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Failure to Respond to Foreign Litigation Can Be Risky

By Stephen Thiele & Suraiya Jinah[i]

In the complex world of international business, many companies and investors often venture outside of their countries of residence or domicile with the hope of developing new and successful business projects or making successful investments. In doing so, however, these companies and investors, plus their professional advisers sometimes fail to understand that actively doing business in foreign countries can expose them to the jurisdiction of a foreign court in the event that their prospective business ventures fail and litigation ensues, and, moreover, that a failure to respond to such foreign litigation can result in judgments against them that will be enforceable in Ontario even if the litigation is ignored.

Such was the case in a failed foreign business project in China that resulted in an Ontario court enforcing an Italian judgment against a Toronto lawyer, Geoffrey King ("**King**"), who was held personally liable for the disappearance of USD $600,000 by an Italian court when he chose not to defend the action that was brought against him and others in Italy.

While King subsequently sought to pass the blame for this result onto the lawyers acting for the plaintiff in Italy and his own various Ontario lawyers, particularly the lawyers who unsuccessfully attempted to convince an Ontario Court to reject the enforcement of the Italian judgment here, the Honourable Justice Corbett determined in the following trilogy of decisions, *King v. Giardina*[ii], *King v. O'Toole*[iii], and *Lang Michener v. King*[iv], that King's multiple lawsuits should be dismissed, with the exception of a claim against a lawyer, John P. O'Toole ("**O'Toole**"), who allegedly advised King not to defend the initial Italian action, which was permitted to proceed to trial.

Fhe Facts

In the 1990's, King had become involved in a project to build a hotel in Nansha, China (the "**Project**"). A

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Founded in the 1920s, Gardiner Roberts LLP has grown to become a strategically placed mid-sized business law firm with a diverse client base which includes two of Canada's largest banks, several medium to large-sized municipalities, agencies, boards and commissions and other government entities, high tech and software companies, real estate developers, lenders and investors.

A number of our lawyers have enjoyed in-house corporate positions and been appointed as board members of tribunals or as judges.

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major shareholder in the Project was Sincies Chiementin SpA ("**Sincies**"), an Italian construction company, who was seeking to grow its business outside of Europe because of a sluggish European economy.

King had a legal relationship with a Sincies affiliate and had thus learned about Sincies interest in the Project. Ultimately, King was engaged in connection with the Project and received a 5% interest in it.

Unfortunately, the Project was unsuccessful and Sincies went bankrupt.

During a bankruptcy investigation conducted in Italy, Sincies' trustee discovered that USD $600, 000 had been misappropriated from the Project by an investor who used it for a new joint venture agreement. The investor, in turn, claimed that King had authorized his signing of the new joint venture agreement on behalf of Sincies — a fact which King denied.

The trustee sought information about the Project and the transactions that took place from King. Dissatisfied with the responses received and King's ultimate failure to adequately respond to inquiries, the trustee issued a claim against the investor and King in Italy.

The trustee alleged that the Project was a scheme designed by the investor and King to induce Sincies to part with USD $600,000 and "no other purpose".

King strongly denied the allegations contained in the trustee's action. However, he chose not to formally defend the Italian proceeding or appear before the Italian court despite being warned by the trustee to appoint an Italian lawyer to protect his interests and to explain all the "procedural and substantive arguments" King had set out in a detailed letter to the trustee after being served with the Italian action. According to the trustee, Italian rules of procedure did not require the trustee to draw the Italian court's attention to King's explanations and protests in his correspondence.

Eventually, the Italian court gave judgment against the investor and King for USD $600,000, plus interest and costs.

When the Italian judgment went unsatisfied, the trustee brought an enforcement action in Ontario against King (the "**Ontario Enforcement Action**"). Although vigorously opposed by King, an Ontario court found that the Italian judgment was enforceable. This judgment was upheld by the Ontario Court of Appeal. Leave to appeal to the Supreme Court of Canada was refused.

Dissatisfied with the result, King sued the trustee and the trustee's Italian law firm ("**Chiomenti**"), the law firm where he had worked ("**Gowlings**") and O'Toole, and the lawyers who represented him in opposing the trustee's Ontario Enforcement Action.

With respect to the latter action, King alleged that the Ontario Enforcement Action was defended negligently and that he was given negligent advice about commencing a claim against his own insurer, who had denied him coverage in the Ontario Enforcement Action. King alleged that he had been told by the lawyers opposing the enforcement action that the limitation period for a potential action against the insurer for denying coverage would

not start until the court rendered a decision in the enforcement action.

Claim against trustee (*King v. Giardina*) dismissed

With respect to the claim against the trustee and Chiomenti, King contended that they acted in a conflict of interest during Sincies' bankruptcy proceeding and that they breached duties owed to him both (i) in acting against him, and (ii) in the way they conducted the Italian litigation against him.

The court rejected this action on the grounds that the Ontario court did not have jurisdiction over the trustee and Chiomenti, and that, in any event, there was no conflict of interest or duty of care owed by the trustee and Chiomenti to King for lack of proximity. The trustee and Chiomenti did not represent King in the Italian bankruptcy proceeding.

Allegations against Toronto lawyer's law firm (King v. Gowlings)

King also sued Gowlings and O'Toole, who King claimed had allegedly advised him that he did not need to defend the Italian proceeding. The majority of the claims in that action, including a claim that King be entitled to indemnification from Gowlings, were dismissed because they either were statute barred or were "spurious".

The claim for indemnification had no legal foundation because King was not a member of Gowlings at the time the Italian proceeding took place. He worked for a different firm at the material time.

Meanwhile an allegation that King's legal advisor had provided negligent advice in connection with reporting the proceedings to King's professional liability insurer was dismissed because it was made too late.

The facts showed that one of the reasons for denying insurance coverage was that King had failed to report the trustee's claim to the insurer at an early stage. Instead, King had waited to make a report to the insurer until the enforcement action was started against him seven years later.

King also waited another 5 years after the denial of coverage to sue O'Toole. This was well beyond the two year limitation period.

However, King's allegation that O'Toole improperly advised him not to defend the Italian proceeding was permitted to continue on the assumption that (a) there was a triable issue that such advice had been given, (b) that there was a triable issue that such advice was negligent at the time that it was given, (c) that there was a triable issue that such advice was relied upon by the King, and (d) that there was a triable issue that King's reliance on such advice allegedly caused him damage.

The judge noted, however, that nothing in the reasons were to be construed as reaching a conclusion on the merits of any of these triable issues. The outcome of that dispute remains to be determined and the litigation is ongoing.

Claims against lawyers who defended enforcement action (*King v. Lang Michener*)

With respect to the Ontario Enforcement Action, King claimed that the lawyers he retained to defend that action were negligent.

More specifically, King argued that these lawyers failed to pursue certain, in his opinion, "strong" arguments against the Italian judgment and that but for the lawyers' negligence the results of the Ontario Enforcement Action would have been different.

As well, King contended that these lawyers, like O'Toole, provided negligent legal advice which resulted in him failing to commence timely proceedings against his own professional liability insurer.

An appeal of the Ontario Enforcement Action, however, was dismissed by the Ontario Court of Appeal and leave to appeal to the Supreme Court of Canada was denied.

Among other grounds, the lawyers contended that King's action against them was a collateral attack on the decisions made in the Ontario Enforcement Action and that the claim in connection with the failure to provide competent advice for commencing a timely claim against the professional liability insurer was statute-barred.

The court agreed.

Justice Corbett described that the collateral attack rule rested on the need for court orders to be treated as final, binding and conclusive unless they are set aside or varied on appeal and that court orders could not be attacked collaterally. In other words, a court order could not be attacked by a person bound by it in proceedings other than those whose specific object is the reversal, variation or nullification of that order such as an appeal.

In any event, the judge also found that there was no basis in fact to prove that any shortcomings by the lawyers in defending the Ontario Enforcement Action could have caused King any compensable damage.

With respect to the alleged negligent advice not to sue the professional liability insurer, the court ruled that King was aware of the Italian proceeding against him by February 1998 and that his first meeting with the lawyers defending the Ontario Enforcement Action was in January 2008. Even if this allegation could be proven, by that point King's potential claim against the professional liability insurer had long expired, and thus any alleged failure to provide him with proper legal advice to commence a claim caused no damages because King would have lost that claim anyway.

Lastly, this allegation of negligence was dismissed because the professional liability policy only covered claims against King arising from his provision of professional services. The Italian judgment found that King had acted in concert with an investor to defraud Sincies of USD $600,000. While the motions judge found that the fraud arose in the context of a transaction in which King acted as a lawyer, the Italian judgment was not in respect to an "error, omission or negligent act" in the provision of legal services. Therefore, coverage under the policy from the professional liability insurer was not available to King regardless of the advice he may have received.

Case is significant to the legal industry

Among other things, these cases once again confirm that the failure to respond to litigation commenced in foreign countries is risky and that

immediate action should be taken by a party served with a foreign claim to secure local legal assistance to properly respond to the foreign action.

In addition, this trilogy of cases highlight the collateral attack rule and confirm that in general litigants only get one kick at the can.

Multiple and endless litigation is discouraged by the courts. Thus it is incumbent on a litigant to always put their best foot forward, and if dissatisfied with a decision to promptly appeal.

Once a decision is final, attacking that decision by bringing a negligence claim against the litigant's own lawyers will in most circumstances be fruitless.

Representation by Gardiner Roberts LLP

In this series of cases, Gavin Tighe, partner and certified specialist in litigation, represented the lawyers who defended the Ontario Enforcement Action against King. He was assisted throughout by litigation partner Rob Winterstein.

About the Author

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ii 2017 ONSC 1588
iii 2017 ONSC 1915
iv 2017 ONSC 1917