

CANADA / JUDGMENT

1001790 BC Ltd. v. 0996530 BC Ltd.

2020 BCSC 2270

COURT

Supreme Court of British Columbia

DECIDED

7 April 2020

Source: bccourts.ca · Research copy typeset by Esheria. Not court-issued or certified.

2020 BCSC 2270 1001790 BC Ltd. v. 0996530 BC Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

1001790 BC Ltd. v. 0996530 BC Ltd.,

2020 BCSC 2270

Date: 20200407

Docket: 189799

Registry: New Westminster

Between:

1001790 BC Ltd.

Petitioner

And

0996530 BC Ltd., Chia Hwei Lin, 1039963 BC Ltd.

and Wen-Yi Chang

Respondents

Before: The Honourable Madam Justice Donegan

Oral Ruling on Applications

Counsel for the Petitioner:

R. Davidson

Counsel for the Respondent, 0996530 BC Ltd. and Chia Hwei Lin:

A.L. Folino

K. MacEwan

No one appearing on behalf of the Respondent, 1039963 BC Ltd. and Wen-Yi Chang:

Place and Date of Hearing:

New Westminster, B.C.

November 28, 2019

and February 7, 2020

Place and Date of Judgment:

New Westminster, B.C.

April 7, 2020

INTRODUCTION

- [1] This is a foreclosure case in which the parties bring competing applications pertaining to an alleged settlement agreement. Shortly before the hearing of the petition last year, representatives of the parties discussed settlement directly, without their counsel. They believed they reached an oral agreement to settle and confirmed it a few days later via email (the "Oral Agreement"). The respondents asked their counsel to draft a written settlement agreement purporting to reflect the parties' agreement, and representatives of the parties signed that document a few days later (the "Written Agreement").
- [2] When it came time to transfer the settlement funds, the parties and their counsel immediately discovered a rather significant problem. The respondents believed they were required to pay \$75,721.00 under the terms of the Written Agreement. The petitioner believed the amount it was to receive from the respondents was a great deal more, \$325,721.50, in accordance with their Oral Agreement. The petitioner had mistakenly believed the Written Agreement reflected the Oral Agreement.
- [3] Calling their competing applications "two sides of the same coin", the respondents seeks to have the Written Agreement enforced and the petitioner seeks to have it rectified to accord with the underlying Oral Agreement.

FACTUAL BACKGROUND

- [4] The petitioner, 1001790 BC Ltd. ("790"), is a corporation incorporated under the laws of the Province of British Columbia. Its shareholders consist of members of the Parmar family and their friends, most of whom reside in Prince George.

- [5] Jagdish Parmar is the family matriarch. Her husband is Hardev Parmar. Jagdish Parmar is a director and the president of 790. English is her second language, and she deposes that while she can read and write English, she does not understand nor is she comfortable with legal and mortgage terminology. She had her brother, who is also a shareholder of 790, Narinder Ludu, and her daughter, a mortgage broker named Sukhraj Parmar ("Ms. Parmar"), look after the matters that form the subject matter of the underlying petition proceeding. Jagdish Parmar provided two affidavits in this proceeding. Ms. Parmar and Mr. Ludu each provided an affidavit as well.
- [6] The respondent, 0996530 BC Ltd. ("530"), is a corporation duly incorporated under the laws of the Province of British Columbia. Lee Huan Chen is the general manager of 530. Mr. Chen provided an affidavit in this matter. The personal respondent, Chia Hwei Lin, is a director of 530. The respondents 1039963 BC Ltd. ("963") and Wen-Yi Chang have not participated in this litigation. For ease of reference, I will refer to 530 and Mr. Lin at times collectively as "the respondents."
- [7] The underlying petition concerns certain vendor take-back financing in the form of a mortgage and assignment of rents.
- [8] In June 2014, 790 sold certain parcels of land located in Surrey to 530 for \$3 million. As part of the purchase price, 530 granted a mortgage over the properties purchased and over other properties that 530 owned. Mr. Lin guaranteed the mortgage.
- [9] The mortgage agreement was in writing. The document shows that the amount borrowed was for \$1.4 million and that interest was to be charged at 15%, compounded monthly. It was for a term of 26 months, ending August 5, 2016. The mortgage included an additional term that the borrowers agreed to make
- "semi-annual lump-sum payments of \$200,000 commencing February 5, 2015, until the principal sum is paid in full".
- [10] 530 made several lump-sum payments on the mortgage between March 2015 and August 2016 totalling \$1,150,000, leaving a balance to be paid on the principal amount of \$250,000.
- [11] In or about December 2016, 790 provided 530 with a pay-out statement and a dispute arose over the interest rate that had been charged. 790 took the position that the rate charged under the mortgage was 15%, as written on the mortgage document. The respondent took the position the rate was to be 7.5%.
- [12] In April 2017, 790's lawyer at the time, Mr. Roxburgh, commenced these foreclosure proceedings. Mr. Roxburgh took instructions from Ms. Parmar.

- [13] In or about September 2017, 530 applied to court to discharge the mortgage against certain of the properties that it wished to sell. On October 3, 2017, the parties agreed to an order in front of Master Caldwell that the mortgage be released against certain parcels and that the solicitors for the respondents hold \$515,000 in trust pending further court order or written agreement of the parties.
- [14] 790 soon applied for an order releasing the principal amount of the mortgage remaining, \$250,000, from the funds held in trust. Because the principal amount remaining was not in dispute (only the interest was in dispute), the respondents agreed to such an order. On December 12, 2017, in front of Master Keighley, the parties agreed to an order that the "undisputed amount of \$250,000 being held in trust" (the "Undisputed Amount") was to be paid out to counsel for the petitioner. The pay-out occurred on December 14, 2017.
- [15] Thereafter the parties' only dispute in the underlying litigation concerned the rate and calculation of interest.
- [16] The petition was eventually scheduled to be heard on February 22, 2019. As its Statement of Relief Sought filed on February 11, 2019, shows, 790 took the position that the amount of money remaining due and owing under the mortgage was, as of February 22, 2019, the sum of \$325,721.50 with a per diem of \$133.89.
- [17] In early February 2019, despite being represented by counsel, representatives of the parties decided to discuss settlement directly. Ms. Parmar and Mr. Chen initially spoke over the phone.
- [18] During their call, Ms. Parmar told Mr. Chen that she was calling about settlement and asked him if he knew what 530 wanted. She deposes that he told her that 530 would agree to share the remaining money held in trust equally. The amount held in trust at that time was \$265,000. Half of that amount would be \$132,500. Ms. Parmar deposed that Mr. Chen also indicated that 530 would pay the petitioner's legal fees. Mr. Chen denies this latter aspect of their conversation and said that he told Ms. Parmar that 530 would not pay the petitioner's legal fees.
- [19] If it were necessary to decide this latter point of contention, I would accept the evidence of Ms. Parmar on this point as it is supported by the parties' email communications. Specifically, Mr. Chen emailed Ms. Parmar on February 5, 2019, and wrote:

Jackey [Mr. Lin] is gone after Wed. We have presented you our proposal, meeting you at half and offer to cover your legal expense. I do not see the need to meet again. [My emphasis.]

- [20] This email reflects the respondents' offer to pay the petitioner one-half of the funds held in trust at the time, as well as the petitioner's legal expenses. Ms. Parmar told Mr. Chen that she would share this information with the petitioner. Thereafter Ms. Parmar and Mr. Chen exchanged a few emails and ultimately arranged a telephone conference call.

- [21] The telephone conference call took place on Friday, February 15, 2019, at 4:00 p.m. Ms. Parmar, Mr. Ludu, Harden Parmar and Amarjit Parhar were on the call for the petitioner, and Mr. Chen was on the call for the respondents. The call lasted about two minutes and Ms. Parmar did almost all of the talking.
- [22] Ms. Parmar introduced the participants to the call to Mr. Chen and he greeted them. Ms. Parmar deposes that she told Mr. Chen that 790 wanted the sum of \$325,721.50 in order to settle, representing the amount of interest that 790 believed would be owed as of the hearing date on February 22, 2019. She deposes that she said that if the respondent paid that amount, the petitioner would waive its legal costs in exchange.
- [23] Mr. Chen replied, Ms. Parmar deposes, by saying that it was "done, finished and settled". He told Ms. Parmar that he would let his lawyer know and that his lawyer would prepare the settlement documents. He told Ms. Parmar to send him an email confirming the settlement. At no time during the call was there any mention of the Undisputed Amount that had been previously paid from trust to the petitioner in December 2017.
- [24] Mr. Ludu's evidence supports Ms. Parmar's recollection of this telephone conversation.
- [25] Mr. Chen did not recount his precise recollection of the telephone call discussion in his affidavit, but he generally asserts that he had a "clear understanding" from his "discussions with Ms. Parmar that the \$250,000 (that had previously been paid out) was included in the \$325,721.50 that the petitioner agreed to as the settlement". Mr. Chen did not depose to what those discussions were or when they occurred. Mr. Chen further deposes that while he did not have the specific amount held in trust at the time of the call, he was prepared to confirm the respondents' agreement to what he believed the proposal to be because he "knew the principals of 530 would be agreeable to that".
- [26] Then, on Tuesday, February 19, 2019, at 9:25 a.m., Ms. Parmar emailed Mr. Chen. She wrote:
- As per our discussion we had over our telephone conference call with my party listening on Friday, February 15, 2019, at 4:00 p.m., our final figure as of February 22, 2019, the amount outstanding would be \$325,721.50. We would like to settle at that amount, which is \$325,721.50, and will eliminate the legal costs. As per your confirmation, please let me know via email or telephone when I can expect to pick up our cheque. [My emphasis.]
- [27] Mr. Chen forwarded this email from Ms. Parmar to counsel for the respondent, Ms. Goosen, six minutes later. Ms. Goosen replied to Mr. Chen quickly, via email, writing:
- So this would mean paying out the \$250,000 in court plus an additional \$75,721.50, is that correct? If I have done that correct, I will get in touch with opposing counsel to sort out the details. [My emphasis.]

- [28] Ms. Goosen has not provided an affidavit in this matter, although some of her correspondence is before the court through the affidavits of others. I am unsure of what Ms. Goosen meant when she wrote in her email "paying out the \$250,000 in court". "Paying out" denotes a future act and there were never any funds held in court.
- [29] In any event, Mr. Chen replied to Ms. Goosen a few minutes later with "Yes. Thanks."
- [30] Ms. Goosen called Mr. Roxburgh that same day and advised him that the parties had spoken directly and settled the case. Although Ms. Goosen told Mr. Chen that she would discuss the details of settlement with opposing counsel, there is no evidence that the lawyers discussed any details of their clients' settlement agreement.
- [31] Mr. Roxburgh provided an affidavit in this matter. He deposes that after learning the parties had settled, he called Ms. Parmar and she confirmed the parties had indeed settled. Ms. Parmar did not discuss the specific amount of the settlement with Mr. Roxburgh, but she confirmed the amount of the settlement included the full interest claim that was being advanced by the petitioner and that the compromise was that the respondents would not have to pay the petitioner's legal costs.
- [32] At 6:45 p.m. that same day, Mr. Chen responded to Ms. Parmar's original email from 9:25 a.m. with an email of his own, which he copied to Ms. Goosen. His email reads simply "Confirmed. I have instructed my lawyer to process this. Thanks, Thomas".
- [33] On Wednesday, February 20, 2019, at 11:28 a.m., Ms. Parmar wrote to Mr. Chen copying Ms. Goosen. She wrote simply "Hi, Thomas. Thank you for your confirmation".
- [34] That same day, Ms. Goosen's office prepared the Written Agreement. Page 1 contains the recitals, which read as follows:

WHEREAS the Petitioner filed the Petition 1001790 B.C. Ltd. V. 0996530 B.C. Ltd., Supreme Court of British Columbia, Vancouver Registry No.189799 on April 11, 2017 (the "Claim");

WHEARAS the petition respondents 1039963 B.C. Ltd. And WEN-YI CHANG have not filed responses to the Claim and are not parties of record;

WHEARAS the Respondents paid the undisputed sum of \$250,000 to the Petitioner on or about December 14, 2017 (the "Initial Payment"); and

WHEARAS the Petitioner and the Respondents (individually a "Party" or collectively, the "Parties") reached an agreement for full and final settlement of the Claim.

THEREFORE, IN CONSIDERATION OF the Payment as set out below and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledges, the Parties agree to the full and final settlement of the Claim on the following terms ...

- [35] The Written Agreement continues:

1. The Respondents agree to pay to the Petitioner the total sum of \$325,721.50 (the "Payment") as follows:
 - (a) The Petitioner agrees that the Initial Payment of \$250,000 has been received and shall be deducted from the total Payment; and
 - (b) The Respondents shall pay an additional \$75,721 to the Petitioner by way of bank draft, certified check, or trust check made out to Roxburgh Law Group in trust (the "Additional Payment"); and
 - (c) The Additional Payment shall be delivered to counsel for the Petitioner on or before March 8, 2019.
- [36] Following several other terms relating to discontinuing the claim and certain releases, the Written Agreement continues on page 3:
6. IT IS FURTHER UNDERSTOOD AND AGREED that the parties hereby represent and declare that they have read this Release and confirm that this Release contains the entire agreement between the parties hereto in regard to the matters which are the subject of this Release and the terms of this Release are contractual, and not merely recital.
7. IT IS FURTHER UNDERSTOOD AND AGREED that the parties have entered into this Release freely and voluntarily and have either received independent legal advice with respect to this Release and any representations or statement regarding the events mentioned herein made by either party to this Release, or have waived their right to independent legal advice.
8. IT IS FURTHER UNDERSTOOD AND AGREED that the parties hereto each acknowledge that the facts in respect of which this Release is made may prove to be other than or different from the facts now known or believed by them to be true and they each accept and assume the risk of the facts being different and agree that this Release shall be in all respects enforceable and not subject to termination, rescission or variation by discovery of any difference in facts.
- [37] Mr. Chen reviewed the Written Agreement before Ms. Goosen sent it to Mr. Roxburgh's office on February 21, 2019. Mr. Chen deposes that he approved the document because it "... accurately reflected what had been discussed in those emails". Ms. Goosen sent the Written Agreement to Mr. Roxburgh's assistant, with a copy to Mr. Roxburgh.
- [38] Mr. Roxburgh deposes that he did not recall reviewing the Written Agreement. He simply instructed his assistant to forward it directly to Ms. Parmar, for it to be signed by Jagdish Parmar.
- [39] On February 22, 2019, Ms. Parmar received an email from Mr. Roxburgh's assistant attaching the Written Agreement and asking her to send it on to her mother in Prince George to be signed. Ms. Parmar deposes that she forwarded the email and attachments to her mother. Ms. Parmar did not read the Written Agreement.

- [40] Jagdish Parmar received her daughter's email with the attachments. She had not been personally dealing with these legal proceedings, but deposes that she relied on her daughter and brother to instruct counsel and deal with the litigation. She deposes that she took the Written Agreement to a notary in Prince George. She looked at it without reading it, saw the figure of \$325,721.50, which she understood the petitioner would be receiving in settlement, and signed. The notary simply witnessed her signature. She instructed the notary to return the signed document to Mr. Roxburgh.
- [41] On February 26, 2019, Mr. Roxburgh's assistant received the signed Written Agreement. Mr. Roxburgh deposes that he does not recall reviewing it before sending it on to Ms. Goosen that same day.
- [42] I have no reason to reject the unchallenged evidence of Mr. Roxburgh, Ms. Parmar and Jagdish Parmar that establishes that no one from the petitioner actually read the Written Agreement before it was signed and returned to counsel for the respondents.
- [43] On March 1, 2019, Mr. Roxburgh received a trust cheque from Ms. Goosen in the amount of \$75,721.50. He called Ms. Parmar to advise her that the respondents had not paid the correct amount.
- [44] Ms. Parmar called Mr. Chen on March 5, 2019. She told him that the settlement amount that was due and owing was \$325,721.50 and that the Undisputed Amount was not to be deducted. She deposes that Mr. Chen agreed with her when she said this and told her that he would contact his lawyer and get back to her right away.
- [45] Mr. Chen does not expressly deny saying what Ms. Parmar attributes to him, but deposes that:
- 2.
- c) This was clearly contrary to my recollection of what had been agreed to, but as she was making a serious allegation, I was not prepared to say anything further to Ms. Parmar without speaking to our lawyer, so I told her that I would speak with our lawyer and get back to her. There was no way 530 would agree to pay \$325,721.50 as I was pretty sure that would exceed the amount of money being held in trust.
- [46] Ms. Parmar did not hear back from Mr. Chen, so she sent him an email later that same day. She wrote:

Hi, Thomas. As per our conversation that we had this morning in regards of the discrepancy on the disputed settlement. The amount that was agreed upon was for \$325721.50, which was the final disputed settlement amount that was supposed to be paid in full to company 1001790 BC Ltd as February 22,2019. Apparently, there was an error made from your lawyers, stating that \$250K was paid out in December 2017 which was not a part of this outstanding disputed amount. The draft should be made for the total final disputed settlement amount of \$325721.50. I have not heard back from you, can you please have this rectified on your end and have your lawyer

forward our lawyer the necessary corrected documents. Please also follow up with me on this matter urgently. Thank you.

- [47] Mr. Chen replied to Ms. Parmar shortly before 5:00 p.m., copying Ms. Goosen. He advised Ms. Parmar that he had left messages with Ms. Goosen and was waiting to talk to her.
- [48] On March 5, Mr. Roxburgh wrote to Ms. Goosen. He expressed his view that the parties had no agreement on the amount of the settlement and asked for a return of the documents on undertakings. Since they lost the date that had been scheduled for the hearing of the petition, he asked that the parties find a mutually convenient date to reschedule the hearing. Ms. Goosen replied and advised that her clients intended to rely on the Written Agreement.
- [49] Over the next few days, Mr. Roxburgh continued to ask Ms. Goosen to set the petition for hearing. In reply, another member of Ms. Goosen's office wrote to Mr. Roxburgh on March 11 expressing his "surprise and disappointment at the petitioner's position" and after explaining his client's position, wrote that he would take immediate steps to apply to enforce the Written Agreement and seek special costs against Mr. Roxburgh personally. Following receipt of this letter, Mr. Roxburgh advised the petitioner that it would have to retain other counsel. And, here we are.

POSITIONS OF THE PARTIES

- [50] As set out in their Notice of Application, the respondents seek four orders:
1. That the Written Agreement be enforced;
 2. That the underlying petition be dismissed, without costs;
 3. That such dismissal be for all purposes of the same force and effect as if the judgment had been pronounced at the trial of this action on its merits; and
 4. That special costs be awarded against the petitioner in relation to the enforcement of the Written Agreement.
- [51] At the hearing, the respondents added that they also seek special costs against Mr. Roxburgh personally.
- [52] The respondents submit that this court has jurisdiction to summarily enforce a settlement agreement and should do so in this case in respect of the Written Agreement. They say that the only agreement between the parties, written or oral, was the Written Agreement. They argue that it is a valid and binding settlement agreement, that they have complied with all of its terms and that the petitioner has not. The respondents submit that the language of the Written Agreement is neither legal nor technical in nature and that the petitioner should not be permitted to resile from or seek to rectify it simply because its representative and lawyer chose not to read it. They emphasize that the test for rectification, which is what the petitioner seeks in its application, is a high one and argue that the petitioner failed to meet that test in every respect.

- [53] The respondents further submit that the court has only two options here: enforcement of the Written Agreement, or rectification of it in accordance with what the petitioners say was the underlying Oral Agreement. They argue that since rectification is inappropriate, enforcement of the Written Agreement must be the result. In other words, the respondents take the position that the court should not exercise its discretion to decline either remedy because to do so would give the petitioner the result it was hoping for all along, to avoid its obligations under the Written Agreement and force the petition to a hearing.
- [54] The petitioner agrees the court has jurisdiction to summarily enforce a settlement agreement within this proceeding, but submits that the court should decline to enforce the Written Agreement because it did not represent the parties' actual agreement. It says the actual agreement was the Oral Agreement, as confirmed in the emails. For this reason, the petitioner seeks to have the Written Agreement rectified to accord with the Oral Agreement and have the respondents ordered to pay \$325,721.50. It also seeks special costs or, alternatively, ordinary costs in relation to these applications.
- [55] The petitioner submits that this is a classic case for rectification. It argues the parties had an oral agreement reduced to writing in email exchanges for payment of new money in the amount of \$325,721.50. Because it was an agreement, and not simply an offer, the petitioner and its counsel reasonably expected that the Written Agreement prepared by respondents' counsel would match the underlying Oral Agreement as confirmed in the email exchanges. Unfortunately it did not.
- [56] The petitioner submits that the language of the prior Oral Agreement reduced to writing in the emails is clear and unambiguous. There was no mention of any credit for the \$250,000 payment received in 2017. The language of Mr. Chen's acceptance of 790's offer was clear. In light of that clear and unambiguous language, the petitioners submit that Mr. Chen ought reasonably to have known that the Written Agreement was inconsistent with the prior Oral Agreement reduced to writing in the emails.
- [57] The petitioner also points to Mr. Chen's original offer (that the parties settle by each taking half of the money held in trust - \$132,500 each) as support for its position. It says that Mr. Chen could not have believed 790 would respond to this offer by accepting only \$75,721, which is much less than the respondents' offer.
- [58] Overall, the petitioner argues that it would go against good conscience to allow the respondents to take advantage of the petitioner's errors.

LEGAL FRAMEWORK

Enforcement of Settlement Agreements

- [59] Under ss. 8 and 10 of the Law and Equity Act, R.S.B.C. 1996, c. 253 [LEA], the court has authority to enforce settlement agreements: *Simoran Enterprises Ltd. v. Global Dental Direct Inc.*, 2017 BCCA 458 at para. 16.
- [60] Section 8 of the LEA allows the court to stay further proceedings in the action. It reads, in part:

No restraint by prohibition or injunction

8 (1) A cause or proceeding pending in the court must not be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of that cause or proceeding might have been obtained before April 29, 1879, either conditionally or unconditionally, may be relied on by way of defence.

- (2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.
- (3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.
- [61] Under s. 10 of the LEA, the court may grant all reasonable remedies to which any of the parties may be entitled in a matter, provided the order is within the court's jurisdiction: *Son v. Kim*, 2009 BCSC 776 at para. 41.

- [62] Section 10 of the LEA reads:

Avoidance of multiplicity of proceedings

10 In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies that any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.

- [63] A settlement agreement may be summarily enforced within an original action: *McKenzie v. McKenzie* (1974), 55 D.L.R. (3d) 373 (BCSC); *Trieu v. Diep*, 2015 BCSC 950; and *Carlton v. Carlton*, 2017 BCSC 603.
- [64] The court has jurisdiction to enforce or set aside a settlement agreement that compromises an action, even if there is a "substantial issue as to the terms, validity or enforceability of the agreement": *Son* at para. 45. However, the exercise of that jurisdiction in a summary procedure is dependent on whether "justice is best served" in the circumstances of the agreement in question. In determining whether justice can be done, the court must consider factors such as: (1) the degree to which extraneous matters are involved; (2) how substantial the questions are to be determined; and (3) whether other pre-trial procedure such as pleadings and discoveries may be desirable: *Son* at para. 47.
- [65] While the jurisprudence seems clear that the court does have jurisdiction to enforce or set aside a settlement agreement on a summary basis within an original action, there is no authority expressly determining whether there is jurisdiction to do so in a petition proceeding.
- [66] Counsel referred me to *Son* where Justice MacKenzie was asked to summarily enforce a settlement agreement in a petition proceeding. In declining to do so, the court left open the question of whether or not a settlement agreement may be enforced summarily where the originating proceeding was a petition. Justice MacKenzie held:
- [52] I do not say that the Court could never enforce a settlement agreement of this nature when the originating proceeding was a petition. However, in the circumstances before me, if I do have the jurisdiction or discretion to enforce such an agreement, I decline to do so.
- [67] Enforcement of a settlement agreement in a petition proceeding was also considered in *Bazbal Properties Inc. v. Bowen Contracting Ltd.*, 2011 BCSC 1731. In that case, the respondent sought dismissal of the petition on the basis that the parties had entered into a settlement agreement in relation to the matter. The petitioner had failed to carry out its obligations under the agreement and, therefore, the respondent was required under the terms of the agreement to abandon its claims. The petitioner argued that it had not agreed to the "terms" in question; rather, the petitioner argued that the letter setting out those terms was an attempt to unilaterally impose conditions to which the petitioner did not agree: para. 16.
- [68] Justice Bernard considered the correspondence between the parties and determined that there was "no suggestions that the letters do not, collectively, capture the whole of the exchanges between the parties regarding settlement": para.18. He concluded:

[28] For all the foregoing reasons, I conclude that the settlement agreement is that captured in the March 21st letter; that it is a valid and enforceable agreement; that Bazbal failed to obtain formal subdivision approval by August 26, 2011; and that by the terms of the agreement, Bazbal was obliged to "abandon any and all further claims and accept that the lease/option is frustrated as a result of the inability to obtain a subdivision."

[69] Justice Bernard went on to consider the law in relation to the enforcement of settlement agreements:

[30] In *Robertson v. Walwyn Stodgell Cochrane Murray Ltd.* (1988), [1988] CanLII 188 (BC CA), 24 B.C.L.R. (2d) 385 (C.A.), Lambert J.A., for the Court, made the following apposite remarks at 386 in relation to the enforcement of settlement agreements:

The law in relation to the enforcement of settlement agreements by stays of proceedings brings together principles of contract law, principles of the law of agency as they apply to barristers and solicitors, rules of equity as they apply to discretionary remedies, and rules of procedure as they apply to the pronouncement and entry of consent orders. In each case, the issues between the parties must be dealt with in accordance with those principles. The effectiveness and the enforcement of settlement agreements does not constitute a separate field of law to which the ordinary principles of contract law, agency, and equity, and the ordinary rules of procedure, do not apply.

[31] Lambert J.A. would go on to state the following at 387:

A completed settlement agreement is the same as any other contract. If the contract is valid and enforceable by ordinary principles of contract law, and if it is put in issue in appropriate proceedings, then the court, in the end, must give effect to it.

[32] Having regard to the foregoing legal principles and to the terms of the settlement agreement, I am satisfied that Bowen is entitled to each of the remedies it seeks.

[70] Justice Bernard stayed the petition proceeding on the basis that the parties had entered into a valid and binding settlement agreement and, under the terms of that agreement, held that the petitioner was required to abandon its claims.

Rectification

[71] Rectification is a discretionary equitable remedy. The Supreme Court of Canada recently summarized the general principles and operation of this remedy in *Canada (Attorney General) v. Fairmont Hotels Inc.*, 2016 SCC 56. Justice Brown, writing for the majority, held at paras. 12-15:

A. General Principles and Operation of Rectification

- [12] If by mistake a legal instrument does not accord with the true agreement it was intended to record -- because a term has been omitted, an unwanted term included, or a term incorrectly expresses the parties' agreement -- a court may exercise its equitable jurisdiction to rectify the instrument so as to make it accord with the parties' true agreement. Alternatively put, rectification allows a court to achieve correspondence between the parties' agreement and the substance of a legal instrument intended to record that agreement, when there is a discrepancy between the two. Its purpose is to give effect to the parties' true intentions, rather than to an erroneous transcription of those true intentions (Swan and Adamski, at §8.229).
- [13] Because rectification allows courts to rewrite what the parties had originally intended to be the final expression of their agreement, it is "a potent remedy" (Snell's Equity (33rd ed. 2015), by J. McGhee, at pp. 417-18). It must, as this Court has repeatedly stated (Shafron v. KRG Insurance Brokers (Western) Inc., 2009 SCC 6, [2009] 1 S.C.R. 157, at para. 56, citing Performance Industries Ltd. v. Sylvan Lake Golf & Tennis Club Ltd., 2002 SCC 19, [2002] 1 S.C.R. 678, at para. 31), be used "with great caution", since a "relaxed approach to rectification as a substitute for due diligence at the time a document is signed would undermine the confidence of the commercial world in written contracts": Performance Industries, at para. 31. It bears reiterating that rectification is limited solely to cases where a written instrument has incorrectly recorded the parties' antecedent agreement (Swan and Adamski, at §8.229). It is not concerned with mistakes merely in the making of that antecedent agreement: E. Peel, The Law of Contract (14th ed. 2015), at para. 8-059; Mackenzie v. Coulson (1869), L.R. 8 Eq. 368, at p. 375 ("Courts of Equity do not rectify contracts; they may and do rectify instruments"). In short, rectification is unavailable where the basis for seeking it is that one or both of the parties wish to amend not the instrument recording their agreement, but the agreement itself. More to the point of this appeal, and as this Court said in Performance Industries (at para. 31), "[t]he court's task in a rectification case is To restore the parties to their original bargain, not to rectify a belatedly recognized error of judgment by one party or the other".
- [14] Beyond these general guides, the nature of the mistake must be accounted for: Swan and Adamski, at §8.233. Two types of error may support a grant of rectification. The first arises when both parties subscribe to an instrument under a common mistake that it accurately records the terms of their antecedent agreement. In such a case, an order for rectification is predicated upon the applicant showing that the parties had reached a prior agreement whose terms are definite and ascertainable; that the agreement was still effective when the instrument was executed; that the instrument fails to record accurately that prior agreement; and that, if rectified as proposed, the instrument would carry out the agreement: Ship M. F. Whalen v. Pointe Anne Quarries Ltd. (1921), [1921 CanLII 57 (SCC)], 63 S.C.R. 109, at p. 126; McInnes, at p. 820; Snell's Equity, at p. 424; Hanbury and Martin Modern Equity (20th ed. 2015), by J. Glister and J. Lee, at pp. 848-49; Hart v. Boutilier (1916), [1916 CanLII

631 (SCC)], 56 D.L.R. 620 (S.C.C.), at p. 622.

- [15] In *Performance Industries* (at para. 31) and again in *Shafron* (at para. 53), this Court affirmed that rectification is also available where the claimed mistake is unilateral -- either because the instrument formalizes a unilateral act (such as the creation of a trust), or where (as in *Performance Industries* and *Shafron*) the instrument was intended to record an agreement between parties, but one party says that the instrument does not accurately do so, while the other party says it does. In *Performance Industries* (at para. 31), "certain demanding preconditions" were added to rectify a putative unilateral mistake: Specifically, that the party resisting rectification knew or ought to have known about the mistake; and that permitting that party to take advantage of the mistake would amount to "fraud or the equivalent of fraud" (para. 38).
- [72] Most of the jurisprudence where rectification has been considered has occurred in the context of a trial. The parties did not provide me with any authorities dealing with an application for rectification of a settlement agreement on an application made within a petition proceeding. There are, however, authorities where rectification of a contract has been considered in a petition proceeding. I will provide two examples. In the first, *Crean v. Canada (Attorney General)*, 2019 BCSC 146, rectification was granted on the basis of affidavit evidence. In the second, *First Calgary Capital Corporation v. D.W. Johnson Holdings Ltd.*, 2018 BCSC 38, it was not.
- [73] In *Crean* the petitioners sought rectification of a purchase agreement and related promissory note. The petitioners alleged that the documents did not accord with their prior agreement and that the discrepancy arose due to a sequential error in the transactional scheme structured by their tax advisors. As a result of the error, the parties were subject to unanticipated tax consequences. The respondents opposed the application. After considering the affidavit evidence, Justice Burke found that the petitioners had a "prior definite and ascertainable agreement", and granted rectification: paras. 83-86.
- [74] It is notable that in *Crean* the petitioners consisted of all the parties to the agreement in question and there was no dispute between them as to its intended terms. Furthermore, rectification was the relief sought in the petition itself. There was no separate application brought within the proceeding seeking rectification.
- [75] While rectification was granted in *Crean*, the court in *First Calgary* declined to do so, finding there were triable issues not appropriate for summary disposition.
- [76] In *First Calgary*, the petitioners sought remedies against the respondents under an agreement for sale of a hotel property. The respondents argued the matter was not suitable for summary disposition by petition as there were triable issues.

- [77] The parties in that case had executed two contracts with different interest terms: a contract of purchase and sale and a right to purchase agreement. The petitioner argued it was the right to purchase agreement that set out the applicable interest terms. The respondent's position was that the contract of purchase and sale was the governing agreement, but if the court determined that the right to purchase agreement was the governing document, the interest terms set out in that document were mistakes amenable to rectification.
- [78] Justice Thompson held that the petitioner did not meet its onus of showing it to be manifestly clear there was no bona fide triable issue and found the matter unsuitable for summary disposition: paras. 2-3. He went on to hold:
- [16] Whether the CPS is the governing document, the proper construction of the CPS, and whether this is an appropriate case for rectification are bona fide triable issues going to the root or foundation of the proceeding; issues bearing on the amount due and owing under an agreement go to the root or foundation: *Griffin v. 0904713 B.C. Ltd.*, 2013 BCSC 273 at para. 41.
- [79] Justice Thompson noted that rectification is "to be used with great caution": para. 18. The petitioner argued post-agreement documents and conduct demonstrated acceptance by the respondents of the petitioner's interpretation of their agreement, but Justice Thompson found, in part:
- [19] ... whether the documents and conduct amount to admissions depends very much on context and I do not agree that the outcome of the assessment of the evidence is a fait accompli.
- [80] Justice Thompson referred the matter to the trial list.

DECISION

- [81] Counsel urged me to resolve this dispute in a summary manner. In addition to their shared view that justice will be done by resolving the dispute this way, counsel also point to Rule 1-3 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 [Rules] which provides that the object of the Rules is to secure the just, speedy and inexpensive determination of every proceeding on its merits. Despite their agreement on this point, I must nevertheless be satisfied that justice can be done by such an exercise in the facts of this case.
- [82] From my review of the authorities, it appears that enforcement and/or rectification of a settlement agreement may be considered within a petition proceeding as counsel suggest. Assuming this is correct, the key question still remains as to whether the circumstances are appropriate for determination in this summary procedure. While I think the circumstances are appropriate for determination in a summary procedure in this case, I reach the conclusion that neither enforcement nor rectification is appropriate.

- [83] I am not satisfied there was ever a valid and binding agreement to settle. A settlement agreement is a form of contract and, as such, it is made when the terms of a proposed agreement are accepted, without qualification, by one party, as presented by the other party. A contract is formed when parties reach a meeting of the minds, or consensus ad idem, about its essential terms. There must be evidence of an intention to be bound and sufficient clarity or certainty of the essential terms: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 322; *Tham v. Bronco Industries Inc.*, 2017 BCSC 282 at para 75; and *Berthin v. Berthin*, 2016 BCCA 104 at para. 47.
- [84] In *Le Soleil*, Justice Dickson, as she then was, held:
- [321] Courts strive to uphold contractual obligations solemnly and freely undertaken. They do not, however, impose them upon parties who have not reached agreement on all essential terms: *Catalyst Paper Corp. V. Companhia de Navegacao Norsul*, 2008 BCCA 336.
- [322] For parties to be bound in a contractual relationship there must be a manifest meeting of the minds. They must express themselves outwardly in a manner that indicates both an intention to be bound and reasonably certain mutually agreed terms: *Klemke Mining Corporation v. Shell Canada Limited*, 2007 ABQB 176, affirmed 2008 ABCA 257.
- [85] Parties are not required to agree on every issue, but they must agree on terms that are essential; that is, being vital or fundamental to their arrangement. The amount of money that would change hands to settle an entire proceeding, such in the case at bar, quite clearly is a term that is fundamental to the agreement.
- [86] The assessment about whether there was a meeting of the minds must be done objectively, because the test of agreement for legal purposes is whether the parties have indicated to the outside world, as their communications are seen by an objectively reasonable bystander, not only their intention to contract but also the terms of such contract. Subjective intentions are not relevant because, as explained in *Fridman, The Law of Contract*, (6th ed., 2011) at 15:
- The law is concerned not with the parties' intentions but with their manifested intentions. It is not what an individual party believed or understood was the meaning of what the other party said or did that is the criterion of agreement; it is whether a reasonable man in the situation of that party would have believed and understood that the other party was consenting to the identical terms.
- [87] The burden of proving the existence of a settlement agreement is on the party seeking to enforce or rely on it on a balance of probabilities. The focus of the analysis is objective evidence: *Salminen v.* 2011 BCSC 339 at paras 26-27.

- [88] In short, if a reasonable person would find that the parties were in agreement as to a contract and its terms, then a contract would exist at common law: *Witzke (Guardian ad litem of) v. Dalglish*, [1995] B.C.J. No. 403, 1995 CarswellBC 1822 at para. 59. The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.
- [89] Applying these principles, I am not satisfied that a reasonable person could find the parties were in agreement on the essential term of their agreement-the funds to be paid. The petitioner's email communication to the respondents, which purported to reduce their Oral Agreement to writing, set out that the petitioner's "final figure as of February 22, 2019, the amount outstanding would be \$325,721.50. We would like to settle at that amount, which is \$325,721.50, and we will eliminate the legal costs".
- [90] The word "outstanding" is defined in Black's Law Dictionary as "remaining undischarged, unpaid, uncollected". This could suggest the settlement amount was \$325,721.50 in new money, although it was fairly ambiguous. However, the Written Agreement prepared by respondents' counsel, which purported to put the parties' Oral Agreement to writing, reflected something quite different. Objectively, I do not think a reasonable person would find that the parties were in agreement as to a contract and its terms.
- [91] It is objectively clear that the parties never had a meeting of the minds about settlement and never truly came to a settlement agreement. To enforce the terms of one view of their agreement would be to impose a contractual obligation on the other that was not agreed to, and it would have the effect of ending the underlying proceeding completely. This would not be just.
- [92] Courts strive to uphold contractual obligations, but do not impose them on parties who have not reached agreement on all essential terms, which is clearly what occurred here. In concluding that neither rectification nor enforcement of the Written Agreement is appropriate, there is no "end run" (to use the respondents' phrase) allowing either party to avoid living up to its bargain. Quite simply, there was no enforceable bargain.
- [93] I, therefore, dismiss both applications. The petition should be reset for hearing.

COSTS

- [94] On the issue of costs, I will begin by observing that these applications show the mischief that can occur when parties try to negotiate their own settlement agreements directly, without their counsel. Ultimately, though, these applications arose primarily because of errors and assumptions made by representatives of the petitioner and petitioner's former counsel. Had any one of those errors or assumptions not occurred, the parties would have quickly discovered there was no meeting of the minds on the settlement amount and these applications would never have occurred. The petitioner's hearing could have proceeded, and I quite suspect this litigation would long ago be resolved. The respondents should receive some compensation for their costs of these unnecessary applications.

[95] I award the respondents costs of these applications on Scale B in any event of the cause. Once the misunderstanding was discovered, counsel on both sides took positions to protect and further their clients' interests, but the conduct of the petitioner and/or its counsel is certainly not reprehensible conduct worthy of an award of special costs within the principles outlined in *Garcia v. Crestbrook Forest Industries Ltd.*, [1994] B.C.J. No. 2486 and *Mayer v. Osborne Contracting Ltd.*, 2011 BCSC 914. This concludes my ruling.

"S.A. Donegan J."

DONEGAN J.

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

ORIGINAL SOURCE <https://www.bccourts.ca/jdb-txt/sc/20/22/2020BCSC2270.htm>

CASE PAGE <https://chat.esheria.ai/case-law/canada/1001790-bc-ltd-v-0996530-bc-ltd-2020>

Prepared on 27 October 2026 · Esheria