
CANADA / JUDGMENT

Advantage Helicopters Inc. v. Heliponents, Inc.

2012 BCSC 1938

COURT

Supreme Court of British Columbia

DECIDED

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2012 BCSC 1938 Advantage Helicopters Inc. v. Heliponents, Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Advantage Helicopters Inc. v. Heliponents, Inc.,

2012 BCSC 1938

Date: 20121205

Docket: S097339

Registry: Vancouver

Between:

Advantage Helicopters Inc. and Rilpa Enterprises Ltd.

Plaintiffs

And

Heliponents, Inc. and John Doe #1

Defendants

Before: The Honourable Mr. Justice Willcock

Oral Reasons for Judgment

Counsel for the Plaintiffs:

S. Cordell

Counsel for the Defendants:

R.J.R Hordo, Q.C.

D. Fetterly

Place and Date of Hearing:

Vancouver, B.C.

November 26-30, 2012

Place and Date of Judgment:

Vancouver, B.C.

December 5, 2012

[1] THE COURT:

Introduction

[2] This is an application by the plaintiffs to withdraw admissions made in response to a notice to admit in April 2011. The trial of this case is set for hearing over 34 days commencing February 18, 2013.

Background

- [3] Rilpa Enterprises ("Rilpa") was the owner of a Bell 204B helicopter involved in an accident near Kaslo, British Columbia, on October 6, 2007. At the time of the accident, the helicopter was leased by Rilpa to Advantage Helicopters Inc. ("Advantage").
- [4] Advantage had leased the helicopter from September 2002 to the date of the accident and paid Rilpa an amount determined by the hourly use of the helicopter. At the time of the accident, it was being operated by Advantage to perform heli-logging operations for Meadow Creek Cedar.
- [5] As a result of the accident, the helicopter was damaged and could not be flown. After the accident, a decision was made to build a replacement helicopter using some of the components from the damaged machine. The replacement helicopter was certified as airworthy in July 2008 and was back in operation in or about August 2008.
- [6] A statement of claim was filed on October 6, 2009, and an amended statement of claim was filed on October 29, 2009. Paragraph 17 of the amended statement of claim describes the damages for which a claim is advanced. They include claims in paragraph 17(d) for lost revenue and in paragraph 17(f) for lost lease payments.

[7] On November 12, 2010, the defendant Heliponents demanded Advantage and Rilpa to provide particulars of the claim for lost revenue and lost lease payments set out in paragraph 17(d) and (f) of the statement of claim. On November 30, 2010 an application compelling production of those particulars was filed. Discussions between counsel ensued with respect to the claim for damages that would be advanced.

[8] On February 25, 2011, counsel for Advantage and Rilpa, then Mr. Pankratz, provided responses to the demand for particulars. On behalf of Rilpa he advised the defendant:

With respect to the claim for loss of revenue, Rilpa claims that it has lost lease payments which would have been made by Advantage for use of the helicopter had the crash not occurred. At this time Rilpa is unable to provide specific particulars of the amount of this loss.

[9] Rilpa said it was unable to provide particulars of the claim for lost lease payments, but responded to the demand for particulars of damages under this head by saying:

Its claim for loss of lease payments relates to that revenue which it would have received pursuant to the lease agreement it had with Advantage. Had the crash not occurred, Advantage would have operated the helicopter and provided further payments to Rilpa.

[10] Similarly Advantage was unable to provide particulars of its lost revenue, but responded to the demand for particulars by saying:

Its claim for loss of revenue relates to that revenue which Advantage would have received pursuant to its logging agreement with Meadow Creek Cedar Ltd. dated January 2, 2007, with respect to forest licence A30171.

[11] By notice to admit dated March 28, 2011, which was the second notice to admit in this case, counsel for Heliponents sought the following admissions. Paragraph 14:

Advantage Helicopters Inc. does not advance a claim in this action for revenue lost under the contract between Advantage and Meadow Creek Cedar Ltd. with respect to forest licence A30171 for any period after December 31st, 2007.

[12] Paragraph 25:

Rilpa Enterprises Ltd. does not advance a claim in the action for lost lease payments with respect to aircraft CGREL for any period after December 31, 2007.

[13] Paragraph 26:

The claim advanced by Rilpa under paragraph 17(f) of the amended claim is restricted to a claim for the lease payments that Rilpa alleged would have been made by Advantage to Rilpa subsequent to October 6, 2007, in relation to the use of the aircraft to perform work under the contract.

[14] That is reference, of course, to the Meadow Creek Cedar contract.

- [15] On April 12, 2011, counsel for Advantage and Mr. Rilpa, Mr. Pankratz, admitted paragraph 14 of the second notice to admit on behalf of Advantage and admitted paragraphs 25 and 26 of the second notice to admit on behalf of Rilpa. Those admissions are the subject of this application.

Evidence

(a) Affidavit Evidence of Kenneth Mizera

- [16] Mr. Mizera, the principal of Rilpa, deposed on January 4, 2012, that if the accident had not occurred, the helicopter would have been operated by Advantage during 2008 as much as it had in the past. He believed the helicopter would have flown in excess of 650 hours in 2008 prior to the completion of the rebuilding of the substitute helicopter, and says that if so, Rilpa would have received lease payments from Advantage in the amount of \$487,500 plus taxes or more.

- [17] He deposed that he received a copy of the second notice to admit in early April 2011, spoke with Mr. Pankratz and gave him instructions to admit the facts in paragraph 25 and 26 on behalf of Rilpa. He says:

At the time I provided those instructions to Mr. Pankratz, I believed that the admissions sought by the defendant Heliponents Inc. were for negotiation purposes, which allowed the opportunity of revision. I was wrong in my understanding of the effect and purpose of the admissions which were sought and given on behalf of Rilpa.

This matter went to mediation on November 30 and December 1, 2011. In preparation for the mediation, I provided Mr. Pankratz with my calculations on the loss of lease payments which were from the date of the accident to the completion of the rebuild of the replacement helicopter. At that time I was unaware that there was anything which might prevent Rilpa from pursuing its entire claim for lost lease payments.

(b) Affidavit of Alan Partridge

- [18] Mr. Partridge is the president of Advantage. He deposed on January 5, 2012, that if the accident had not occurred, Advantage would have continued to operate under the contract with Meadow Creek Cedar and would have resumed flying on behalf of any other clients, based on availability, from October 6, 2007, onward.
- [19] It was his evidence that if the accident had not occurred, the helicopter would have been operated by Advantage during 2008 as much as it had in the past and that it would have flown in excess of 650 hours in 2008 prior to the completion of the rebuilt substitute helicopter.
- [20] Mr. Partridge deposed to receipt of the second notice to admit in early April 2011; he spoke to Mr. Pankratz regarding the notice to admit and he provided instructions to admit the facts in paragraph 14 on behalf of Advantage. He further deposes:

At the time I provided those instructions to Mr. Pankratz, I believed that providing an admission that Advantage's claim for loss of revenue was limited in length was for negotiation purposes but would not prohibit Advantage from reconsidering that position.

In the absence of an early settlement, however, I did not intend to completely abandon or waive any entitlement which Advantage had to claim for the loss of revenue which it suffered in 2008 as a result of the accident. I was wrong in my understanding of the effect and purpose of the admission which was sought and given on behalf of Advantage in the second notice to admit.

(c) Affidavit of Daniel Fetterly

[21] Mr. Fetterly, counsel for Heliponents, deposed on January 16th, 2012, to the extensive efforts made by counsel for Heliponents commencing in June 2010 to obtain documents and particulars substantiating any claim for loss of revenue or lease payments in the period following conclusion of the Meadow Creek Cedar contract.

[22] He deposed that at the time of the issuance of the second notice to admit, there were no settlement discussions or proposals in the action and that no such discussions occurred until mediation in late November or early December 2011. He deposes that examinations for discovery were conducted in May 2011 and at discovery, the examination of representatives of the plaintiffs was limited because of the admission that no claims were being advanced for losses subsequent to December 31, 2007. Mr. Fetterly says withdrawal of the admissions would make necessary the production of documents, further examination for discovery and locating and interviewing third-party witnesses and potentially experts.

(d) Solicitor's Brief

[23] The parties agreed that the filing of the affidavits by Mr. Partridge and Mr. Mizera resulted in a limited waiver of solicitor/client privilege. An affidavit was sworn by former counsel for Advantage and Rilpa, Mr. Pankratz, on November 22nd, 2012. Prior to his examination before me and the swearing of the affidavit, Mr. Pankratz produced excerpts from his file at the direction of counsel.

[24] Those excerpts include the following notations:

- i. a note dated January 9, thought by Mr. Pankratz to be a note recording his early instructions in the case of a telephone conversation with Mr. Partridge where he noted:

Claim only for losses from MCC project. Not willing to try and bring in people for 2007. Wood still there, perhaps just deferred. Not want to spend all time and effort to dig up records/info to try to recover. Focus on uncontestable loss, deductible, lost premium.

- ii. a note in June 2010 of a discussion with counsel for a pilot injured in the helicopter accident with respect to ongoing settlement discussions between the pilot and Heliponents;

- iii. a note in July 2010 that the pilot's claim had been settled;

iv. an e-mail dated December 21, 2010, from Mr. Pankratz to Mr. Mizera referring to the documents that would have to be produced to establish a claim after the end of the Meadow Creek Cedar contract;

v. the following notes of a telephone conference with Mr. Partridge in early 2011:

Claim for lost revenue, limiting it to MCC. Don't think as evidence to establish beyond. Apprehensive about making any claim because it takes too much time and effort. Self-defeating.

vi. Correspondence to Advantage and Rilpa enclosing the relevant notice to admit. These include the following advice to Advantage:

Unless you fully agree with the set of facts as set out, they should be denied. We can respond more fully with any clarifications as required.

vii. And to Rilpa:

The only paragraphs I wish to draw to your attention are paragraphs 25 and 26. Would you please review those two paragraphs. I believe that the statements in paragraph 26 are correct. The answer to paragraph 25 relates to the answer which is given by Al on behalf of Advantage. If Advantage pursuing a claim for lost revenue beyond December 31, 2007, and are successful in that regard, then Rilpa would have received the benefit of payments made pursuant to its lease agreement with Advantage. Assuming that Advantage does not claim beyond December 31, 2007, I would ask for your confirmation that the claim for lost lease payments with respect to aircraft CGREL does not extend beyond that date.

viii. A note dated April 6, 2011, of a telephone conversation with Mr. Partridge referring to the relevant notice to admit, noting paragraph 14 and recording:

Not beyond '07.

ix. A note of an April 8, 2011 telephone conversation with Mr. Partridge, including the following notation with respect to the notice to admit:

Second NTA, intention from beginning to limit claim for loss of revenue to MCC contract. Not asking for anything after December 31, '07.

Bottom line, prepared to limited time frame of claim to end '07. Claim limited October 6 -- December 31, '07.

x. The file also contains notes commencing in early November, 2011, with respect to the calculation by Advantage and Rilpa of profit and lease payments lost in 2008, leading Mr. Pankratz to write Mr. Mizera as follows on December 29, 2011:

With regard to the loss of lease payments, you will recall we were asked to address that issue in the second notice to admit provided by Heliponents. Based on discussions with Al and you and as per your instructions, we admitted that the claim for lost lease payments being claimed by Rilpa was limited to the MCC project.

(e) Affidavit of Mr. Pankratz

- [25] Mr. Pankratz deposes that he does not recall advising either Mr. Mizera or Mr. Partridge, prior to providing responses to the notice to admit, that the admissions could not be withdrawn without consent or court order. He did not have a standard practice of doing so when dealing with a client in response to a notice to admit.
- [26] He deposes that when he received correspondence from Mr. Mizera and Mr. Partridge in November 2011 documenting a claim for the 2008 year, he was advised by both that they had not understood, at the time they gave instructions with respect to the notice to admit and subsequently, the responses would restrict them from advancing such a claim. Mr. Pankratz advised the court at the trial management on December 8, 2011, he expected a motion would be necessary to withdraw admissions, and he shortly thereafter withdrew as counsel from the record.

(f) Cross-Examination of Deponents

- [27] The deponents were cross-examined on their affidavits. Mr. Mizera was unable to provide significant detail with respect to the 2008 claim that will be advanced by Rilpa if leave is granted to withdraw the admission. It was clear from his cross-examination that he has still not fully addressed that claim.
- [28] He acknowledged he gave Mr. Pankratz instructions to make the admissions in question on behalf of Rilpa and did not express any reservation when he did so. He sought no explanation from Mr. Pankratz and did not express to him his understanding that he might be free to withdraw the admission at a later date. He thought liability would not be a significant issue in the litigation and throughout believed that there was some prospect of settling the claim, but he could not recollect any specific discussions of settlement with Mr. Pankratz at the time he made the admissions in question.
- [29] He is adamant he never intended to abandon any claim for losses after December 31, 2011, in the event the claim could not be settled at an early date. He says he sought to withdraw the admissions when it became clear to him the claim might go to trial.
- [30] Similarly it was Mr. Partridge's evidence, on behalf of Advantage, Advantage suffered a loss in 2008, but he was unable to document the loss and he withdrew the suggestion in his previously filed affidavit that the helicopter would have been used for 650 hours up until the time the replacement helicopter was available in 2008. He acknowledged that assertion in his affidavit was erroneous.
- [31] He testified in cross-examination there had been a significant decline in wood prices in 2008 and Advantage received a notice from MCC in June 2008 that it would not be doing heli-logging that year and was seeking to defer payment of Advantage's bill. He acknowledged the replacement helicopter was flown for only 80 hours in 2008 after the repair. He expressed the view Advantage's 2008 claim would depend upon establishing the helicopter would be used for forest fire fighting, and he acknowledged some of the difficulty which would be

encountered in locating witnesses to testify they might have hired the helicopter for that purpose.

- [32] Mr. Partridge admits he instructed Mr. Pankratz to make the admissions in question on behalf of Advantage, but says when he did so he did not appreciate if the case went to trial he would be unable to withdraw the admissions and make a claim for 2008 losses. He admits he did not ask Mr. Pankratz for an explanation of the effect of the notice to admit. He says his intention was to limit the claim with a view toward negotiating settlement. He acknowledged, however, that at the time he made the admission, he had not given instructions to Mr. Pankratz to make a settlement offer. Only as the mediation approached in 2011 did he seek to determine the value of the 2008 claim.
- [33] In cross-examination, Mr. Partridge said he believed he told Mr. Pankratz he wished to reserve a claim in relation to the 2008 losses at the time the admission was made. I reject that evidence. He made no such allegation in his affidavit sworn in January 2012. It was vital to his case, if true, and cannot have been forgotten and now remembered. It is inconsistent with all of the documentary records and contradicted by the credible and consistent evidence of Mr. Pankratz. In some other respects, specifically in relation to the estimate of 2008 losses, Mr. Partridge's evidence has proven to be inaccurate.
- [34] On his cross-examination, Mr. Pankratz acknowledged that on receipt of demand for discovery of documents, he would have canvassed with his clients the necessary production that would be required. He would have conveyed to his clients the demand for production of documents with respect to the claim for future loss of revenue or lease payments.
- [35] He acknowledges he had discussions with counsel for the defendant Heliponents while the application for further production of documents was pending in December 2010 and January 2011 with respect to the nature of the claim for damages that would be advanced. He testified to his understanding from the outset in January 2009 that Advantage was not interested in advancing a claim for damages after the end of 2007 in part because of the difficulty of documenting and proving that claim.
- [36] He acknowledged that nowhere in his file is there any suggestion the responses to the demand for particulars or notices to admit are limited or for settlement purposes only. He says in response to the notice to admit, neither client suggested their intention was to limit the admissions for settlement purposes or to make any other reservation.
- [37] Mr. Pankratz was a careful and forthright witness. There was nothing in cross-examination inconsistent with the contents of his affidavit or the documentary evidence of his dealings with his clients in his file. No party challenges or seeks to impeach the evidence of Mr. Pankratz.

Applicants' Position

- [38] The plaintiffs submit the admissions that effectively limit their claim were made to encourage settlement and under the misapprehension they could be retracted and they were, therefore, inadvertent. They say there is circumstantial evidence to support their sworn testimony. The pilot's claim was settled before their admissions were made, and US attorneys for Heliponents suggested as early as October 14, 2008, in an e-mail that liability would not be an issue in relation to the accident.
- [39] In light of those facts, they say their evidence that they initially contemplated quick resolution of their dispute with Heliponents makes sense. They say the admissions were made with a view toward avoiding expensive litigation as examinations for discovery approached. They acknowledge there was no pending offer at the time the admissions were made but say they generally believed their solicitor was working on a settlement.
- [40] The fact they honestly believed the admissions could be withdrawn and did not limit their claims is evidenced by the fact that when protracted litigation appeared to be more likely, they began to seek to quantify a claim for 2008 and did so before asking Mr. Pankratz whether they could withdraw the admissions. They clearly thought they could move off their early settlement positions without leave. This course of conduct, they say, is consistent with a layperson's understanding of a notice to admit as an acknowledgement, like pleadings, of the nature of the claim being advanced for the time being.
- [41] They say their misapprehension was permitted to exist and continue by Mr. Pankratz, who did not inform them of the irrevocable nature of admissions. They further say common sense dictates against the quick and final abandonment of a claim with a potential value in the range of \$400,000. And they say such a claim may be made out on the evidence of historic use of the helicopter.
- [42] Advantage says the effect of its admission is unclear unless read together with the response to the demand for particulars and that Mr. Pankratz never sent the demand for particulars or the reply to the client. Mr. Partridge may therefore have been unaware of the effect of the admission made in April 2011. They say an admission may be withdrawn where in all of the circumstances there is a triable issue which ought to be tried in the interests of justice.
- [43] The plaintiffs cite the leading case *Norlympia Seafoods Limited v. Dale & Company Limited* (1982), 41 B.C.L.R. 145 (C.A.), as authority for the proposition that a party seeking to withdraw an admission need not prove the admission was inadvertently made. In *Norlympia*, leave to withdraw an admission clearly made in the pleadings was granted by the chambers judge. On appeal, it was argued it had not been established the admission had been made by inadvertence. Mr. Justice MacFarlane for the Court held:

In other words there may be circumstances in which the defendant may not be able to show by satisfactory evidence that the fact admitted is not true but the defendant may be able to show that an admission was made by inadvertence and that in the interest of justice the issue between the plaintiff and the defendant ought to be resolved by a trial of that issue.

[44] That may be so even where the admission was not a result of inadvertence.

[45] Nor is it necessary to prove new facts, or facts which were not taken into account at the time of the admission of liability was made, have come to light. The acquisition of new evidence, like inadvertence in making the admission, is a factor to be taken into consideration in deciding whether it is in the interests of justice to permit the withdrawal of an admission which otherwise could conclude a triable issue.

[46] Relying on *Norlympia*, supra; *Can-Am Produce and Trading Ltd. v. Moradian* (1995), 64 B.C.A.C. 207; *Fontaine v. British Columbia (Official Administrator)* (1996), 22 B.C.L.R. (3d) 371 (C.A.); and *Hamilton v. Ahmed* (1999), 28 C.P.C. (4th) 139 (B.C.S.C.), the plaintiffs say in considering whether the interests of justice demand that an issue be tried on the merits, the Court should weigh the following factors:

- Whether the admission was made hastily, inadvertently, or without knowledge of the facts;
- Whether prejudice in the conduct of the litigation would be occasioned by the withdrawal of the admission;
- Whether the fact admitted was within the knowledge of the party making the admission;
- Whether the fact admitted is not true;
- Whether the fact admitted is one of mixed fact and law;
- Whether there has been delay in applying to withdraw the admission.

[47] While the cases do identify the factors described by the applicant and while those factors are expressly listed in *Hamilton v. Ahmed*, there is in my view in the reported decisions a reluctance to give weight to any principal factor or to enunciate a test any more specific than that described in *Norlympia* and reiterated in *Can-Am Produce* in para. 8 as follows:

There is no dispute in this case that the chambers judge correctly stated the test to be applied in determining whether a party should be permitted to withdraw a deemed admission. That test is set forth in the decision of this Court in *Norlympia Seafoods Limited et al. v. Dale & Company Limited*, 1982 CanLII 491 (BCCA), (1982) 41 B.C.L.R. 145. The test is whether, in all of the circumstances, there is "a triable issue which ought to be tried in the interests of justice."

[48] Whether there is a triable issue is a question to be addressed summarily. In *Can-Am Produce*, the trial judge was held to have erred in weighing the prospects of success on the amended plea rather than simply satisfying himself that there was a case to be tried. At para. 12 in *Can-Am Produce*, the Court of Appeal held:

Having read the reasons for judgment of the chambers judge, I conclude that he erred in the manner in which he applied the test as to whether the admissions should be withdrawn. In particular, I conclude that he treated the application as effectively being one under Rule 18A [the old summary trial rule] and that he made a final determination on that basis rather than simply determining whether there was an issue worthy of being tried.

[49] The plaintiffs say where an admission has been made inadvertently, or as in some of the cases, has been occasioned by a solicitor's slip, the application to withdraw should be made on a simple balance of prejudice and consideration of the interests of justice. They say a particular test applies in such circumstances, citing *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, 2005 BCSC 90.

[50] In that case, Master Bolton attempted to reconcile what he considered to be two lines of cases: those which appear to be decided on a simple analysis of prejudice on one hand, such as *La v. Le* (1993), 78 B.C.L.R. (2d) 322 (C.A.); and those which impose other specific burdens on the applicant: *Halagen v. Reiffel* (1998), 56 B.C.L.R. (3d) 59 (S.C.); *Gillies v. Coutu* (1994), 100 B.C.L.R. (2d) 115 (S.C.); and *Phil Whittaker Logging Ltd. v. British Columbia Hydro and Power Authority* (1985), 65 B.C.L.R. 384 (S.C.). In that case, Master Bolton held that the line of authorities are reconcilable at para. 22:

From my review of the cases cited by counsel here, it appears that where an applicant can establish one of the conditions referred to by McFarlane J.A. -- that the admission was made inadvertently, hastily, without knowledge of the facts, or where the facts came to the attention of the court (the applicant?) Only after the admission was made -- the issue will be decided on a simple balance of prejudice and consideration of the interests of justice. Where, however, none of those conditions are met, the balance of prejudice must be much more substantially in favour of the applicant before the court will conclude that the interests of justice warrant the withdrawal of the admission.

[51] The plaintiff says an admission may be said to have been a result of inadvertence where there is a misunderstanding between the client and his counsel, relying upon *Abacus Cities Ltd. v. Port Moody (City)* (1981), 26 B.C.L.R. 381 (C.A.), where there was a misunderstanding by the then-solicitor for the defendant of the defendant's position with respect to a contract. The plaintiffs say the admissions in question were made as a result of an error on the part of their solicitor and that this is precisely the type of situation which warrants an order allowing the withdrawal of the admissions.

Respondent's Position

[52] The defendant says the assertions of Mr. Partridge and Mr. Mizera that they believed the admissions could later be withdrawn defy all logic. There is no evidence of settlement discussions ongoing at the time of the admissions. To the contrary, the defendant was pressing for the production of evidence in support of the alleged 2008 losses. The attempt to withdraw the admissions on the eve of mediation suggests that the plaintiffs themselves

believed a larger claim rather than a smaller one would be conducive to or an incentive to settlement. The defendant says at that the admissions were never, in fact, used as a negotiating tactic.

- [53] The defendant says Mr. Pankratz's correspondence to his client sufficiently describes the importance of the admissions and counsels the clients to deny any facts with which they do not fully agree. The defendant attacks the credibility of Mr. Partridge and Mr. Mizera by pointing out errors and overstatements in their statement with respect to the value of the 2008 losses.
- [54] The defendant says there is no case authority for permitting the withdrawal of clear, affirmative admissions. It is true that most reported cases to which I was referred involve the withdrawal of deemed admissions or admissions inadvertently made in pleadings. The defendant relies on *Davie v. Wilson*, 2007 BCSC 1876, where Mr. Justice Edwards refused to permit a plaintiff to withdraw an admission made five years prior to the application that no income losses had resulted from two of his eight motor vehicle accidents.
- [55] The defendant says there, as here, the admission was not made inadvertently or hastily. It was clearly made with the advice of counsel and apparently for the purpose of forestalling discovery with respect to an issue. The admission appeared to be a deliberate step taken after due consideration. No new facts had come to the attention of the plaintiff. Delay had occasioned prejudice. The claim had become harder to defend. Records might have been lost. The application in that case was dismissed.
- [56] Insofar as the prejudice resulting from the inability to withdraw the admission is concerned, the defendant says the plaintiff's own cost/benefit analysis speaks to the limited value of the claim to the plaintiffs. The defendant says given the clear unambiguous admission and the lack of misapprehension, the plaintiffs ought to be required to show the balance of prejudice weighs heavily in favour of withdrawal of the admission in order to succeed, but that even on a simple balancing of prejudice, the plaintiffs ought not to succeed.

Analysis

- [57] There is clearly a case to be tried in relation to lost revenue and lease payments in 2008. I am not now to conduct a summary trial or to weigh the merits of the claim. The defendant did not attempt to establish there was not a triable case. Evidence of the merits was before me for the purpose of establishing the clear and compelling motive of the plaintiffs to abandon the 2008 claim and the marginal prejudice that would result from its abandonment, the relative difficulty and expense involved in proving that claim in comparison with its potentially limited value.

- [58] To that extent, the defendant was only partly successful. The claim clearly faces some evidentiary hurdles. It will also entail some expense. It is not clear to me that the expense of proving the claim is so large in relation to its potential value that it is obviously a claim a reasonable plaintiff would willingly abandon.
- [59] I do not regard this application as hinging primarily or even significantly on the credibility of the parties. It is not necessary, in my view, to determine whether Mr. Mizera and Mr. Partridge intended the admissions to assist in resolution of the claim or whether, when the admissions were made, they really believed that they might later be withdrawn at their sole discretion. It is neither helpful nor possible to inquire into the plaintiffs' unexpressed thoughts and intentions. They acknowledge there was no specific settlement offer pending and the admissions were not made conditionally either to the defendant or by the plaintiffs to their own counsel.
- [60] If it can be said that the admissions were made here for the purpose of settling the claim, so might every admission be said to be made for that purpose. The circumstances in which the admissions were made do not suggest the admissions were intended to be subject to retraction or withdrawal. There was no apparent uncertainty with respect to what was intended.
- [61] I turn to the question of haste, inadvertence or absence of knowledge of the facts. The admission in this case was not a result of inadvertence on the part of the solicitor, but was clearly made on the express instructions of the clients on the basis of facts that have not changed since the date of the admissions. There was no haste in making the admissions. They were considered and made after an exchange in writing and some express consideration of the costs and benefits of the admissions.
- [62] This is not a case such as *Abacus Cities Ltd. v. Port Moody (City)* where the solicitor misunderstood the instructions given to him by his client, or *Piso v. Thompson*, 2010 BCSC 1746, where there was a deemed admission said to arise out of sloppy, inadvertent and possibly even negligent failure on the part of former counsel for the plaintiff. The plaintiffs were expressly and formally abandoning any claim for the losses suffered after 2007. When they made the admissions, they would have settled the claim without seeking payment for any 2008 losses. They do not say how long they would have been willing to do so or claim to have instructed counsel to that effect. Their instructions were clear and unequivocal.
- [63] The plaintiffs may have harboured the unexpressed intention of advancing a different claim in the future, but given the views expressed by Mr. Partridge to Mr. Pankratz that the cost of making a 2008 claim was not worthwhile and given the fact that Rilpa claim depended in large part upon an Advantage claim, there was no apparent reason, in my view, for Mr. Pankratz to regard the admission as one made solely for settlement purposes or to inquire further into his clients' motives. There was no reason to suspect the intention to abandon a 2008 claim was temporary given the reasons Mr. Partridge expressed to Mr. Pankratz for abandoning that claim. The difficulty of proving a 2008 loss could only increase over time, as

Mr. Partridge in fact suggests it has.

- [64] I turn to the question of prejudice in the conduct of the litigation. There will be prejudice in the withdrawal of the admissions. The parties will lose the presently set trial date in February 2013, and the resolution of the issues between them will be delayed by at least a year. There will be some expense thrown away in preparation for trial and examination for discovery that will have to be repeated. An appropriate order for costs may relieve the defendant from the effects of the expense thrown away but will not make up for lost time in litigation.
- [65] Further, Mr. Partridge in cross-examination and re-examination testified to the difficulty even he, the person who is the most able to reconstruct his potential earning stream, may encounter in identifying and locating those who might have offered Advantage fire-fighting work in the spring and summer of 2008 in Alberta, Ontario and Quebec. His potential clients were informal contacts and the people involved were described by him as mobile and they may be difficult to locate.
- [66] Further, as Mr. Hordo pointed out in submissions, the 2008 claim may be answered by looking at utilization and the profitability of others in the helicopter lease business in 2008, and that data may be harder to reconstruct now than it might have been when discovery of income information with you first by Mr. Fetterly over two years ago.
- [67] I turn to delay in making the application. The plaintiffs say there was no delay in making the application. That is true in the strict sense in that the application was filed promptly upon the plaintiffs learning in November 2011 they could not withdraw the admission at their sole discretion.
- [68] There has, however, in my view, been delay in formulating the 2008 income loss case and that has caused prejudice. There was clearly some consideration given to their costs and convenience when the plaintiffs initially made the admissions in question in 2011. In the years since they learned last November the admissions could not be withdrawn without leave, they have apparently done nothing to advance their claim. It is true that it was difficult to bring on this four-day hearing, but that did not preclude the plaintiffs from obtaining and producing the evidence necessary to quantify the 2008 claim. That 2008 claim might have been documented and quantified before the matter came on for hearing before me. The plaintiffs might have been in a position to say that the defendant had known the particulars of their claim for months. They might have put the defendant in the uncomfortable position of relying on its own inactivity to establish its prejudice. The plaintiffs did not do so, but rather came before me with no more evidence in support of their claim and apparently having expended no more effort on its verification than they had in early 2011 when they made the admissions.

[69] By their conduct they, in my view, continued to demonstrate an unwillingness to expend time and effort on the claim they now wish to advance. In the circumstances, I am of the view that it would be unjust to the defendant to permit the plaintiffs to reassess the costs and benefits of a claim for 2008 losses and thereby cause the defendants to have to engage in a late and more difficult examination of that claim. The application to withdraw the admissions is therefore dismissed.

[SUBMISSIONS]

[70] There will be costs to the defendant of the application to withdraw the admissions, in any event of the cause.

"P. Willcock J."

The Honourable Mr. Justice P. Willcock

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