CITATION: Patel v. Kanbay International Inc., 2008 ONCA 867
DATE: 20081223
DOCKET: C48699

COURT OF APPEAL FOR ONTARIO

Winkler C.J.O., Moldaver and Goudge JJ.A.

BETWEEN:

Shiraz Patel

Plaintiff (Respondent)

And

Kanbay International Inc., Kanbay Managed Solutions Inc., Kanbay Managed Solutions Canada Inc., Kanbay Canada Inc. and Kanbay Inc.

Defendants (Appellants)

Brian D. Mulroney for the appellants

Barry Goldman and Nicole Salama for the respondent

Heard: December 11, 2008

On appeal from the order of Justice Sandra Chapnik of the Superior Court of Justice dated April 22, 2008.

Goudge J.A.:

[1] The appellants are a group of related companies. Kanbay Managed Solutions (KMS), Kanbay Managed Solutions Canada (KMS Canada), Kanbay and Kanbay Canada are all subsidiaries of Kanbay International.

[2] The respondent served as the president of KMS and KMS Canada until his dismissal on January 23, 2006. He has sued the appellants for wrongful dismissal and negligent misrepresentation. The latter claim alleges that prior to becoming president, representations were made to him by representatives of the appellants that he would become an equity owner of KMS if he accepted the offer of employment and that those shares would be an asset of significant value to him. He claims that the appellants knew then that this was false and that the KMS shares would be worthless.

[3] In support of this claim, the respondent seeks a forensic valuation of the stock of KMS and Kanbay International. He proposes to rely on this evaluation to assist in proving the misrepresentation and the damages that he says flow from it.

[4] The appellants' position is that the respondent's rights and obligations respecting his shareholdings in KMS and the value of those shares must be governed by the Shareholders' Agreement he signed, effective March 26, 2003, after he commenced his employment. The appellants rely on that agreement and on the *International Commercial Arbitration Act*¸ R.S.O. 1990, C.I.9 (the *ICAA*) to argue that the evaluation sought by the respondent must be done by arbitration under the Shareholders' Agreement. They say that the court must refer this issue to arbitration and stay that aspect of the respondent's action. The appellants also argue that the Shareholders' Agreement contains a waiver by the respondent of these claims, and that this issue must also be arbitrated under the Shareholders' Agreement, thus also necessitating a stay of the respondent's action.

[5] In seeking to stay parts of the respondent's action, the appellants point to the UN Model Law on International Commercial Arbitration which is a schedule to the *ICAA*. Article 8(1) of the Model Law says this:

> 8(1) A court before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party so requests not later than when submitting his first statement on the substance of the dispute, refer the parties to arbitration unless it finds that the agreement is null and void, inoperative or incapable of being performed.

[6] Section 8 of the *ICAA* says the following:

> 8. Where, pursuant to article 8 of the Model Law, a court refers the parties to arbitration, the proceedings of the court are stayed with respect to the matters to which the arbitration relates. R.S.O. 1990, c. I.9, s. 8.

[7] Finally, the appellants concede that if they are wrong in relying on the Shareholders' Agreement and the *ICAA*, they cannot contest Chapnik J.'s decision, pursuant to her discretion under the *Arbitrations Act, 1991*, S.O. 1991, Chap. 17, not to refer these issues to arbitration, but to allow the respondent's actions to proceed in its entirety.

[8] In my view there are two reasons to reject the appellants' position, each of which is fatal.

[9] The first reason is that the issues in question here to do not relate to an international commercial arbitration as that term is used in the *ICAA* and the UN Model Law. These issues therefore do not meet the threshold necessary to engage the *ICAA* and the Model Law.

[10] Section 2 of the *ICAA* and Article 1 of the Model Law make the Act and the Model Law applicable only to international commercial arbitration (my emphasis).

[11] What then is the scope of the term "commercial"? Section 13 of the *ICAA* expressly provides that, for the purpose of interpreting the Model Law, resort may be had to the Report of the United Nations Commission on International Trade Law to its Eighteenth Session (June 3 -21, 1985).

[12] Article Eighteen of Part II of the Commentary in that Report reads in part as follows:

> 18. The content of the footnote reflects the legislative intent to construe the terms commercial in a wide manner. This call for a wide interpretation is supported by an illustrative list of commercial relationships. Although the examples listed include almost all types of contexts known to have given rise to disputes dealt with in international commercial arbitrations, the list is expressly not exhaustive. Therefore, also covered as commercial would be transactions such as supply of electric energy, transport of liquefied gas via pipeline and even "non-transactions" such as claims for damages arising in a commercial context. Not covered are, for example, labour or employment disputes and ordinary consumer claims, despite their relation to business.

[13] The issues at stake here do not arise from a transaction like the supply of electric energy, or the transportation of liquefied gas via pipeline. They arise from a wrongful dismissal dispute and a tort action for negligent misrepresentation. The question of the value of the respondent's share entitlement arises only in the course of determining

whether he received a negligent misrepresentation about that value. The question of waiver arises only in the context of that tort claim and the respondent's wrongful dismissal dispute. Neither question arises in a dispute over a commercial transaction. In the context of this case, the term "commercial" does not apply and the issues cannot be said to require a "commercial" arbitration for their resolution. For that reason the *ICAA* and the Model Law are not engaged.

[14] The second reason to reject the appellants' position is that the issues at stake here do not come within the scope of the arbitration provision in the Shareholders' Agreement. Hence there cannot be an arbitration about them. Thus there can obviously be no international commercial arbitration about them, and the *ICAA* and the Model Law are not engaged. The appellants cannot satisfy the "arbitration" requirement, just as they cannot satisfy the "commercial" requirement.

[15] Article 8.10 of the Shareholders' Agreement begins as follows:

> If the parties are unable to resolve any disagreement, dispute, controversy or claim that may arise out of the transactions contemplated by this Agreement, they shall resolve the disagreement or dispute as follows:

[16] Thus only claims arising out of transactions contemplated by the Shareholders Agreement are to be arbitrated under it.

[17] "Transaction" is defined in Article 3.1(b) of that agreement in these terms:

> The term "Transaction" shall mean a single transaction or a series of related transactions constituting (i) a sale or lease of all or substantially all of the assets of the Corporation; (ii) a merger or consolidation with the Corporation or to which the Corporation is a party; (iii) a share exchange in which stock of the Corporation will be acquired by another corporation or the Stock of the Corporation will be issued to stockholders of another corporation; (iv) the purchase of all or substantially all of the assets or shares of capital stock of any Person except in the ordinary course of the Corporation's Business; or (v) the creation or acquisition of a subsidiary other than Kanbay Managed Solutions Canada Inc. (the "Canada Subsidiary Entity").

[18] Article 8(1) of the Model Law requires the court, when the matter is the subject of an international commercial arbitration agreement, to refer it to arbitration (unless it finds

one of the defined exceptions apply none of which need to be considered here). In the context of this case, Article 8(1) of the Model Law requires the court to determine whether the issues at stake come within Article 8.10 of the Shareholders' Agreement. While the case law suggests that any final determination as to the scope of the arbitration agreement is better left to the arbitration tribunal (since the question of jurisdiction is itself within the jurisdiction of that tribunal), where it is clear that the matter does not fall within the arbitration agreement, the court should make that finding and decline to make the referral to arbitration. See *Dalimpex Ltd. v. Janicki* (2004), 228 D.L.R. (4th) 179 at paras. 21 and 22.

[19] That is the case here. The matters raised by the appellants – the value of the respondent's shares and whether he has waived his rights – arise out of the respondent's claims for wrongful dismissal and negligent misrepresentation. Neither of these matters arise out of a transaction contemplated by the Shareholders' Agreement. These matters clearly fall outside the arbitration provision in that agreement. They could not properly be referred to arbitration pursuant to the *ICAA* and the Model Law. The respondent's action should proceed in its entirety.

[20] For both these reasons the appeal must be dismissed. Costs to the respondent in the amount $19,500 inclusive of disbursements and GST.

RELEASED: December 23, 2008 "S.T.G."

"S.T. Goudge J.A."
"I agree Winkler C.J.O."
"I agree M. J. Moldaver J.A."