

CANADA / JUDGMENT

Fisher v. Airfoam Industries Ltd. (Quad-Lock Building Systems)

2025 BCSC 758

COURT

Supreme Court of British Columbia

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2025 BCSC 758 Fisher v. Airfoam Industries Ltd. (Quad-Lock Building Systems)

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Fisher v. Airfoam Industries Ltd. (Quad-Lock Building Systems),

2025 BCSC 758

Date: 20250424

Docket: S227089

Registry: Vancouver

Between:

Timothy R. Fisher

Plaintiff

And:

Airfoam Industries Ltd. dba Quad-Lock Building Systems

Defendant

Before: The Honourable Justice Francis

Reasons for Judgment

Counsel for the Plaintiff:

D. Gruber

Counsel for the Defendant:

N. Shirazian

Place and Dates of Hearing:

Vancouver, B.C.

March 5-6, 2025

Place and Date of Judgment:

Vancouver, B.C.

April 24, 2025

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Introduction

- [1] The plaintiff, Timothy Fisher, purchased insulated concrete forms from the defendant, a British Columbia company, for residential construction projects in the United States. The plaintiff has sued the defendant, claiming that the product he purchased from the defendant was faulty. The defendant brings this application seeking a stay of proceedings on the basis that the parties are bound to submit their dispute to arbitration pursuant to a binding arbitration clause. The plaintiff submits that the defendant is estopped from relying on the arbitration clause.
- [2] This application raises the question of whether an arbitration clause in a sales order, signed by the plaintiff after a number of terms of the contract were negotiated and agreed to, binds the parties. It also raises the question of whether a defendant will be estopped from relying on an arbitration clause in circumstances in which they have, in settlement negotiations with the plaintiff, indicated their agreement to proceeding with litigation should a settlement not be reached.
- [3] In support of his estoppel argument, Mr. Fisher seeks to adduce evidence about the parties' settlement negotiations. The defendant submits that these negotiations are privileged, and has applied to have that evidence struck.
- [4] I will first review the background facts and the overall legal framework, and then will consider the application to strike certain portions of the plaintiff's evidence on the basis of privilege. I will then consider the stay application with a focus on the two primary substantive issues: whether the contract between the parties contains an arbitration clause, and, if so, whether the defendant is estopped from relying on it.

Background Facts

- [5] Mr. Fisher was introduced to the defendant Quad-Lock Building Systems at a conference in 2020. He decided to purchase insulated concrete forms ("ICFs") made by Quad-Lock for a construction project. From September 2020 until July 2021, Mr. Fisher made ten orders for ICFs from Quad-Lock. Each order occurred in the following way: Mr. Fisher sent drawings to Ryan Derrer, a regional sales manager for Quad-Lock. Mr. Derrer then used those drawings to come up with a quote for price, quantity, and product type of ICFs. Once the parties agreed on these terms, Mr. Derrer arranged for a freight company to transport the ICFs to Mr. Fisher's construction site. The payment for each order was made prior to the order being shipped. After payment, Quad-Lock sent Mr. Fisher documents to be signed electronically. These documents were called sales orders (the "Sales Orders"). Some Sales Orders included orders for a particular product manufactured by the defendant called "Quad-Deck". When Mr. Fisher made an order that included Quad-Deck products, there were additional forms that Mr. Fisher was required to sign (the "Quad-Deck Order Forms").

[6] The Sales Orders included a "date" and a "ship date". In all cases the "ship date" was later than the "date". For example, the first Sales Order was dated September 4, 2020, with a ship date of October 2, 2020. Mr. Fisher signed the document after the "ship date" on October 7, 2020. In the case of other Sales Orders, Mr. Fisher signed the Sales Order after the "date" but prior to the "ship date".

[7] The Sales Orders all contain the following statement:

Quad-Lock Building Systems, a business unit of Airfoam Industries Ltd.

The Terms and Conditions of this sale are set forth at www.quadlock.com/terms. Overdue amounts are subject to 1.5% service charge monthly (18% per annum). CAUTION: EPS products are combustible. The Safety Data Sheet (SDS) is available upon request or at www.quadlock.com/SDS.pdf

[8] For orders involving Quad-Deck products, the Quad-Deck Order Forms signed by Mr. Fisher had the following statement immediately above the signature box:

The Terms and Conditions of Sale are set forth at www.quadlock.com/terms - the undersigned Buyer acknowledges having read and understood the terms & conditions, the terms & conditions are agreed to and are incorporated into and form an integral part of this purchase.

[9] The Terms and Conditions of Sale, posted on Quad-Lock's website, contain the following relevant provisions:

a) A "whole agreement" clause that states:

This agreement constitutes the entire agreement between the Buyer and Quad-Lock regarding the sale of products ("Products") by Quad-Lock to the Buyer and sets out the final and complete expression of all terms and conditions of this Agreement. Any representations, promises, warranties, or statements that are not contained in this Agreement are void.

b) An arbitration clause (the "Arbitration Clause") that states:

20. WAIVER OF JURY TRIAL/ BINDING ARBITRATION. The Buyer hereby waives all rights to a trial by jury. The Buyer consents that all disputes arising out of or relating to this Agreement shall be settled finally by arbitration under the Rules of the British Columbia Commercial Arbitration Centre ("BCICAC"). The arbitration will take place before one arbitrator appointed in accordance with the BCICAC Rules. The place of arbitration shall be in the City of Vancouver, British Columbia. Any hearings shall be conducted in Vancouver, British Columbia, and will be conducted in English. Except for travel and lodging expenses, which will be borne by each party separately, any and all costs of arbitration and any and all lawyer's fees will be borne by the Buyer and/ or Quad-Lock as determined by the arbitrator depending on the arbitrator's outcome.

[10] Mr. Fisher deposed that he never went to the website to review the Terms and Conditions of Sale, and was unaware of the Arbitration Clause until after he commenced this proceeding.

Legal Framework

The legislation

[11] The defendant brings this application for a stay pursuant to s. 8 of the International Commercial Arbitration Act, R.S.B.C. 1996, c. 233 [ICAA]:

- 8 (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may, before submitting the party's first statement on the substance of the dispute, apply to that court to stay the proceedings.
- (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is null and void, inoperative or incapable of being performed.
- (3) Even if an application has been brought under subsection (1) and even if the issue is pending before the court, an arbitration may be commenced or continued and an arbitral award made.

The competence-competence principle and its exceptions

- [12] Before considering the merits of the stay application, I must first consider whether I am able to determine the operability of the Arbitration Clause, given that the ICAA incorporates the competence-competence principle. This principle establishes that challenges to an arbitrator's jurisdiction, including objections to the validity of an arbitration agreement, should generally be decided at first instance by the arbitrator: *Spark Event Rentals Ltd. v. Google LLC*, 2024 BCCA 148 at para. 7; *Peace River Hydro Partners v. Petrowest Corp.*, 2022 SCC 41 at para. 41.
- [13] The competence-competence principle is not absolute. A court may resolve a challenge to an arbitrator's jurisdiction in certain circumstances. Those circumstances were most recently considered and explained by the Supreme Court of Canada in *Uber Technologies Inc. v. Heller*, 2020 SCC 16 [Uber]. In *Spark Event Rentals*, at para. 15, Harris J.A. described the three exceptions under the framework from *Dell Computer Corp. v. Union des consommateurs*, 2007 SCC 34 that allow a court to consider the jurisdiction of an arbitrator, as discussed in Uber:
- [15] As explained in Uber, the Dell framework establishes exceptions to the rule that any challenge to the jurisdiction of an arbitrator must first be referred to the arbitrator. First, a court may decide a question of law alone: Uber at para. 32, citing Dell at para. 84. This exception does not apply in this case. Second, where the jurisdiction of the arbitrator requires the admission and examination of factual proof alone, normally the matter is referred to the arbitrator: Uber at para. 32, citing Dell at para. 85. Third, "[f]or questions of mixed law and fact, courts must also favour referral to arbitration, and the only exception

occurs where answering questions of fact entails a superficial examination of the documentary proof in the record and where the court is convinced that the challenge is not a delaying tactic or will not prejudice the recourse to arbitration": Uber at para. 34, citing Rogers Wireless Inc. v. Muroff, 2007 SCC 35 at para. 11.

[Emphasis added.]

[14] A superficial review is not inconsistent with a searching analysis of the legal questions, so long as the necessary facts engaged in the analysis are evident or not legitimately disputed: Spark Event Rentals at para. 18.

[15] In this case, Mr. Fisher argues that the third exception to the Dell framework applies such that, on a superficial review of the evidence, it is clear that the Arbitration Clause is inoperable.

[16] I am satisfied that I am able, on a superficial review of the evidence, to determine whether the Arbitration Clause is inoperable and I have considered the operability of the Arbitration Clause below.

The test under s. 8 of the ICAA

[17] In an application to stay proceedings in favour of arbitration pursuant to s. 8 of the ICAA, there are two components:

- a) the technical prerequisites for a mandatory stay of court proceedings; and
- b) the statutory exceptions to a mandatory stay of court proceedings.

Peace River at para. 76.

[18] Under the first component, the applicant for a stay in favour of arbitration must establish the technical prerequisites on the applicable standard of proof. If the applicant discharges this burden, then under the second component, the party seeking to avoid arbitration must show that one of the statutory exceptions applies, such that a stay should be refused: Peace River at paras. 78-79.

[19] There are three technical prerequisites under s. 8(1) of the ICAA:

- a) the applicant must show that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement;
- b) the legal proceedings must be in respect of a matter agreed to be submitted to arbitration; and
- c) the application must be brought before the applicant takes a step in the proceeding.

Pixhug Media Inc. v. Steeves, 2017 BCSC 2171 at para. 43.

- [20] The standard of proof at the first stage is lower than a balance of probabilities. To satisfy the first component, the applicant must only establish an arguable case that the technical prerequisites are met: *Peace River* at para. 84.
- [21] The second stage involves a consideration of the statutory exceptions. A court should dismiss a stay application on the basis of a statutory exception only in clear cases, such as where the party seeking to avoid arbitration has established, on a balance of probabilities, that the arbitration agreement is void, inoperative, or incapable of being performed. In cases that are not clear, the question of the enforceability of the arbitration agreement should be dealt with by the arbitrator rather than the court: *Peace River* at para. 89.

Application to strike evidence

- [22] The defendant has applied to strike portions of the plaintiff's evidence, primarily because it includes correspondence protected by settlement privilege. The plaintiff submits that this evidence is admissible and properly before the court to enable the plaintiff to establish that the defendant is estopped from relying upon the Arbitration Clause.
- [23] Much of the evidence tendered by Mr. Fisher in support of his estoppel claim consists of without prejudice settlement discussions, which would, in the ordinary course, be privileged. At issue here is whether an exception applies to enable Mr. Fisher to advance this evidence, notwithstanding the without prejudice nature of the correspondence, in support of his claim of estoppel.
- [24] In *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, Chief Justice Finch discussed the exceptions to blanket settlement privilege:
- [17] In *Middelkamp*, *supra*, Chief Justice McEachern said there must be exceptions to the blanket privilege for settlement communications. Notably, he referred to the proper disposition of litigation (para. 20).
- [18] In my view, *Middelkamp* did not close the door on what might constitute a valid exception to the blanket privilege (see reviews of types of exceptions to the rule in *Berry v. Cypost Corp.* (2003), 43 C.P.C. (5th) 275, 2003 BCSC 1827, and *Unilever plc v. The Proctor & Gamble Co.*, [2000] 1 W.L.R. 2436 (C.A.)).
- [19] However, the test for discharging the burden to establish an exception should not be set too low. The public policy behind settlement privilege is a compelling one. It is so compelling that even threats arising in the context of settlement negotiations may not justify an exception: *Unilever*, *supra* at p. 2449-2450.

[20] To establish an exception in this case, the defendant must show that a competing public interest outweighs the public interest in encouraging settlement. An exception should only be found where the documents sought are both relevant, and necessary in the circumstances of the case to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice.

[Emphasis in original.]

[25] Without prejudice communications may fall under an exception to privilege if they include a statement by one party that could form the basis of an estoppel claim: *Berry v. Cypost et al* (No. 1), 2003 BCSC 1827 at para. 19(f)(i). This makes sense, because the public policy behind protecting settlement privilege is not served if privilege is used to shield an otherwise valid estoppel claim from scrutiny by the court. In *Berry*, Justice Burnyeat cited the following passage from "The Law of Evidence in Canada" at para. 20:

The privilege cannot be used as a means to deceive the courts as to the facts, by excluding evidence which would repel a charge of fraud made by a party or who is shown by the impugned communication to have effected a waiver or made an election (at p. 729).

[26] If, in without prejudice discussions, the defendant made some kind of promise or assurance on which the plaintiff detrimentally relied, it would be contrary to the interests of justice to prohibit the plaintiff from advancing that evidence in support of an estoppel argument. Privilege should not be used to obscure the true state of affairs between the parties from the court, at least not where one party has detrimentally relied on the representation of another, giving rise to equitable concerns. In my view, the plaintiff ought to be entitled to adduce this evidence in this application, for the sole purpose of providing an evidentiary basis for the plaintiff's argument that the defendant is estopped from relying on the Arbitration Clause.

Stay Application

Position of the Parties

[27] In this case, the defendant submits that it has established an arguable case that the technical prerequisites for a mandatory stay are met, and that the plaintiff is unable to establish on a balance of probabilities that any statutory exceptions apply. As such, the stay should be granted and any issues with respect to the arbitrator's jurisdiction should, pursuant to the competence-competence principle, be remitted to the arbitrator.

[28] The plaintiff submits that, on the evidence, there is no arguable case that Mr. Fisher is bound by an arbitration agreement. As a result, the plaintiff submits that the defendant cannot meet the low burden of showing an arguable case that the technical requirements are met. Further, the plaintiff submits that this application was not brought in a timely manner. In terms of statutory exceptions, the plaintiff argues that even if the technical requirements are met, the arbitration agreement has been rendered inoperative, and the defendant is estopped from relying on it.

Are the plaintiff and defendant parties to an arbitration agreement?

- [29] The first technical requirement under s. 8 of the ICAA is that the applicant must establish an arguable case that a party to an arbitration agreement has commenced legal proceedings against another party to the agreement. In this case, the plaintiff submits that the defendant has no arguable case because the Arbitration Clause clearly did not form part of any contract between Mr. Fisher and Quad-Lock.
- [30] The question of whether the Arbitration Clause is part of a contract between Mr. Fisher and Quad-Lock turns in part on when the contracts between Mr. Fisher and Quad-Lock were formed. The defendant submits that the contract for each order was formed at the time Mr. Fisher electronically signed the Sales Orders and the Quad-Deck Order Forms. Because the Sales Orders and the Quad-Deck Order Forms expressly contain a reference to the Terms and Conditions which include the Arbitration Clause, the Arbitration Clause was incorporated by reference into the contracts between the parties.
- [31] In contrast, the plaintiff argues that all essential terms were agreed upon prior to Mr. Fisher signing any documents, and that therefore the documents he signed are better characterized as shipping receipts rather than written agreements between the parties. The true contracts between the parties were formed orally in advance of the Sales Orders or the Quad-Deck Order Forms being signed by Mr. Fisher.
- [32] Mr. Fisher deposed that the first order he made for products from Quad-Lock came about by way of Mr. Fisher providing Mr. Derrer with a set of drawings, and from those drawings, Mr. Derrer calculated how much product Mr. Fisher would need. Mr. Derrer then sent a proposal for "price, quantity and product type", and the parties "negotiated on pricing by a combination of phone, text, and email, due to wireless connectivity problems". The documents that constituted the text and email portions of the negotiations were not in evidence before me. On the basis of what Mr. Fisher has deposed, it appears that the result of the phone, text, and email negotiations was an agreement on a per-unit price. However, other than a general reference to reaching agreement on a per-unit price for the first order, Mr. Fisher offered no further details about what the precise terms of agreement were between the parties as a result of these negotiations.
- [33] In *Kobelt Manufacturing Co. Ltd. v. Pacific Rim Engineered Products (1987) Ltd.*, 2011 BCSC 224, the plaintiff sold the defendant brakes that the defendant failed to pay for. The defendant argued that the brakes were faulty. The plaintiff relied on exclusion clauses that the plaintiff said formed part of the contract between the parties and excluded liability for any claim the defendant may have had with respect to the brakes being faulty. The defendant, like the plaintiff in this case, argued that the exclusion clause was not part of the contract because it was not brought to the buyer's attention before the goods were ordered. Justice Sigurdson considered whether the exclusion clause was part of the contract. He noted that the terms and conditions were located on the company's website, the address of which was noted on the shipping invoice, which the buyer received only after having placed

its order. Relying on the proposition that an exclusion clause cannot be introduced by way of a document delivered after the contract has been formed, Sigurdson J. found that the exclusion clause in that case could not form part of the contract because "the first time [the buyer] received actual notice of these terms was in a document referring to the website that was delivered to the purchaser following the entry into the contract": at para. 13.

- [34] The plaintiff submits that Kobelt is factually indistinguishable from the case at bar. However, this submission depends on this court finding that, as in Kobelt, the contract was entered into prior to the buyer receiving notice of relevant terms by way of the shipping documents.
- [35] Mr. Fisher says that the contracts were formed before he was given the Sales Orders and Quad-Deck Order Forms to sign, however he does not take a position on precisely when the contracts were formed. In fact, there is very little evidence as to what the terms of the agreement between the parties were, if they were not the written terms and conditions that were referenced on the documents signed by Mr. Fisher.
- [36] In this respect, this case is quite different from Kobelt, where the controversial contractual terms were contained on a delivery slip that was not signed by the buyer, in circumstances in which the court found the contract terms had previously been agreed to.
- [37] Another case the plaintiff relies on is *H & H Marine Engine Service Ltd. v. Volvo Penta of the Americas, Inc.*, 2009 BCSC 1389. This case is in some respects very similar to the case at bar, insofar as it also involved defendants seeking to stay proceedings pursuant to s. 8 of the ICAA because of an arbitration agreement that the defendants said bound the plaintiffs. In *H & H*, the plaintiff agreed to supply the defendant with certain marine engine parts. The parties did not sign a formal contract governing the supply of the parts. Instead, they conducted business by way of invoices issued by the plaintiff and purchase orders issued by the defendant. They also held regular teleconferences and communicated with one another by fax. For one of the projects in issue, the defendant issued purchase orders, only the first page of which were faxed to the plaintiff. The front pages of the purchase orders did not contain any reference to arbitration, but referred to terms and conditions on "page two attached". Only after the dispute arose did the defendant deliver to the plaintiff a copy of the "General Purchasing Terms and Conditions" that were found on the reverse side of the purchase orders. One of the terms was an arbitration clause.
- [38] However, there was an additional complicating factor in *H & H*, which was that, in addition to the General Purchasing Terms and Conditions, the defendant also had a standard set of General Purchasing Conditions that were different, and had a different arbitration clause, from the General Purchasing Terms and Conditions. The General Purchasing Terms and Conditions mandated arbitration in Washington, DC and the General Purchasing Conditions mandated arbitration in Gothenburg, Sweden. Taking a position that Justice Dickson described as "striking", the defendants relied on the two different arbitration clauses at different stages of the dispute.

- [39] The case before me is somewhat different. While in H & H there was no evidence that consensus ad idem had been reached between the parties with respect to the arbitration clause, in this case there is some evidence of Mr. Fisher's agreement, namely his signature immediately below a provision that refers to the terms and conditions on the website.
- [40] In addition, Mr. Fisher's evidence simply lacks the necessary precision for me to be so satisfied that the parties entered into a binding contract prior to Mr. Fisher signing the Sales Orders and Quad-Lock Order Forms that I could find that the defendant has no arguable case with respect to the Arbitration Clause.
- [41] As such, the defendant has established an arguable case that the Sales Orders and Quad-Lock Order Forms, which refer to and appear to incorporate the terms and conditions from Quad-Lock's website, including the Arbitration Clause, constitute binding contracts between the parties, and that the plaintiff is bound by their terms.

Timeliness

- [42] The plaintiff submits that the application was not brought in a timely manner because the defendant filed its application to stay over six months after being served with Mr. Fisher's notice of civil claim.
- [43] In stay applications of this nature, timeliness is understood with reference to whether the moving party has taken a step in the proceeding in advance of bringing the stay application: Pixhug at para. 70; Friesen v. Lam, 2007 BCSC 1124 at para. 19; Larc Developments Ltd. v. Levelton Engineering Ltd., 2010 BCCA 18 at para. 19.
- [44] The plaintiff does not allege that the defendant has taken a step in this proceeding so much as registered a concern that the defendant has waited too long to bring this stay application. In the circumstances, I cannot find that the defendant's modest delay in bringing this application is sufficient to disentitle it from seeking to enforce the arbitration agreement.

Estoppel

Facts relevant to estoppel claim

- [45] Under s. 8(2) of the ICAA, even if the technical requirements for a stay have been met, a party seeking litigation can avoid a stay by showing on a balance of probabilities that the arbitration clause is void, inoperable, or incapable of being performed.
- [46] In Peace River at paras. 138-139, Justice Côté considered the meaning of the term "inoperative" and held:

In arbitration law, however, the term has been used to describe arbitration agreements which, although not void ab initio, "have ceased for some reason to have future effect" or "have become inapplicable to the parties and their dispute" [citations omitted].

Possible reasons for finding an arbitration agreement inoperative include frustration, discharge by breach, waiver, or a subsequent agreement between the parties.

- [47] The plaintiff submits that the Arbitration Clause is inoperative because the defendant, as a consequence of its words and actions, is estopped from relying on it. The plaintiff says that the precise equitable doctrine of estoppel that applies depends on the state of mind of the defendant. Either this was an estoppel by convention, a shared understanding during the settlement communications that the proper forum for resolving their dispute was this court, or there was estoppel by representation, because the defendant by its silence allowed the plaintiff to be lulled into the belief that the defendant was prepared to proceed with the litigation and would not enforce the Arbitration Clause. In either scenario, the plaintiff detrimentally relied on the defendant's actions, believing that the matter would proceed to court if the parties were unable to settle. He only learned about the arbitration clause in October 2023, when the defendant filed a jurisdictional response to the notice of civil claim.
- [48] Discussions between the parties about Mr. Fisher's potential claim against Quad-Lock took place prior to the filing of the notice of civil claim. When the notice of civil claim was filed in mid-September 2022, Josh Plamondon, CEO of the defendant, wrote to counsel for the plaintiff and expressed that the defendant "would like to resolve this in an amicable way and avoid any costly proceedings". Later in September, an exchange of emails took place between counsel for the plaintiff and counsel for the defendant. In response to an email from US counsel for Mr. Fisher, asking for an admission of liability, counsel for Quad-Lock wrote back and said:

WITHOUT PREJUDICE

Gregg,

I am not going to debate this with you on e-mail. This is not how we do things in Canada.

My client does not agree with your assertions and reserves all of its rights and defences. If your client has an offer to make, then he should do so. If not, this can proceed in the courts in BC.

- [49] On March 27, 2023, counsel for Mr. Fisher emailed counsel for Quad-Lock and inquired as to whether the defendant was interested in discussing settlement. He said:

If there is no longer any interest in engaging in settlement discussions, please let me know. And, if this is the case, please confirm that you are able to accept formal service of the Statement of Claim, and we can get that done and start moving the matter forward (please also confirm service by email would be acceptable).

- [50] In response to this email, counsel for Quad-Lock informed Mr. Fisher's counsel that the defendant's insurer was involved and that they would be in touch.

- [51] Settlement discussions appear to have ensued, but no settlement was reached. By way of letter dated August 1, 2023, counsel for the insurer offered to settle the claim (the "Settlement Letter"). In the Settlement Letter, counsel referred to the fact that the terms and conditions found on Quad-Lock's website included limitation of liability provisions. The Settlement Letter made no reference to the Arbitration Clause.
- [52] On October 16, 2023, the defendant filed a jurisdictional response to the notice of civil claim. It was only after receiving the jurisdictional response that Mr. Fisher became aware that the defendant was asserting that the parties were bound to proceed to arbitration pursuant to the Arbitration Clause.
- [53] The question I must consider is whether the Arbitration Clause is inoperative as a result of the words or conduct of the defendant.

Estoppel by Convention

- [54] In his textbook, *Estoppel*, 2nd ed (Toronto, ON: LexisNexis Canada, 2019), at page 124, Prof. Bruce MacDougall traces the origin of the modern approach to estoppel by convention to the "reinvigoration" of the doctrine represented by Lord Denning M.R.'s decision in *Amalgamated Investment & Property Co. v. Texas Commerce International Bank Ltd.*, [1981] 3 W.L.R. 565 (C.A.), wherein the Court said:

When the parties to a transaction proceed on the basis of an underlying assumption -- either of fact or of law -- whether due to misrepresentation or mistake makes no difference -- on which they have conducted the dealings between them -- neither of them will be allowed to go back on that assumption when it would be unfair and unjust to allow him to do so. If one of them does seek to go back on it, the courts will give the other such remedy as the equity of the case demands.

- [55] Prof. MacDougall notes that Canadian courts have "to a certain extent" adopted Lord Denning's approach in the context of estoppel by convention, although "in a somewhat more structured way and keeping the various estoppel doctrines separate": at 126.
- [56] *Ryan v. Moore*, 2005 SCC 38 is the leading authority from the Supreme Court of Canada on the doctrine of estoppel by convention. In that case, Justice Bastarache described the doctrine at para. 4:

Estoppel by convention operates where the parties have agreed that certain facts are deemed to be true and to form the basis of the transaction into which they are about to enter (G. H. L. Fridman, *The Law of Contract in Canada* (4th ed. 1999), at p. 140, note 302). If they have acted upon the agreed assumption, then, as regards that transaction, each is estopped against the other from questioning the truth of the statement of facts so assumed if it would be unjust to allow one to go back on it (G. S. Bower, *The Law Relating to Estoppel by Representation* (4th ed. 2004), at pp. 7-8).

[57] After an extensive review of the UK and Canadian authorities on estoppel by convention, the Court in Ryan laid out the following criteria to form the basis of the doctrine, at para. 59:

- (1) The parties' dealings must have been based on a shared assumption of fact or law: estoppel requires manifest representation by statement or conduct creating a mutual assumption. Nevertheless, estoppel can arise out of silence (impliedly).
- (2) A party must have conducted itself, i.e. acted, in reliance on such shared assumption, its actions resulting in a change of its legal position.
- (3) It must also be unjust or unfair to allow one of the parties to resile or depart from the common assumption. The party seeking to establish estoppel therefore has to prove that detriment will be suffered if the other party is allowed to resile from the assumption since there has been a change from the presumed position.

[58] With regard to the requirement of a shared assumption, in Ryan, Bastarache J. noted that it is not necessary for the estopped party to have created or encouraged the other party, so long as there was a shared assumption:

62 While it may not be necessary that the assumption by the party raising estoppel be created or encouraged by the estopped party, it must be shared in the sense that each is aware of the assumption of the other (John v. George, [1995] E.W.J. No. 4375 (QL) (C.A.), at para. 37). Mutual assent is what distinguishes the estoppel by convention from other types of estoppel (Bower, at p. 184). The courts have described communications complying with this requirement as "crossing the line".

[59] In Ryan, the Court noted that the requirement of detrimental reliance lies at the heart of true estoppel and that detrimental reliance encompasses two distinct, but interrelated concepts: reliance and detriment. Reliance is established where a party changed their course of conduct by acting, or abstaining from acting, in reliance upon the assumption, thereby altering their legal position: at para. 69.

[60] In terms of detriment, Bastarache J. stated:

73 Once the party seeking to establish estoppel shows that he acted on a shared assumption, he must prove detriment. For the plea to succeed, it must be unjust or unfair to allow a party to resile from the common assumption (Wilken, at p. 228). It is often said that the fact that there will have been a change from the presumed legal position will facilitate the establishment of detriment: "This is because there is an element of injustice inherent within the concept of the shared assumption -- one party has acted unjustly in allowing the belief or expectation to 'cross the line' and arise in the other's mind": Wilken, at p. 228.

74 This final requirement of estoppel has been described as proving that it would be "unjust", "unconscionable" or "unfair" to permit a party to resile from the mutual assumption (see, e.g., Bower, at p. 181; John; The "Indian Grace"; The "Vistafood"). However, it may be preferable to refrain from using "unconscionable", in order to avoid confusion with this last concept which has

developed a special meaning in relation to inequality of bargaining power in the law of contracts (where we speak of unconscionable transactions, for instance) (see *Litwin Construction*, at p. 468).

- [61] In *Husky Oil Operations Limited v. Technip Stone & Webster Process Technology Inc.*, 2023 ABKB 545 [Husky Oil], the Alberta Court of King's Bench considered a case with similar facts to this application. In that case, Husky was the third party beneficiary in a contract between a contractor and a sub contractor (the "Subcontract"). The Subcontract had an arbitration clause. Husky sought to sue the subcontractor for breach of warranty under the Subcontract; the subcontractor argued that the arbitration clause required the dispute to be submitted to arbitration, notwithstanding the fact that Husky was not a party to the Subcontract. Husky's primary argument was that it should not be bound by an arbitration clause in an agreement it was not party to. The Alberta Court of King's Bench held that Husky was required, if it wished to enforce the warranties in the Subcontract, to submit to the arbitration that was mandated by the same Subcontract: at para. 65.
- [62] One of the additional arguments raised by Husky was that the subcontractor was estopped from relying on the arbitration clause because the subcontractor did not invoke the arbitration clause for some time after the claim was filed and served. The parties engaged in negotiations about the warranty for a period of years without the subcontractor asserting that the arbitration clause in the Subcontract applied. The Court rejected this argument because Husky could not point to any actual representation made by the subcontractor to Husky, in words or by conduct, on the subject of whether litigation or arbitration was the appropriate forum: at para. 70.
- [63] Husky appealed the order of the Alberta Court of King's Bench to the Alberta Court of Appeal. The Court of Appeal held that Husky was not required to submit its claim to arbitration because the agreement to arbitrate was not expressed in clear and explicit language such that it was manifest to Husky that, as a non-party to the Subcontract, they were bound to bring their warranty dispute to arbitration: 2024 ABCA 369 at para. 35. As a result of this decision, the Court of Appeal never dealt with the estoppel argument.
- [64] Husky Oil is a helpful illustration of how a court might approach the operability of an arbitration clause in circumstances in which parties negotiated the resolution of litigation for a lengthy time without reference to arbitration. However, any case of estoppel by convention must rest on an analysis of the particular assumptions at play for the parties in that case.
- [65] As noted by Prof. MacDougall in *Estoppel*, the joint quality of the shared assumption is the hallmark of estoppel by convention and distinguishes it from estoppel by representation: at 144. It is not sufficient that the parties happen to share the same assumption. As Chief Justice Esson stated in *32262 B.C. Ltd. v. Companions Restaurant Inc.* (1995), 17 B.L.R. (2d) 227, 1995 CanLII 354 (B.C.S.C.), at para. 18, "[t]he authorities require a considerable degree of formality or, at the least, conscious dealing between the parties in order to create a

convention to replace the actual facts as the basis of that transaction".

- [66] It is on this point, in my view, that the plaintiff's estoppel by convention claim falters. In this case, on the evidence, there was, at best, a coincidence of assumptions, not a joint assumption. Mr. Fisher assumed that the BC Supreme Court was the proper forum to pursue his dispute because he was unaware of the Arbitration Clause. While the evidence is thin about the assumptions motivating the defendant, it can reasonably be inferred from the correspondence that counsel for the defendant did not turn their mind to the Arbitration Clause until sometime after the Settlement Letter was sent, because no mention was made of the Arbitration Clause in the Settlement Offer or any other without prejudice communication between the parties. But there is no evidence of a conscious, shared assumption being made by both parties to overlook the Arbitration Clause in favour of litigation. Indeed, such an assumption would be impossible because Mr. Fisher was unaware of the Arbitration Clause until after the jurisdictional response was filed. If both parties discussed litigation as the forum in which they would resolve their dispute because they were not aware of, or did not turn their minds to, the Arbitration Clause, this would not meet the criteria for a shared assumption, but rather would be (in the words of Bastarache J. in *Ryan*), a case of "mutual ignorance, not mutual assumption": at para. 63.
- [67] The second problem with the plaintiff's estoppel argument is the absence of reliance. In *Ryan*, the Supreme Court of Canada held that detrimental reliance was a central component of estoppel by convention. Reliance requires a finding that the party seeking to establish the estoppel changed their course of conduct by acting or abstaining from acting in reliance upon the assumption, thereby altering their legal position: at para. 69.
- [68] There is no evidence that Mr. Fisher changed course in reliance on the assumption that the Arbitration Clause did not apply. He was unaware of the Arbitration Clause. Before, during, and after his settlement discussions with the defendant, he remained on the same course: seeking to vindicate his claim against the defendant by commencing, and seeking to settle, litigation proceedings. The necessary change of course simply can't be established on the evidence.
- [69] I therefore find that the plaintiff has failed to demonstrate that the Arbitration Clause is inoperable because the defendant is estopped by convention from relying upon it.

Estoppel by Representation

- [70] I have considered the plaintiff's alternative argument that the actions of the defendant amount to estoppel by representation.
- [71] Estoppel by representation was also dealt with by the Supreme Court of Canada in *Ryan* at para. 76:

76 Where there is no shared assumption, as in the present case, there can be no estoppel by convention, no matter how unjust the other party's conduct may appear to be. However, in some circumstances, the party seeking to establish estoppel may be able to rely on estoppel by

representation, an alternative here advocated by the respondent. The added difficulty in such a case is that an estoppel by representation cannot arise from silence unless a party is under a duty to speak. Silence or inaction will be considered a representation if a legal duty is owed by the representor to the representee to make a disclosure, or take steps, the omission of which is relied upon as creating an estoppel: see Wilken, at p. 227; Bower, at pp. 46-47.

- [72] The sole representation upon which the plaintiff could ground an estoppel is the comment by counsel for the defendant, in an email to counsel for the plaintiff, that, if the matter did not settle, the case could "proceed to court".
- [73] A representation must be clear and unambiguous in order to ground an estoppel by representation: *Low v. Bouverie*, [1891] 3 Ch. 82 at 106 (C.A.); *Pannenbecker v. Dominion of Canada General Insurance Company* (1978), 93 D.L.R. (3d) 450 at 461, 1978 CanLII 1952 (A.B.C.A.).
- [74] I cannot find that the required standard of clarity and unambiguousness is met in this case. No express representation was made that the Arbitration Clause would not be relied on, nor was the defendant silent in the face of an express statement by the plaintiff of his intention to bypass the Arbitration Clause and proceed to court. The Arbitration Clause was simply not discussed by either party, presumably because Mr. Fisher was unaware of it and the defendant had overlooked or forgotten about it. In this context, there is no evidentiary basis on which I could find that the defendant clearly and unambiguously represented to the plaintiff that it would not rely on the Arbitration Clause. I therefore find that the plaintiff cannot successfully establish that the Arbitration Clause is inoperative as a result of estoppel by representation.

Other forms of estoppel

- [75] The plaintiff argues that this Court must take a broad approach to estoppel, which is a flexible doctrine resistant to being placed in water-tight categories. He submits that a broad and flexible approach to estoppel could render the Arbitration Clause inoperable.
- [76] Counsel for the plaintiff relies on the robust body of UK jurisprudence in which a principled, less categorical approach has been taken to estoppel claims. This approach is perhaps best exemplified in *Taylors Fashions Ltd. v. Liverpool Victoria Trustees Co. Ltd.*, [1982] 1 Q.B. 133 at 151, [1981] 1 All E.R. 897 at 915, wherein Mr. Justice Oliver said:

Furthermore the recent cases indicate, in my judgment, that the application of the *Ramsden v. Dyson*, L.R. 1 H.L. 129 principle - whether you call it proprietary estoppel, estoppel by acquiescence or estoppel by encouragement is really immaterial - requires a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which, knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to inquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable

behaviour.

[77] The loosening of the categorical distinctions between different types of estoppel, a process that has been underway in the UK since the early 1980s, has also, to a certain extent, been underway in this province. The above noted passage from *Taylor's Fashions* has been cited with approval multiple times by our Court of Appeal: *Hild Holdings Ltd v. Adams*, (1994) 91 B.C.L.R. (2d) 203, 1994 CanLII 2888 (C.A.) at para. 12; *Erickson v. Jones*, 2008 BCCA 379 at para. 54. In *Litwin Construction (1973) Ltd. v. Pan* (1988), 52 D.L.R. (4th) 459, 1988 CanLII 174 (B.C.C.A.), the BC Court of Appeal adopted the flexible approach to estoppel endorsed by the UK courts and held, at p. 15:

Under this broad principle, the distinctions between estoppel, promissory estoppel, waiver, election, laches and acquiescence do not always affect the outcome, though they may in some cases. The underlying concept is that of unfairness or injustice and it is not essential to its application that there be knowledge, detriment, acquiescence or encouragement although their presence may serve to raise the unfairness or injustice to the level requiring the exercise of judgment. If the unfairness or injustice is very slight, then the principle would not be applied. If it is more than slight, then the principle may be applicable.

[78] While the flexible approach to estoppel has very clearly been endorsed by the BC Court of Appeal, I am also bound by the Supreme Court of Canada in *Ryan*, in which the Supreme Court declined to situate the doctrines of estoppel by convention and estoppel by representation into a more generalized estoppel doctrine.

[79] While the strict categorical approach to estoppel has, in the modern era, given way to a more flexible doctrine, the flexibility of that doctrine does not render it devoid of principle. In these circumstances, in which there was no joint assumption, no representation by the defendant, and no change of course by the plaintiff in reliance on a representation or an assumption, I cannot find that any form of estoppel has been made out.

Is the Arbitration Clause inoperative due to the limitation period?

[80] A further alternative argument raised by the plaintiff is that the Arbitration Clause is inoperative because the time to commence an arbitration under the Limitation Act, S.B.C. 2012, c. 13, has expired. As I understand this argument (which counsel for the plaintiff acknowledged was based on thin authority), it is that Quad-Lock discovered the claim no later than September 13, 2021, which was when Quad-Lock learned that Mr. Fisher had a potential claim against them. If Quad-Lock wished to refer the dispute to arbitration, it was incumbent on it to take steps to do so before the two-year limitation period expired. In other words, the plaintiff argues that the two-year limitation period applies to the defendant's attempts to enforce the Arbitration Clause. More than two years having passed since the claim was discovered, the Arbitration Clause is statute-barred and inoperative.

[81] I cannot accede to this argument. The claim was not Quad-Lock's to make, and the timing of the claim was, as in all claims, in the hands of the plaintiff. To hold that there was a duty on Quad-Lock to commence arbitration upon learning of Mr. Fisher's potential claim, even in the absence of any claim being filed, lest they risk losing the right to rely on the Arbitration Clause, would set a troubling precedent. Plaintiffs generally control when and how to advance a cause of action against a defendant, and limitation periods exist to protect defendants against stale claims. The Limitation Act applies to set limitation periods for the commencement of claims, defined in the legislation at s. 1 as "a claim to remedy an injury, loss or damage that occurred as a result of an act or omission". The defendant's position that the claim should be resolved by arbitration is not, itself, a claim. In my view, the Limitation Act has no application to the question of whether or not the Arbitration Clause is operable on the facts of this case.

Conclusion

[82] I order the proceeding stayed. The defendant shall have its costs of the application.

"Francis J."

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