In the Court of Appeal of Alberta

Citation: Jardine Lloyd Thompson Canada Inc. v. SJO Catlin, 2006 ABCA 18

Date: 20060118
Docket: 0501-0227-AC
0501-0228-AC
Registry: Calgary

In the Matter of the International Commercial Arbitration Act, R.S.A. 2000 c. I-5
Between:

Jardine Lloyd Thompson Canada Inc.,
Jardine Lloyd Thompson Group Plc and JLT Risk Solutions Limited
Respondents/Appellants on Cross Appeal (Applicants)

- and -

SJO Catlin & Others Syndicate Nos. 1003 and 2003 @ Lloyd's of London, et al
Appellants/Respondents on Cross Appeal (Respondents)

And Between:

Syndicate Nos. 1003 and 2003 @ Lloyd's of London et al
Appellant (Applicant)

- and -

Jardine Lloyd Thompson Canada Inc.,
Jardine Lloyd Thompson Group Plc and JLT Risk Solutions Limited,
Paul Murphy, Cindy Simpson, David Keen, and Paul Latimer
Respondents (Respondents)

Corrected judgment: A corrigendum was filed on January 10, 2007; the corrections have been made to the text and the corrigendum is appended to this judgment.

The Court:

The Honourable Madam Justice Carole Conrad
The Honourable Mr. Justice Willis O'Leary
The Honourable Mr. Justice Clifton O'Brien

Reasons for Judgment Reserved of the Honourable Mr. Justice O'Brien
Concurred in by the Honourable Madam Justice Conrad
and Concurred in by the Honourable Mr. Justice O'Leary

Appeal from the Orders of The Honourable Associate Chief Justice Wittmann
Entered the 12th day of August, 2005; Filed the 12th day of August, 2005
Q.B. Docket: 0501-04245

Reasons for Judgment
of the Honourable Mr. Justice O'Brien

Introduction:

[1] The primary issue in this appeal is the scope of examination for discovery in international commercial arbitrations. The issue involves a determination of whether the court should lend its assistance in obtaining discovery evidence from third persons. The judgment under appeal declared that an arbitral tribunal (the "tribunal") did not have jurisdiction to order that certain employees and former employees of a third party be examined for discovery prior to the arbitration hearing. The judgment also dismissed an application concurrently made by a party to the arbitration to direct and compel the examination for discovery, in Alberta or such other place as the court may direct, of those designated employees or former employees of the third party. The arbitration is governed by the ***International Commercial Arbitration Act***, R.S.A. 2000, c. I-5 (the "***Act***"), which incorporates the Model Law on International Commercial Arbitration as part of the law of Alberta.

[2] A cross-appeal has been brought from that portion of the judgment dismissing an application for a declaration that the tribunal had no jurisdiction to compel certain parties to the arbitration to provide a copy, or disclose the contents, of a confidential agreement entered into between those parties and a third party.

Facts on Appeal

[3] The facts giving rise to the application heard by the Associate Chief Justice are set out in his judgment in ***Jardine Lloyd Thompson Canada Inc. v. Western Oil Sands Inc.***, 2005 ABQB 509. Those facts are summarized for purposes of the appeal.

[4] Western Oil Sand Inc. and Western Oil Sands LP (collectively, "Western") are making a claim under an insurance policy issued by a number of insurers (collectively, the "Underwriters") in respect to losses arising in the construction of the Athabasca Oil Sands Project. The Underwriters have denied coverage in respect of the losses. Western and the Underwriters are in arbitration proceedings pursuant to an arbitration clause in the policy. The issues between the parties have been defined by pleadings delivered in the arbitration proceedings.

[5] The Underwriters have defended the claim on the basis of alleged misrepresentation by and on behalf of Western at the time of placement of the insurance. Jardine Lloyd Thompson Canada Inc., Jardine Lloyd Thompson Group Plc and JLT Risk Solutions Limited (collectively "JLT") are alleged to have acted as agents and brokers on behalf of Western in the placement of the insurance. It is alleged that JLT made misrepresentations on behalf of Western which provide grounds to void the insurance policy.

[6] In addition to the arbitration, Western has also commenced an action in the Court of Queen's Bench of Alberta against both the Underwriters and JLT, which action is in abeyance pending the arbitration.

[7] Western and JLT have entered into what has been described as a mutual co-operation agreement (the "Standstill Agreement"). Western and JLT have disclosed the existence of the Standstill Agreement but advise that none of its terms may be disclosed to any third party without the express consent of the parties thereto. JLT has claimed that the document is confidential and has refused to consent to the disclosure of the terms of the Standstill Agreement in the arbitration proceedings.

Decision of the Tribunal

[8] An application was made to the tribunal by SJO Catlin and Others Syndicate Nos. 1003 and 2003 @ Lloyds of London ("Catlin"), one of the Underwriters, to require Western to produce the Standstill Agreement and for the examination for discovery of four employees, or former employees, of JLT and for related relief.

[9] Western did not oppose the application but did bring to the attention of the tribunal that JLT had not consented to disclosure of the terms of the Standstill Agreement. JLT was given notice of the application but did not appear as it was not prepared to concede any jurisdiction on the part of the tribunal to grant the directions sought by Catlin.

[10] The tribunal, in Reasons for Decision dated March 14, 2005, made the following directions and orders:

> (a) that the Standstill Agreement be produced by Western to the tribunal for inspection, following which it will determine whether the document meets the test of relevance and should be produced to the Underwriters;
>
> (b) that the designated employees and former employees of JLT be examined for discovery; and
>
> (c) that Catlin may seek the assistance of the Court of Queen's Bench of Alberta to obtain the examinations for discovery so directed by the tribunal.

[11] In its decision, the tribunal acknowledged that JLT is not a party to the arbitration proceedings. The tribunal pointed out the arbitration is to be conducted in Calgary, Alberta and that the parties have agreed to discovery along the lines permitted by the *Alberta Rules of Court*.

[12] With respect to the request for examinations for discovery, the tribunal found that the JLT employees and former employees ("the JLT witnesses") sought to be examined had been "involved

one way or another in the negotiations and presentations over a period of several months, as broker and agent for Western, in the placement of the insurance coverage" and further that the persons "are important to various aspects of the defence to Western's claims".

[13] The tribunal considered Alberta R. 200(1) and the case law in Alberta concerning its application, and determined that it was "clear" that examinations of the nature sought by Catlin would be permitted under the Rule.

[14] With respect to the request for production of the Standstill Agreement, the tribunal had regard to Alberta R. 209(1) and stated that production in the arbitration was to be made on the same basis as in litigation. The tribunal held that as there was no suggestion that the document was "privileged", then the sole issue was one of relevance, and directed that Western, as a party to the arbitration, provide the document to the tribunal for its inspection to allow it to determine relevance of the document for purposes of production.

Judgment in Court of Queen's Bench of Alberta

[15] The chambers judge considered the issue of discovery, both documentary and oral examination of witnesses, in the context of basic principles governing the conduct of international commercial arbitrations. He reviewed academic commentaries with respect to the scope of discovery allowed in arbitration proceedings and concluded that the law in this area is uncertain.

[16] The chambers judge observed, at para. 69, that the jurisdiction of the tribunal "is limited and must derive from a legitimate term in the agreement to arbitrate or the statute". He considered that a term purporting to compel non-parties to adhere to a procedure, even if it is the procedure of the place where the arbitration takes place, is not legitimate unless the ***Act*** authorizes it. The chambers judge concluded that the ***Act*** did not authorize the examination for discovery of third parties and therefore he was of the view that the tribunal did not have the authority to compel pre-hearing examination for discovery of the JLT witnesses.

[17] With respect to the production of the Standstill Agreement in the possession of Western, the chambers judge held that the tribunal was permitted by Article 19 of the Model Law to determine its own procedure over the parties to the arbitration. He concluded that such power entitled the tribunal to order the production by Western notwithstanding its contractual obligation to JLT not to do so without JLT's consent which was not forthcoming. The chambers judge pointed out that the jurisdiction of the tribunal extended over Western, not JLT, and that the tribunal had no need to invoke *Alberta Rules of Court*, nor did it have authority to do so. He rested his judgment on the fact that Western had possession of the document and Western, as a party to the policy containing the agreement to arbitrate, was subject to the directions of the tribunal. It was not necessary to interfere with a third party in order to obtain the production of the document.

Appeal relative to Examinations for Discovery

[18] Catlin has appealed to this Court and submits that the chambers judge erred in law in holding that the tribunal lacked jurisdiction to order the JLT witnesses to submit to pre-hearing examination for discovery or to permit Catlin leave to seek the assistance of the court, pursuant to Article 27 of the Model Law, in taking their evidence. The parties are in agreement that the standard of review is one of correctness.

[19] Section 4 of the ***Act*** makes the International Law applicable to arbitration agreements and awards. "International Law" is defined by s. 1(1)(b) of the ***Act*** to mean the "Model Law on International Commercial Arbitration adopted by the United Nations Commission on International Trade Law on June 21, 1985, as set out in Schedule 2" to the ***Act***.

[20] Article 19 of the Model Law is entitled "Determination of rules of procedure" and provides:

> (1) Subject to the provisions of this Law, the parties are free to agree on the procedure to be followed by the arbitral tribunal in conducting the proceedings.
>
> (2) Failing such agreement, the arbitral tribunal may, subject to the provisions of this Law, conduct the arbitration in such manner as it considers appropriate. The power conferred upon the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence.

[21] Article 27 of the Model Law is entitled "Court assistance in taking evidence" and provides:

> The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent court of this State assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.

[22] Section 12 of the ***Act*** sets out aids for its interpretation, including the Model Law:

> 12(1) This Act shall be interpreted in good faith, in accordance with the ordinary meaning to be given to the terms of the Act in their context and in the light of its objects and purposes.
>
> (2) In applying subsection (1) to the International Law recourse may be had to
>
> > (a) the Report of the United National Commission on International Trade Law on the Work of its Eighteenth Session (June 3-21, 1985);

> and
>
> (b) the International Commercial Arbitration Analytical Commentary on Draft Test of a Model Law on International Commercial Arbitration,
>
> which shall be published in The Alberta Gazette.

[23] It should be specifically noted that subsection (2) of s. 12 contemplates that subsection (1) of that section will be applied to the International Law which, as has been seen, is defined as the Model Law. Section 12 is consistent with interpretative principles governing all enactments within Alberta. Section 10 of the ***Interpretation Act***, R.S.A. 2000, c. I-8, states:

> 10. An enactment shall be construed as being remedial, and shall be given the fair, large and liberal construction and interpretation that best ensures the attainment of its objects.

[24] It is axiomatic that a tribunal derives its jurisdiction from the agreement to arbitrate made by the parties and the legislation governing such agreements. The ***Act*** makes the Model Law applicable to the arbitration agreement made in this case. The Model Law entitles the parties to make specific agreements concerning the conduct of the arbitration proceedings.

[25] The parties to the arbitration can craft an arbitration agreement to suit their own purposes but they cannot, without more, exercise powers over third persons. The Legislature has seen fit, however, to empower tribunals to request the court's assistance in taking evidence. It is common ground, and properly so, that Article 27 can be used to obtain the evidence of third persons at the arbitration hearing. What precludes using this Article to obtain the assistance of the court in obtaining discovery evidence from third parties? This issue goes to the heart of the appeal.

[26] The first question to be asked is: Does the arbitration agreement contemplate discovery of third persons? It is open to the parties to agree that no oral examinations for discovery shall be conducted or otherwise limit discovery as they see fit.

[27] In this case, the parties have not by their agreement placed any limitations either on the scope of examinations for discovery or the persons subject to be examined. Rather, they have agreed that examinations for discovery are available along the lines provided by the *Alberta Rules of Court*. The tribunal, pursuant to Article 19 of the Model Law, is required to conduct the arbitration in accordance with the agreement of the parties or where there is no agreement in any area to conduct the arbitration in such manner as it sees fit.

[28] The Analytical Commentary, which as has been noted is an interpretative aid, suggests that Article 19 should be interpreted to give the tribunal considerable latitude in the adoption of procedural rules governing the conduct of the arbitration. The procedural rules specifically

encompass the adoption of "rules of evidence" appropriate to the proceedings.

COMMENTARY

"Magna Carta of Arbitral Procedure"

1. Article 19 may be regarded as the most important provision of the model law. It goes a long way towards establishing procedural autonomy by recognizing the parties' freedom to lay down the rules of procedure (paragraph (1)) and by granting the arbitral tribunal, failing agreement of the parties, wide discretion as to how to conduct the proceedings (paragraph (2)), both subject to fundamental principles of fairness (paragraph (3)). Taken together, with the other provisions on arbitral procedure, a liberal framework is provided to suit the great variety of needs and circumstances of international cases, unimpeded by local peculiarities and traditional standards which may be found in the existing domestic law of the place.

Freedom of parties to lay down procedural rules, paragraph (1)

2. Paragraph (1) guarantees the freedom of the parties to determine the rules on how their chosen method of dispute settlement will be implemented. This allows them to tailor the rules according to their specific needs and wishes. . . . They may choose those features familiar to them and even opt for a procedure which is anchored in a particular legal system. However, if they refer to a given law on civil procedure, *including evidence*, such law would be applicable by virtue of their choice and not by virtue of being the national law.

3. The freedom of the parties is subject only to the provisions of the model law, that is, to its mandatory provisions. . . .

Procedural discretion of arbitral tribunal, paragraph (2)

4. Where the parties have not agreed, before or during the arbitral proceedings, on the procedure (i.e. at least not on the particular matter at issue), the arbitral tribunal is empowered to conduct the arbitration in such manner as it considers appropriate, . . . As stated in paragraph (2), this power includes the power to determine the admissibility, relevance, materiality and weight of any evidence. This, in turn, *includes the power of the arbitral tribunal to adopt its own rules of evidence,* although that is no longer expressed in the text.

5. Except where the parties have laid down detailed and stringent rules of procedure, *including evidence*, the discretionary powers of the arbitral tribunal are considerable in view of the fact that the model law, with its few provisions limiting the procedural discretion, provides a liberal framework. This enables the arbitral tribunal to meet the needs of the particular case and

> to select the most suitable procedure when organizing the arbitration, conducting individual hearings or other meetings *and determining the important specifics of taking and evaluating evidence.*
>
> 6. In practical terms, the arbitrators would be able to adopt the procedural features familiar, or at least acceptable, to the parties (and to them). For example, where both parties are from a common law system, the arbitral tribunal may rely on affidavits and order pre-hearing discovery to a greater extent than in a case with parties of civil law tradition, where, to mention another example, the mode of proceedings could be more inquisitorial than adversary. . . .
>
> [emphasis added]

[29] The tribunal has determined on the evidence before it that JLT acted as agent for Western in the placement of the insurance policy. It also found that the JLT witnesses were participants in the negotiations leading to the issuance of the insurance policy and that what was represented in those negotiations has direct relevance to the issues raised in the pleadings. It is fair to infer that the JLT witnesses may be the only persons with direct knowledge of some of the matters in issue. The tribunal also determined that examinations of the JLT witnesses would be permitted under R.200(1) of the *Alberta Rules of Court*. The rule provides::

> 200(1) Before trial, a party to proceedings may orally examine under oath, without an order the Court,
>
> (a) any other party to the proceedings who is adverse in interest,
>
> (b) if the other adverse party is a corporation, one or more officers of the corporation, and
>
> (c) one or more other persons who
>
> (I) are or were employed by the other party, and
>
> (ii) have or appear to have knowledge of a matter raised in the pleadings that was acquired by virtue of that employment.
>
> (1.1) Subrule (1) applied whether the person sought to be examined is insider or outside the jurisdiction of the Court.

[30] The tribunal in its analysis canvassed a number of leading cases in Alberta with respect to the interpretation of R. 200(1), including ***Cana Construction Co. Ltd. v. Calgary Centre for the Performing Arts*** (1986), 71 A.R. 158 (C.A.), ***Adams v. Norcen Energy Resources Ltd.***, (1998), 233

A.R. 174 (Q.B.), 1998 ABQB 913 and ***Petro-Canada Products Inc. v. Dresser-Rand Canada Inc.***, (2004), 348 A.R. 81, 2004 ABCA 144, as support for its conclusion that the type of examination sought by Catlin of the JLT witnesses is permitted under the Alberta Rule.

[31] The tribunal concluded as follows:

> The arbitration agreement between the parties specifies that the arbitration be in Alberta and the parties have agreed between themselves for wide party examination for discovery analogous to the Alberta Rules. Having regard as well to the discretion that the Model Law and the Commentary seems to afford an arbitral tribunal, we have concluded, that in the circumstances of this case, it is appropriate to make the order sought, so that the defendants can make the appropriate application for the assistance of the Alberta Court to enforce the order, with respect to persons both in and outside of Alberta. It is clear from the material filed before us set out earlier in these Reasons, that the JLT Group and the employees sought to be examined were directly involved in the negotiations with the defendants that led to the underwriting of policy and what transpired in those negotiations has direct relevance to the issues raised by the defendants in their defences and the counterclaim.

[32] In ***Petro-Canada Products Inc.***, *supra*, this Court stated, at paragraph 14:

> [14] Additionally, the Rule refers to "persons who are or were employed by the other party". The Alberta Rule, unlike rules in some other jurisdictions, does not refer to "servants" nor suggest that a true master-servant relation is required. Being "employed" by a company has been interpreted to be broader than being an employee of a company. Professionals, such as lawyers and independent consultants, can be "employed by" a company, for the purposes of discovery, without being legal employees of a company. Depending upon the nature and circumstances of the action and the particular role played, the Rule permits the examination of independent consultants "employed by" a party: ***Adams v. Norcen Energy***.

[33] I am unable to find any error by the tribunal either in its fact findings relative to the JLT witnesses or in its appreciation of the law relating to the application and effect of the *Alberta Rules of Court*.

[34] The chambers judge did not take issue with the findings of the tribunal but nevertheless ruled that the tribunal did not have the authority to order non-parties to the arbitration to submit to pre-hearing discovery, much less allow a party leave to seek the assistance of the court to enforce such an order. The nub of his conclusion is that Article 27 of the Model Law is not applicable in this situation. He acknowledged that the Act and Model Law are a source of the tribunal's power but interpreted Article 27 as not permitting the court to lend assistance to require witnesses to attend for

pre-hearing examinations for discovery.

[35] The chambers judge agreed with and relied upon the reasoning of Morrison, J. in ***BNP Paribas & Others v. Deloitte & Touche LLP***, [2003] EWHC 2874 (Comm. Ct.), and quoted from that judgment as follows:

> [47] In *BNP Paribas & Others v. Deloitte & Touche LLP,* [2003] EWHC 2874 (Comm. Ct.), the English Commercial Court considered the section of the English *Arbitration Act, 1996,* Ch. 23, which derives from Article 27, and made the following comments:
>
> > It seems to me clear that s. 43 does not give the Court, in respect of arbitration proceedings, power to order disclosure from a third party. ... The result is not, I think, surprising. Arbitration is a private process of adjudication agreed to by the parties to it. ... [T]he fact is that the privacy of the process and the autonomy of the parties distinguishes arbitration from actions in the Courts, and there should be no automatic assumption that one can read across from one to the other. I am not aware of any compelling need for the Courts to be given an equivalent power to CPR 31.17. There is no academic support for Mr. Stewart's views and no case where this issue has been raised and considered. Party autonomy and the removal of what may have been seen as the Court's interference with the arbitral process contained in s. 12(6) of the 1950 Act, suggests to me that the policy is to restrict the number of occasions when a litigant in an arbitration can invoke this Court's jurisdiction.
>
> > Furthermore, I do not regard the reference to the Model Law as assisting Mr. Stewart's arguments. Model Clause 27 provides:
> >
> > > The arbitral tribunal or a party with the approval of the arbitral tribunal may request from a competent Court of this state assistance in taking evidence. The court may execute the request within its competence and according to its rules on taking evidence.
> >
> > This clause is dealing with the taking of evidence and not with the disclosure process. The taking of evidence is assisted by the issuing of a subpoena to produce, for introduction into the evidence, particular documents. Thus, s. 43 gives effect to this Article. There is nothing in the Model Law which suggests that the Court should assist with the process of disclosure. Indeed, disclosure questions have been taken from the Court (by the repeal of s. 12(6)) and given

> back to the arbitral tribunal. This is recognized by s. 33 and 34 of the 1996 Act including 34(2)(d). That subsection makes disclosure by the parties a matter for the arbitral tribunal.

[36] The chambers judge also recited from the judgment of Kaplan, J. of the Hong Kong High Court in ***Vibroflation A.G. v. Express Builders Co. Ltd.***, [1994] 3 H.K.C. 263, who likewise interpreted Article 27 as a means of securing evidence at the hearing and not as a means of obtaining disclosure.

[37] In my view, this appeal turns upon the interpretation of Article 27. The issue is one of statutory interpretation. With all due respect to the chambers judge, I disagree with his interpretation of Article 27, which I consider to be unduly restrictive. My reasons for disagreement are explained in the following paragraphs.

[38] The Model Law is part of the law of Alberta. It must be interpreted in accordance with the ordinary meaning to be given to the terms in their context and in light of its objects and purposes. Article 27 speaks of "assistance in taking evidence". In my view, it is a gloss to add, by implication or otherwise, the words "at the hearing". Those words are not there.

[39] Evidence is obtained through the discovery process and it is common parlance to speak of discovery evidence. In ***Zingre v. The Queen***, [1981] 2 S.C.R. 392, Dickson, J., as he then was, in delivering the judgment of the Supreme Court of Canada, speaks in terms of pre-hearing or pre-trial "evidence" and recognizes that evidence gathered through pre-hearing examination may on occasion be used for pre-trial proceedings. In that case, an application was made to obtain "testimony" under s. 43 of the ***Canada Evidence Act***. Objection was made on the ground that such testimony was not for purposes of trial. The Court pointed out, at p.403, that s. 43 "does not make a distinction between pre-trial and trial proceedings". Neither does Article 27. The term "evidence" does not, in my view, connote that its use must be only for purpose of trial any more than does the term "testimony". Evidence is evidence whether taken at discovery or trial.

[40] The ordinary and plain meaning of evidence includes evidence gathered by way of discovery. In Alberta such evidence may be read in at the trial or otherwise used in pre-trial applications. If the drafters of Article 27 had intended that assistance would only be given for taking evidence at the hearing, they could have expressly said so. This distinction was not made and in the context of an arbitration proceeding conducted in Alberta, the word "evidence" must be given its ordinary meaning which includes all evidence whether pre-hearing or at the hearing itself.

[41] Article 27 should be interpreted in the light of its objects and purposes. The obvious purpose of Article 27 is to facilitate the tribunal in its search for the truth. I do not conceive that a tribunal has any less desire for, or need for, the truth to reach a fair and proper result than does a court of law.

[42] With respect, limiting the scope of examinations for discovery in arbitration proceedings cannot be justified on the basis that arbitration is not a parallel to the court system. It is the forum that the parties have determined and arbitration litigation is not some lesser form of litigation than that being conducted in the courts. There are, of course, many distinguishable features but the ability to procure relevant evidence should not necessarily be one of them. This is especially so when Alberta law permits the tribunal to adopt its own rules of evidence without distinguishing between pre-hearing and hearing evidence. The need for relevant evidence is the same whether the dispute is being conducted by a tribunal or in the courts.

[43] It is correct, of course, that the parties themselves cannot by their own agreement intrude into the affairs of a third person so as to entitle them to take evidence of any nature from such person. But the Model Law empowers a tribunal to seek the assistance of the court to take evidence in a manner consistent with the laws of the place of the arbitration. The policy of the law is to provide assistance to tribunals in appropriate circumstances where the tribunal has satisfied itself that the evidence is relevant to the issues before it.

[44] The Analytical Commentary relative to Article 19 expressly speaks of the entitlement of a tribunal to order pre-hearing discovery. While Article 19 does not speak one way or the other to confining the discovery to the parties themselves, there is good rationale for allowing examinations of third parties in arbitration conducted in Alberta to the same extent that such examinations are available under the Rules in Alberta. The reasons for obtaining evidence through discovery are as cogent as those for obtaining evidence at the hearing itself. In addition to using the discovery evidence at the hearing itself, such evidence may be used as pre-hearing motions and the discovery facilitates the orderly gathering of the evidence by the parties. If it was not intended that the evidence of third persons be available for arbitrations, then there would be little need for Article 27. Since the law clearly entitles a tribunal either to ask, or to authorize the asking of the court for assistance in taking evidence, I conclude that third persons will be subject to having their evidence obtained in accordance with the practice of the court. In Alberta this includes discovery of third parties falling within the ambit of R. 200(1).

[45] I emphasize that the statute has a number of safeguards. Such requests for examination are not taken at the whim of one of the parties. The tribunal must first be satisfied that the evidence may be useful for purposes of the arbitration before the tribunal can be expected to seek the assistance of the court or to give leave to one of the parties to do so. A tribunal must always weigh the competing relevant interests and value, including the time and expense of the addition discovery, and should be careful in the exercise of its powers.

[46] The court is not obliged to grant its assistance. The court will examine the reasons for the request and must be satisfied that the request is reasonable and in accordance with the practices of the court. In this case, the Court had before it a carefully reasoned decision of a tribunal composed of experienced and knowledgeable counsel who have determined that such discovery evidence is necessary for purposes of the arbitration proceedings and in accordance with discovery practice in Alberta. There is no reason to thwart this request for assistance if Article 27 can reasonably be

interpreted, as I have held it can be, to permit the request for assistance in taking evidence to include evidence by way of discovery.

[47] With respect to the judgments from other jurisdictions cited by the chambers judge, discovery practices in other jurisdictions are different and it is not evident from the judgments that the discovery sought for the arbitration proceedings would be available in accordance with the rules governing litigation in those jurisdictions. In any event, for reasons already stated, I cannot, in the context of Alberta practice, read into Article 27 an unstated limitation that the evidence be taken solely at, and only for, the hearing.

[48] The interpretation advanced by JLT also imports a further limitation which I view as artificial and without any good rationale. If Article 27 is restricted to taking evidence only at and for the hearing, then the court has no power to order the attendance of a party, an employee of a party or a former employee of a party to attend at an examination for discovery in arbitration proceedings. It may be that the tribunal could penalize a party for refusing to submit to discovery but employees and former employees could be examined only by persuasion of the parties. In my view, there is no good reason to narrowly interpret the scope of Article 27 so that it could not be relied upon in such situations.

[49] In short, I am satisfied that Article 27 can properly be relied upon in the circumstances of this case to found jurisdiction to compel the examination of the JLT witnesses. In the case of the two witnesses who are not resident in Alberta, the court, if necessary, may order the issue of a commission for the examination of those persons.

Cross-Appeal

[50] The primary issue on the cross-appeal is whether the tribunal had jurisdiction to require Western, as a party to the proceedings, to produce the standstill agreement which it had in its possession. The objection of JLT is that the tribunal's order requires Western to violate its agreement to maintain the confidentiality of the Standstill Agreement except as disclosure may be consented to by JLT.

[51] As held by the tribunal, and affirmed by the chambers judge, the test for production is relevance. No ground of privilege recognized by the law has been asserted. Even if this Court could intervene regarding this issue, which I do not decide, I am satisfied that the tribunal has the jurisdiction exercised by it in this case.

Conclusion

[52] In the result, the appeal is allowed and the cross-appeal is dismissed. The case is remitted to the Court of Queen's Bench to grant the orders to take evidence in accordance with this judgment.

Appeal heard on October 31, 2005

Reasons filed at Calgary, Alberta
this 18th day of January, 2006

O'Brien J.A.

I concur:

Conrad J.A.

I concur:

O'Leary J.A.

Appearances:

F.J.C. Newbould, Q.C.
for the Appellants (Respondents in Cross-Appeal) SJO Catlin & others et al

A.Webster Macdonald, Q.C.
M.B. Cohen
for the Respondents, Allianz Canada

D.R. Haigh, Q.C.
D.J. Chernichen, Q.C.
for the Respondents (Appellants on Cross-Appeal), Jardine Lloyd Thompson et al

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Corrigendum of the Memorandum of Judgment

The docket number on the front page of the judgment has been corrected to read 0501-0227-AC; 0501-0228-AC.