COURT FILE NO.: CV-08-792300 CL
CV-09-80244-00CL
DATE: 2009-04-08

ONTARIO

SUPERIOR COURT OF JUSTICE

COMMERCIAL LIST

BETWEEN:	)	
BANGLAR PROGOTI LTD.	)	*Earl A. Cherniak Q.C.* and *Cynthia B. Kuehl*, for the Applicant
Applicant	)	
- and -	)	
RANKA ENTERPRISES INC., RANKA MARKETING INC. and 1007328 ONTARIO LIMITED	)	*Javad Heydary* and *David Alderson*, for the Respondents
Respondents	)	
AND BETWEEN:	)	
RANKA ENTERPRISES INC. and RANKA MARKETING INC.	)	*Javad Heydary* and *David Alderson*, for the Applicants
Applicants	)	
- and -	)	
BANGLAR PROGOTI LTD.	)	*Earl A. Cherniak Q.C.* and *Cynthia B. Kuehl*, for the Respondent
Respondent	)	

Pepall J.

REASONS FOR DECISION

Relief Requested

[1] There are two applications before me. Banglar Progoti Ltd. ("BPL") seeks an order recognizing three arbitral awards. It also seeks a declaration that Ranka Enterprises Inc. ("Ranka") is the beneficial owner of property municipally known as 300 Danforth Road, Toronto and that the registered owner, 1007328 Ontario Limited, be required to transfer the property to Ranka and to register the transfer on title.

[2] Ranka and Ranka Marketing Inc. ("Marketing") seek an order setting aside the arbitral awards on the grounds that they are in conflict with the public policy of Ontario that forbids champerty and maintenance and therefore are prohibited by Article 36(1)(b)(ii) of the UNCITRAL Model Law on Commercial Arbitration. The Ranka parties have conceded that if their public policy argument is unsuccessful, the awards should be enforced.

The Facts

[3] The facts are as follows. BPL, a Bangladeshi company, entered into a joint venture agreement with Ranka, an Ontario company, for the development of a composite textile plant in Bangladesh. The joint venture agreement contained an arbitration clause. This clause provided for no right of appeal. Specifically it stated:

> "In case of dispute between the partners, an arbitrator(s) will be appointed in USA, their ruling will be final and accepted by both parties. Both parties hereby confirm and wave (sic) their right for further appeal."

[4] A dispute arose between the parties. The parties appointed Larry Banack as the arbitrator. The arbitral hearing commenced on July 31, 2006 and continued intermittently for 51 days until March 16, 2008. The first award was granted on March 19, 2008. It was based on admissions in the pleadings of Ranka and Marketing. The arbitrator ordered that BPL was the owner of 75% of the shares of Marketing, that title to certain equipment be transferred back from Ranka to Marketing and that a receiver/manager of Marketing be appointed. An amalgamation was also set aside. There is no evidence before me of compliance by Ranka with this first award.

[5] The second award was released on October 24, 2008. The reasons for decision were approximately 150 pages in length. The arbitrator awarded BPL damages of $1,780,000 US and associated relief and dismissed Ranka's counterclaim.

[6] The third award was dated December 8, 2008. It awarded BPL pre-judgment interest in the amount of $217,387.60 US and costs of $1,263,612 on a full indemnity basis.

[7] There is no evidence that there has been compliance with the awards. Ranka has posted $1,780,000 US as security to the credit of this action but this sum does not include the interest and costs that were awarded. It obviously does not address compliance with the non-monetary component of the awards. Ranka suffered net losses in 2006 and 2007. Its 2008 financial results are not before me. There is also no evidence that would suggest that Ranka has the ability to pay the awards.

[8] The trust agreement between 1007328 Ontario Limited and Ranka was signed by the principal of Ranka, Mr. K.L. Sood, on behalf of both parties to the agreement. It provides that Ranka funded the acquisition of the Danforth Road property and is the beneficial owner. Specifically the agreement states:

> NOW THEREFORE, Ranka Enterprises Inc. will record this acquisition in their books of records being the beneficial owner and have the title moved from 1007328 Ontario Limited.
>
> AND 1007328 Ontario Limited declares that it has no intention of keeping the title and has no objection to remove this title to Ranka Enterprises Inc. who are the beneficial owner of this property.

[9] BPL is a family owned and run corporation. The directors and shareholders at all relevant times were Mr. Haq who served as the chairman, his wife, daughter and son. His daughter, Normin Mobassera, married Robert Taylor in December, 2003. Mr. Taylor has great love and affection for his father-in-law. Mr. Taylor had worked as a managing director at Lehman Brothers and now works at Barclay's Capital, an investment bank in New York.

[10] In 2003, Mr. Haq asked Mr. Taylor whether he would be interested in investing in the aforementioned joint venture business but he declined.

[11] In 2004, Mr. Haq advised Mr. Taylor that the joint venture agreement had been breached and that settlement attempts had been unsuccessful. Mr. Haq asked for Mr. Taylor's assistance in finding legal counsel. Mr. Taylor lived in North America. Mr. Haq testified that if Mr. Taylor had not assisted in this regard, he would have sought assistance from someone else. Mr. Taylor identified the law firm of Tough & Podrebarac LLP ("TP") as potential counsel. Mr. Haq chose to retain them and the retainer agreement, which I reviewed at the request of Ranka and Marketing's counsel, was between the TP law firm and BPL.

[12] Mr. Haq requested that Mr. Taylor communicate with TP as BPL's agent. Ms. Podrebarac of TP fully satisfied herself that Mr. Taylor was authorized to act as an agent for BPL. Throughout, Mr. Taylor facilitated communications. The evidence of all of Mr. Haq, Mr. Taylor and Ms. Podrebarac was that Mr. Taylor did not instruct Ms. Podrebarac or her firm but conveyed instructions he received from Mr. Haq.

[13] Mr. Haq had requested that the invoices for legal services be directed to Mr. Taylor's home address rather than to Bangladesh. Mr. Taylor was going to oversee the administration of payments. Mr. Haq had paid the initial retainer but having become aware of the escalating legal fees, Mr. Taylor began to pay the invoices. Both Mr. Haq and Mr. Taylor testified that this was a loan. There was no repayment agreement and Mr. Haq was going to repay Mr. Taylor regardless of the outcome of the arbitration. Mr. Taylor was confident that Mr. Haq would repay him knowing the type of man he is. In total, $700,000 was lent by Mr. Taylor. The evidence is reflective of a close family relationship in which Mr. Taylor loved and cared for his father-in-law.

The Issues

[14] There are three issues for me to decide:

a) Was there champerty and maintenance?
b) Should the arbitral awards be recognized?
c) What additional relief, if any, should be granted?

Discussion

a) Existence of Champerty and Maintenance

[15] First, I will address the law applicable to this issue. The UNCITRAL Model Law was adopted by the Province of Ontario in the *International Commercial Arbitration Act.*[1] It governs these proceedings and provides in Article 34(2)(b)(ii) that an arbitral award may be set aside by the court if the court finds that the award is in conflict with the public policy of the state. In addition, pursuant to Article 36(1)(b)(ii) recognition or enforcement of an award may be refused on the same ground.

[16] In *McIntyre Estate v. Ontario (Attorney General),* A.C.J O'Connor described maintenance and champerty. Maintenance is directed against those who for an improper motive become involved with disputes of others in which the maintainer has no interest and the assistance rendered is without justification or excuse.[2] Champerty is a type or subspecies of maintenance in which the maintainer shares in the profits of the litigation.[3] Without maintenance, there can be no champerty.

[17] Motive is determinative of whether conduct or an arrangement constitutes maintenance or champerty. There must be an improper motive. According to *McIntyre Estate*, the court is to look at the conduct of the parties and the propriety of the motive of the alleged champertor to determine if the requirements for champerty are present. As stated by Fogarty D.C. J. in S. *v. K.:*

> "I must conclude that the motive of the party who interests himself in the suit of another is most relevant to determine whether maintenance is made out. If the motive is genuine and arises out of concern for the litigant's rights, it is not maintenance. Similarly if that interest of such party arises genuinely from an interest in the outcome, it is not maintenance and this is not restricted to blood relationships."[4]

[1] R.S.O 1990 CI. 9, s 2(1)
[2] (2002), 61 O.R. (3d) 257 at 265.
[3] Ibid at para. 22.
[4] (1986), 55 O.R. (2d) 111 at 117.

A.C.J. O'Connor observed that there can be no maintenance if the alleged maintainer has a justifying motive or excuse.[5] Familial relationships may constitute such a motive or excuse.

> "The early English authorities, obviously concerned about the possibility of the multiplicity of suits caused by the stirring up of litigation, held maintenance to be made out in situations where such would not be held today. The courts have made justifiable that which would otherwise be maintenance where there is a common interest, believed on reasonable grounds to exist. Thus, there would be no maintenance found where the involvement arose from the interest of a master for a servant, or a servant for a master; an heir, a brother, a son-in-law, or brother-in-law; a fellow commoner defending the rights of common; a landlord defending his tenant in a suit for tithes; a rich man giving money to a poor man out of charity to maintain a right which he would otherwise lose."[6]

In this regard, the 1873 decision of *Hutley v. Hutley*[7] is no longer good law in Ontario.

[18] It is not conceded that champerty and maintenance are contrary to public policy. Similarly, it is not conceded that these torts apply to both court proceedings and arbitration. Given my conclusion that there was no champerty or maintenance, it is unnecessary to decide these issues. The reasons for my conclusion are as follows.

[19] Applying the legal principles to the facts of this case, there is no evidence of any improper motive and hence there is no evidence of any champerty. Firstly, the allegations made by the Ranka parties are speculative. Indeed, even the evidence of speculation is not advanced by those parties but by an articling student who works in the office of their counsel and who has no personal knowledge. On cross-examination, he refused to identify the person who was the source of his information and belief. Secondly, the evidence of all witnesses having direct knowledge of Mr. Taylor's motive is consistent. Mr. Taylor is married to Mr. Haq's daughter Normin Mobassera, and has great love and affection for his father-in-law. As a result of receiving legal invoices for payments, Mr. Taylor became aware of the escalating legal fees which exceeded the initial retainer that had been paid to T.P. In recognition that this was a family

[5] Ibid at para. 34.
[6] S. v. K., *supra*, note 4 at para. 14.
[7] L.R.8 Q.B. 112.

company in which his wife was a shareholder, out of great love and respect for this father-in-law, and because he could afford to do so, Mr. Taylor began paying these invoices. Furthermore, the payments were in the nature of a loan which would be repaid regardless of the outcome of the arbitration.

[20] Although speculative in nature, BPL has properly responded to the allegations advanced on behalf of the Ranka parties. They claim that Mr. Taylor must have interfered or meddled because Mr. Haq had never previously pursued litigation. It was Ranka, however, who refused to negotiate, leaving BPL with no reasonable alternative to assert their claim but to litigate. Indeed, on July 5, 2005, BPL offered to settle the dispute for a payment by Ranka of $264,000. US. Mr. Taylor did not advise Mr. Haq to commence or to continue the arbitration. Mr. Haq chose to retain T.P. and the retainer agreement dated June 28, 2005 was between BPL and T.P. There is no dispute that Mr. Taylor communicated with T.P. Mr. Taylor acted as BPL's agent and served as a conveyor of instructions rather than as a decision maker. Again, the evidence is consistent that Mr. Haq on behalf of BPL instructed Ms. Podrebarac directly or through Mr. Taylor.

[21] Similarly, the evidence from Ms. Podrebarac, Mr. Haq and Mr. Taylor is consistent with respect to the delivery and payment of the invoices. I also observe that the applicants' concerns relating to Ms. Podrebarac's docket reductions and BPL's financial state are unjustified with respect to the former and absent improper motive, irrelevant with respect to the latter. There is nothing that supports the applicants' speculation and no evidence that supports any inference that Mr. Taylor controlled the arbitration or that his contribution was for financial gain as submitted by counsel for Ranka. The absence of any loan agreement and corporate authority from BPL is consistent with arrangements made amongst family members. There is no improper motive on Mr. Taylor's part; indeed his motive was legitimate and based on love and affection rooted in family ties. The allegations of champerty and maintenance are unfounded and unjustified.

[22] As noted in the *McIntyre Estate* decision, the common law of champerty was developed to protect the administration of justice from abuse by those who wrongfully maintain litigation.

There is no abuse by Mr. Taylor or BPL in this case. Indeed, the granting of the Ranka parties' application would be an abuse. Justice is served by a dismissal of the application in its entirety.

b) Recognition of Awards

[23] Having determined that there was no champerty or maintenance, I must then consider whether the arbitral awards should be recognized.

[24] Ranka and Marketing conceded that if I found that there was no champerty or maintenance, the awards should be recognized. In this regard, I note that the joint venture contract provided that the arbitral ruling would be final and that the parties waived any right of appeal.

[25] Article 35(1) of the Model Law provides that:

> "An arbitral award, irrespective of the country in which it was made, shall be recognized as binding and, upon application in writing to the competent court, shall be enforced subject to the provisions of this article and of article 36."

[26] There has been compliance with article 35 and the grounds in article 36 are limited and inapplicable. In my view, the three arbitral awards should be recognized.

c) Additional Relief

[27] The third and last issue to consider is whether the additional relief requested by BPL should be granted in the circumstances. Specifically, BPL asked that title to the Danforth Road property currently held by 1007328 Ontario Limited as bare trustee for the benefit of Ranka, be transferred to Ranka or alternatively, that the court declare that Ranka holds a 100% interest in the property that can be seized pursuant to a writ of seizure and sale.

[28] Section 11(1) of the *International Commercial Arbitration Act* provides that an arbitral award recognized by the court is enforceable in the same manner as a judgment or order of the court. Rule 60.07 provides that a creditor may issue a writ of seizure and sale of any real property interest held by a judgment debtor. Pursuant to Rule 14.05 (3) (e), an application may be brought for a declaration of an interest in or charge on land.

[29] 1007328 Ontario Limited holds the Danforth Road property in a bare trust solely for the benefit of Ranka and expressly agrees to transfer title to Ranka who had funded the acquisition of the property. The evidence is clear, and there is no evidence to the contrary, that Ranka has a 100% beneficial interest in the Danforth Road property. BPL is a judgment creditor and Ranka holds a real property interest in the Danforth Road property as required by Rule 60.07. It seems to me that judgment creditors of Ranka should be able to realize on that asset. The alternative relief requested is therefore granted.

Summary

[30] In summary, the application brought by Ranka and Marketing to set aside the awards on the grounds of public policy is dismissed. The application brought by BPL to recognize the awards is granted. Lastly, the application for a declaration that Ranka holds a 100% beneficial interest in 300 Danforth Road, Toronto, is granted.

[31] I have not reviewed the costs submissions as I noted that those of the Ranka parties appeared to include reference to an offer to settle which I did not read. I will address costs after this decision is released.

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Pepall J.

Released: April 8, 2009

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B E T W E E N:

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Applicant

- and -

RANKA ENTERPRISES INC., RANKA MARKETING INC. and 1007328 ONTARIO LIMITED

Respondents

AND BETWEEN:

RANKA ENTERPRISES INC. and RANKA MARKETING INC.

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BANGLAR PROGOTI LTD.

Respondent

REASONS FOR DECISION

PEPALL J.

Released: April 8, 2009