

CANADA / JUDGMENT

Centura Building Systems Ltd. v. Cressey Whistler Project Corp.

2003 BCSC 1227

COURT

Supreme Court of British Columbia

DECIDED

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2003BCSC1227

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Centura Building Systems Ltd. v. Cressey Whistler Project Corp. et al

2003 BCSC 1227

Date: 20030908

Docket: L010513

Registry: Vancouver

Between:

Centura Building Systems Ltd.

Plaintiff

And

Cressey Whistler Project Corporation

and Cressey Development Corporation

Defendants

Before: The Honourable Madam Justice Neilson

Reasons for Judgment

Counsel for the Plaintiff

Stuart B. Hankinson

Counsel for the Defendants

D. Bruce Gleig

Date and Place of Hearing:

May 20, & September 3, 2003

Vancouver, B.C.

INTRODUCTION

[1] The plaintiff brings this application under Rule 18A of the Rules of Court to enforce a settlement agreement it says it concluded with the defendants at a mediation on December 19, 2002. The defendants say that the settlement agreement is void as it was made with a different legal entity than the one with whom they believed they were contracting.

FACTS

[2] The underlying action arises out of the construction of a hotel in Whistler, British Columbia in 1999 (the "project"). The plaintiff, to whom I will refer as "Centura 1", contracted with the defendants to install EIFS cladding for \$3.3 million. Disputes arose between the parties over responsibility for costs incurred by both due to delays.

[3] On March 15, 2000, Centura 1 filed a claim of builder's lien against the property. The defendants posted a letter of credit as security for the lien claim on March 17, 2000, and the lien was removed.

[4] On February 21, 2001, Centura 1 commenced this action to enforce its claim for the balance owing on the contract price and costs related to delays. The defendants filed a defence which included a claim of set-off, and a counterclaim, for costs they attributed to delays and back charges. The action was scheduled for trial commencing January 20, 2003.

[5] On August 30, 2002, Centura 1 changed its name to Centura Building Systems (1997) Ltd. ("Centura 1997"), and a new company was incorporated using the plaintiff's former name, Centura Building Systems Ltd. I will refer to this new company as "Centura 2". Mr. Mudie, who was Vice-President Finance for Centura 1, Centura 2, and Centura 1997, says the changes were part of a corporate reorganization undertaken by the companies' owners for reasons unrelated to this litigation.

[6] Despite many opportunities to do so, the plaintiff did not communicate this corporate restructuring to its litigation counsel in this matter, or to the defendants. The plaintiff's representatives say this was due to mere inadvertence, and there is no evidence to suggest otherwise.

[7] A mediation was scheduled for December 19, 2002.

- [8] About December 11, 2002, the defendants learned that there appeared to be a problem with blistering of the finishing coat on the EIFS stucco at the project. This was a new potential deficiency in the work done by Centura 1, that had not been raised in this action. The defendants directed further investigations to determine its extent and the need for repairs.
- [9] The mediation nevertheless proceeded on December 19, 2002. The plaintiff was represented by Mr. Mudie and Mr. Nichele, who attended with plaintiff's litigation counsel. Mr. Mudie says he attended in his capacity as the officer of the Centura company that had contracted for and performed the work on the project, which was by then Centura 1997. However, the mediation proceeded without either counsel or the defendants being aware of the corporate reorganization that had produced Centura 1997 and Centura 2 in August, 2002.
- [10] The defendants were represented at the mediation by Mr. Cressey, an officer of both defendants, and Mr. Turcotte, Vice President of Construction at Cressey Development Corporation, who attended with defence counsel. After an initial joint session, most of the mediation took place with the parties and their counsel in separate rooms, while the mediator moved between them to communicate their respective positions.
- [11] During the mediation, the defendants advised the Centura representatives of the blistering issue for the first time. They indicated the extent of it was not yet known, and said they would look to "Centura Building Systems Ltd." for the cost of any remedial work. The parties agreed, however, that they would not attempt to resolve this new problem at the mediation, and that the defendants would be free to pursue a claim against the plaintiff in the future with respect to the blistering. The defendants did ask for the plaintiff's assistance in assigning to the present owner of the project the warranties from material suppliers that had potential relevance to that problem.
- [12] The mediation proceeded on that basis, and the parties ultimately appeared to reach a settlement of the action and counterclaim. The basis for their agreement was initially expressed in handwritten offers from each party provided independently to the mediator. The defendants' offer read:

Cressey agree to settle Action No. L010513 for \$1,100,000 net of counterclaim

"Scott Cressey"

With warranties from Tremco and Dryvit and valid GST registered company.

[13] The offer from the plaintiff read:

If Cressey offers to settle the claim by payment to Centura of \$1.1M today Centura will accept the offer. Centura will also agree to assign the Dryvit and Tremco warranties if available to Cressey.

"Jerry Nichele"

[14] When the mediator presented these to the parties, they acknowledged that they had an agreement. Mr. Cressey and Mr. Nichele then left the mediation. Mr. Turcotte and Mr. Mudie remained with their counsel, while the mediator wrote out the formal settlement agreement. This agreement was signed by Mr. Mudie on behalf of "Centura Building Systems Ltd." and by Mr. Turcotte on behalf of the defendants. It reads:

Settlement Agreement

Dec. 19, 2002

The parties have entered into the following settlement agreement with respect Action No. L010513, Vancouver Registry (the action).

1. The defendant Cressey Whistler Project Corporation and Cressey Development Corporation agrees to pay to the plaintiff Centura Building Systems Ltd. the sum of \$1,100,000 Cdn. all in full settlement of the action, including counterclaim.
2. Payment to be paid by the defendants to the plaintiff on or before Jan. 15, 2003.
3. The plaintiff agrees to use its best efforts to assign building warranties of the original construction contract Tremco and Dryvit to the Westin Whistler strata corporation on or before January 15, 2003.
4. The plaintiff represents it is a GST registered company.
5. The defendants counsel shall prepare a mutual release with respect to all matters or claims advanced and raised in the action.
6. Letter of credit to be released by the plaintiff to defendants upon receipt of \$1,100,000 payment.
7. CDO to be prepared defendant and filed by defendant when signed.
8. There shall included in the release a confidentiality clause.
9. Assumption of risk of facts to be true clause in release.
10. No admission of liability clause in release.

Agreed this 19th day of December the parties have executed this agreement.

Cressey Whistler Project Corp.

Per ___[Mr. Turcotte]

Cressey Development Corporation

Per ___[Mr. Turcotte]

Centura Building Systems Ltd.

Per [Mr. Mudie]_

Witnessed by mediation

[Mr. Urquhart]_____

G.A. Urquhart

[15] Mr. Mudie says that in signing the agreement for Centura Building Systems Ltd., it was his intent to bind the company that was the plaintiff in the litigation.

[16] Steps were undertaken in partial performance of the settlement agreement. The trial was adjourned by consent, and the benefit of warranties under the original construction contract was assigned. On January 3, 2003, defence counsel sent a Mutual Release to plaintiff's counsel. This sets out "Centura Building Systems Ltd." as a party to the release. The first two paragraphs read:

WHEREAS:

A. Centura and Cressey are parties to a Supreme Court of British Columbia action commenced out of the Vancouver Registry under action No. L010513 (the "Action"), concerning claims and counterclaims arising out of the construction of a resort hotel located in Whistler, British Columbia, known as Westin Whistler Resort;

B. Following a mediation process conducted by Glenn Urquhart, Q.C., the parties agreed on December 19, 2002, to resolve and settle all issues arising out of the Action on the terms contained herein;

It then goes on to formalize the terms of the settlement in the format of a release.

[17] Paragraph 7 of the release reserved the defendants' right to claim in the future for hidden or latent defects:

7. CENTURA DOES HEREBY AGREE that nothing in this Mutual Release and Settlement Agreement shall be construed as releasing Centura from any liability which may exist through contract or otherwise for hidden or latent defects in workmanship or materials at Westin Whistler Resort, and this exclusion shall apply notwithstanding that evidence of possible defects may have come to the attention of Cressey prior to the date first stated above.

[18] The defendants retained an engineering firm to estimate the extent and cost of the blistering problem. They received a preliminary report on January 15, 2003 giving a "worst case scenario" of \$1.4 million for remedial costs.

[19] About January 13, 2003, counsel for the defendants did a corporate search of Centura 1. This revealed the corporate restructuring to the defendants for the first time. They refused to complete the settlement, taking the position that they had contracted with the wrong party, and the settlement agreement was void.

[20] The plaintiff accordingly brings this application to enforce the settlement.

ISSUES

[21] There are three issues:

A. Does the present plaintiff have standing to bring this application?

B. Is there a binding settlement agreement between the parties?

C. If there is a binding agreement, do its terms exclude the defendants' right to set-off amounts for newly discovered deficiencies?

ANALYSIS

A. The plaintiff's standing to bring the application

[22] The defendants raise a preliminary objection to the plaintiff's status to bring this application, saying that it is no longer a proper party to the action. The proper plaintiff is Centura 1997.

[23] The defendants are technically correct, in that there has been no formal application to substitute Centura 1997 for Centura 1 as the plaintiff in this action, to reflect the change in name. I find, however, that the combined effect of s. 223(3) of the Company Act, R.S.B.C. 1996 c. 62, and Rules 5(9) and 15(5)(a)(ii) of the Rules of Court, preserve the validity of the action, and the rights of the plaintiff's successor to continue it:

Company Act s. 223(3)

No change of name of a company affects any of its rights or obligations, or renders defective any legal proceedings by or against it, and any legal proceedings that may have been continued or commenced against it under its former name may be continued or commenced against it by its new name.

Rule 5(9)

No proceeding shall be defeated by reason of the misjoinder or nonjoinder of a party and the court may deal with the matter in controversy so far as it affects the rights and interests of the parties before it.

Rule 15(5)(a)(ii)

15(5)(a) At any stage of a proceeding, the court on application by any person may

(ii) order that a person, who ought to have been joined as a party or whose participation in the proceeding is necessary to ensure that all matters in the proceeding may be effectually adjudicated upon, be added or substituted as a party

- [24] The defendants do not seriously contest the substitution of Centura 1997 for Centura 1 as the proper plaintiff in the action. While there has been no formal application under Rule 15(5)(a)(ii), in *Clark v. Teamsters, Local 464* (1998), 49 B.C.L.R. (3d) 62 (C.A.) at 68, Southin J.A. said that such an order may be made *ex mero motu* in some circumstances. I find it is appropriate to follow that course here. It makes no sense to require a formal application under Rule 15(5)(a)(ii) before the issues before me can be determined.
- [25] I accordingly order that Centura Building Systems (1997) Ltd. be substituted for Centura Building Systems Ltd. as the plaintiff in this action, but make that order without prejudice to the defendants' position on the remaining issues.

B. Is there a binding settlement agreement between the parties?

- [26] The central issue is the effect of the corporate restructuring on the validity of the apparent settlement between the parties. The written settlement agreement was signed by Mr. Mudie on behalf of "Centura Building Systems Ltd.", at a time when that entity was Centura 2, a company that had no involvement in the litigation or the project. After August 30, 2002, the proper plaintiff and signatory to any settlement agreement should have been Centura 1997.
- [27] The plaintiff argues that use of the incorrect name was a mere misnomer, and the name of Centura 1997 can simply be substituted in the agreement for Centura 2, as is done frequently in substituting parties to litigation. Alternatively, if the matter is viewed in the context of the principles of contract law, it says that use of Centura 2's name was a mistake that can be rectified by replacing Centura 2 with Centura 1997 as the proper party to the contract.
- [28] The plaintiff argues that the use of the wrong corporate name was a technical and inadvertent error that should not defeat an otherwise valid contract. There is no prejudice to the defendants in substituting the correct name. Both parties intended to settle their claims with the companies involved in the project and the litigation. Both parties negotiated in good faith, and intended to complete a binding agreement between the parties to the action. Although Mr. Mudie inadvertently used the wrong corporate name in signing the agreement, he had authority to bind Centura 1997 to the settlement, and intended to do so. Centura 1997 should therefore be substituted as the proper party to the agreement, and the agreement upheld.
- [29] In support of its argument on misnomer, the plaintiff relies on s. 223(3) of the Company Act, and Rules 5(9) and 15(5)(a)(ii) of the Rules of Court, which I have set out above. As well, it says that Rules 1(5) and 2(1) of the Rules of Court encourage an approach that will not permit a technical error to interfere with the just, speedy, and inexpensive resolution of a matter. It cites *Insurance Corporation of British Columbia v. Piche* (1983), 44 B.C.L.R. 90 (C.A.), *Kelby Contracting Ltd. v. Weyerhaeuser Canada Ltd.*, [1996] B.C.J. No. 2273 (Q.L.) (S.C.), *1030553 Ontario Ltd. v. Pieckenhagen*, [1997] O.J. No. 4759 (Q.L.) (Ont. C.J. (Gen. Div.)), and *Sign-O-Lite Signs Ltd. v. Carruthers*, [2000] B.C.J. No. 90 (Q.L.) (S.C.) as authority for the Court's power to substitute Centura 1997 as the correct party to the settlement agreement.

[30] I am unable to agree that these sources support the result the plaintiff seeks. The legislation and Rules of Court cited by the plaintiff, as well as the decisions in *Piche*, *Kelby Contracting Ltd.*, and *Sign-O-Lite Signs Ltd.*, all deal with the substitution of a party in the context of litigation. Only the following reference in *Kelby Contracting Ltd.* at para. 6 to the test for misnomer set out in *Davies v. Elsby Bros. Ltd.*, [1960] 3 All E.R. 672, suggests that the principle of misnomer may apply to substitute a party to a contract:

In English law as a general principle the question is not what the writer of the document intended or meant, but what a reasonable man reading the document would understand it to mean; and that is the test which ought to be applied as a general rule in cases of misnomer - which may embrace a number of other situations apart from misnomer on a writ, for example mistake as to identity in the making of a contract. [Emphasis added]

[31] *Davies v. Elsby Bros. Ltd.* was, however, also concerned with substitution of a party to litigation. The plaintiff provided no authority in which the concept of misnomer has been used to substitute the name of a party to a contract.

[32] In my view, the law of contract provides a more appropriate context for the examination of the issues here than does the concept of misnomer.

[33] The parties agree that the ordinary principles of contract law apply to determining the validity of a settlement agreement: *Robertson v. Walwyn Stodgell Cochrane Murray Ltd.* (1988), 24 B.C.L.R. (2d) 385 (C.A.) at 388. The principles of particular application here are those dealing with mistake and rectification. Clearly, the agreement was signed in the name of Centura 2 in error. The questions are what is the correct characterization of that error, and what are the consequences that flow from it.

[34] The defendants argue that they unknowingly negotiated and concluded a contract with Centura 2, a stranger to the project and this litigation. They say that the identity of the other party to the settlement was critical, given the outstanding action, and the discovery of the new blistering problem. The plaintiff's representatives knew about the mistake, and failed to advise them of it. As a result, the settlement agreement is void.

[35] The defendants rely first on G.H.L. Fridman, *The Law of Contract in Canada*, 4th ed. (Scarborough: Carswell, 1999) Professor Fridman makes the following observations with respect to cases of mistaken identity at 284:

Another way of analyzing these situations is in terms of unilateral mistake. The offeree cannot accept an offer which he knows is intended for someone else; an acceptance based upon a misconception of the identity of the offeror, where that is a vital term of the contract, is an invalid acceptance because the offeror knows that the offeree is affected by the mistake at the time of acceptance.

He goes on to say that the effect of a mistake of identity in such cases is to negate the apparent contract, as the offer and acceptance do not correspond to establish the necessary consensus ad idem.

[36] The defendants rely as well on the classic statement by the House of Lords in *Cundy v. Lindsay* (1878), 3 App. Cas. 459 as to the three findings of fact that must be made to set aside a contract on the basis of mistake in identity of the parties. These were restated in *Citibank NA v. Brown Shipley & Co. Ltd.*, [1991] 2 All E.R. 690 (Q.B.) at 699 as follows:

... the *Cundy v. Lindsay* principle only reaches the result of no title at least in a bilateral contract situation where the findings of fact are: (i) A thinks he has agreed with C because he believes B, with whom he is negotiating, is C; (ii) B is aware that A did not intend to make any agreement with him; and (iii) A has established that the identity of C was a matter of crucial importance.

[37] In deciding if the defendants have established those three facts, the test is objective: looking at the words and conduct of the parties, who would reasonable people infer were the parties to the agreement: *Con-Force Products Ltd. v. Rosen* (1967), 61 W.W.R. 129 (Sask. Q.B.) at 140-43.

[38] Turning to the first necessary fact in *Cundy*, the defendants (A) must establish that they thought they had agreed with Centura 1 (C) because they believed Centura 2 (B), with whom they were negotiating, was Centura 1 (C). I find they have failed to do so.

[39] I recognize that Centura 1 at this point had changed its name to Centura 1997. However, the fact it was operating under a new name did not interfere with its ability to negotiate and conclude an agreement with the defendants over matters that had transpired under its former name.

[40] I find that the parties attended the mediation, negotiated, and concluded the settlement on the basis that they were the plaintiff and the defendants in this action, and the parties to the original construction contract. The plaintiff throughout represented itself as Centura 1, and the defendants believed that they were dealing with Centura 1. This was not a situation in which Centura 1 deliberately misrepresented itself to the defendants as Centura 2, or knowingly induced the defendants to contract with Centura 2. The plaintiff has said its mistake in using the name of Centura 1 was inadvertent, and there is no evidence that would suggest otherwise.

[41] Centura 2 had no interest, rights, or obligations connected with the construction contract or this action. It played no part in the negotiations, and had no power to carry out the terms of settlement that were reached. The defendants did not even know Centura 2 existed. It emerged only because its name was mistakenly used in formalizing the agreement reached.

- [42] In my view, the terms of the settlement between the parties confirm that they viewed it as an agreement between the plaintiff and the defendants in this action, who were also the parties to the original contract. The written offer from Cressey that formed the basis for the completed settlement does not refer to the plaintiff by name. It simply states Cressey's intention to "settle Action No. L010513 for \$1,100,000". The plaintiff's response refers only to "settle the claim by payment to Centura".
- [43] The written agreement confirms this. Its preamble refers to a "settlement with respect to Action No L010513, Vancouver Registry (the action)." All parties clearly knew that action encompassed claims arising from disputes between the defendants and Centura 1. Paragraph 1 of the agreement identifies Centura Building Systems Ltd. as the plaintiff in the action, and the balance of the agreement treats Centura Building Systems Ltd. as synonymous with the plaintiff in describing its rights and obligations under the agreement. Those rights and obligations include receipt of settlement funds, preparation of a mutual release, filing a consent dismissal order, and release of a letter of credit that both parties knew had been posted as security for the lien claim of Centura 1. As well, paragraph 3 refers to the original construction contract, which would be known by both parties to have been between the defendants and Centura 1.
- [44] I find that a reasonable person, on examining the circumstances here, and the terms of the settlement agreement, would infer that the proper parties to the agreement were the parties to the action, and to the construction contract, despite the erroneous use of Centura 2's name in signing the agreement. It would be unreasonable to conclude that a third party such as Centura 2, that was unrelated to the project, and did not even exist at the time of the events covered by this litigation, would be a party to the agreement that settles this action.
- [45] Accordingly, while the plaintiff did mistakenly use the wrong name in the settlement agreement, I find that in the circumstances here, the defendants have failed to establish the first of the three requirements in *Cundy v. Lindsay*: that they contracted with Centura 2, believing it to be Centura 1. Rather, I find that they intended to and did contract with the plaintiff in this action, who was Centura 1, and is now Centura 1997.
- [46] I agree with the plaintiff that this is not the kind of mistake in identity that is necessarily fatal to the settlement agreement. It remains to consider whether the plaintiff has established the necessary basis for rectification of this mistake, by replacing "Centura Building Systems Limited" with "Centura Building Systems (1997) Ltd."
- [47] Professor Fridman in his text, *The Law of Contract in Canada*, describes the concept of rectification at 867-71:

Rectification is concerned with contracts and documents, not intentions. The essence of rectification is to bring the document which was expressed or intended to be in pursuance of a prior agreement into harmony with that prior agreement. It deals with the situation where, contracting parties having reduced into writing the agreement reached by their negotiations, some mistake was made in the wording of the final, written contract, altering the effect, in whole

or in part, of the contract. What the court does is to alter the document, in accordance with the evidence, and then enforce the document as changed. Rectification is not used to vary the intentions of the parties, but to correct the situation where the parties have settled upon certain terms but have written them down incorrectly. But the court will not give a remedy for a party who is displeased with what the contract has brought him.

[867-68]

...

What must be shown by a party claiming rectification either in a suit for such remedy, or by way of a defence to an action on a contract, is a mistake in putting down the parties' intentions, and some earlier agreement which shows that there was such a mistake. These important qualifications for, or ingredients of, a successful claim for rectification must be established, as noted earlier, by strong, clear, and convincing proof, which leads to a consideration of the kind of evidence that may be introduced by that party to make his case.

[870]

...

Rectification can be granted, said Fitzpatrick C.J. dissenting in the Supreme Court of Canada, only if the mistake is mutual and the evidence of this mistake is clear and unambiguous. Nor will it be granted if the mistake is the fault of the plaintiff, for example, through his negligence. This statement suggests that both parties must be mistaken as to what they had agreed and that, in consequence, a unilateral mistake will be inoperative or ineffectual as a basis for rectification. The essential idea is that the written document must not defeat the spirit and terms of the accord reached between the parties.

[871]

[48] In *Bank of Montreal v. Vancouver Professional Soccer Ltd.* (1987), 15 B.C.L.R. (2d) 34 (C.A.) at 36, the Court of Appeal set out two requirements for rectification:

Before rectification can be obtained, the applicant must establish:

1. that the written instrument does not reflect the true agreement of the parties;
2. that the parties shared a common continuing intention up to the time of signature that the provision in question stand as agreed rather than as reflected in the instrument.

[49] In *Armstrong v. Armstrong* (1978), 22 O.R. (2d) 223 (Ont. H.C.), Mr. Justice Labrosse set out four requirements of the doctrine of mistake and rectification: a prior agreement; a common intention; a final document which did not properly record the intention of the parties; and common or mutual mistake. I find it useful to consider the evidence under those four headings, in assessing whether the plaintiff has provided the strong and convincing proof required to justify rectification.

- [50] First, was there a prior agreement? I find there was. In my view, the plaintiff and the defendants to this action reached an earlier agreement to settle the action, through the exchange of the notes they handed to the mediator, and their acknowledgement that they then had a deal. There was clearly a meeting of minds between them on the essential terms of the settlement, enabling the chief representatives of each party to depart. The remaining officers of the parties were left to record the agreement in writing.
- [51] Second, with respect to a common intention, I find the plaintiff and the defendants shared an intention to reach an agreement that conclusively settled this litigation, and did so.
- [52] Third, I find the document recording the settlement agreement did not properly record the intention of the parties as it wrongly identified the plaintiff. While all parties intended and believed that the settlement was between the parties to the action, the plaintiff was misdescribed.
- [53] With respect to fourth requirement, that of a common or mutual mistake, the defendants argue that the error here was unilateral, and caused by the plaintiff's negligence. They say that until January 13, 2003, only the plaintiff knew of the corporate reorganization, and could identify the error in the settlement agreement. It was not a mutual mistake and the plaintiff's claim for rectification must fail.
- [54] I disagree. First, in my view the error in the signatory to the agreement is properly characterized as a mutual mistake. This is not a situation in which one party is trying to obtain rectification of an erroneous term that the other party claims is correct. The parties had a common intention as to the identity of the parties to the settlement agreement: they intended the plaintiff to be a party. They now agree that because of the mistake in use of Centura 2's name in the settlement agreement, the plaintiff is not a party. None of them intended Centura 2 to be a party to the settlement. Clearly, if the agreement is not rectified, neither party would try to enforce a settlement with Centura 2.
- [55] Second, the excerpt from p. 871 of Professor Fridman's text which I have quoted in para. 47 refers to a dissenting judgment of Fitzpatrick C.J. in *Hart v. Boutilier* (1916), 56 D.L.R. 620 (S.C.C.), for authority that rectification will only be granted if the mistake is mutual. The majority judgment, however, disagreed with that view, and has been quoted with approval in *B.C. Forest Products Ltd. v. Nordan*, [1954] 11 W.W.R. (N.S.) 403 (B.C.S.C.). In the latter case, Wilson J. at 407-408 quoted at length from the judgment of Duff J. in *Hart v. Boutilier*, including this paragraph:

It is right to add, in view of an observation by one of the Judges in appeal in Nova Scotia, that it is not the practice to refuse relief because the party who asks it was himself the person who had the instrument drawn or indeed was the draughtsman of it. In such a case the plaintiff, it is true, comes to be relieved against the consequences of his own error; but that can be affirmed, as Sir John Leach said, in *Ball v. Storie* (1823) 1 Sim & St 210, at 219, 57 ER 84, of every party who comes to be relieved against an instrument which he has signed.

Mr. Justice Wilson noted that this observation was particularly apt, as the plaintiff in the case before him was also responsible for the error in question. He nevertheless granted rectification. I accordingly conclude that, although the error here was caused by the carelessness of the plaintiff, that does not bar its claim for rectification.

- [56] Finally, the cases indicate that rectification of a unilateral mistake has generally been denied because the non-mistaken party sought to take unfair advantage of the other party's error. Here, while the defendants claim unfairness and prejudice if the agreement is rectified to substitute Centura 1997 for Centura 2, I find their concerns are not supported by the evidence.
- [57] The defendants argue that, because of the plaintiff's unilateral mistake, they almost paid over \$1 million to Centura 2, a party with no relationship to the litigation, and any release they received from Centura 2 would have been meaningless. They say the potential prejudice of these steps for them was significantly increased by the late discovery of the blistering problem, which may result in a further substantial claim by them against what is now Centura 1997. The defendants claim that, had they known of the corporate restructuring, they would at the least have adjourned the mediation, to investigate the effect of the reorganization on the financial viability of Centura 1997, and to better ascertain the cost of remediation required by the blistering, before proceeding further. They say that the results of these investigations may well have altered the manner in which they approached any settlement, and the litigation generally.
- [58] Mr. Scott Cressey expressed his concerns in paragraphs 21, 23, and 24 of his affidavit:
21. Likewise, we were never told that the company to which Cressey Whistler had to look for the recently discovered EIFS deficiencies was apparently no longer carrying on business, or that it was not the company which had attended the mediation.
 23. If I had known of the change of company names, and the possible financial collapse of the Centura company which had performed the work at the Hotel, my whole approach to the mediation would have changed. I would have postponed the mediation until we had arranged for an expert inspection of the Hotel to determine the cost of remedial work on the EIFS deficiencies. I would not have been prepared to mediate or reach any agreement on December 19, 2002 without knowing the extent of the damage to the EIFS.
 24. If Mr. McLean had not learned of the Reorganization, Cressey Whistler and CDC would have paid \$1,100,000.00 to a company which did not have a contract with Cressey Whistler, did not perform the work at the Hotel, did not file a claim of lien, and did not sue Cressey Whistler or CDC. This would have left Cressey Whistler in a poor position, since the settlement monies would go to the new Centura company, and Cressey Whistler would have to look to the old Centura company for its claim relating to repair of the EIFS deficiencies.

- [59] Clearly, any concerns about paying the money to the wrong company will be cured by the rectification sought by the plaintiff. When cross-examined on his affidavit, Mr. Cressey could provide no basis for his concerns that the plaintiff was "no longer carrying on business" or in a state of "possible financial collapse". He conceded that these were merely assumptions on his part.
- [60] Moreover, a lengthy cross-examination of Mr. Mudie, the plaintiff's representative, failed to provide any evidence that the restructuring of the Centura companies placed the defendants in a worse position with respect to this action, or future litigation against Centura 1997. The reorganization took place to accomplish legitimate corporate objectives. Nothing suggests it was designed to assist Centura 1997 escape its obligations to the defendants or its other creditors, or to accomplish any other improper purpose. Indeed, Mr. Mudie stated that, even if the settlement funds had been payable to Centura 1, they would have gone into the bank account of Centura 1997. Nor does the evidence show that the transition from Centura 1 to Centura 1997 detrimentally affected the financial viability of the plaintiff. It did not involve a transfer of assets, and all indications are that Centura 1997, like its predecessor Centura 1, has assets, receivables, and a viable ongoing business.
- [61] I am sceptical of the defendants' claim that, had they known of the corporate changes, they would have investigated the financial viability of Centura 1997 before proceeding with settlement, once the blistering problem was discovered. The cross-examination of the defendants' representatives clearly demonstrated that they knew nothing of the financial means of Centura 1 in December 2002. Mr. Cressey agreed that, for all he knew, that company could have been on the brink of financial collapse. Yet the defendants took no steps to adjourn the mediation and investigate Centura 1's financial viability, once they discovered the blistering. Instead, they negotiated a settlement of \$1.1 million with a company about whose financial status they knew nothing.
- [62] I conclude that the plaintiff has established an appropriate basis for rectification of the settlement agreement by replacing "Centura Building Systems Ltd." in that agreement with "Centura Building Systems (1997) Ltd." I find support for that conclusion in *Naber Seeds Ltd. v. Brett-Young Seeds Ltd.*, [2003] S.J. No. 254 (Q.L.) (Sask. Q.B.), a decision recently provided by the plaintiff in which rectification was permitted where there was an error in the plaintiff's corporate name in a sales agreement.
- [63] An order for rectification with respect to the name of the plaintiff is accordingly granted.
- C. If there is a binding agreement, do its terms exclude the defendants' right to set off amounts for newly discovered deficiencies?
- [64] The defendants say that parties to a contract are entitled to claim a set-off unless that right has been clearly and unequivocally excluded by the terms of the agreement: *Swagger Construction Ltd. v. UBC et al*, 2000 BCSC 1839. They seek a determination as to whether the terms of the settlement agreement in this case preclude a right of set-off.

- [65] This issue was put forward as a question of contractual interpretation only. While it is apparent that the defendants may ultimately seek to set off the settlement funds against the future remediation costs of the blistering, I was not asked to rule on whether they have established the necessary legal or equitable grounds for doing so.
- [66] With respect to the limited question of contractual interpretation, I find nothing in the terms of the settlement agreement that excludes the defendants' right of set-off expressly or by necessary implication. Nor do I find any ambiguity in the agreement, such as would entitle consideration of extrinsic evidence to assist in determining this issue.
- [67] I appreciate that, as the plaintiff points out, there is some incongruity in finding that a settlement agreement does not exclude a future right of set-off. I am sympathetic as well to the plaintiff's view of the inequities of construing the agreement in a way that preserves a right of set-off against settlement funds payable at the end of prolonged litigation and negotiations. Nevertheless, the law as expressed in *Swagger Construction Ltd.* is clear that a waiver of the right of set-off in an agreement must be clear and unequivocal. I am unable to find such a waiver simply in the fact that this was a settlement agreement, particularly when the likelihood of a future claim was known to all parties at the time of the settlement.
- [68] I find that the terms of the settlement agreement do not exclude the defendants' right to set off amounts for newly discovered deficiencies.
- [69] The question remains, however, as to whether the defendants have established the factual prerequisites for a valid legal or equitable right of set-off against the settlement funds. While the plaintiff suggested that this was not the case, this issue was not fully argued before me. I therefore limit my findings to the interpretation of the contract, and make no final determination on the defendants' right of set-off.

CONCLUSION

- [70] "Centura Building Systems (1997) Ltd." will be substituted for "Centura Buildings Systems Ltd." as the plaintiff in this action.
- [71] The settlement agreement between the parties will be rectified to replace "Centura Building Systems Ltd." with "Centura Building Systems (1997) Ltd."
- [72] The terms of the settlement agreement do not exclude the defendants' right to set off amounts from newly discovered deficiencies.

"K.E. Neilson, J."

The Honourable Madam Justice K.E. Neilson

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