2010 CarswellOnt 6086, 2010 ONCA 559

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ING Insurance Co. of Canada v. TD Insurance Meloche Monnex

IN THE MATTER of the Insurance Act, R.S.O. 1990, c. I.8, as amended, and O. Reg. 283/95

AND IN THE MATTER of the Arbitration Act, 1991, S.O. 1991, c. 17

AND IN THE MATTER of an Arbitration

ING Insurance Company of Canada (Applicant / Appellant) and TD Insurance Meloche Monnex (Respondent / Respondent)

Ontario Court of Appeal

E.E. Gillese J.A., H.S. LaForme J.A., and R.G. Juriansz J.A.

Heard: March 3, 2010
Judgment: August 24, 2010
Docket: CA C51308

Proceedings: Affirmed, 73 C.C.L.I. (4th) 105, 2009 CarswellOnt 2087, [2009] O.J. No. 1589 (Ont. S.C.J.)

Counsel: Eric K. Grossman for Appellant

Pamela L. Blaikie, Courtney Toomath-West for Respondent

Subject: Insurance

Insurance.

Cases considered by *E.E. Gillese J.A.*:

Andriano v. Wawanesa Mutual Insurance Co. (2007), 2007 CarswellOnt 5669 (F.S.C.O. Arb.) — referred to

ING Insurance Co. of Canada v. State Farm Insurance Co. (2009), 77 C.C.L.I. (4th) 198, 2009 CarswellOnt 5199, 97 O.R. (3d) 291, [2009] I.L.R. I-4887 (Ont. S.C.J.) — referred to

Liberty Mutual Insurance Co. v. Commerce Insurance Co. (2001), 2001 CarswellOnt 4710, 36 C.C.L.I. (3d) 269, [2002] I.L.R. I-4049, [2002] I.L.R. 7366 (Ont. S.C.J.) — followed

McIntosh v. Allstate Insurance Co. of Canada (2004), 2004 CarswellOnt 2467 (F.S.C.O. Arb.) — referred to

Pooler v. Guardian Insurance Co. of Canada (1999), 1999 CarswellOnt 4508 (F.S.C.O. Arb.) — considered

State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance) (2002), *(*sub nom. *Kingsway General Insurance Co. v. West Wawanosh Insurance Co.)* 58 O.R. (3d) 251, 35 C.C.L.I. (3d) 267, *(*sub nom. *Kingsway General Insurance Company v. West Wawanosh Insurance Company)* [2002] I.L.R. I-4087, 2002 CarswellOnt 425, 24 M.V.R. (4th) 1, 155 O.A.C. 238 (Ont. C.A.) — considered

Statutes considered:

Arbitration Act, 1991, S.O. 1991, c. 17

Generally — referred to

s. 49 — referred to

Insurance Act, R.S.O. 1990, c. I.8

Generally — referred to

Regulations considered:

Insurance Act, R.S.O. 1990, c. I.8

Disputes Between Insurers, O. Reg. 283/95

Generally — referred to

s. 2 — considered

s. 3(1) — considered

s. 7(1) — considered

Statutory Accident Benefits Schedule — Accidents on or after November 1, 1996, O. Reg. 403/96

s. 2 "insured person" — considered

s. 32 — considered

s. 32(1) — considered

s. 32(2) — considered

s. 32(2)(a) — considered

s. 59 — referred to

***E.E. Gillese J.A.*:**

1 In Ontario, people injured in car accidents have immediate access to statutory accident benefits. To ensure this result, the first insurer to receive a "completed application for benefits" is responsible for paying the benefits. While that insurer may dispute its obligation to pay the benefits, such disputes are not to hold up benefit payments to the injured person.[FN1]

2 In the present case, four people were injured in a car accident. They went to a chiropractor for treatment. The chiropractor sent ING Insurance Company of Canada ("ING") certain forms. The question arose: did the forms amount to "completed applications for benefits", thereby triggering ING's obligation to pay benefits? This appeal answers that question.

The Background

3 On July 23, 2006, Francisco Quintero was driving a car in which Susan Vasquez, Gema Aranciabia, and Gema Orellanza Aranciabia were passengers. The Quintero car was in a collision with a car being driven by Neil Sheppard. All four people in the Quintero car (the "claimants") were injured.

4 The Quintero car was allegedly insured by TD Insurance Meloche Monnex ("TD"). TD maintains that it had terminated the policy and was no longer the insurer of the vehicle at the time of the accident.

5 The Sheppard car was insured by ING.

6 Dr. R.F. Komeilinejad is a chiropractor who treated the claimants some time after the ac-

cident.

7 On May 30, 2007 - some 10 months after the accident - ING received four OCF-23 forms from Dr. Komeilinejad, one for each claimant (the "Form(s)"). The OCF-23 is entitled "Pre-approved Framework Treatment Confirmation Form". It is used by health practitioners to initiate pre-approved treatment for injuries.

8 The Forms consist of four pages. All four of the Forms were filled out in a similar fashion. In the top left-hand corner of page 1, there is a handwritten notation that reads: "Attn. AB Claims, ING Insurance". In the top right hand corner, there is a claim number, policy number and the date of the accident.

9 Below, in Part 1, each claimant's full name, address, telephone number, gender and birth date is set out. The Forms showed the same address (Fountainhead Drive in North York) for Francisco Quintero and Susan Vasquez. The Forms showed the Aranciabias as having the same address as one another (Queens Drive in North York). The Forms indicated that all four claimants had the same phone number.

10 In Part 2, ING is identified as the insurance company. The words "AB Claims" have been written in the boxes marked "Adjuster First Name" and "Adjuster Last Name".

11 Part 3 indicates that there is no other insurance coverage for the pre-approved treatment. Part 4 is a section explaining the meaning of conflict of interest in relation to the provision of treatment under the pre-approved treatment regime.

12 In Part 5 of the Forms, Dr. Komeilinejad is identified as the initiating health practitioner. Her office address, telephone number and FAX number are set out and, at the foot of Part 5, Dr. Komeilinejad signed each Form and dated them November 25, 2006.

13 Part 6 gives a brief description of the nature of the injuries that each claimant had sustained in the accident. Parts 7 and 8 address prior and current conditions and barriers to recovery.

14 In Part 9 of each Form, the pre-approved services are identified, as well as the estimated fee for the services.

15 All the claimants signed the Forms and dated them November 25, 2006.

16 When asked why she sent the Forms to ING, Dr. Komeilinejad stated that she had seen ING's contact information in her file and wanted to receive payment for the services she had provided to the claimants.

17 ING attempted to contact the claimants based on the information in the Forms. On June 5, 2007, ING tried calling the claimants using the telephone number provided on the Forms. That

telephone number was out of service. ING then did a Canada 411 search on the claimants' names but the search yielded only the same information as that contained on the Forms.

18 ING also called Dr. Komeilinejad and asked if she had any contact information for the claimants. Dr. Komeilinejad gave ING a telephone number for the cell phone of Gema Orellanza Aranciabia, a student. ING called the number and spoke briefly with Ms. Aranciabia, who said that she was leaving for a class and would call ING back later. Ms. Aranciabia never made the promised return phone call.

19 As well, an ING adjuster sent letters dated June 5, 2007, to each of the claimants. In the letters, the claimants were asked to complete and return the standard form used to make an initial application for accident benefits (the "OCF-1") or to contact the adjuster if they had any questions. The OCF-1 form was not included with the letters.

20 Unfortunately, all of the letters were mistakenly sent to the Fountainhead address. The Aranciabias had never lived at that address and apparently Mr. Quintero and Ms. Vasquez had moved from that address by the time that the letters were sent.

21 None of the letters were returned to ING. None of the claimants contacted ING at any time or filed an OCF-1 with ING.

22 On June 4, 2007, an ING adjuster wrote on each Form that ING was unable to respond as it could not confirm coverage.

23 ING closed the files for the four claimants on July 20, 2007.

24 TD opened accident benefit claims files for the claimants on July 25, 2007. On October 10, 2007, TD received four OCF-1 forms from the claimants' authorized representative, GM Accident Claims & Dispute Resolution Specialists.

25 Neither ING nor TD adjusted the files or paid benefits.

26 Section 2 of O. Reg. 283/95 (the "Regulation") to the *Insurance Act*, R.S.O. 1990, c. I.8 (the "Act") is the crucial legislative provision in the present case. It provides that

> [t]he first insurer that receives a completed application for benefits is responsible for paying benefits to an insured person pending the resolution of any dispute as to which insurer is required to pay benefits under section 268 of the Act.

27 ING and TD disagreed about which had been the first insurer to receive a completed application for accident benefits within the meaning of s. 2 and, therefore, which had priority to respond to the Claimants' claims for statutory accident benefits. They went to arbitration to have the matter determined.[FN2]

28 The arbitrator, Kenneth Bialkowski, found that ING's receipt of the Forms from the chiropractor constituted the receipt of a "completed application for benefits" within the meaning of s. 2. Based on this finding and in accordance with s. 2 of the Regulation, the arbitrator held that ING was responsible for the payment of benefits, pending determination of the priority dispute.

29 ING applied to the Superior Court to have the arbitrator's decision set aside. The application was dismissed.

30 ING now appeals to this Court.

31 For the reasons that follow, I would dismiss the appeal.

The Arbitrator's Decision

32 The arbitrator summarized the facts, noting that the ING contact information was in the chiropractor's file and that the Forms provided the names and addresses of each of the claimants, along with a brief description of the nature of the injuries each had sustained in the accident. He then set out the relevant legislative provisions.

33 Next, the arbitrator considered the governing legal principles. He stated that it is settled law that a person need not provide a formal application to an insurance company to be deemed to have provided a completed application for accident benefits. Relying on *Liberty Mutual Insurance Co. v. Commerce Insurance Co.* (2001), 36 C.C.L.I. (3d) 269 (Ont. S.C.J.), he opined that a person need only provide sufficient particulars to an insurance company so as to reasonably assist the insurer with the processing of the application and the assessment of the claim. Accordingly, the arbitrator viewed the real question to be whether the Forms "contained sufficient particulars to reasonably assist [ING] with the processing of the application and the assessment of the claim and whether ING took reasonable steps to obtain the necessary information from the information provided to [it]."

34 The arbitrator concluded that the Forms met this test. In reaching this conclusion, he referred to several pieces of evidence from which the natural inference could be drawn that proper contact with one of the claimants would likely have provided timely contact information for all of them. Further, he found that had ING sent letters to the correct addresses for the Aranciabias or had it reasonably followed up with Gema Aranciabia once it had her cell phone number, it would have obtained sufficient contact information to enable it to process the claims. He observed that ING knew that Gema Aranciabia was a student and may not have had her phone activated during business hours and that there was no evidence that ING attempted to contact her outside of normal school hours. Moreover, ING made no attempt to personally contact any of the claimants at the addresses shown on the Forms. Documentation indicated that the Aranciabias continued to reside at the Queens Drive address throughout the relevant period.

35 The arbitrator rejected ING's submission that the Forms were not a proper application because they had been submitted by an initiating health practitioner and not a "person" as set out in s. 32 of the Statutory Accident Benefits Schedule for accidents occurring on or after November 1, 1996 - O.Reg. 403/96 (the "Schedule").[FN3] The arbitrator held that there was no requirement that the actual claimant provide the notice, noting that in many cases an injured claimant is incapable of providing notice and that in *Liberty Mutual*, notice was provided by the injured party's lawyer.

36 The arbitrator then held that as ING was the first insurer to have received a completed application for benefits, pursuant to s. 2 of the Regulation, it was responsible for the payment of accident benefits, pending determination of the priority dispute.

The Application Judge's Decision

37 The application judge began by summarizing the facts and the reasons for decision of the arbitrator. In respect of the standard of review, he stated that the parties had agreed that the correctness standard applied to an appeal from the decision of a private arbitrator under the priority regulation.

38 Next, the application judge noted that the policy of "pay now, dispute later" underpins s. 2 of the Regulation.

39 The application judge then undertook a detailed consideration of *Liberty Mutual*. ING had argued that the arbitrator erred in applying the reasoning in *Liberty Mutual* because *Liberty Mutual* involved a claim for accident benefits under the predecessor regime, which did not include provisions for pre-approved framework claims. The application judge rejected this argument, stating that he did

> not see how the addition of a further benefit, such as [pre-approved frameworks], changes the over-arching "pay now, dispute later" policy informing the [statutory benefits] regime. The reasoning of Lissaman J. [in *Liberty Mutual Insurance Co.*] fits as well with the current [statutory benefits] scheme as it did with the predecessor one. The Regulation seeks to start [statutory benefits] flowing to entitled claimants as quickly as possible, without awaiting the resolution of priority disputes amongst insurers. *Liberty Mutual Insurance Co.*'s functional, rather than formal, approach to interpreting what constitutes a "completed application" to commence the payment of benefits supports the policy underlying the [statutory benefits] regime.

40 He concluded that the arbitrator was correct in accepting and applying the principle set out in *Liberty Mutual*. The application judge noted that in applying that principle, the arbitrator made a key finding of fact: had ING sent the letters to the correct address for the Aranciabias or made better efforts to reach Gema Aranciabia by telephone, sufficient contact information would have been obtained which would have allowed ING to process the claims. He noted that this

finding was "amply supported" by the evidence and there was no reason to interfere with it.

41 The application judge also queried why, at a minimum, ING did not treat the Forms as notice by the claimants of their intention to apply for benefits and send them the appropriate application forms as required by s. 32(2) of the Schedule.

42 Finally, the application judge rejected ING's submission that the arbitrator had erred in holding that a benefits application could result from a communication made by a person, such as the chiropractor in the present case, on behalf of the injured claimant. He noted that this was exactly what had taken place in *Pooler v. Guardian Insurance Co. of Canada*, [1999] O.F.S.C.I.D. No. 233 (F.S.C.O. Arb.), where invoices submitted by a treating sports clinic had been held to constitute sufficient notice within the meaning of the former s. 59 of the Schedule, and that in *Liberty Mutual* it was the injured party's lawyer who provided notice of the claim.

The Issue

43 This appeal raises a single issue: did the application judge err in upholding the arbitrator's decision that ING was the first insurer to receive a completed application for accident benefits within the meaning of s. 2 of the Regulation?

44 In addition to addressing the issue as framed, ING asks the court to answer the following four questions.

1. Did the arbitrator err (as upheld by the application judge) in finding that ING could have, through more extensive efforts, obtained the information necessary to adjust the potential claims of the claimants?

2. Did the arbitrator err (as upheld by the application judge) in implicitly accepting that a third party service provider, Dr. Komeilinejad, was an agent authorized to bind the claimants in asserting claims with ING?

3. What are the broader implications of the interpretation given by the arbitrator to the meaning of what constitutes a "completed application for benefits"?

4. Of what significance is the inconsistent interpretation reached in *ING Insurance Co. of Canada v State Farm Insurance Co.*, (April 15, 2009) (Arbitrator L. Samis) and upheld on appeal, as reported at (2009), 97 O.R. (3d) 291 (Ont. S.C.J.)?

45 It bears noting that this is an appeal from the decision of the application judge. Thus, it is the decision of the application judge that is under consideration and the alleged errors should be those of the application judge. Nonetheless, when deciding the issue, I will briefly address these questions.

The Standard of Review

46 ING submits that the standard of review to be applied by this court is that of correctness.[FN4] TD makes a number of arguments in favour of a reasonableness standard of review.

47 In my view, it is beyond debate that in this case, the standard of review is that of correctness. According to the reasons of the application judge, both parties agreed that he was to apply a correctness standard of review to the arbitrator's decision and it was that standard which he applied. The order of the application judge comes before this court by way of an appeal, albeit with leave.[FN5] As the application judge had to decide whether the arbitrator was correct in his determination that ING was the first insurer to receive a completed application for benefits and the application judge's decision comes to this court by way of appeal, this court must determine whether the application judge was correct in upholding the arbitrator's decision.

48 I would simply add that all of the arguments that TD makes in favour of the reasonableness standard of review relate to a review of arbitrators' decisions. Accordingly, those are arguments that apply to the standard of review that the application judge was to apply when reviewing the arbitrator's decision. Had TD wished to make these arguments, they should have been made below. As it stands, the application judge applied a correctness standard of review and, as no cross-appeal was taken on this matter, the propriety of the standard of review used by the application judge is not under scrutiny by this court.

Analysis

49 ING's position is essentially this. It wrote to the claimants, asking them to send in completed application forms for benefits. No such forms were ever received. The claimants never communicated - and may never have had - an intention to assert a claim with ING. In contrast, it is clear that the claimants intended to seek accident benefits from TD because they submitted completed OCF-1 forms to TD on October 10, 2007. In the circumstances, ING submits it was an error for the arbitrator to have found that ING was the first insurer to receive a completed application for benefits and the application judge erred in refusing to overturn that decision.

50 I disagree.

51 I agree with the application judge, for the reasons that he gave, that the principle in *Liberty Mutual* applies. Accordingly, an application for accident benefits need not be on a certain form in order to be valid - it need only provide sufficient particulars to reasonably assist the insurer with processing the application, identifying the benefits to which the applicant may be entitled, and assessing the claim: see paras. 41-42 of *Liberty Mutual*. That is, the insurer only needs sufficient information to meaningfully move forward or commence the process of adjusting the claim: see *Andriano v. Wawanesa Mutual Insurance Co.*, 2007 CarswellOnt 5669 (F.S.C.O. Arb.), at para. 36 and *McIntosh v. Allstate Insurance Co. of Canada*, 2004 CarswellOnt 2467 (F.S.C.O. Arb.), at paras. 32-33, both relying on *Liberty Mutual*.

52 The Forms contained significant information about the claimants. The claimants had signed the Forms. They obtained chiropractic treatment and gave the chiropractor information about ING. This is evident from the fact that the Forms identified the ING claim and policy numbers. The Forms also set out the treatment that had been provided and requested payment for the same. When the adjuster at ING received the Forms on May 30, 2007, she had sufficient information to assist her with commencing the processing of the applications and assessing the claims. As discussed more fully below, the arbitrator was entitled to find that ING had failed to take reasonable steps to obtain the necessary further information from the claimants. Consequently, I see no error in the application judge upholding the arbitrator's determination that the Forms, in the circumstances of this case, amounted to completed applications for accident benefits.

Question 1 - ING's Efforts to Obtain Additional Information

53 ING argues that the application judge erred in failing to interfere with the arbitrator's finding that had ING taken reasonable steps, it could have obtained sufficient information to process the claims and pay benefits to the claimants. It contends that the only question was whether the information constituted a completed application and that ING's information gathering is irrelevant to that assessment.

54 I see nothing in this argument. As I explained above, the principle in *Liberty Mutual* applies. Consequently it was relevant for the arbitrator to consider ING's conduct. As for the finding of the arbitrator, as the application judge stated, that finding was amply supported by the evidence and there is no reason to interfere with it. That is, it was open to the arbitrator to find that contact with one claimant would have led to contact with the others and, had ING sent letters to the correct address for the Aranciabias or made better efforts to contact Gema Aranciabia by phone, it would have obtained the information necessary to process their claims.

Question 2 - Provision of the Forms by a Third Party

55 ING points to s. 32(1) of the Schedule which provides that a "person" shall notify the insurer of his or her intentions to apply for accident benefits. It then points to the definition of an "insured person" in s. 2 of the Schedule, which does not expressly include a third party. Consequently, ING contends, as a third party service provider is not an "insured person" nor is it necessarily the injured person's agent, in the absence of evidence of any agency agreement between Dr. Komeilinejad and the claimants, it cannot be said that Dr. Komeilinejad notified ING of the claimants' intention to apply for accident benefits.

56 This argument appears to be misconceived. An insurer's obligation arises if it is the first insurer to receive a completed application for accident benefits. There is no requirement in the legislation that the completed application be submitted by the injured person and I see no reason for reading in such a requirement. As the arbitrator noted, the claimant may be physically inca-

pable of submitting the claim due to his or her injuries. As well, one can conceive of language and disability challenges that might lead to someone other than the injured person submitting an application. Given that there is no requirement that the completed application be submitted by the injured person him or herself, there was no need for the arbitrator or the application judge to have determined whether Dr. Komeilinejad was acting as agent for the claimants in sending in the Forms to ING. Even if I am wrong on this matter, given that the claimants signed the Forms and gave the chiropractor ING's information, including policy and claim numbers, as well as the date of the accident, it was open to the arbitrator to have found that the claimants intended to apply for accident benefits from ING and that Dr. Komeilinejad submitted the Forms on behalf of the claimants.

Question 3: The Broader Implications of this Decision

57 ING makes essentially two arguments on this matter.

58 First, it says that the goal of the Regulation is to ensure that insured persons are not left without benefits in the event of a priority dispute. It submits that this goal is not served by broadening the concept of a "completed application for benefits" to include a single, stale-dated PAF treatment plan or invoice from a service provider in the absence of any indication that the injured person intended to pursue a claim for accident benefits.

59 Second, ING says that ambiguity and uncertainty about what constitutes a completed application for accident benefits renders it difficult for an insurer to comply with this court's decision in *State Farm Mutual Automobile Insurance Co. v. Ontario (Minister of Finance)* (2002), 58 O.R. (3d) 251 (Ont. C.A.), in which it emphasized the importance of providing timely notice of a dispute, where priority to pay the benefits is challenged by an insurer.

60 I do not accept either of these submissions. The goal of the Regulation is to "pay now, dispute later". By adopting a flexible - rather than a formalistic - approach to deciding what documents amount to a completed application for benefits, the courts have encouraged insurers to do just that. Once an insurer has received sufficient information that it can obtain any further necessary information, it must obtain that additional information and begin to pay benefits. This interpretation furthers the goal of "pay now" as the insurer cannot rely on shortcomings in written documentation as a ground for refusing to pay benefits. Furthermore, in my view, there is nothing inconsistent with such an approach to this court's admonition in *Kingsway General Insurance* that insurers must give timely notice of a priority dispute. If an insurer takes steps to obtain any additional information that may be required to pay benefits and then pays such benefits, the insurer will have the opportunity to get the information necessary to give timely notice if it disputes its obligation to pay such benefits.

***Question 4: Reconciling This Decision with* ING v. State Farm**

61 In *ING v. State Farm*, ING became aware of an accident. It met with the claimant and

took a statement that described the accident circumstances, the claimant's injuries, her employment status and her access to benefits. The statement did not include a request for accident benefits. Twelve days later, the claimant filed an OCF-1 form with ING. Just under 90 days later, ING commenced a priority dispute with State Farm. State Farm argued that the statement that ING had taken amounted to a completed application for the purposes of commencing the 90-day limitation period within which an insurer may dispute its obligation to pay benefits.[FN6]

62 ING says that *ING v. State Farm* stands for the proposition that the claimants' failure to submit OCF-1s to ING and their submission of such forms to TD makes it clear that TD was the first insurer to receive a completed application for accident benefits. It submits that the decision in the present case is inconsistent with that rendered in *ING v. State Farm.*

63 I disagree.

64 *ING v. State Farm* can be distinguished from the present case on two factual bases. First, the statement in *ING v. State Farm* did not notify ING of the claimant's intention to apply for accident benefits nor did it include a request for the payment of benefits. By way of contrast, in the present case each Form was signed by the claimant, sets out the treatment for that claimant and requests payment for those treatments.

65 Second, ING's conduct in the two cases was very different. In *ING v. State Farm* at p. 3, the arbitrator praised ING, saying that it displayed a "high caliber of claims handling which is appropriately responsible to notification of a claim". At p. 2, he said that:

> ING's course of conduct in [respect of the statement] is entirely appropriate, and indeed is to be encouraged. They moved expeditiously to respond to a potential claim. They have been thorough in their investigation. They have been careful to deal with all of the rather complicated requirements of the insurance regime. On December 5, 2006, they sent a letter to the claimant providing an accident benefits package of various documents and enclosing descriptions of the various benefits that would potentially be available to the claimant.

66 In the present case, however, the arbitrator was justifiably critical of ING. As has already been noted, ING did not move expeditiously to respond to a potential claim nor was it thorough in its investigation. After receiving the Forms, ING failed to take reasonable steps to obtain any additional information that it required. It never sent letters to the Aranciabias' correct address. It failed to reasonably follow up with Gema Aranciabia by phone and it made no attempt to personally contact any of the claimants at the addresses shown on the Forms. Further, ING did not carefully deal with the requirements of the insurance regime. Section 32(2) of the Schedule requires an insurer to promptly provide a claimant with the appropriate application forms.[FN7] ING failed to send the appropriate forms to the claimants in this case, whereas in *ING v. State Farm*, it did so promptly.

67 These factual differences fully explain the different results in the two cases, thus, I do not

view them as inconsistent. Moreover, it is significant that in *ING v. State Farm* at p. 6, the arbitrator opined that there might be circumstances relating to the conduct of the insurer that would justify holding the insurer as having received a completed application in the absence of receipt of the prescribed form. He noted that in the case before him there was no documentation submitted in lieu of a form and there were no communications in which the claimant had, in writing, requested benefits.

68 The present case falls within the circumstances described by the arbitrator in *ING v. State Farm* as justifying a finding that the insurer had received a completed application form. The Forms are written documents submitted in lieu of the OCF-1 form, in the sense that they were a request for the payment of benefits. The claimants had each signed the Forms, thus, there were written request for benefits. These facts, coupled with ING's failure to take reasonable steps to obtain additional information, justify the arbitrator's conclusion that ING received a completed application for accident benefits within the meaning of s. 2 of the Regulation.

69 While ING argues that the reasoning of Strathy J. in the appeal decision in *ING v. State Farm* supports its position, I disagree. It is correct to say that Strathy J. indicated that the plain meaning of the words in s. 3(1) of the Regulation contemplated an OCF-1 form, however, he went on to say that there are cases - distinguishable from the one before him - in which an insurer that has not received a completed OCF-1 form should be treated as being the first insurer to have received a completed application for accident benefits. He expressly referred to the decisions of the arbitrator and application judge in the present case as one such case: see para. 35. At para. 37, he described ING's conduct in the present case as "unsatisfactory claims handling" that resulted "in prejudice or potential prejudice to the injured party". He went on to state that "The insurer was not permitted to avoid its responsibilities by sticking its head in the sand and hoping that the claim would disappear or that the claimant would pursue another insurer."

70 I share Strathy J.'s view, expressed at para. 44 of his reasons, that the interests of the insurance industry favour certainty in the meaning of a "completed application" as it is that which triggers the commencement of the limitation period. However, I also agree with Strathy J. when he says that while normally a completed application will mean an application in the OCF-1 form, there will be those "relatively rare cases" in which because of "waiver, estoppel, delay or deflection", an insurer who has not received an OCF-1 form is to be treated as the first insurer for the purposes of s. 2. As I have already explained, the findings of the arbitrator, as affirmed on appeal in the present case, justify treating ING as the first insurer in the present case.

Disposition

71 Accordingly, I would dismiss the appeal with costs to the respondent fixed at $8,000.00, inclusive of disbursements and applicable taxes.

H.S. LaForme J.A.:

I agree.

R.G. Juriansz J.A.:

I agree.

FN1 The legislative provisions underlying these statements are set out below.

FN2 Section 7(1) of the Regulation provides, among other things, that if insurers cannot agree on who is required to pay benefits, the dispute shall be resolved through an arbitration under the *Arbitration Act, 1991*, S.O. 1991, c. 17.

FN3 Section 32(2)(a) reads as follows: "The insurer shall promptly provide the person with, the appropriate application forms."

FN4 In oral argument, ING resiled somewhat from this position but argued that standard of review was not of particular importance in this case.

FN5 *Arbitration Act, 1991*, S.O. 1991, c. 17, s. 49.

FN6 Section 3(1) of the Regulation provides: "No insurer may dispute its obligation to pay benefits under section 268 of the Act unless it gives written notice within 90 days of receipt of a completed application for benefits to every insurer who it claims is required to pay under that section."

FN7 In *ING v. State Farm* at p. 5, the arbitrator described this as the insurer's "unequivocal" obligation.

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49 If left to my own devices, I would extend the time. The Jean Estate and Mr. Wong clearly had the intention to appeal very soon after the Arbitrator's decision was released. They complied with the *Rules of Civil Procedure* which they thought was applicable.

50 This application was issued soon after the appeal was quashed. An extension of time would cause no discernible prejudice to Wires Jolley.

51 Mr. Hainey submits that leave can be granted. He relies on the following statement of Feldman J.A. in *Brent v. Brent*[FN22]:

> The test for granting an extension of time is set out *Frey v. MacDonald*...the appellant must have maintained a firm intention to appeal from the beginning, the failure to observe the time limits must be reasonably explained, subject to a broader rule that leave will be granted if the justice of the case requires it, including the merits of the proposed appeal and the prejudice to the respondent.

52 On first reading *Brent v. Brent* seems to involve an appeal from an Arbitrator's decision.[FN23] However, on a closer review the issue becomes clear. Weekes J. had quashed an appeal from an arbitrator's decision. The appellant sought to appeal that decision under the *Rules of Civil Procedure.* When the time limit set forth in the *Rules of Civil Procedure* expired, the appellant sought an extension. A broad power to extend time is set forth in the *Rules of Civil Procedure*: rule 3.02.

53 Section 47 of the *Arbitrations Act, 1991* imposes a time limit but says nothing about an extension of time. Is that significant? I believe it is.

54 Section 39 of that statute reads:

> The court may extend the time within which the arbitral tribunal is required to *make an award*, even if the time has expired.(My italics)

55 In my view, I do not have the authority under the *Arbitration Act* to extend the time to appeal because:

> (i) the statute has created its own time frame within which an appeal is to be commenced. The time limits set forth in the *Rules of Civil Procedure* do not apply;
>
> (ii) since jurisdiction to extend time in one situation is expressly given in section 39, I am of the view the power to extend a time limit in the *Arbitration Act, 1991*, does not exist unless it is specifically conferred;
>
> (iii) section 47 of the *Arbitration Act, 1991* contains no such statement.

56 Is there inherent jurisdiction to extend the 30 day period? Not in this case. Inherent jurisdiction is not limitless. As Morawetz J. wrote in *Scion Capital LLC v. Goldfields* (2006), 15 B.L.R. (4th) 331 (S.C.J.), at para. 34:

> Inherent jurisdiction is a power derived from the very nature of the court as a superior court of law, permitting the court to maintain its authority and to prevent its process being obstructed and abused. In *Stelco Inc., Re*, the Court of Appeal, at para. 35, states: In spite of the expansive nature of this power, inherent jurisdiction does not operate where Parliament or the legislature has acted. As Farley J. noted in *Royal Oak Mines*, *supra*, inherent jurisdiction is "not limitless; if the legislative body has not left a functional gap or vacuum, then inherent jurisdiction should not be brought into play." [Citations omitted.]

57 For the reason already given I am not of the view the legislature has left a "functional gap or vacuum". The legislature has given the court jurisdiction to extend time in one instance in proceedings to which the *Arbitration Act, 1991* applies. This is not that situation.

58 As Juriansz J.A. said in *Danso-Coffee v, Ontario*, 2010 ONCA 171 at para. 61:

> Time limits and limitation periods serve a valuable function in the legal process by promoting finality. The fact that time limits and limitation periods are to the detriment of parties who miss them does not affect the equities, in my view.

VI Should Leave to Appeal Be Granted?

59 Even if Mr. Wong succeeded, should leave to appeal be granted?

60 Leave to appeal can only be granted if three preconditions are met:

a) the issue raised is a question of law;

b) the matters at stake in the arbitration are sufficiently important to the parties that an appeal is justified; and

c) the determination of the issue raised will significantly impact the rights of the parties.

61 Eight paragraphs and various subparagraphs in the notice of application are devoted to the Arbitrator's alleged errors in law. They can be condensed. In essence, Mr. Wong maintains the Arbitrator erred:

a) by saying the regulations outlining the specific requirements which contingency fee agreements must meet[FN24] had not been proclaimed by September, 2005. The parties' agree the arbitrator was mistaken. The regulations came into force October 1, 2004;[FN25]

b) by failing to apply section 28.1 of the *Solicitors Act*, *supra* and the regulation relating to contingency fee agreements; and

c) by awarding an amount which was determined as if there was a valid contingency agreement in place containing the terms advocated by Wires Jolley rather than an amount determined by application of the factors used to determine a fee which is fair and reasonable.

62 Do any of those raise a question of law? Questions of law are questions about what the correct legal test is.[FN26] The question as to whether section 28.1 of the *Solicitors Act* applied to the parties' fee arrangement is, in my view, one of law. Despite the importance to the parties of the matters at stake in the arbitration, Mr. Wong cannot satisfy the third precondition outlined above. Section 28.1 of the *Solicitors Act* and the related regulation do not "significantly affect the rights of the parties". Their provisions had no practical impact on the arbitrator's decision because he concluded, as Mr. Wong advocated, that the fee arrangement was not a valid contingency arrangement.

63 In determining a "fair and reasonable" fee, the arbitrator turned to *quantum meruit.* The applicants complain that the Arbitrator was wrong in withdrawing that equitable remedy from the toolbox. Indeed paragraph 54 of the applicants' factum says:

After determining that there was no agreement as to the terms of the contingency fee agreement, the Arbitrator quite properly stated that he was required to apply the doctrine of *quantum meruit* to the question of the success fee. However, instead of properly applying the doctrine...the Arbitrator merely applied a percentage of 10% to the 2007 value of the assets of the Tung Jean Estate, the very calculation Wires claimed applied.

64 The complaint is that the Arbitrator fashioned the remedy inadequately: the arbitrator paid lip service to some but not all of the relevant factors when, in reality, he chose to ignore the factors and enforce the fee arrangement advocated by Wires Jolley.

65 Unquestionably at first sight the fact the amounts equate seems more than coincidental. However, closer scrutiny provides an explanation. Although the portion of the reasons dealing with the issue of fair and reasonable compensation is not lengthy, the reasons of the Arbitrator clearly outline his thought process. By way of example, at paragraph 37 he wrote:

...the quality of services rendered by Mr. Wires are (sic) not in question. He is very experienced counsel who worked very hard on behalf of his clients. The obstacles he faced were formidable, but with skill and perseverance he succeed (sic) to his clients' entire satisfaction. Indeed, the ultimate result may well have exceeded Mr. Wong's fondest expectations.

66 In other paragraphs the arbitrator referred to the complexity and enormity of the worldwide litigation Mr. Wires was overseeing, the fact Mr. Wires expended "substantial" time "involving a great deal of travel, and innumerable conversations...with counsel in many jurisdic-

tions"[FN27] While he found that the dramatic increase in the estate's value "came about largely through the passing of time and not because of Mr. Wires' efforts"[FN28] he was of the view Mr. Wires was instrumental in achieving a settlement which allowed Mr. Wong to enjoy the fruits of escalating market value.

67 In concluding that Wires Jolley was entitled to a substantial premium, the Arbitrator said:

> "There is no formula by which to calculate a premium. *Each case will stand or fall on its particular facts.* And in this case they show that Mr. Wires, by his knowledge, skill, perseverance and great devotion to his client, brought about an excellent result. True, as I said before, the large accretion of value was incidental, but this would not have come about had the winding up of the estate, with its world-wide implications, not been overseen, directed and managed with great astuteness."[FN29] [My italics]

68 These passages and references support the conclusion that in determining the appropriate fee, questions of mixed fact and law were engaged. As Iacobucci J. said:

> "In short, as the level of generality of the challenged proposition approaches utter particularity, the matter approaches pure application, and hence draws nigh to being an unqualified question of mixed law and fact."[FN30]

69 The applicants' submissions with respect to the Arbitrator's approach to *quantum meruit* do not involve a question of law. In any event, the arbitrator did consider the relevant factors.[FN31] A reading of the reasons in their entirety evidence the fact the Arbitrator considered the time and effort required and spent, legal complexity, the degree of responsibility assumed, the monetary value of the matters at issue, the importance of the matters to the clients, the degree of skill and competence demonstrated by Mr. Wires, the results achieved, the ability of the client to pay and to the extent he could, the clients' expectations as to the amount of the fee. While my determination of what was appropriate may not have accorded with the Arbitrator's, I am not in a position to say it was unreasonable

70 I do not believe that the preconditions to the granting of leave to appeal have been satisfied.

71 I reiterate that while the parties could have agreed to an appeal on a question of fact or a mixed question of fact and law,[FN32] they did not do so.

VI Conclusion

72 For the reasons given the application is dismissed.

73 Absent agreement short written submissions on costs not exceeding four pages (exclusive of a costs outline) may be provided to me through Judges' Administration by, in the case of

Wires Jolley, September 24, 2010 and in the case of Mr. Wong, October 8, 2010. I appreciated the assistance of counsel.

FN1 Originally McCague Peacock Borlack McInnis & Lloyd acted for the estate and Mr. Wong. David Wires was the lawyer performing the work. He left that firm in 2002 and took the file with him.

FN2 After deducting payments made to Wires Jolley LLP on account, the arbitrator ordered the applicants to pay the principal sum of $1,427,107.68, pre-award interest from July 20, 2007 of $144,494.65, the sum of $129,643.41 on account of costs and post-award interest.

FN3 It appears that the problem first arose in the summer of 2001.

FN4 Wires Jolley set forth two options in a September 12, 2005 letter.

FN5 Mr. Wong responded on September 16, 2005. There were subsequent communications on September 21, 22 and 23. In a September 23, 2005 e-mail Mr. Mis advised Mr. Wires: "Your emails to Peter and his responses will now constitute the revised contingency success fee agreement..."

FN6 Copies appear at tab 3 of the applicants' compendium. It is not clear from the calculation where the values were drawn. Counsel for Mr. Wong takes the position they were based on estimated values as at the date Ms Jean died in 1999.

FN7 By this time Mr. Wong had paid $118,425 on account of the success fee. That payment was made in December, 2005.

FN8 The September 12, 2005 letter from Wires Jolley to Mr. Wong had proposed that "Disputes arising from or in relation to the success fee will be resolved by arbitration in Toronto with a single arbitrator from ADR Chambers."

FN9 *Jean Estate v. Wires Jolley LLP* (2008), 90 O.R. (3d) 231 (S.C.J.)

FN10 *Jean Estate v. Wires Jolley LLP*, 2009 ONCA 339(at para. 84)

FN11 The Decision and Reasons are dated November 2, 2009 but the parties agree the release date was much later.

FN12 The Ruling on Costs is dated January 12, 2010. Once again, the parties agree it was not delivered for some time.

FN13 The formal award embodying the Decision and Reasons dated November 2, 2009 and the Ruling on Costs dated January 12, 2010, also bears the date of January 12, 2010.

FN14 Until the application was argued it was not clear to what extent the applicants' argument was based on the *International Commercial Arbitration Act*, R.S.O. 1990, c. I.9. During argument, it became clear that the applicants' relied on the *Arbitration Act, 1991* and not the *International Commercial Arbitration Act.* For that reason, I have not mentioned the latter statute in the body of my endorsement.

FN15 The grounds are set forth in section 46 (1) 1 through 10 and include the invalidity of the arbitration agreement, procedural unfairness and reasonable apprehension of bias.

FN16 The reference is to the *ADR Rules* effective September 7, 2007. Paragraph 13.5 of the *ADR Rules* effective January 1, 2009 is identically worded.

FN17 *ADR Rules*, section 2.1.

FN18 (2002), 61 O.R. (3d) 257 (C.A.) at 283

FN19 *Walmsley v. Griffith* (1886), 13 S.C.R. 434

FN20 *Ibid.*

FN21 *Byers (Litigation Guardian) v. Pentex Print Master Industries Inc.* (2003), 62 O.R. (3d) 647 (C.A.) at para. 17

FN22 [2004] O.J. No. 637 (C.A.) at para. 10

FN23 The appellants rely on *Demers v. Desrochers*, [2009] O.J. No. 3294 (S.C.J.). The court held the 30 day time period set forth in section 47 of the *Arbitration Act, 1991*, had not started to run because the parties had contractually agreed to defer its commencement until the arbitrator's decision on costs had been delivered. In *obiter*, the court indicated it would have extended the time even if it had expired on the authority of *Brent v. Brent, supra.*

FN24 O'Reg. 195/04

FN25 Ontario Gazette, Vol. 137-27 dated July 3, 2004.

FN26 *Director of Investigation and Research v. Southam Inc. et al.* (1998) 144 D.L.R. (4th) 1 (S.C.C.) at para. 35

FN27 At paragraph 39

FN28 At paragraph 35

FN29 At paragraph 41

FN30 *Southam*, *supra*, at para. 37

FN31 *Cohen v. Kealey & Blaney* (1985), 26 C.P.C. (2d) 211 (Ont. C.A.)

FN32 *Arbitration Act*, *supra*, s. 45(3)

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Wong v. Wires Jolley LLP

PETER WONG, ESTATE TRUSTEE OF THE ESTATE OF TUNG JEAN and PETER WONG (Applicants) and WIRES JOLLEY LLP (Respondent)

Ontario Superior Court of Justice

A.D. Grace J.

Heard: June 11, 2010
Judgment: September 7, 2010
Docket: CV-10-396534

Counsel: Glenn A. Hainey, Christopher Stanek for Applicants

Paul Michell, James Renihan for Respondent

Subject: Estates and Trusts; Public; Civil Practice and Procedure

Estates and trusts.

Alternative dispute resolution.

***A.D. Grace J.*:**

1 The administration of the estate of Tung Jean was complex and, for many years, hotly contested. Net proceeds of $20,546,298.49 were generated after the settlement of protracted, worldwide litigation.

2 Lawyer David Wires and his firm Wires Jolley LLP ("Wires Jolley") acted for the estate and its sole beneficiary Peter Wong[FN1]. The issue is whether Wires Jolley should be paid a contingency fee of $2,054,629.85 as ordered by the Honourable Fred Kaufman, Q.C., who acted as arbitrator. [FN2]

3 Some brief factual and procedural history provides important context for the issues ad-

dressed by counsel during their submissions.

I How Did the Dispute Arise?

4 Tung Jean passed away in 1999. Her husband, S.T. Wong, died a short time later.

5 Peter Wong was Tung Jean's sole surviving child. S.T. Wong had been married before. Nine children were born during his first marriage. Bitterness among the children of the blended family quickly ensued.

6 Ms Jean's assets were extensive and far flung. They were located in Canada, Hong Kong, Singapore and Japan. Her holdings included several pieces of real estate, bank accounts, shares in companies; even a transferable golf course membership.

7 The administration of the estates of Tung Jean and her husband precipitated lawsuits in several jurisdictions.

8 Mr. Wires was retained at an early stage. Until 2007, he played a significant role in the administration of the estate of Tung Jean, acted in respect of Ontario based litigation and oversaw ongoing legal proceedings in other parts of the world.

9 Wires Jolley rendered accounts regularly but was paid sporadically. With the estate embroiled in litigation, converting the estate into cash and then distributing the proceeds was delayed.

10 The provision of services by Wires Jolley was uninterrupted despite arrears in payments. The magnitude of the mounting, unpaid legal accounts became an increasing source of friction.[FN3] In 2004, the parties began to discuss an alternative fee arrangement. Instead of fees being charged based on hours spent, legal fees would be tied to the value of assets of the estate.

11 No agreement had been reached by the time the various factions of the Tung Jean family assembled in Hong Kong to try to obtain a mediated resolution of their dispute.

12 The Tung Jean family reached an accord on September 19, 2004. For the purposes of this application, the settlement included two significant features:

(a) Wires Jolley was to receive $400,000 in trust; and

(b) the solicitors for the estate of Tung Jean could seek probate, without challenge, in the various jurisdictions in which assets were held.

13 Approximately a year later, Wires Jolley sought and obtained a consent order of Kiteley J. of this Court. The September 27, 2005 order approved various accounts of Wires Jolley and

the predecessor law firm and directed that most of the funds held by Wires Jolley in trust ($372,547.27 of $400,000) be paid on account. Wires Jolley was directed to pay the balance to Peter Wong.

14 As the motion materials presented to Kiteley J. were being prepared, Wires Jolley and Mr. Wong were quietly finalizing a new fee arrangement going forward. Walter Mis, an Alberta based lawyer, assisted Mr. Wong in this endeavour.

15 The new arrangement was not outlined in a single document. Its terms are to be drawn from a proposal of Wires Jolley[FN4] and subsequent communications.[FN5] While the parties seemed to agree the fee was to be equal to ten per cent of the net value of the estate's assets, the valuation date is the subject of disagreement.

16 Wires Jolley maintained the relevant date was when the assets were converted into cash. That approach resulted in its claim to more than $2 million. Mr. Wong argued the values were fixed when Ms Jean died. Mr. Wong says those figures were set forth in a calculation prepared by Wires Jolley for a September 16, 2005 meeting.[FN6] According to that calculation, the fee would have been $461,115.

17 Matters reached a head in July, 2007. Mr. Wong and Mr. Wires met over dinner. It went badly. No further work was performed by Wires Jolley. Within days the firm rendered an account for $2,054,629.80 representing ten per cent of the market value of the estate's assets as at that date and not the market value as at the date of Ms Jean's passing.[FN7]

18 Shortly after, Wires Jolley served Mr. Wong with a notice of arbitration.[FN8] No further work was performed by Wires Jolley after July, 2007.

II How Did the Matter Get Here?

19 Mr. Wong disputed the notice of arbitration. Mr. Wong took the position a disagreement over a solicitor's account had to be resolved by the court as contemplated by the *Solicitors Act*, R.S.O. 1990, c. S.15. He argued that parties were not free to vary the statutory procedure by agreement. The argument initially found favour,[FN9] However, the Court of Appeal disagreed. It held the parties could select a different decision maker so long as the assessment was made in accordance with the substantive statutory rights contained in the *Solicitors Act.*[FN10]

20 The Honourable Mr. Kaufman had already been appointed arbitrator by the ADR Chambers but the arbitration process was suspended pending the outcome of the jurisdictional issue. With the Court of Appeal decision in hand, the process continued.

21 On November 13, 2009 the Arbitrator released his decision.[FN11] The Arbitrator concluded Wires Jolley and Mr. Wong were not of one mind on the valuation issue. The Arbitrator wrote:

> "In the final analysis, even though both parties (as well as the Court of Appeal) seemed to agree that a success fee arrangement existed, I am not certain that [Wires Jolley] and [Peter Wong] had the same view of the contents, as demonstrated by subsequent discussion, either directly or through the medium of Mr. Mis. I will therefore decide the dispute on a *quantum meruit* basis. The result, I might say, will be the same since what I decide, by whatever method, must be fair and reasonable." (para. 36) (Portions in square brackets added)

22 The Arbitrator concluded the compensation sought by Wires Jolley was fair and reasonable. It received an award for the amount it claimed on account of a success fee, less partial payments already received.

23 On January 28, 2010 the Arbitrator awarded costs to Wires Jolley on a partial indemnity basis in the amount of $129,643.41 inclusive of disbursements.[FN12]

24 Dissatisfied with the awards, Mr. Wong wished to appeal. The parties had failed to address that issue in their patchwork fee agreement.

25 Absent agreement, the *Arbitration Act, 1991*, S.O. 1991, c. 17, gives an unsuccessful party a narrow avenue of appeal. Section 45 (1) provides:

> If the arbitration agreement does not deal with appeals on questions of law, a party may appeal an award to the court on a question of law with leave, which the court shall grant only if it is satisfied that,
>
> > (a) the importance to the parties of the matters at stake in the arbitration justifies an appeal; and
> >
> > (b) determination of the question of law at issue will significantly affect the rights of the parties.

26 The "court" referred to in that section is the Superior Court of Justice: *Arbitration Act, 1991*, *supra*, s. 1.

27 Mr. Wong's lawyers believed they had a wider right of appeal to another court. Since the arbitrator's decision related to the provisions of the *Solicitors Act*, *supra*, they were of the view the right of appeal arose under the *Courts of Justice Act*, R.S.O. 1990, c. C.43, s. 6 (b) and followed its path. On December 1, 2009, they appealed to the Court of Appeal.

28 Wires Jolley was then represented by Mr. Marin. He reacted immediately. In a December 3, 2009 letter Mr. Marin questioned Mr. Wong's right to appeal at all. Mr. Marin's first words were "Your clients' appeal to the Court of Appeal is misconceived".

29 The point was not conceded and so Wires Jolley moved to quash the appeal. A panel of the Court of Appeal granted the motion on January 25, 2010. The short handwritten endorsement read:

> The award under appeal was made by an arbitrator, not by a Superior Court judge. Accordingly this court has no jurisdiction to hear the appeal. The appeal is quashed but without prejudice to the right of the responding parties to seek a remedy elsewhere. The moving parties (sic) are entitled to their costs, fixed at $3500 all inclusive.

30 On February 5, 2010, notice of this application was issued seeking leave to appeal "if required" and an order setting aside the Arbitrator's award.[FN13]

31 The following issues arise[FN14]:

(1) Has Mr. Wong contracted out of any right of appeal?

(2) Is Mr. Wong's appeal timely;

(3) If not, can and should there be an extension of time?

(4) If the appeal proceeds, should leave to appeal be granted?

(5) If leave is granted, should the Arbitrator's award be set aside?

III Has Mr. Wong Contracted Out of Any Right of Appeal?

32 Section 3 of the *Arbitration Act, 1991*, *supra*, allows parties to exclude almost all of its provisions "expressly or by implication". No particular form of agreement is required. In appropriate circumstances, an agreement to adhere to institutional rules will suffice: Sutton, Gill & Gearing, *Russell on Arbitration* (Sweet & Maxwell, 23rd ed., 2007) at 65-66.

33 While parties cannot contract out of their right to set aside an award based on the grounds set forth in section 46,[FN15] Mr. Wong does not rely on that provision. Mr. Wong could, therefore, contract out of any right of appeal from the decision of the Arbitrator. Did he?

34 On September 12, 2007 Mr. Wires sent a copy of the notice of arbitration to the ADR Chambers and asked for "a list of eligible arbitrators for an international commercial arbitration."

35 On September 20, 2007 the Coordinator of the ADR Chambers advised Mr. Wires and Mr. Wong that the arbitration would be conducted in accordance with the *ADR Chambers Arbitration Rules ("ADR Rules")* and provided them with the uniform resource locator.

36 Paragraph 12.5 of the *ADR Rules*[FN16] provided:

> An award or interim award made under the provisions of these Rules shall be treated as a final award...and shall not be subject to any appeal to the courts or otherwise *unless the Parties have otherwise agreed.*(My italics)

37 The *ADR Rules*[FN17] further provided:

> These Rules shall, subject to such modification as the Parties may agree upon, be deemed to have been made a part of any Arbitration Agreement which provides for arbitration to be administered by ADR Chambers, under these Rules or under the rules of ADR Chambers, or any similar expression.

38 On July 23, 2009, the Response to the Notice of Arbitration of Mr. Wong and the Jean Estate was served. Paragraph 63 says:

> The Respondents agree that this arbitration should be heard by Fred Kaufman, Q.C. at ADR Chambers.

39 While the response did not mention the *ADR Rules*, their existence was not a mystery. They were specifically mentioned by ADR Chambers in the early stages of the process. Experienced and capable counsel for Mr. Wong expressly agreed to arbitration at ADR Chambers by the arbitrator ADR Chambers had assigned. I am of the view that the parties agreed to be bound by the terms of the *ADR Rules.* While they were free to vary them, they did not. Regrettably, I am of the view, that the Jean Estate and Mr. Wong have no right of appeal under section 45 of the *Arbitration Act, 1991.*

40 Does the fact the parties' dispute revolves around a fee arrangement between a firm of solicitors and its clients change the approach? Mr. Hainey maintains it does. He submits that by declining to hear an appeal relating to a solicitor's account the Court is abdicating its responsibility to supervise and regulate contingency fee arrangements. In *McIntyre Estate v. Ontario (Attorney General),*[FN18] O'Connor J.A. said:

> It is critical that contingency fee agreements be regulated and that the amount of fees be properly controlled. Courts should be concerned that excessive fee arrangements may encourage the types of abuses that historically underlay the common law prohibition against contingency fee agreements and that they can create the unfortunate public perception that litigation is being conducted more for the benefit of the lawyers than for the clients. Fairness to clients must always be a paramount consideration.

41 In this case, the decision maker chosen by the parties did review the "success fee agreement" (the phrase preferred by Wires Jolley) or "contingency fee agreement" (the phrase preferred by the Jean Estate and Mr. Wong) as contemplated by the *Solicitors Act.*

42 Is it essential that the court become involved whenever a client is dissatisfied with the result? In my view, no. Full rights of appeal could easily have been preserved by the parties. The *Arbitration Act, 1991* allows the parties to establish the parameters of an appeal. The arbitration agreement can give rights to appeal on a question of fact (s. 45 (3)), a question of law (s. 45 (1)) or a mixed question of fact and law (s. 45 (3)). As already stated subject to limited exceptions, the parties can agree to exclude the right of appeal entirely (ss. 3 and 46).

43 The *ADR Rules* expressly gave the parties wide latitude. Many of their provisions, including those relating to appeals, could have been modified by agreement. The parties did not exercise those rights. Should the court now confer a right of appeal on one party against the wishes of the other because the issue relates to a solicitor's bill? In my view the answer is no. Mr. Wong is sophisticated. Throughout he has been assisted by counsel. He received what he bargained for. The public interest was served. The fee arrangement was reviewed by an objective decision maker agreed to by the applicants.

44 While that finding is fatal to the application, I will address the other issues raised in case others disagree with my conclusion.

IV Is the Appeal Timely?

45 The *Arbitration Act, 1991* requires that an appeal be commenced within 30 days after "the appellant...receives the award, correction, explanation, change or statement of reasons on which the appeal or application is based": section 47 (1).

46 When did time start to run? In my view, the 30 day period started on November 13, 2009 when the parties received the arbitrator's reasons.[FN19] Aside from costs, nothing else was left to be decided. Although the arbitrator's ruling on costs and formal award were not issued until January 28, 2010, the time to appeal had already expired.[FN20] As Borins J.A. wrote:[FN21]

> ...litigants are best served by a rule which accords with the traditional understanding that a decision on the merits is final for the purpose of appeal when it is rendered, notwithstanding the pendency of the determination of the costs attributable to the case.

47 Timeliness would not have been an issue had the Court of Appeal been the proper court. However, it was not. The appeal was quashed. While I would have thought there was jurisdiction to do so, the appeal was not transferred or adjourned to the Superior Court of Justice: *Courts of Justice Act*, *supra*, s. 110.

48 Absent authority, I am reluctantly unable to conclude that the 30 day period ceased to run when an appeal to the wrong forum started. I unhappily conclude this appeal is not timely.

V Can and Should There Be an Extension of Time?