COURT OF APPEAL FOR ONTARIO

CITATION: La Française IC 2 v. Wires, 2024 ONCA 171
DATE: 20240306
DOCKET: COA-23-CV-0822

van Rensburg, Roberts and Gomery JJ.A.

BETWEEN

La Française IC 2, SICAV-FIS also known as IC2 Fund, SICAV-FIS

Applicant (Respondent)

and

David E. Wires

Respondent (Appellant)

Paul Michell, for the appellant

Myriam Seers, for the respondent

Heard: February 13, 2024

On appeal from the judgment of Justice Peter J. Cavanagh of the Superior Court of Justice, dated June 29, 2023, with reasons reported at 2023 ONSC 3879.

REASONS FOR DECISION

[1] The appellant appeals from the judgment recognizing and enforcing the April 7, 2021 Arbitration Award ("the Award") obtained by the respondent. In the Award, the arbitrator dismissed the appellant's claims and ordered the appellant to pay the arbitrator's fee in the amount of EUR 44,541.25, the Stockholm Chamber of Commerce ("SCC") Administrative fee in the amount of EUR 14,412.50, and the respondent's costs in the amount of GBP 112,107.38.

[2] The appellant entered into a Bespoke Funding Agreement ("the Funding Agreement") with "Profile Investment, incorporated … for and on behalf of IC2 Fund, SICAV-FIS, a regulated company existing under the Laws of Luxembourg whose registered number is B205456". The appellant commenced an arbitration in London, England against the respondent, described as "IC2 Fund, SICAV-FIS formally known as La Française IC2 Fund, SICAV FIS Registration No. B205456 Luxembourg," to obtain payment under the Funding Agreement for the pursuit of a claim and recovery of damages.

[3] In the course of the arbitration, the arbitrator awarded the respondent security for costs against the appellant. The appellant did not pay security for costs as ordered. Shortly thereafter, the appellant challenged the appointment of the arbitrator before the SCC, requesting that the arbitrator be removed because of a reasonable apprehension of bias. The SCC dismissed this challenge on the bases that it was time-barred and that the allegations of bias were without merit.

[4] The appellant then attempted to discontinue the arbitration. The respondent sought a dismissal of the arbitration and costs, which the arbitrator granted.

[5] The appellant submits that the judgment recognizing and enforcing the Award should be set aside, and the application should be remitted to the Superior Court for a rehearing because of the following errors by the application judge:

1. The application judge erred in failing to address the appellant's argument that the arbitral tribunal was improperly constituted as a result of an alleged lack of independence and impartiality. The application judge also erred in finding that it was an abuse of process for the appellant to relitigate this issue.
2. The application judge erred in finding that the respondent had standing to bring the application. The application judge also had no jurisdiction to correct the misnaming of the respondent in the Award.
3. The application judge erred in upholding the arbitrator's award of costs to the respondent that included costs settled by the parties.

[6] We are not persuaded that there is any basis for appellate intervention.

[7] With respect to the first ground of appeal, we do not accept the appellant's argument that the application judge mistakenly concluded that he could not raise the issues concerning the propriety of the arbitral tribunal anew because he had failed to pursue a further appeal of the SCC decision in England. Rather, the application judge determined that in the particular circumstances of this case, it would be an abuse of process to permit the appellant to do so. We agree with the application judge's characterization.

[8] Abuse of process is a broad, flexible doctrine. It serves as an adaptable judicial tool to address circumstances that threaten the fairness and integrity of the

court's process and the administration of justice. It is not restricted to preventing the re-litigation of issues or addressing issues that could have been raised in previous proceedings. Rather, it becomes engaged "to prevent the misuse of [the court's] procedure, in a way that would be manifestly unfair to a party to the litigation before it or would in some other way bring the administration of justice into disrepute": *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26, [2013] 2 S.C.R. 227, at paras. 39-41, citing *Canam Enterprises Inc. v. Coles* (2000), 51 O.R. (3d) 481 (C.A.), at para. 55, *per* Goudge J.A. (dissenting), rev'd 2002 SCC 63, [2002] 3 S.C.R. 307 and *R. v. Scott*, [1990] 3 S.C.R. 979, at p. 1007, *per* McLachlin J. (dissenting). See also *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, at paras. 34-35.

[9] Here, the appellant's challenge to the arbitrator's independence and impartiality seems to have arisen more from his dissatisfaction with the arbitrator's security for costs order than from a real concern about the arbitrator. The issues raised by the appellant regarding the arbitrator's slight acquaintance with the respondent's principal could have been discovered at the time of the arbitrator's appointment. As the SCC determined, the appellant's allegations of independence and impartiality were brought out of time and were not well-founded. Moreover, given that the appellant's challenge to the arbitrator was made early on in the arbitration, any valid deficiencies identified by the appellant, if accepted, could have been remedied and a new arbitrator could have been appointed if the

appellant had pursued an appeal of the SCC decision before the English courts. These circumstances and, importantly, the SCC's conclusion that the appellant's allegations were unmeritorious, support the application judge's conclusion that relitigating the challenge would amount to an abuse of process.

[10] With respect to the second ground of appeal, we disagree that the application judge made any error in finding that the respondent was the named party to the arbitration and on the judgment. In order to recognize and enforce the Award, the application judge was required to determine the parties to the Award and the recognition and enforcement application. The application judge's finding that the respondent was a party to both and entitled to enforce the Award was grounded in the record before him and included, importantly, the fact that the appellant had named the respondent in its Request for Arbitration. We see no error in the application judge's conclusion that an isolated reference to another corporation registration number, in addition to the repeated references to the correct registration number for the respondent in the Request for Arbitration, was clearly a misstatement and of no consequence. Based on these findings of fact, the respondent had standing to bring the application, and the application judge had jurisdiction to determine the proper parties to the Award and to order its recognition and enforcement accordingly.

[11] Finally, the application judge made no error in recognizing and enforcing the costs in the Award. The arbitrator distinguished between the settled costs of the

respondent's counterclaim and the costs of the arbitration. He applied a discount to the costs of the arbitration to account for this distinction. There was no double-counting or overcompensation.

[12] As a result, the appeal is dismissed. The respondent is entitled to its costs of the appeal in the agreed-upon, all-inclusive amount of $25,000.

"K. van Rensburg J.A."
"L.B. Roberts J.A."
"S. Gomery J.A."