Case Name:

Western Oil Sands Inc. v. Allianz Insurance Co. of Canada

Between
Western Oil Sands Inc. and Western Oil Sands L.P., applicants, and
Allianz Insurance Company of Canada, Allianz AG, Lloyd's Underwriters, S J O Catlin & Others Syndicate Nos. 1003 and 2003 @ Lloyd's of London, Wellington Underwriting Syndicate 2020 @ Lloyd's of London, AF Beazley Syndicate No. 623 @ Lloyd's of London, Alleghany Syndicate No. 376 @ Lloyd's of London, Sackville Syndicate No. 1047 @ Lloyds of London, HG Jago & Others Syndicate No. 205 @ Lloyd's of London, FR White Syndicate No. 190 @ Lloyd's of London, AD Hicks & MH Wheeler & Others Syndicate No 1007 @ Lloyd's of London, MRD Reith & Others Syndicate Nos 861 and 1209 @ Lloyd's of London, DP Mann Syndicate No 435 @ Lloyd's of London, Faraday Syndicate No 435 @ Lloyd's of London, General Cologne Re, General Cologne Re Services UK Limited, General Reinsurance Corporation fo Canada, Stephen John Oakley Catlin on his own behalf and on behalf of all other members of S J O Catlin & Others Syndicate Nos 1003 and 2003 @ Lloyd's of London, Rolf Albert Whilhelm Tolle on his own behalf and on behalf of all other members of DO Mann Syndicate No. 435 @ Lloyd's of London, Andrew Frederick Beazley on his own behalf and on behalf of all other members of AF Beazley Syndicate No. 623 @ Lloyd's of London, Charles Christopher O'Kane on his own behalf and on behalf of all other members of Wellington Underwriting Syndicate 2020 @ Lloyd's of London, Jill Anita Loveless on her own behalf and on behalf of all other members of Alleghany Syndicate No. 376 @ Lloyd's of London, Alasdair Graham Bishop on his own behalf and on behalf of all other members of HG Jago & Others Syndicate No. 205 @ Lloyd's of London, Thomas Rokeby Conygham Corfield on his own behalf and on behalf of all other members of FR White Syndicate No. 190 @ Lloyd's of London, Mark Handley Wheeler on his own behalf on behalf of all other members of AD Hicks & MH Wheeler & Others Syndicate No. 1007 @ Lloyd's of London, John Does 1-3 on their own behalf

and on behalf of all other members of Sackville Syndicate No 1047 @ Lloyd's of London and MRD Reith & Others Syndicate Nos 861 and 1209 @ Lloyd's of London, ACE INA Insurance, Ace Global Markets Limited, Ace Bermuda Insurance Ltd., Assicurazioni General Spa, Independent Insurance Company Limited, Underwrite Insurance Company Ltd., Mitsui Sumitomo Insurance Company Limited previously known as Mitsui Marine & Fire Europe Ltd., ERC Frankona Reinsurance Limited, GE Frankona Reinsurance Limited, GE Frankona Ruckversicherungs-Aktiengesellschaft, GE Reinsurance Corporation, Storebrand Skadeforsikring A/S, Storebrand/IF, respondents

[2004] A.J. No. 85

2004 ABQB 79

Docket No. 0301 19520

Alberta Court of Queen's Bench
Judicial District of Calgary

Hawco J.

Heard: January 23, 2004.
Judgment: February 2, 2004.

(34 paras.)

Administrative law — Arbitration — Stay of arbitration proceedings — Jurisdiction of court.

Application by the plaintiff Western Oil Sands Inc. for a permanent stay of arbitration proceedings on the basis that the defendants were already bound to participate in a prior arbitration proceeding about the same matters.

Application dismissed. The court was without jurisdiction as it was not specifically given such in the legislation governing arbitrations.

Statutes, Regulations and Rules Cited:

Alberta Rules of Court, Rule 440.

Arbitration Act, sec. 2(1)(b).

International Commercial Arbitration Act, Part 2, ss. 4(1), 8, 8(1), 8(2), 8(3).

Judicature Act, sec. 5(3)(f).

Counsel:

Doug A. Graham, for the applicants.
Laurent Fortier, for the respondents (ACE Global Markets, Mitsui Marine & Fire Europe Ltd., Storebrand/IF, Wellington Syndicate, Faraday Syndicate 435).
W.J. Kenny, Q.C., for the respondents (Beazley Furlonge Ltd., Talbot Underwriting Ltd., Sackville

Syndicate Management Ltd., Jago Managing Agency Ltd., Liberty Syndicate Management Ltd., SVB Syndicates Ltd., XL London Market Ltd.)
Mitchell B. Cohen, for the respondents (Allianz Canada, Assicurazioni Generali SPA, GE Frankona Reinsurance Limited, The Underwriters Insurance Company Ltd.),
F.J.C. Newbould, Q.C, for the respondents (Catlin Syndicates 1003 and 2003 @ Lloyd's)

MEMORANDUM OF DECISION

HAWCO J.:--

Introduction

1 The Applicant, Western Oil Sands Inc. ("Western"), seeks a permanent stay of arbitration proceedings instituted by S J O Catlin & Others Syndicate Nos. 1003 and 2003 ("Catlin"), in accordance with a contract of insurance. The stay is being sought on the basis that Catlin is bound to participate in a previous arbitration proceeding in respect of the same matters.

2 Alternatively, Western is seeking to have the previously instituted arbitration proceedings consolidated with the proceedings commenced by Catlin.

3 Western relies on s. 8 of the Arbitration Act, R.S.A. 2000, c. A-43 and s. 8 of the International Commercial Arbitration Act, R.S.A. 2000, c. I-5 for the relief sought.

Facts

4 Catlin is an underwriting agent at Lloyd's of London. Its place of business is in London, England. Western's place of business is Alberta.

5 Catlin participated in insurance coverage for Western by subscribing to slips setting out the essentials of the risk proposed. A "slip" is an informal, binding contract. Catlin signed the slips for its participation after having been approached by Western's broker.

6 On December 5, 2003, Catlin notified Western that it was rescinding and avoiding the contract of insurance on the basis that there was material non-disclosure and/or misrepresentations by Western and that the terms of the insurance coverage were misrepresented to Catlin.

7 Pursuant to the contract of insurance, any dispute or other matter in question arising between the insured(s) and the insurer in connection with the relevant Section of the Policy shall be submitted to arbitration. The arbitration is triggered by one party providing the other parties with notice of its intention to pursue arbitration. Each of the parties then nominate an arbitrator and those arbitrators select an umpire.

8 On June 10, 2003, several underwriters, excluding Catlin, served a Notice of Intention to Arbitrate on Western, seeking to arbitrate "all outstanding disputes and matters between the parties". The specific issues enumerated in the Notice concerned the production of documents, access to information and interviews relating to material non-disclosure and/or misrepresentation and a ruling with respect to payments under Section I of the Policy.

9 On June 16, 2003, the Notice of Intention to Arbitrate was amended to include Catlin.

10 Western took the position that the matters that were raised in the underwriters' Notice of Intention to Arbitrate were not arbitrable.

11 On October 20, 2003, Western served a Notice of Intention to Arbitrate on the underwriters in relation to "the entitlement of Western to be paid by the insurers for all sums and damages arising under, out of or in connection with claims made by Western " pursuant to Sections I and IV of the Policy. Catlin took the position that Western's Notice of Intention to Arbitrate was duplicitous or a nullity.

12 On November 4, 2003, the underwriters and Western each appointed an arbitrator.

13 On December 5, 2003, Catlin purported to withdraw from the first arbitration, served Western with a new Notice of Intention to Arbitrate and appointed an arbitrator in relation to that Notice. The issues delineated in Catlin's Notice of Intention to Arbitrate focussed primarily on whether Catlin is entitled to rescind and avoid the Policy on the basis that there was a material misrepresentation or a failure to disclose by Western.

Issues

14 The preliminary issue is whether this Court has the jurisdiction to grant the relief sought. If so, I must determine whether it is appropriate to consolidate the arbitrations or stay the arbitration initiated by Catlin.

Parties' Positions

15 Catlin takes the position that the International Commercial Arbitration Act applies in relation to these proceedings, to the exclusion of the Arbitration Act. It submits that, in accordance with s. 8(1) of the International Commercial Arbitration Act, the Court has no jurisdiction to hear this application without the consent of all parties.

16 Western argues that either the International Commercial Arbitration Act or the Arbitration Act are applicable.

17 Western submits that s. 8(1) of the International Commercial Arbitration Act does not require the consent of all of the parties to stay or consolidate arbitration proceedings. Rather, it submits that s. 8(1) requires only the consent of "a party" or "any party". This is evident, it suggests, when one compares the wording of ss. 8(1) and 8(2).

18 Western argues further that Catlin's interpretation of s. 8(1) would lead to an absurdity. Specifically, it submits that the interpretation urged by Catlin would mean that the court would be powerless to control arbitration proceedings other than in instances where all of the parties applied to the court and agreed on the proposed order. Catlin points out that in such cases the court's intervention would be superfluous.

19 Finally, Western submits that the court has inherent jurisdiction to prevent a multiplicity of proceedings pursuant to s. 5(3)(f) of the Judicature Act, R.S.A. 2000, c. J-2 and Rule 440 of the Rules of Court, Alta. Reg. 390/68. It also argues that s. 6 of the Arbitration Act allows the court to retain its jurisdiction to "assist in the arbitration process".

Analysis

20 Section 4(1) of the International Commercial Arbitration Act states that the Model Law on International Arbitration applies in Alberta subject to that Act. Article 1 of the Model Law, states in part :

> Article 1. Scope of application
>
> (1) This Law applies to international commercial arbitration ..

...

(3) An arbitration is international if:

(a) the parties to an arbitration agreement have, at the time of the conclusion of that agreement, their places of business in different States...

21 As Western has its place of business in Alberta and Catlin's place of business is London, England, the International Commercial Arbitration Act applies in relation to these proceedings.

22 Section 2(1)(b) of the Arbitration Act provides that that Act does not apply where Part 2 of the International Commercial Arbitration Act is applicable. Accordingly, the International Commercial Arbitration Act is the legislation governing this dispute.

23 Section 8 of the International Commercial Arbitration Act reads:

8(1) The Court of Queen's Bench, on application of the parties to 2 or more arbitration proceedings, may order

(a) the arbitration proceedings to be consolidated, on terms it considers just,

(b) the arbitration proceedings to be heard at the same time, or one immediately after another, or

(c) any of the arbitration proceedings to be stayed until after the determination of any other of them.

(2) Where the Court orders arbitration proceedings to be consolidated pursuant to subsection (1)(a) and all the parties to the consolidated arbitration proceedings are in agreement as to the choice of the arbitral tribunal for that arbitration proceeding, the arbitral tribunal shall be appointed by the Court, but if all the parties cannot agree, the Court may appoint the arbitral tribunal for that arbitration proceeding.

(3) Nothing in this section shall be construed as preventing the parties to 2 or more arbitration proceedings from agreeing to consolidate those arbitration proceedings and to take such steps as are necessary to effect that consolidation. [Emphasis added.]

24 I do not accept Western's interpretation of s. 8(1) of the International Commercial Arbitration Act. In my view, the term "parties" as it appears in that section refers to all of the parties to the arbitration. It would, in my respectful opinion, amount to a perverse interpretation and simply not make sense to accept that the plural, "parties", is used to refer to a single party. Further, in s. 8(3) "parties" must refer to all of the parties to the arbitration proceedings, otherwise a consolidation could conceivably be triggered by the agreement of less than all of the parties.

25 In Liberty Reinsurance Canada v. QBE Insurance and Reinsurance (2002), 42 C.C.L.I. (3d) 249 (Ont. S.C.J.), Day J. was concerned with the interpretation of the Ontario equivalent of s. 8 (1) of the Alberta International Commercial Arbitration Act. In that case there were four related contracts between the parties that were governed by two different arbitration clauses. The applicant in that case was seeking to have the arbitrations under the four contracts consolidated. The Court declined to grant the order on the basis that the parties were bound by the terms of

the contracts which prescribed two different arbitration processes in two different countries. The Court found further at p.256:

> Despite the desirability for arbitrations under all four contracts to be conducted under one roof, the court has no jurisdiction to consolidate arbitrations unless all parties agree. Here, the parties do not agree. See s. 7(1) of the ICRA re consolidation of proceedings:
>
> > 7(1) The Ontario Court (General Division) [Superior Court of Justice], on the application of the parties to two or more arbitration proceedings, may order,
> >
> > > (a) the arbitration proceedings to be consolidated, on terms it considers just;
>
> The words "application of the parties" on a fair and natural interpretation must mean all the parties; in this case both the parties. Otherwise, there should be qualifying or restrictive language such as "a party" or "any party" or "one or more parties." Such has not occurred. [Emphasis in original.]

26 I agree with the reasoning of and the interpretation adopted by Day J.

27 Western argues that Liberty is distinguishable on the facts and has no application to this case. I agree that the cases are factually distinguishable. However, none of those distinguishing features bear upon the application of Day J's interpretation of "parties" to s. 8 of the Alberta International Commercial Arbitration Act.

28 I also do not accept Western's submission that reading "parties" to mean "all of the parties" would lead to an absurdity. The interplay of the subsections does limit the courts' intervention in the arbitration process, but that can hardly be considered "absurd". In fact, such an interpretation is consistent with one of the objectives of the Model Law, as expressed by J.B. Casey in International and Domestic Commercial Arbitration, looseleaf (Scarborough Ont.: Carswell, 1993), at p.2-2:

> The desire of international business people to have a forum for the settlement of disputes distinct from the domestic court system of either party has resulted in a Model Law that keeps court involvement to an absolute minimum.

29 Nor in my view is it absurd or superfluous for the legislation to provide an avenue whereby the parties may seek a court order on a matter to which they all agree. Indeed, it is not uncommon for parties to agree to terms and then seek an order to document that agreement and ensure compliance therewith. There may also be occasions where, although the parties agree to consolidation, they may require the court's assistance in determining the appropriate terms or procedures to be applied.

30 Finally, Western argues that s. 5(3)(f) of the Judicature Act and Rule 440 provide the court with inherent jurisdiction to prevent a multiplicity of proceedings. Leaving aside the issue of whether the Judicature Act or the Rules apply to arbitration proceedings, it is clear that the inherent jurisdiction of the court may be limited by legislation. In this case it is limited by the International Commercial Arbitration Act. Indeed, Article 5 of the Model Law specifically provides:

> Article 5. Extent of court intervention
>
> In matters governed by this Law, no court shall intervene except where so provided in this Law.

31 Casey restates this provision at p. 4-2:

> In other words, for a court to have any jurisdiction respecting the arbitration process, it must be found in the relevant Arbitration Act, and not in any other Act or rule governing court procedure.

32 This reasoning also defeats Western's argument that s. 6 of the Arbitration Act allows the court to retain some jurisdiction in arbitrations that come within the scope of the International Commercial Arbitration Act.

Conclusion

33 For the reasons set out above, I find that this Court lacks the jurisdiction to grant the relief sought without the consent of all of the parties. Accordingly, the application is dismissed.

Costs

34 In the event the parties are unable to agree, costs may be spoken to.

HAWCO J.

cp/e/nc/qw/qlmmm

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