

CANADA / JUDGMENT

Avina v. Rodriguez

2022 BCSC 482

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Supreme Court of British Columbia

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2022 BCSC 482 Avina v. Rodriguez

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Avina v. Rodriguez,

2022 BCSC 482

Date: 20220325

Docket: S187218

Registry: Vancouver

Between:

Oscar Avina

Plaintiff

And

Lenic M. Rodriguez and Sea-Chariot Holdings Inc.

Defendants

Before: The Honourable Justice Mayer

Reasons for Judgment

Counsel for the Plaintiff:

J.H. Ormiston

J. Lau, Articled Student

(November 16-19, 2021

P. Jarrett

(March 4, 2022)

The Defendant, appearing in Person:

L.M. Rodriguez

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 16-19, 2021 and

March 4, 2022

Place and Date of Judgment:

Vancouver, B.C.

March 25, 2022

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- [1] This matter concerns a dispute between two shareholders of a holding company regarding the distribution of proceeds from the sale of a pleasure craft, the Sea Senior, in May 2018.
- [2] The particular issues before the court concern the terms and enforceability of an alleged settlement agreement between the plaintiff, Oscar Avina, and the defendants Lenic Rodriguez and the parties' holding company, Sea-Chariot Holdings Inc. (the "Settlement Agreement").
- [3] Mr. Avina alleges that the parties entered into the Settlement Agreement on July 20, 2017, the day that they appeared before Justice Sigurdson, as he then was, to speak to an order for costs arising from an earlier and related proceeding. Mr. Avina alleges that Mr. Rodriguez breached various terms of the Settlement Agreement and seeks judgement against the defendants in the amount of \$79,590.58 - primarily consisting of Mr. Avina's claim for a 49% interest in the proceeds from the sale of the Sea Senior.
- [4] Mr. Rodriguez, who appeared for himself and Sea-Chariot Holdings Inc. ("Sea-Chariot") at trial, denies that the parties entered into the Settlement Agreement. He contends that Mr. Avina's share of the net proceeds from the sale of the Sea Senior is approximately \$9. He also counterclaims for various expenses he says he incurred in maintaining the Sea Senior before and after it was sold.

Background

The Decision to Purchase the Sea Senior

- [5] Mr. Avina and Mr. Rodriguez had been friends for many years and both shared an interest in boating. They formulated a plan to find a vessel which they would purchase together and share.
- [6] In early 2012, Mr. Avina and Mr. Rodriguez attended at a Vancouver boat show and decided to purchase the Sea Senior, a 2007, 34 foot Mainship Trawler, for \$225,000, with each party agreeing to share the purchase cost and subsequent maintenance and related costs on a 50/50% basis. Mr. Avina was unable to obtain financing to pay his 50% share of the purchase price and Mr. Rodriguez lent him the necessary amount, which Mr. Avina agreed to repay over time at 5% interest. The parties purchased the Sea Senior through Sea-Chariot, with Mr. Rodriguez holding 51% of the shares and Mr. Avina holding 49%.
- [7] After purchasing the Sea Senior, Mr. Avina and Mr. Rodriguez moored it at a marina on False Creek in Vancouver, within walking distance of Mr. Avina's home. They used the Sea Senior and shared some costs for approximately two years until a dispute arose between the parties regarding repayment of the loan provided to Mr. Avina by Mr. Rodriguez.

- [8] In the Spring of 2014 the parties tried to sell the Sea Senior for \$250,000 at a boat show but were unsuccessful. Around the end of August 2014, and without Mr. Avina's consent, Mr. Rodriguez took the Sea Senior from its moorage in False Creek, used it for a time and then moved it to a new moorage location on Bowen Island. Mr. Rodriguez characterizes the step of taking the Sea Senior as a seizure, which he contends was justified as a result of Mr. Avina's breach of the loan agreement.

Commencement of Litigation

- [9] In January 2015, after the Sea Senior was taken by Mr. Rodriguez, Mr. Avina commenced an Admiralty action in rem against the Owners and All Others Interested in the Ship "Sea Senior", Mr. Rodriguez and Sea-Chariot. Pursuant to an arrest warrant issued February 25, 2015, Mr. Avina had the Sea Senior arrested at Bowen Island and it remained tied to the dock for some time before it was ultimately sold in May 2018.
- [10] Mr. Avina's action was heard before Justice Sigurdson in November 2016. In reasons for judgement released December 14, 2016, indexed as *Avina v. Sea Senior (Ship)*, 2016 BCSC 2488 [Avina], Justice Sigurdson found that Mr. Avina had defaulted on the loan agreement between him and Mr. Rodriguez. At that time, the principle due under the loan was approximately \$62,000. Justice Sigurdson declined to order that the Sea Senior be sold at that time, as was sought by Mr. Avina at trial, due to a lack of time to deal with this issue: Avina at paras. 83-84.
- [11] Justice Sigurdson left it to the parties to calculate the amount due and owing to Mr. Rodriguez under the loan, inclusive of interest. He also found this amount was subject to adjustment, depending on the amount each party had contributed toward their share of moorage and other costs in accordance with their cost sharing arrangement: Avina at paras. 70-74. Justice Sigurdson did not make a finding with respect to the contributions which the parties had made but left it to them to try to resolve this issue.
- [12] Following issuance of Justice Sigurdson's December 14, 2016 reasons for judgment, Mr. Avina tendered payment of \$62,454.50 to Mr. Rodriguez pursuant to the judgment. On June 15, 2017 Mr. Rodriguez signed and returned a document entitled "ACKNOWLEDGMENT OF PAYMENT" in which he acknowledged receipt of this amount in satisfaction of "the balance owing by [Mr. Avina] on the loan from [Mr. Rodriguez], interest on the same and any amounts owing between the parties pursuant to the expense sharing agreement as of August 31, 2014 and pre and post judgment interest".

Settlement Negotiations

[13] The parties appeared before Justice Sigurdson in chambers in July 2017, to make submissions on various ancillary issues, including an order that the Sea Senior be sold and an order concerning costs of the November 2016 trial. During this hearing, as a result of advice from counsel that both parties wished to list the Sea Senior for sale, Justice Sigurdson stood the matter down to provide the parties with an opportunity to discuss settlement.

[14] A transcript of the chambers proceeding was entered as an exhibit at this trial. Mr. McCubbin, the then counsel for the defendants, and Mr. Jarrett, counsel for Mr. Avina, made the following submissions:

MR. McCUBBIN: All right. Thank you for the indulgence, My Lord, and I am pleased to say that the morning was not spent in the hallway in vain.

We do have a settlement for part of the matter, that I think my friend would agree is a fair compromise between - between the parties interests here.

So pursuant to the terms we got to, and this is subject to - a final draft, but we've gone into a fair bit of detail. I'd be very surprised if it fell through at this point.

Mr. Rodriguez will maintain the listing with - Freedom Marine, or such other [broker] as he deems suitable.

During the listing Mr. [Rodriguez] will have exclusive use, access, responsibility and so on for the vessel, including operating costs and expenses.

Mr. Rodriguez will provide reasonable information to Mr. Avina regarding proof of insurance, maintenance costs and records, as well as offers received - received while it's listed.

Mr. Rodriguez will have exclusive conduct of sale, including handling the listing, negotiating sale - any sales or any offers, managing the brokerage and so on.

He is not under any obligation to sell. Any sale will be subject to shareholder approval, which will not be unreasonably withheld, the parties will have the right to apply for the court on two days' notice .

MR. MCCUBBIN: And that approval will also be based on information exchanged so the parties are able to assess the providence of the sale.

If not sold by October 30, 2018, then Mr. Avina is to make a shotgun offer, choosing the price at which he is to buy or sell the - Mr. Rodriguez's shares.

Mr. Rodríguez has 15 days to elect whether to buy or sell, failing which election then it will be deemed a purchase by Mr. Rodriguez and a share sales to close within 30 days of the election or deemed election.

Upon sale the funds will be paid to MJM Law Corp in trust, that being my firm, with proceeds paid out as follows: first to brokerage and other closing costs of the sale; second to the reasonable expenses arising during arrest, [moorage] maintenance and so on, paid to Mr. Rodriguez, and my friend and I have agreed on some details around that; as well any sale expenses, so for example if the broker agree - - suggests a bit of money to stage the vessel to increase the sale price, then with prior approval those will be paid to Mr. Rodriguez first; net proceeds to be paid out to Mr. Rodriguez and Mr. Avina in the most tax-advantageous way on a 51/49 percent basis and the company would then be dissolved.

Upon accepting an offer Mr. Rodriguez to confirm that there is no claims, outstanding debts or possible claims against the vessel.

The agreement will include the usual commercial terms, like to act reasonably and in good faith and that time is of the essence, and any sale will be conditional on a purchaser paying the applicable sales tax.

So that is what we worked out. My friend and I are going to try to formalize it, hopefully in the next week, and subject to that we will adjourn Mr. Avina's relief generally.

THE COURT: All right. That's your understanding of the arrangement?

MR. JARRETT: Yes, and just subject to papering it, I mean it was a long haul, but I think we've got most of the details and -

THE COURT: Okay.

MR. JARRETT: -- that was a - a broad strokes brush just to get it on the record, My Lord.

[15] At the trial before me, Mr. Avina testified that on July 20, 2017 the parties engaged in shuttle negotiations in the Vancouver courthouse and that the parties' settlement was recorded on notes taken by Mr. McCubbin, the defendants' lawyer. Mr. Avina testified that having a cap on expenses for maintaining the Sea Senior before it was sold was an issue of concern for him and that the parties agreed to a \$15,000 cap.

[16] Mr. McCubbin testified that the negotiation on July 20, 2017 took all morning. He confirmed that during the negotiation the parties had agreed to certain terms which he recorded on notes. Mr. McCubbin testified that the parties had resolved the bulk of the issues and when they returned before Justice Sigurdson read the agreement into the record, and intended to finalize a paper agreement confirming the remaining details.

[17] Mr. McCubbin's notes of the settlement discussions between the parties on July 20, 2017 was entered as an exhibit. The notes, with the heading "Terms of Listings" set out terms which are consistent with the terms of settlement that Mr. McCubbin read into court. The only difference is that Mr. McCubbin's notes state that upon a sale of the vessel, sales proceeds would also first be paid to Mr. Rodriguez for "[r]easonable expenses of arrest (moorage/ insurance etc.) and sale expenses w/prior approval" before the balance was divided between the parties.

- [18] Mr. McCubbin testified that during the negotiation the major issue was who would deal with the proceeds from the sale of the Sea Senior and that the intention was that the funds would be paid into his account. He did not recall discussing a cap on expenses for maintaining the Sea Senior before it was sold, on July 20, 2017. He testified that he is not sure where a cap of \$15,127 for maintenance expenses, which appeared on a draft of a written settlement agreement he sent to Mr. Jarrett on July 26, 2017, came from. He testified that he reviewed his file and has no record showing a discussion concerning a \$15,127 cap. I will discuss the evidence concerning the exchange of draft written settlement agreements later in my reasons.
- [19] At this trial, Mr. Rodriguez testified that on July 20, 2017 the parties agreed that the Sea Senior would be sold. He testified that the parties had not agreed to a cap on the costs of maintaining the Sea Senior before a sale occurred.
- [20] In reasons for judgment on the remaining issue of costs of the November 2016 trial, released August 11, 2017, Justice Sigurdson awarded costs of the November 2016 trial to the defendants, Mr. Rodriguez and Sea-Chariot: *Avina v. Sea Senior (Ship)*, 2017 BCSC 1406. Justice Sigurdson's reasons at para. 2 suggest that he believed the parties had settled the terms for listing and sale of the Sea Senior, stating as follows:
- [2] They have now apparently reached an agreement for the listing and sale of the subject vessel and a mechanism for judicial approval of a sale if the parties cannot agree. Accordingly, the only outstanding issues were the question of costs
- [21] Some time after issuance of Justice Sigurdson's August 2017 reasons, Mr. Avina paid costs to the defendants in the amount of \$13,000. On November 7, 2020 Mr. Rodriguez signed and returned a document entitled "ACKNOWLEDGMENT OF PAYMENT" in which he acknowledged receipt of this amount in satisfaction of "the judgment of August 11, 2017".
- [22] On July 26, 2017, Mr. McCubbin provided a first draft of a written settlement agreement, entitled "Listing Agreement", to Mr. Jarret. His email indicated that he had not reviewed the draft with his clients - Mr. Rodriguez and Sea-Chariot. Included for the first time was a clause limiting the amount which would first be paid to Mr. Rodriguez for "expenses associated with maintenance following the Arrest" to \$15,127.27, unless otherwise agreed or not reasonably foreseeable.
- [23] The parties exchanged additional draft settlement agreements during the remainder of August 2017 but were unable to finalize the terms of a written agreement.
- [24] At some point during the month of August 2017, the Sea Senior was vandalized while at its berth on Bowen Island and as a result sustained damage to its engines and other systems. Mr. Rodriguez made an insurance claim for damages resulting from the vandalism in the amount of \$73,574.01 and received \$62,570.64 in insurance proceeds. At trial, Mr. Rodriguez acknowledged that he received the insurance proceeds from insurers but did not know what he did with the money.

- [25] In May 2018, and without notice to Mr. Avina, Mr. Rodriguez sold the Sea Senior for \$155,000US. He initially deposited the sales proceeds into Sea-Chariot's corporate account and then withdrew the funds.
- [26] On May 16, 2018, Mr. Rodriguez sent Mr. Avina an email setting out his calculation that after deducting sales commissions and various expenses Mr. Avina was entitled to receive \$9.04 from the proceeds of sale of the Sea Senior.
- [27] Mr. Avina did not agree with Mr. Rodriguez's calculation and commenced this action on June 29, 2018, seeking to enforce the terms of the Settlement Agreement - which he contends include a \$15,127.27 cap on expenses for maintaining the Sea Senior.
- [28] In March 2020, Mr. Rodriguez sent Mr. Avina an invoice claiming that Mr. Avina owed Sea-Chariot \$127,000. Mr. Rodriguez filed his counterclaim on August 4, 2020, seeking an award for an unspecified amount for damages.

Issues

[29] The issues are as follows.

1. Did the parties enter into a binding agreement on July 20, 2017 (the Settlement Agreement)? If yes, then,
 - a) Did the Settlement Agreement include a \$15,127.27 cap on maintenance expenses for the Sea Senior? If yes, over what period of time?
 - b) If I do not find that parties agreed to a cap on maintenance expenses, what are the terms of the Settlement Agreement regarding expenses?
2. If the Settlement Agreement is binding, what amount is payable to Mr. Avina from the sale of the Sea Senior?
3. If the Settlement Agreement is binding, did Mr. Rodriguez and Sea-Chariot breach the Settlement Agreement by failing to pay Mr. Avina his proportionate share of the proceeds of sale of the Sea Senior? If the Settlement Agreement is not binding, is Mr. Avina entitled to a share of the proceeds pursuant to the doctrine of unjust enrichment?
4. Is Mr. Avina entitled to an award of punitive damages arising from Mr. Rodriguez's alleged reprehensible conduct of unilaterally selling the Sea Senior and then retaining the sales proceeds for himself?
5. Is Mr. Rodriguez entitled to damages in respect of his counterclaim?

Discussion

Did the parties enter into an agreement on July 20, 2017 and if so, what were its terms?

[30] Mr. Avina submits that the parties entered in the Settlement Agreement on July 20, 2017 and that the agreement is binding upon them. He contends that the terms of the Settlement Agreement include, in summary, the following relevant terms:

- a) That Mr. Rodriguez would continue to list the Sea Senior for sale with a yacht broker until October 31, 2018;
- b) That Mr. Rodriguez would provide Mr. Avina with, amongst other things, any written offers received for the Sea Senior and that Mr. Avina's approval was required for a sale;
- c) Mr. Rodriguez would have exclusive use of and responsibility for the Sea Senior, including paying operating costs and expenses during a listing period expiring October 31, 2018 (the "Listing Period");
- d) That Mr. Rodriguez would be reimbursed for reasonable maintenance expenses during the Listing Period up to \$15,127.27;
- e) When the Sea Senior was sold, sales proceeds would be paid to Mr. McCubbin's firm in trust and distributed to the parties pursuant to their proportionate shareholdings in Sea-Chariot after payment of the following:
 - i. Brokerage and related fees related to the sale;
 - ii. Mr. Rodriguez's reasonable expenses for maintenance, moorage, repairs and insurance, arising from September 1, 2014, the date when Mr. Rodriguez seized the Sea Senior, until March 24, 2017, when it was released from arrest by Mr. Avina, of up to a cap of \$15,127.27 unless otherwise agreed or not reasonably foreseeable - less any amounts paid by Mr. Avina for insurance; and
 - iii. Additional expenses associated with improving the Sea Senior for the purposes of increasing its market value.
- f) Before accepting an offer to sell Mr. Rodriguez would confirm in writing that there were no potential claims or debts in respect of the Vessel if so, he would be responsible for discharging and satisfying all such claims; and
- g) Following a sale of the Sea Senior, Sea-Chariot would be dissolved.

[31] Mr. Rodriguez denies that the parties entered into a binding agreement, the Settlement Agreement, on July 20, 2017. He contends that when the parties were before Justice Sigurdson on that date and afterwards they had not agreed on all essential terms - in particular, payment of maintenance and related costs for the Sea Senior.

[32] In *Salminen v. Garvie*, 2011 BCSC 339 at paras. 24-27, Justice Williams sets out a brief and helpful outline of the basic requirements for finding that a contract has been made out:

- [24] A contract is usually the product of negotiation, during which the terms of a proposed agreement are accepted, without qualification, by one party (the offeree) as presented by the other party (the offeror).
- [25] For parties to be bound in a contractual relationship, there must be a manifest meeting of the minds or consensus ad idem on all the essential elements of what that relationship will be: G.H.L. Fridman, *The Law of Contract in Canada*, 5th ed. (Toronto: Thomson Canada Ltd., 2006) [Fridman] at p. 14. The absence of a formal signed and properly witnessed agreement does not change the binding nature of a contract. What is required is that the contracting parties express themselves outwardly in a manner indicating an intention to be bound to mutually-agreed and reasonably-certain terms.
- [26] The burden of proving consensus is on the party seeking to prove the existence of the agreement; the standard to be met is proof on a balance of probabilities: *Reid v. Reid*, 2011 BCSC 231 at para. 27, [2011] B.C.J. No. 298 (QL), citing *Bell v. Bell* (1998), 24 E.T.R. (2d) 169, [1998] B.C.J. No. 1457 (QL) at para. 14 (S.C.).
- [27] The test for determining consensus ad idem at the time of contract formation is objective: it is "whether the parties have indicated to the outside world, in the form of the objective reasonable bystander, their intention to contract and the terms of such contract"; it is "whether a reasonable... [person] in the situation of that party would have believed and understood that the other party was consenting to the identical term": Fridman, *supra*, p. 15; see also *Smith v. Hughes* (1871), L.R. 6 Q.B. 597 at 607 adopted in *St. John Tugboat Co. Ltd. v. Irving Refining Ltd.*, [1964] S.C.R. 614, 1964 CarswellNB 4 at para. 19, and *Remington Energy Ltd. v. B.C. Hydro & Power Authority*, 2005 BCCA 191 at para. 31, 42 B.C.L.R. (4th) 31. The actual state of mind and personal knowledge or understanding of the promisor are not relevant in this inquiry: *Hammerton v. MGM Ford-Lincoln Sales Ltd.*, 2007 BCCA 188 at para. 23, 30 B.L.R. (4th) 183, citing S.M. Waddams, *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book Inc., 2005) at 103. 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. Dalgliesh*, [1995] B.C.J. No. 403 (QL), 1995 CarswellBC 1822 at para. 59 (S.C. Chambers). The test's focus on objectivity animates the principal purpose of the law of contracts, which is to protect reasonable expectations engendered by promises.
- [33] Both parties agree that they sought to negotiate the terms of a settlement agreement during the morning of July 20, 2017, when Justice Sigurdson encouraged them to do so. Both parties agree that the terms they discussed were recorded on notes taken by Mr. McCubbin, Mr. Rodriguez and Sea-Chariot's lawyer. Both parties agree that Mr. McCubbin read the terms negotiated between the parties from his notes into the record when the parties appeared back before Justice Sigurdson later that day.

- [34] The transcript of proceedings from the July Chambers Proceeding shows that Mr. McCubbin advised Justice Sigurdson that the parties had settled on the essential terms of an agreement. Mr. Jarrett, counsel for Mr. Avina, confirmed that the parties had come to an agreement which they intended to "paper" and that the parties wanted to get the terms "on the record". At the trial before me, Mr. McCubbin confirmed that the transcript set out the terms agreed upon between the parties.
- [35] Mr. Rodriguez agreed that he was present when the terms of the agreement were read to Justice Sigurdson on July 20, 2017. In response to a question from the Court, he could not satisfactorily explain why, if he thought that an agreement had not been concluded, he did not say so when his lawyer Mr. McCubbin read the terms out in court before Justice Sigurdson. I find Mr. Rodriguez's explanation in the trial before me that he did not want to interrupt his lawyer to be unconvincing.
- [36] Despite the fact that the parties did not ultimately finalize a written document, which is not required for a binding agreement to be found, I find that on July 20, 2017 the parties entered into a binding agreement. Under this agreement the parties agreed to sell the Sea Senior and distribute the sales proceeds to Mr. Avina and Mr. Rodriguez, after paying various expenses. I find that the terms of the Settlement Agreement, which are those contained within the notes of Mr. McCubbin and read into court, include the following:
- a) After July 20, 2017 Mr. Rodriguez was to maintain a listing agreement for the sale of the Sea Senior with Freedom Marine, or such other yacht broker as he saw fit;
 - b) While the Sea Senior was listed for sale Mr. Rodriguez would have exclusive use, access and responsibility of and for the Sea Senior including the obligation to pay operating costs and expenses;
 - c) Mr. Rodriguez would provide reasonable information to Mr. Avina regarding proof of insurance, maintenance costs and records, as well as any offers received for the Sea Senior while it was listed for sale;
 - d) Mr. Rodriguez would have exclusive conduct of sale, including handling the listing, negotiation of a sale and managing dealings with the yacht broker;
 - e) Before accepting an offer, Mr. Rodriguez would confirm that there were no claims, outstanding debts or other possible claims against the Sea Senior;
 - f) Any offers to purchase the Sea Senior would be subject to the approval of Mr. Avina and Mr. Rodriguez, which would not be unreasonably withheld;
 - g) If the Sea Senior was not sold by October 30, 2018, then a shot-gun procedure would be put in to affect for the shares of Sea-Chariot, with Mr. Avina making the first offer to buy Mr. Rodriguez's shares or sell his shares in Sea-Chariot to Mr. Rodriguez, and if Mr. Rodriguez did not accept such an offer within 15 days Mr. Rodriguez would be deemed to have purchased Mr. Avina's shares for the offered price;

- h) Upon the sale of the Sea Senior, the sales proceeds would first be paid to MJM Law Corp., with proceeds then paid out as follows:
 - i. for yacht brokerage and other closing costs of the sale;
 - ii. to Mr. Rodriguez for reasonable expenses arising during the time that the Sea Senior remained under arrest, including but not limited to moorage and maintenance expenses;
 - iii. for any amounts spent to stage the Sea Senior to increase its sale price; and
 - iv. after payment of the amounts set out above, the net sales proceeds would be paid to Mr. Rodriguez and Mr. Avina in the most tax-advantageous way, proportionate to their respective shareholdings (51/49%) in Sea-Chariot;
- i) After payment to Mr. Rodriguez and Mr. Avina, Sea-Chariot would be dissolved; and
- j) That the parties would incorporate the agreed upon terms into a written agreement which would include "usual commercial terms" including the requirement to act reasonably and in good faith, that time is of the essence, and that any sale would be conditional on a purchaser paying the applicable sales tax.

Did the Settlement Agreement include a cap on maintenance expenses?

[37] I do not find that the parties agreed to a \$15,127.27 cap on maintenance expenses. Both Mr. Rodriguez and his legal counsel Mr. McCubbin denied that this was the case. Although during trial Mr. McCubbin acknowledged that he included a \$15,127.27 cap in the first draft of a written agreement sent on July 26, 2017, he confirmed that he had not discussed this figure with his client and did not know where the number came from. Mr. Avina has not provided any objective evidence on which I can determine that the parties discussed a cap during their negotiations on July 20, 2017. Mr. Jarret, who handled the negotiations for Mr. Avina, was not called as a witness at trial and therefore his evidence on this point is unknown.

[38] The fact that the parties exchanged drafts of a written agreement setting out additional terms including a cap on expenses after they had agreed to terms on July 20, 2017, arguably better terms for Mr. Avina, does not get rid of the contract already arrived at. The following reasons and the authorities referred to by Justice Williams in *Salminen* at paras. 29-31 set out the principles to be applied when considering whether further negotiations affect the formation of a contract:

[29] However, generally, the mere proposal of additional or better terms does not negate the existence of a binding contract. Put alternatively, further negotiations are not necessarily inconsistent with a fully-formed agreement. As noted by Masuhara J. in *Norske Skog Canada Ltd. v. Companhia de Navegação Norsul*, 2007 BCSC 610, [2007] B.C.J. No. 919 (QL) at para. 73 quoting from Sir Guenter Treitel in *The Law of Contract*, 11th ed. (London: Sweet & Maxwell, 2003) at 17-18, rev'd 2008 BCCA 336, 83 B.C.L.R. (4th) 226:

...The court will then look at the entire course of the negotiations to decide whether an apparently unqualified acceptance did in fact conclude the agreement. If it did, the fact that the parties continued negotiations after this point will not normally affect the existence of the contract; it will do so only if the continuation of the negotiations can be construed as an agreement to rescind the contract. A fortiori, the binding force of an oral contract is not affected or altered merely by the fact that, after its conclusion, one party sends to the other a document containing terms significantly different from those which had been orally agreed.

[30] To similar effect, in *Ridgeway-Pacific Construction Ltd. v. United Contractors Ltd.*, [1978] B.C.J. No. 478 (QL) at para. 42, 1978 CarswellBC 668 (S.C.), Gould J. stated as follows:

The principle is that once a definite offer has been made and accepted without qualification and it appears that all essential terms have been agreed between the parties, there exists a contract which cannot be affected by subsequent negotiations. Once there is a complete contract further negotiations between the parties cannot, without the consent of both, get rid of the contract already arrived at. [case references omitted]

[31] Masuhara J. went on to quote from Professor S.W. Waddams in *The Law of Contracts*, 5th ed. (Toronto: Canada Law Book, 2005) at para. 28:

Where there appears to be a firm agreement at one stage, but subsequently negotiations resume, the facts are susceptible of at least two analyses. There may be an agreement that remains intact, with subsequent negotiations on a supplementary agreement, the failure of which is irrelevant to the enforceability of the prior agreement, or the subsequent negotiations may show that there is no agreement, either because, looked at as a whole, events show agreement never was reached, or because the subsequent conduct amounts to a rescission of the earlier agreement, or sets up an estoppel. The latter analysis seems appropriate where one party, in negotiating for better terms, leads the other to believe that there is not yet any firm agreement at all. In those circumstances she is attempting to improve her position by threatening to back out altogether, and she should not then be allowed to fall back on an agreement the existence of which she has by her own conduct denied. On the other hand, if both parties know, or should know, that the negotiations look to supplement an existing firm agreement, there is a strong case for permitting enforcement of that agreement when the supplementary negotiations fall through.

[39] Further, the parties having indicated to Justice Sigurdson that they intended to "paper" the agreement that had been read into court before him does not negate the existence of the agreement already concluded. At para. 33 of *Salimen*, Justice Williams referred to the decision in *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 333 wherein Justice Dickson J. stated:

[333] In some cases where execution of a formal contract is contemplated, a draft contract containing additional or different contractual terms may be produced and delivered. In such circumstances, if the court is satisfied, on objective analysis, that all essential terms were agreed and the new terms do not amount to a repudiation or admission that no agreement was reached earlier, the agreement will be binding: *Perry v. Suffields Ltd.*, [1916]

2 Ch. 187 (C.A.); *Horsnail v. Shute* (1919), 27 B.C.R. 474 (C.A.); *Klemke Mining Corporation... [v. Shell Canada Ltd., 2007 ABQB 176, aff'd 2008 ABCA 257 (CanLII)]*; *Lake Ontario Cement Co. v. Golden Eagle Oil Co. Ltd.*, (1974), 46 D.L.R. (3d) 659. On the other hand, if the Court concludes that key terms remained open for negotiation an intention to be create legal relations will not be found: "*Bay Ridge*" (The), [1999] 2 Ll.L. Rep 277; *Pitt Air Ltd. v. Pitt Meadows Airport Society*, [2006] B.C.J. No. 1870, 2006 CarwellBC 2031 (S.C.), affirmed [2007] B.C.J. No. 36, 2007 CarswellBC 34 (C.A.); *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.).

[40] In this case, I am satisfied that Mr. Avina and Mr. Rodriguez agreed to all essential terms on July 20, 2017. On the basis of the available evidence, I do not find that the parties contemplated that they were still to negotiate a cap on reasonable maintenance costs.

[41] As stated above, I have found that the parties agreed that Mr. Rodriguez would receive payment for reasonable expenses arising during the time that the Sea Senior was under arrest, including moorage and maintenance. This term is not ambiguous and therefore I am not required to look to the parties' post-contract conduct. The evidence establishes that the Sea Senior remained under arrest for approximately 25 months from February 25, 2015 to March 24, 2017, and pursuant to the Settlement Agreement Mr. Rodriguez is entitled to reimbursement for any proven and reasonable expenditures during this period.

What reasonable expenses did Mr. Rodriguez incur during the time that the Sea Senior remained under arrest?

[42] Unfortunately, Mr. Rodriguez adduced no clear evidence at trial of his reasonable expenditures during the 25 months that the Sea Senior was under arrest. I must do my best with the available evidence.

[43] Some evidence concerning maintenance costs can be gleaned from the survey report dated May 2, 2018, prepared by Dean Holonko with Oceatec Marine Services. The survey report set out the cost of insured repairs arising from the vandalism to the Sea Senior and costs considered by the surveyor to be unrelated maintenance costs. Of the amount claimed, \$73,574.01, Mr. Rodriguez was reimbursed \$62,570.64 for damage caused by the vandalism. Mr. Rodriguez paid the amount claimed and he is entitled to keep the insurance proceeds. The balance, \$11,003.37, is the amount Mr. Rodriguez paid for what the insurer considered to be maintenance, which the insurer declined to cover under Sea Senior's insurance.

[44] Mr. Avina called expert evidence from Ian Donald, a surveyor who was asked to review all expense documentation related to maintenance of the Sea Senior from September 1, 2014 to March 24, 2017. For this period, Mr. Donald concluded that the amount spent on maintenance totalled \$11,594.77, approximately \$600 more than the amount Mr. Holonko attributed to maintenance repairs. I find Mr. Donald's evidence concerning maintenance expenses to be more helpful than Mr. Holonko's, given that it covered expenses incurred over a longer period of time.

- [45] It is not possible to determine with precision what portion of the maintenance expenditures were incurred by Mr. Rodriguez between February 25, 2015 and March 24, 2017, the period the Sea Senior was under arrest. I consider that a fair way to determine costs during this period is by determining a monthly cost for maintenance based on the total maintenance costs calculated by Mr. Donald for the period of September 2014 to the end of March 2017 (31 months), and multiplying that amount by 25 months, the number of months the Sea Senior remained under arrest. I calculate maintenance expenditures for the relevant period to be \$9,350[1].
- [46] With respect to other expenses, a spreadsheet prepared by Mr. Rodriguez was put into evidence at trial and Mr. Rodriguez testified to various expenses which he incurred. Unfortunately, Mr. Rodriguez did not put supporting documents into evidence at trial. Despite this, Mr. Avina does take issue with the fact that Mr. Rodriguez incurred moorage, some insurance costs, and purchased a canvas bimini top for the Sea Senior.
- [47] With respect to moorage, Mr. Rodriguez's spreadsheet shows that he spent \$5,429 on moorage in 2015, \$6,030 in 2016 and \$6,738 in 2017. Using the same method as above, I calculate that Mr. Rodriguez spent \$4,524[2] on moorage between the end of February 2015 and December 31, 2015 and \$1,684[3] for the first three months of 2017. Adding these amounts to Mr. Rodriguez's moorage expense for 2016, I calculate that Mr. Rodriguez spent \$12,238 on moorage between February 25, 2015 and March 24, 2017.
- [48] Mr. Avina concedes that Mr. Rodriguez spent \$1,726 on insurance for the Sea Senior and \$4,535.48 for a new bimini top in 2017.
- [49] In total, I calculate that Mr. Rodriguez incurred expenses totalling \$27,849 which is reimbursable pursuant to the terms of the Settlement Agreement.

What amount is payable to Mr. Avina from the sale of the Sea Senior?

- [50] The parties do not dispute that the net proceeds from the sale of the Sea Senior was \$178,560, before deducting expenses incurred by Mr. Rodriguez during the period that it was under arrest. After first deducting \$27,849, the amount that I have determined should be reimbursed to Mr. Rodriguez, this leaves \$150,711 for distribution to Mr. Rodriguez and Mr. Avina . Pursuant to the Settlement Agreement and proportionate to their respective shareholdings in Sea Chariot, Mr. Avina should have received \$73,848.39 from Mr. Rodriguez when the Sea Senior was sold in May 2018.

Did the defendants breach the Settlement Agreement?

- [51] The evidence establishes, and I find, that Mr. Rodriguez and Sea-Chariot breached the Settlement Agreement as follows:

- a) They failed to provide reasonable information to Mr. Avina regarding any offers received for the Sea Senior while it was listed for sale;

- b) Before they accepted an offer in May 2018, Mr. Rodriguez failed to confirm whether there were any claims, outstanding debts or other possible claims against the Sea Senior - which I find includes his own claims;
- c) They failed to obtain Mr. Avina's approval before agreeing to sell the Sea Senior;
- d) Upon receiving the proceeds from the sale of the Sea Senior they failed to direct that the sales proceeds be paid to MJM Law Corp., but instead directed the payments first to Sea-Chariot, then Mr. Rodriguez withdrew the funds for his own purposes; and
- e) They failed to pay Mr. Avina his share of the net sales proceeds from the sale of the Sea Senior, being \$73,848.39.

[52] As a result of my findings above it is not necessary for me to consider Mr. Avina's alternate claim that Mr. Rodriguez has been unjustly enriched.

Is Mr. Avina entitled to punitive damages?

[53] Punitive damages are awarded to punish the wrongdoer for conduct which is harsh, vindictive, reprehensible or malicious in nature: *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085 at 1107-1108. As the term suggests, this head of damages is intended to punish the wrongdoer as opposed to compensate a plaintiff, and includes as an object, deterring others from acting in a similar way: *Whiten v. Pilot Insurance Co.*, 2002 SCC 18 at paras. 36, 39.

[54] Punitive damages are justified where the impugned conduct represents a "marked departure from ordinary standards of reasonable behaviour": *Whiten* at para. 36.

[55] In this case I am satisfied that the parties entered into the Settlement Agreement in good faith to avoid further litigation. I am satisfied that Mr. Rodriguez intentionally breached the terms of the Settlement Agreement by selling the Sea Senior without Mr. Avina's consent or knowledge, transferred the sales proceeds from the account of Sea-Chariot, of which both he and Mr. Avina were shareholders, and kept the proceeds to himself.

[56] Mr. Rodriguez is a sophisticated business person who should have known better. I consider that his conduct was reprehensible and justifies an award of punitive damages. Mr. Avina seeks punitive damages in the amount of \$5,000 and I award this amount to him.

Is Mr. Rodriguez entitled to damages for his counterclaim?

[57] Despite having an opportunity at trial to provide evidence in support of his counterclaim, Mr. Rodriguez failed to do so. In any case, I find that the parties agreed in the Settlement Agreement to settle all of their disputes concerning the distribution of the proceeds from the sale of Sea Senior including any claims with respect to payment for expenses in maintaining the vessel. Mr. Rodriguez counterclaim is dismissed.

Conclusion

- [58] Pursuant to the terms of the Settlement Agreement made July 20, 2017, I order that Mr. Rodriguez and Sea-Chariot are jointly and severally liable for payment to Mr. Avina of \$73,848.39 as his share of the net sales proceeds from the sale of the Sea Senior, plus pre-judgment interest.
- [59] I order that the parties take the steps necessary to see to the dissolution of Sea-Chariot.
- [60] I order that Mr. Rodriguez pay punitive damages to Mr. Avina in the amount of \$5,000.
- [61] Mr. Rodriguez's counterclaim against Mr. Avina is dismissed.
- [62] The parties are at liberty to speak to the issue of costs by setting down a date for hearing before me within 90 days of the date of issuance of these reasons.

"Mayer J."

- [1] \$11,594 divided by 31 (months) = \$374. \$374 x 25 months = \$9,350.
- [2] \$5,429 divided by 12 (months) = \$452. \$452 x 10 months = \$4,520.
- [3] \$6738 divided by 12 (months) = \$561. \$561 x 3 months = \$1,683.

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