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COURT OF APPEAL FOR ONTARIO

LASKIN, MACFARLAND AND LAFORME J.J.A.

BETWEEN:

**OAKWELL ENGINEERING
LIMITED**
Applicant (Respondent in appeal)

**David R. Wingfield,
M. Kate Stephenson
and Paul D. Guy**
for the appellant

- and -

ENERNORTH INDUSTRIES INC.
(Formerly known as Energy Power
Systems Limited, Engineering Power
Systems Group Inc. and Engineering
Power Systems Limited respectively)
Respondent (Appellant)

**Edward Babin and
Matthew I. Milne-Smith**
for the respondent

AND BETWEEN:

ENERNORTH INDUSTRIES INC.
(Formerly known as Energy Power
Systems Limited, Engineering Power
Systems Group Inc. and Engineering
Power Systems Limited respectively)
Respondent (Appellant)

**Edward Babin and
Matthew I. Milne-Smith**
for the respondent

- and -

**OAKWELL ENGINEERING
LIMITED**
Respondent (Respondent in appeal)

Heard: April 10, 2006

**On appeal from the judgment of Justice Gerald F. Day of the Superior Court
of Justice dated August 2, 2005, reported at (2005), 76 O.R. (3d) 528.**

MACFARLAND J.A.:

OVERVIEW

[1] This is an appeal by Enernorth Industries Inc. (Enernorth) from a judgment granting an application brought by Oakwell Engineering Limited (Oakwell) for an order recognizing and enforcing in Ontario a judgment granted against Enernorth by the High Court of the Republic of Singapore on October 16, 2003 and affirmed by the Court of Appeal of the Republic of Singapore on April 27, 2004. The judgment under appeal also dismissed an application brought by Enernorth for a declaration that the Singapore judgment cannot be recognized or enforced in Ontario.

[2] The appellant's position is that the Singapore judgment was granted by a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law and, as such, ought not be enforced in Ontario.

[3] The respondent's position was accurately summarized in the application judge's reasons as follows:

While Oakwell acknowledges that Enernorth has tendered some evidence relating to possible government interference in trials, all of that evidence applies only to political cases. The case at bar is a commercial case. There is no evidence that Singapore courts are biased when deciding a commercial case between private parties.

[4] The Singapore proceedings arose out of Oakwell's successful tender in 1995 for a contract to build and operate power generation facilities in India. Because Oakwell lacked the financial resources to complete the project on its own, in 1997 it entered into a joint venture agreement with Enernorth. Under their agreement, together, they formed the "Project Company" to finance, construct and operate the project.

[5] Disputes arose between the two, which were eventually resolved in a December, 1998 Settlement Agreement. In addition to stating the parties' rights and obligations going forward, the Settlement Agreement provided that any disputes were to be governed by Singapore law and subject to the non-exclusive jurisdiction of the Singapore courts.

[6] Under that Settlement Agreement, Oakwell sold to Enernorth its interest in the Project Company and any claims it may have had under previous agreements between the parties. In return, Enernorth agreed to give Oakwell: (1) 1.85 million Enernorth shares; (2) U.S. \$2.79 million upon successful financing of the Project ("Financial Closure"); and (3) a royalty equal to 6.25% of the available cash flow

from the first five years of the Project's commercial operation. Both parties agreed to do all things necessary to give effect to the Settlement Agreement.

[7] Ultimately, Enernorth did not achieve Financial Closure and, in August 2000, without informing Oakwell, Enernorth divested its interest in Project Company to a third party without in any way dealing with its second and third obligations, as set out above, to Oakwell. Oakwell took the position that Enernorth, in not providing for the disputed sums, had repudiated its obligations to Oakwell under the Settlement Agreement. Enernorth took the position that when it did not achieve Financial Closure, it was absolved of any obligation to pay Oakwell the disputed sums.

[8] When Oakwell learned of the repudiation, it sued Enernorth in Singapore in accordance with the attornment and choice of law clauses in the Settlement Agreement.

POSITIONS OF THE PARTIES

[9] The parties' positions are best articulated in their respective factums as follows:

The Appellant

Before its assets are seized under Canadian law to pay Oakwell's claims, Enernorth is seeking to have its defence to those claims adjudicated in a legal system that guarantees a trial before an independent and impartial judiciary and in a jurisdiction that operates under the rule of law. This will be had in Canada. What Enernorth is faced with, however, is having its assets seized under Canadian law to pay a judgment that was granted by a corrupt legal system before biased judges in a jurisdiction that operates outside the rule of law. Canadian law mandates the former. Justice Day imposed the latter.

This case concerns a judgment from the courts of Singapore. The uncontradicted evidence in this case, from leading international experts, reveals that Singapore is ruled by a small oligarchy who control all facets of the Singapore state including the judiciary, which is utterly politicised. The judiciary bends over backwards to support the government's and ruling elite's interests. Oakwell has close ties to the government. The trial judge held that Enernorth had breached a contract with Oakwell when Enernorth had done no such thing, and the Court of Appeal upheld the judgment, after a perfunctory hearing, despite the existence of manifest legal errors under Singapore law.

The Respondent

2. Justice Day correctly rejected Enernorth's attack on the Singapore legal system. In doing so, he carefully followed the test for enforcement of foreign judgments prescribed by the Supreme Court of Canada's recent decision in *Beals v. Saldanha*. First, he concluded that the Singapore courts had jurisdiction over the dispute. Enernorth has not contested this point. Second, Justice Day examined the various defences to enforcement advanced by Enernorth. He considered, and rejected, each defence that Enernorth now advances on appeal. He concluded that the Singapore courts are characterized by the rule of law and judicial independence; that Singapore's judiciary enjoys a demonstrated reputation for fairness in commercial matters; that the Singapore proceedings were conducted fairly in keeping with the principles of natural justice; that there was no evidence of a reasonable apprehension of bias against Enernorth, let alone actual bias, and that Enernorth's most important witnesses had contradicted themselves and their opinions could not be accepted [citation omitted].

ANALYSIS

[10] The application judge relied on the Supreme Court of Canada's decision in *Beals v. Saldanha*, [2003] 3 S.C.R. 416, and concluded:

[T]he test to decide recognition and enforcement of the Singapore decision will be whether or not the foreign court properly assumed jurisdiction by applying the real and substantial connection test. If that test is met, the court will then decide whether or not Enernorth succeeds in proving any of its defences.

He had no difficulty concluding that there was a real and substantial connection with Singapore, and his finding in this respect is not disputed in this court.

[11] Rather, the appellant argues that there are three pre-conditions, or "filters", for recognizing a foreign judgment and enforcing that judgment domestically. Those three factors are:

1. That the foreign court must have appropriately exercised jurisdiction based on the "real and substantial connection" test (first filter);
2. That the legal system of the court from which the judgment came must meet Canadian constitutional standards (second filter); and
3. That the foreign proceedings must not have been tainted by fraud or conflict with the law or public policy of Canada (third filter).

[12] The appellant relies on certain passages from the majority judgment in *Beals* to support its "second filter" argument. The passages cited are all found in

that part of the majority judgment where the defence of natural justice is discussed. They are not isolated stand-alone passages.

[13] In my view, the majority judgment in *Beals* makes it clear that once an enforcing court is satisfied pursuant to the “real and substantial connection” test set out in *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, that the foreign court properly took jurisdiction, it next must consider the defences available to a domestic defendant, who seeks to have a Canadian court refuse enforcement of a foreign judgment. As Major J., for the majority, noted at paragraph 40 of *Beals*:

The defences of fraud, public policy and lack of natural justice were developed before *Morguard*, *supra*, and still pertain.

[14] The majority then went on to consider these three defences and concluded, at paragraph 79:

Having properly taken jurisdiction, the judgment of that court must be recognized and enforced by a domestic court, provided that no defences bar its enforcement. None of the existing defences of fraud, natural justice or public policy have been supported by the evidence. Although the damage award may appear disproportionate to the original value of the land in question, that cannot be determinative. The judgment of the Florida court should be enforced.

[15] In my view, the only support that might be found in *Beals* for the appellant’s “second filter” argument lies in the dissenting judgment of LeBel J. This court is bound by the majority opinion, which holds that, absent special or unusual circumstances which may require the creation of a new defence, the court’s inquiry is limited to a consideration of three defences – fraud, public policy and natural justice – once jurisdiction is established.

[16] As to the “third filter” that the foreign proceedings must not have been tainted by fraud or conflict with the law or public policy of Canada – the Supreme Court of Canada has defined this concept as a defence. It is not, as the appellant asserts, a precondition.

[17] The application judge carefully considered the evidence as it related to the defences of public policy, bias (as an aspect of the public policy defence) and natural justice. The defence of fraud was not raised.

[18] I will now turn to his consideration of each of those defences and assess his conclusion that they have not been made out.

THE PUBLIC POLICY DEFENCE

[19] In *Beals*, Major J. described the scope of the public policy defence at paragraphs 71 and 75:

The third and final defence is that of public policy. This defence prevents the enforcement of a foreign judgment which is contrary to the Canadian concept of justice. The public policy defence turns on whether the foreign law is contrary to our view of basic morality. As stated in Castel and Walker, *supra*, at p. 14-28:

.... the traditional public policy defence appears to be directed at the concept of repugnant laws and not repugnant facts...

How is this defence of assistance to a defendant seeking to block the enforcement of a foreign judgment? It would, for example, prohibit the enforcement of a foreign judgment that is founded on a law contrary to the fundamental morality of the Canadian legal system. Similarly, the public policy defence guards against the enforcement of a judgment rendered by a foreign court proven to be corrupt or biased.

...

The use of the defence of public policy to challenge the enforcement of a foreign judgment involves impeachment of that judgment by condemning the foreign law on which the judgment is based. It is not a remedy to be used lightly. The expansion of this defence to include perceived injustices that do not offend our sense of morality is unwarranted. The defence of public policy should continue to have narrow application [emphasis in original].

[20] The application judge concluded that “in the present case the asserted repugnancy is in the facts emanating out of Singapore, not the laws of Singapore” and, accordingly, he concluded that the defence of public policy is not available.

[21] Enernorth’s attack on the judgment in question is not that it resulted from a law that is contrary to the fundamental morality of the Canadian legal system, but rather that it is the product of a corrupt legal system, with biased judges, in a jurisdiction that operates outside the rule of law.

BIAS

[22] *Beals* makes it clear, in my view, that for a party to succeed on the bias aspect of the public policy defence, the party asserting bias must prove actual corruption or bias.

[23] The application judge carefully reviewed the evidence relied on by Enernorth in support of its bias argument. He considered the exchange between a witness and the Singapore trial judge concerning the correct spelling of the Koh Brothers Group's name, and the fact they now controlled Oakwell. He concluded that this evidence was insufficient to prove bias or corruption. He considered the evidence of the expert witnesses – Ross Worthington, Nihal Jayawickrama and Francis T. Seow – and concluded that their evidence was either unreliable (as in the case of Mr. Worthington) or too general to prove that there was not a fair trial in this case. He concluded there was a lack of evidence of corruption or bias in private commercial cases and no cogent evidence of bias in this specific case.

[24] In my view, the record supports his findings and they are owed deference in this court.

NATURAL JUSTICE

[25] The defence of natural justice is described in *Beals* at paragraph 60 and following:

The domestic court must be satisfied that minimum standards of fairness have been applied to the Ontario defendants by the foreign court.

The enforcing court must ensure that the defendant was granted fair process.

...

The burden of alleging unfairness in the foreign legal system rests with the defendant in the foreign action.

Fair process is one that, in the system from which the judgment originates, reasonably guarantees basic procedural safeguards such as judicial independence and fair ethical rules governing the participants in the judicial system.

...

The defence of natural justice is restricted to the form of the foreign procedure, to due process, and does not relate to the merits of the case. The defence is limited to the procedure by which the foreign court arrived at its judgment.

...

In Canada, natural justice has frequently been viewed to include, but is not limited to, the necessity that a defendant be given adequate notice of the claim made against him and that he be granted an opportunity to defend.

[26] At trial in Singapore, Enernorth did not contest the jurisdiction of the Singapore court, nor did it allege bias against the presiding judiciary. Enernorth argued that it would have been impossible for it to raise in the Singapore action, the defences it raises here. It has suggested that in doing so, it would likely face charges of sedition there. I note, however, that Enernorth in the Settlement Agreement agreed that the agreement was to be governed by Singapore law and that the courts of Singapore were to have non-exclusive jurisdiction to hear disputes over the agreement. It advanced a U.S. \$175 million counterclaim against Oakwell. The trial lasted thirteen days. As is the practice in Singapore, evidence-in-chief was led by way of affidavits from the twenty-one witnesses. Both parties had full opportunity to cross-examine each other's witnesses and filed extensive written submissions of fact and law. Judgment was reserved for several months and, thereafter, the trial judge issued a forty-six page judgment. Enernorth was ordered to pay to Oakwell the disputed sums in full. Enernorth's counterclaim was dismissed.

[27] Enernorth then appealed the judgment to the Singapore Court of Appeal, solely on the merits of the decision. It did not challenge the conduct or fairness of the trial, the jurisdiction of the Singapore courts or the impartiality of the judiciary. The appeal was dismissed from the bench.

[28] From the time of the Settlement Agreement, Enernorth was at all times represented by a prominent Singapore law firm known to have had a "long record of affiliation with the People's Action Party", Singapore's ruling political party.

[29] The application judge considered both the substantive and procedural law of Singapore, as well as its constitution and compared those laws to the Canadian rule of law. He concluded that "while Enernorth's experts, political scientists and lawyers, provide reports that aspects of the government of Singapore do not meet the standards of the rule of law in Canada, this evidence goes against Singapore's formal legal structure as evidenced by its constitution and laws" and, importantly, "furthermore, Oakwell has provided evidence to the contrary". He concluded that, on a balance of probabilities, both parties enjoyed fair process in the Singapore courts.

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CONCLUSION

[30] These cases are governed by their specific facts. The application judge found that Enernorth had failed to establish, on a balance of probabilities, any of the defences available to it and that, accordingly, the judgment should be enforced.

[31] In my view, the evidentiary record before the application judge supports his findings, which are entitled to deference in this court.

[32] Following the argument on this appeal, counsel for the appellant provided the court with a copy of the recent decision of Sachs J. in *State Bank of India v. Kothari Navarafna and Sayar Kothari*, [2006] O.J. 1125 (Sup. Ct. J.). As the motion judge noted, the factual issues raised in that case were not the same as the issues raised in this case.

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DISPOSITION

[33] For these reasons, I would dismiss the appeal.

[34] Costs of the appeal to the respondent are fixed in the sum of \$25,000.00 inclusive of disbursements and G.S.T. in accordance with the agreement of counsel.

RELEASED: June 9, 2006 “JL”

“J. MacFarland J.A.”

“I agree John Laskin J.A.”

“I agree H.S. LaForme J.A.”