English decisions (*Perry v. Croydon Borough Council*, [1938] 3 All E.R. 670 (C.A.), *Amos v. Chadwick* (1878), 9 Ch. D. 459 (C.A.)) that were relied upon by the Court of Appeal in setting out the test in *AUPE*. Instead, he appears to have simply weighed factors in favour and opposed to the granting of the stay and considered the practical implications of allowing the action to proceed. He held, at p.575:

> ...In the somewhat unusual circumstances of the present case I do not think that the Court is obliged to give undue weight to the mere preference of one party. Considerations of cost and convenience and of the interests of justice generally seem to me to weigh heavily in favour of granting to stay. As to that, the primary consideration as far as Reichhold is concerned is that it should receive such compensation as it is entitled to for whatever loss it has suffered as quickly as possible and with the minimum of inconvenience and expense. No other factor has been suggested. In particular it is worth emphasizing that Mr. McCaughran did not seek to argue that Reichhold had some legitimate reason, over and above obtaining compensation, for pursuing Goldman Sachs rather than Jotun. As far as Goldman Sachs and Jotun are concerned, the interests of justice require that they should have a full and proper opportunity to meet the claims against them, also at a minimum of inconvenience and expense and, in the case of Jotun, in the agreed forum. If Reichhold wishes to pursue a claim against Jotun at all, then, for the reasons I have given, all of these ends are in my judgment most likely to be achieved if the arbitration takes priority. Of course one cannot be absolutely certain of that because whichever claim is pursued first there is the possibility that Reichhold will wish to pursue the other if it is not wholly successful in the first, but I have to decide this application on the basis of the evidence before me making the best assessment I can of the likely outcome. Against all that very little has been put forward by way of counter-argument. It is very striking that Reichhold has not sought to support its case for allowing these proceedings to continue by putting forward any reasoned grounds as to the practical advantages of pursuing the action here in advance of the arbitration, nor has it sought to suggest that it would suffer any prejudice if the action were stayed other than a relatively brief delay which could be adequately compensated by an award of interest. The risks which attend litigation everywhere are not said to be greater in Norway than England; if anything the difficulties attaching to the claim against Goldman Sachs here are greater than those which affect the claim against Jotun. In

> these circumstances I have reached the conclusion that the right course in this case is to stay these proceedings pending the final determination of the arbitration in Norway.

[21] The decision of Lord Bingham of Cornhill, CJ., for the Court of Appeal noted and agreed with the appellants' contention that the action brought by Jotun against Goldman Sachs could in no way be construed as abusive or vexatious. He further noted that there was no prior reported case in which a Judge had made a like order, and that the order was "an advance on previous precedents." Nevertheless, he agreed with counsel for Goldman Sachs that "forensic practice was changing and developing and that the movement was very clearly towards greater control by the Courts over the course of proceedings." Lord Bingham concluded that he could find no misdirection of law or error on the part of the chambers judge and determined that he would not interfere in his exercise of discretion to grant a stay.

[22] This focus upon the exercise of the court's discretion in the interests of convenience and efficiency was emphasized in *ET Plus SA v. Welter*, [2006] 1 Lloyd's Rep. 251 (Q.B.), which followed *Reichhold*. In that case, a dispute arose between parties to an exclusive distributorship agreement which contained an arbitration clause, and an action was brought in England which included parties not privy to the arbitration clause. Gross J. held, at para.91:

> By the conclusion of the hearing and the post-hearing submissions, there was no or no serious dispute that all surviving claims should be stayed under the court's inherent jurisdiction, pending the outcome of the Paris arbitration, as a matter of case management: see, *Reichhold Norway v. Goldman Sachs*, [2000] 1 WLR 173. I agree entirely. In my judgment, the central dispute in this matter lies between ET Plus and Eurotunnel. To proceed in tandem with the English court proceedings and the Paris arbitration would be wasteful of costs. Whether or not the Paris arbitration is ultimately decisive of the surviving claims, it will at the very least clarify the landscape. I grant this stay accordingly.

[23] In my view, the approach taken by the Court in *Boart*, which is consistent with the two English decisions and *Nanisivik* and *Marineserve*, is preferable to the more strict approach exemplified by Master Funduk's application of the *AUPE* test in *Sitko*. This Court is bound by the decision in *AUPE*, and must apply the test therein. However, it is appropriate to apply that test in the context and the spirit of the authorities cited above, which suggest that the Court must have a view to the efficient resolution of disputes and the efficient management of the resources of the Court and the parties.

APPLICATION OF THE TEST

[24] The first step in the test set out in *AUPE* is a determination of whether the issues in the Arbitration Proceeding and the Action are substantially the same. The fundamental issue in both the Arbitration Proceeding and the Action is the existence of Non-Traditional Coverage under Part IV of the Policy. I do not believe that it necessary for the result in the Arbitration Proceeding

to determine the outcome of the Action. I prefer the manner in which the question is framed in *Boart*: Where the matters in dispute in the Action are inextricably bound up with the matter the parties agreed to arbitrate, it is appropriate to conclude that the first step of the test has been met. The fact that the central issue in both proceedings is the existence of coverage is sufficient in the present case to meet the first step of the test for a stay.

[25] I am further satisfied that, in the absence of a stay, the continuance of this action will work an injustice upon JLT. In the event that the matter proceeds as it currently stands, JLT would likely be in the position of having to proceed on the basis that it must establish the existence of Non-Traditional Coverage under Part IV of the Policy, at least until there is a decision in the Arbitration Proceeding. In the event that the Arbitration Proceeding determines that there was no coverage, or only partial coverage, the entire complexion of JLT's defence to the action would likely change: it may then become necessary to challenge the decision in the Arbitration Proceedings and the manner in which Western conducted its case there. Western and the Underwriters will be bound by the arbitration decision; JLT will not.

[26] Moreover, it is not clear how the Action can proceed any further now, in a manner that would be fair to JLT, without the active involvement of the Underwriters. No defences have been filed, but is was submitted at the hearing of this matter that the Underwriters will be taking the position that JLT has made misrepresentations to them.

[27] JLT is not bound by the terms of the standstill agreement and it is clear that in the event that if JLT has to proceed in the Action through the closing of pleadings and to discoveries, it will seek to add the Underwriters as Third Parties. At that point, assuming a proper Third Party claim could be advanced against the Underwriters, the issues in the Action would likely come close to being wholly duplicative of the issues in the Arbitration Proceeding, and the two matters would essentially proceed in tandem.

[28] In response to an offer from the Court of an early trial date, Western contends that it is does not want this matter to go to trial before the conclusion of the Arbitration Proceedings. It seeks only to have JLT subjected to the same sort of discovery process to which it would ordinarily be subjected to in a Queen's Bench action. But it is difficult to conceive how adequate discovery could occur in the absence of the Underwriters as parties. The pleadings of course will define the issues for discovery.

[29] The difficulties confronted by JLT in this instance in the event that the matter proceeds and it is required to add the Underwriters as third parties would be not unlike those faced by the Defendants in *British Columbia Ferry Corp. v. T & N plc.*, [1995] B.C.J. No. 2116 (C.A.). In that case, the third parties had entered into an agreement with the plaintiff whereby the plaintiff agreed to waive its right to recover from the defendants any portion of the loss claimed that the court might attribute to the fault of the third parties. Consequently, the chambers judge concluded that the defendants could not maintain claims for contribution and indemnity against the third parties and also struck the portions of the third party claims that sought declarations attributing the degree of fault of the third parties. The British Columbia Court of Appeal upheld the decision

in respect of the claims for contribution and indemnity, but held that the claims for declaratory relief could proceed. Wood J.A. held, at paras.31 - 32:

> While it is true to say, as the judge did below, that the suit between the plaintiffs and the defendants will require a determination of the fault of the defendants limited as it may be by the fault, if any, of other persons or companies, the fact is that unless those others are joined as parties the ability of the defendants to demonstrate such fault on their part will be adversely affected - perhaps severely so - by the defendants' inability to invoke those procedures under the Rules designed to enhance the ability of one party to an action to prove its case against another...
>
> ...It would, in my view, be manifestly wrong if a private accord between plaintiff and third party could work to deprive a defendant of the ability to establish an element of proof essential to a just resolution of the action on which all parties had joined issue.

[30] I am also satisfied that a stay of the Action will not work any significant injustice upon Western. As indicated, JLT has produced its documents in the Arbitration Proceeding. There is little risk, at this point, that Western will not have the benefit of full document production in the event that the stay is granted. Discoveries of JLT employees in Calgary have already taken place in the Arbitration Proceeding, and discoveries of JLT employees in London, England are scheduled. I understand that those discoveries are proceeding at the instance of the Underwriters and that they are not being conducted by Western. Those discoveries will not be used as read-in evidence in the Action, absent an agreement. It seems likely, however, that the transcripts of those discoveries could be used for impeachment purposes at trial.

[31] Moreover, in view of the fact that discovery of JLT employees is proceeding in the Arbitration Proceeding, there does not appear to be a significant risk of memories fading further or of witnesses dying and their evidence being lost altogether pending the outcome of the Arbitration Proceeding. This is particularly so in view of the fact that the Arbitration Proceeding is presently scheduled to commence in June, 2007 with opening statements and document review, with the oral evidence being heard beginning in September, 2007. In view of the amount of time it has taken for the matter to proceed to its present point, no significant oppression would result if Western is required to await the outcome of the Arbitration Proceeding prior to continuing the Action.

[32] Finally, it is important to note that this situation has come about as a result of the decision by Western and the Underwriters to proceed to arbitration. It was open to those parties to waive arbitration and have the entire matter proceeded with in this Court. It was also open to all of the parties to draft an agreement that would have bound JLT to the arbitration clause. It was utterly foreseeable that, in the event of a disagreement between the Underwriters and Western with respect to coverage, JLT may be implicated in the dispute.

CONCLUSION

[33] The application for a stay of the Action by Western against JLT, pending the final outcome of the Arbitration Proceedings, is granted. The applicants are entitled to their costs of this application in any event of the cause, payable upon the disposition of the Action.

Heard on the 30th day of November, 2006.
Dated at the City of Calgary, Alberta this 21st day of December, 2006.

Neil Wittmann
A.C.J.C.Q.B.A.

Appearances:
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