

CANADA / JUDGMENT

## Hutton v. Hutton

2020 BCSC 2046

COURT

Supreme Court of British Columbia

DECIDED

22 December 2020

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2020 BCSC 2046 Hutton v. Hutton

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Hutton v. Hutton,

2020 BCSC 2046

Date: 20201222

Docket: S159597

Registry: Vancouver

Between:

Harold Lyell Hutton

Plaintiff

**And**

Eleanor Irene Hutton, in her personal capacity, and in her capacity as the Executrix of the Estates of John Meredith Hutton and Eleanor Anne Hutton

Defendant

Corrected Judgment: The text of the judgment was corrected at paragraphs 60(c), 80 and 81 on January 8, 2021

Before: The Honourable Chief Justice Hinkson

Reasons for Judgment

Counsel for the Plaintiff:

M.M. Ranspot

Counsel for the Defendants:

C.E. Selby

Place and Date of Hearing:

Vancouver, B.C.

November 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

December 22, 2020

## Introduction

- [1] The parties are brother and sister, and the only children of John Meredith Hutton and Eleanor Anne Hutton. Both parents are deceased, and the litigation between the parties arises from their parents' wills and estates.
- [2] On February 12, 2020, Madam Justice MacNaughton was to hear the applications of the defendant. Those applications did not proceed, and instead, the parties consented to a judicial settlement conference before MacNaughton J. that day.
- [3] The defendant applies, in both her personal capacity and in her capacity as attorney, executrix of her parents' will, and trustee of their estates, to enforce the settlement agreement that she contends was reached as a result of the February 12, 2020 settlement conference, pursuant to ss. 8(3) and 10 of the Law and Equity Act, R.S.B.C., 1996, c. 253.

## Background

- [4] The wills of the parties' parents were executed on July 19, 2005 and were described by counsel for the plaintiff as "mirror wills". John Meredith Hutton predeceased his wife, and in the result she inherited his estate.
- [5] Eleanor Anne Hutton's will provided in part that if her husband predeceased her, then their daughter Eleanor Irene Hutton was appointed to be the Executrix and Trustee of her will, and that all of her property was to be converted into certain trusts. The will then provided:
  - 4. 2 IN THE EVENT that my husband should predecease me or if he should fail to survive me for a period of fifteen Days after my demise, TO HOLD MY ESTATE upon the administration trusts (hereinafter called the "Administration Trusts") as to sale, conversion, postponement and retention and payment of debts and testamentary and other expenses and the to HOLD THE REMAINING portion of my estate UPON THE FOLLOWING TRUSTS:
    - (a) TO TRANSFER to my daughter, Eleanor Irene Hutton, any real property that I own at the time of my death.

- (b) TO DELIVER to my daughter, Eleanor Irene Hutton, ALL OF MY ARTICLES including all of the contents of any residential property that I may own at the time of my death.
- (c) TO PAY the residue of my estate (the "Net Estate") as follows:
- (i) TO PAY to my daughter Eleanor Irene Hutton seventy five per cent (75%) of my Net Estate, provided that if my daughter should predecease me, and Issue of my daughter should be living at the date of my death, such Issue of my daughter shall take in equal shares per stirpes the share of my Net Estate that my deceased daughter would have been entitled to if living at the date of my death, PROVIDED FURTHER that if my daughter should predecease me without Issue, then the share that my daughter Eleanor Irene Hutton would have received shall be paid to my son, Harold Lyell Hutton.
- (ii) TO PAY to my son Harold Lyell Hutton twenty-five per cent (25%) of my Net Estate, provided that if my son should predecease me, and Issue of my son should be living at the date of my death, such Issue of my son shall take in equal shares per stirpes the share of my Net Estate that my deceased son would have been entitled to if living at the date of my death, PROVIDED FURTHER that if my son should predecease me without Issue, then the share that my son Harold Lyell Hutton would have received shall be paid to my daughter Eleanor Irene Hutton.
- [6] Eleanor Anne Hutton died on November 10, 2015.
- [7] The plaintiff filed his notice of civil claim in these proceedings on November 19, 2015, alleging misuse of his parents powers of attorney and fraud against the defendant, seeking:
1. An order under Section 60 of the Wills, Estates and Succession Act, S.B.C. 2009. C. 13, for such provision as this court thinks adequate, just and equitable in the circumstances for his proper maintenance and support.
  2. An accounting setting out all dealings in respect of the assets and estates of John and Eleanor dating from the issuance to Eleanor of the POAs, including, specifically, the use of all funds advanced pursuant to the CHIP mortgage;
  3. An order that Eleanor repay to the states of John and of Anne any and all amounts misappropriated by reason of the wrongful acts pleaded herein;
  4. Costs;
  5. Such further and other relief as this Honourable Court may consider just.
- [8] Thus began the protracted and acrimonious litigation between the parties.
- [9] On November 20, 2015, the plaintiff filed a certificate of pending litigation against the former family home, where the defendant was still resident.

- [10] On December 16, 2015, the plaintiff filed a notice of dispute in the probate proceedings with respect to the estate of his mother in Action No. V-150075 in the Vancouver Registry of this Court, to prevent the issuance of a grant of probate to the defendant as the executrix of her mother's estate.
- [11] On April 19, 2018, the defendant was granted the administration of her mother's will and estate.
- [12] On September 5, 2018, Mr. Justice Myers cancelled and discharged the certificate of pending litigation against the former family home, and as security therefore, he ordered that the net proceeds from sale, after paying Home Equity and the Crown in Right of B.C., be held by Hollander Plazzer & Co. LLP, pending a further order of the Court or agreement of the parties.
- [13] On August 30, 2019, the net proceeds of the sale of the home, amounting to \$965,388.10 were paid into court.
- [14] The litigation then continued with a host of applications by the parties.
- [15] On February 27, 2020, the defendant purported to accept a settlement offer that she contends was made by the plaintiff on February 12, 2020 in the judicial settlement conference before MacNaughton J.
- [16] On September 24, 2020, MacNaughton J. heard submissions from counsel for the parties to determine whether a settlement had been achieved following the settlement conference of February 12, 2020. Madam Justice MacNaughton recused herself from hearing the application, commenting:

I think that I cannot hear this application. And the reason I cannot hear the application is on a number of the issues in dispute I do not agree with the position of Mr. Hutton.

First, the settlement offer was to be held open until February 28th, that was the agreement and is reflected in the DARS recording of the hearing. Secondly, there was no agreement about the jewellery and no agreement about a pocket watch or the cameras, although the jewellery was discussed and there was some minor discussion about a pocket watch. It was never tabled. The offer that was made by Mr. Hutton was for \$250,000 and the agreement was that it was to be held open until February the 28th. [...] I don't think it's appropriate for me to hear this application having negotiated those terms after a long day with the parties...

- [17] On October 9, 2020, I heard the defendant's application for an order that the parties obtain a transcript of the settlement conference of February 12, 2020. Despite the plaintiff's consent to that application, I declined to make such an order, but agreed to listen to the recording of that conference, and determine which parts, if any, could be transcribed for the parties.
- [18] On October 15, 2020, after my review of the recording, I permitted the parties to obtain a limited transcript of very little of the recording.

## The Positions of the Parties

- [19] The defendant contends that the parties agreed at the settlement conference of February 12, 2020, that the plaintiff offered to accept the sum of \$250,000 to settle all of the matters in issue between them, and to leave his offer open for acceptance until February 28, 2020.
- [20] She also agrees that on March 12, 2020, she agreed to deliver their grandfather's pocket watch and camera equipment to the plaintiff.
- [21] The defendant seeks the following orders and declarations from the Court:
1. The parties have entered into a full, final and binding agreement to settle the Action and the Disputed Claims as set out in the Settlement Agreement & Releases attached hereto, or as modified by the court.
  2. Parties are directed to forthwith sign and exchange a properly executed and witnessed form of the Settlement Agreement & Releases as attached [ ] or as modified by the court.
  3. This proceeding be and is hereby dismissed, without costs to any party. Such dismissal shall be for all intents and purposes of the same force and effect as if this Order had been pronounced at the trial of this proceeding upon the merits and dismissed.
  4. The funds in the amount of \$965,388.10 paid into court to the credit of this proceeding on August 30, 2019, together with all interest accrued thereon be paid out to MacLeod & Company - In Trust
  5. The sum of FIFTY THOUSAND (\$50,000) shall be held back by MacLeod & Company from the Consideration payable to Harold Lyell Hutton pursuant to the terms of the Settlement Agreement & Releases (the "Holdback"), pending determination of costs payable to the Defendants' to enforce the agreement to settle the Action and the Disputed Claims, by court order or agreement between the parties, which costs will be set-off and paid from the Holdback.
  6. This action is stayed pending the court's decision on the hearing of this application to determine the enforceability of the agreement to settle the Action and the Disputed Claims and the form of the Settlement Agreement & Releases.
  7. Upon execution of the Settlement Agreement & Releases by the parties, endorsement of the Order Made After Application herein, and its submission to the Supreme Court Registry for entry, Eleanor will forthwith make available for pick up by Harold those items set out at article 2.02 of the Settlement Agreement & Releases.
  8. The Defendants are at liberty to make submissions regarding costs after the court renders its decision on this application.

- [22] The plaintiff takes the position that there were five issues in this wills variation action, and the related probate proceeding that were raised at the settlement conference of February 12, 2020:
- (a) The conduct of the Defendant, Eleanor Irene Hutton ("Eleanor" or "sister"), as attorney for John Meredith Hutton, deceased ("John" or "father") and Eleanor Anne Hutton, deceased ("Anne" or "mother") and as sole executor for their estates and the harm that Eleanor Irene Hutton caused to those estates,
  - (b) The Plaintiff's entitlement to a share of the monies from Anne's estate,
  - (c) The Plaintiff's entitlement to a share of the chattels of Anne's estate,
  - (d) The return to the Plaintiff of his personal property by Eleanor, and
  - (e) The interment of the remains of John and Anne.
- [23] He contends that there is no binding settlement agreement between the parties, because all that was agreed upon on February 12, 2020, and March 12, 2020, was that:
- (a) He would receive a payment of \$250,000 from Eleanor. In what capacity Eleanor would pay the \$250,000 and the characterization of the \$250,000 payment was and remains in dispute.
  - (b) Eleanor would cause to be delivered to Harold their grandfather's pocket watch and specified cameras and photographic equipment.
- [24] The plaintiff says there was no agreement on the disposition of his parents remains, the claims which he was settling, and the capacity in which the defendant was to pay the sum of \$250,000, or the costs of this action.
- [25] In the alternative, the plaintiff argues that the defendant repudiated the settlement agreement with further negotiations after February 28, 2020.

## Discussion

### Can the Court Enforce the Settlement Agreement on this Motion?

- [26] As determined by Mr. Justice Macfarlane in *McKenzie v. McKenzie*, [1975] 4 W.W.R. 354, 55 D.L.R. (3d) 373 at 377, (B.C.S.C.), *aff'd* [1976] 5 W.W.R. 214, (1977) 69 D.L.R. 765 (B.C.C.A.) [McKenzie], there is a well-established practice in our courts "to enforce settlement agreements in the suit compromised". Where there is a dispute between parties about a settlement agreement, the party seeking to enforce the settlement need not start a separate action to enforce the agreement, and may bring a motion to enforce the agreement as part of an existing action, as long as "no substantial question was raised as to the terms, validity or enforcement of the settlement agreement": *McKenzie* at 378.
- [27] In *Son v. Kim*, 2009 BCSC 776 at para. 36, Madam Justice MacKenzie, as she then was, wrote:

[36] Mr. Justice Smith went on to consider the provisions of s. 24(7) of the Judicature Act, 1873, 36 & 37 Vict., c. 66 (now embodied in s. 10 of the Law and Equity Act). He concluded at 564:

(i) The Court will now enforce the agreement of compromise upon motion in the action whenever the circumstances are such that it would have been enforced in a corresponding manner in the old Court of Chancery.

(ii) In addition the agreement may be so enforced notwithstanding the fact that it involves matters extraneous to the action, and notwithstanding that there is a substantial question raised as to the terms or validity or enforceability of the agreement, provided that the Court is clearly satisfied that justice can be done under the summary procedure. At least this is so where all that the Court needs to order for the purpose of enforcing performance upon just terms is a stay of proceedings or a dismissal of the action or some relief claimed in the action.

In deciding whether justice can be done under the summary procedure the Court, of course, needs to consider a variety of matters involving questions of degree. These, I think, must include the extent to which extraneous matters are involved, how substantial are the questions to be determined, to what extent questions of credibility are likely to arise, and whether pleadings and discovery may be desirable.

[28] At para. 47 MacKenzie J. concluded:

In the case before me, the applicant does not seek to set aside a consent order or a settlement agreement. Rather, he seeks to enforce a settlement agreement that compromises an originating application. I interpret the caselaw to stand for the proposition that in determining whether justice can be done under such a summary procedure, the court must consider various matters involving

- (1) the degree to which extraneous matters are involved,
- (2) how substantial the questions are to be determined, and
- (3) whether other pre-trial procedures such as pleadings and discoveries may be desirable.

[29] In *Robertson v. Walwyn Stodgell Cochran Murray Ltd.*, [1988] 4 W.W.R. 283 at 285 (B.C.C.A.). Mr. Justice Lambert explained that:

Once it has been conceded, as it has been conceded in this case, that a settlement agreement was made with the knowledge and consent of the parties to the litigation, and where no ground is advanced for setting aside the agreement under general contract principles, such as fraud, duress, lack of capacity, or mutual mistake, then the court has no alternative, in the end, but to enforce the agreement. That being so, the proper course is normally to grant the stay of proceedings when it is applied for, rather than to defer the inevitable result by refusing the stay and leaving the defence of settlement to be upheld at trial or in collateral proceedings.

Justice affects both parties and requires a balancing of their interests. The fact that the settlement agreement may not have been a desirable one from the point of view of the Robertsons, or the fact that they may have received poor advice from their lawyer, or the fact that they later changed their minds, can not provide grounds for setting aside the settlement agreement, or for a refusal to enforce it. And it would do scant justice to the interests of the defendants in this case to recognize the validity of the settlement agreement, and that it will ultimately prevail, but to refuse to enforce it at this time and in these proceedings.

[Emphasis added.]

[30] I find that I can properly enforce the settlement agreement and grant a stay of proceedings through this motion, should I find that there is a binding settlement agreement.

Is there an Enforceable Agreement between the Parties?

[31] The burden of proving the existence of a settlement agreement is on the party seeking to enforce or rely on it: *Salminen v. Garvie*, 2011 BCSC 339 [Salminen] at para. 26. The standard of proof required is on the balance of probabilities.

[32] To determine if a settlement agreement is enforceable, the court must consider whether the parties reached agreement on all essential terms. In *Fieguth v. Acklands Ltd.* (1989), 59 D.L.R. (4th) 114 (B.C.C.A.), [Fieguth] Chief Justice McEachern stated at 121:

... The first question is whether the parties have reached an agreement on all essential terms. There is not usually any difficulty in connection with the settlement of a claim or action for cash. That is what happened here and as a settlement implies a promise to furnish a release and, if there is an action, a consent dismissal unless there is a contractual agreement to the contrary, there was agreement on all essential terms.

[33] In *Apotex Inc. v. Allergan, Inc.*, 2016 FCA 155, at paras. 32-33, Mr. Justice Stratas phrased the test to determine if an enforceable settlement had been reached as follows:

[32] The court is to view the specific facts of the case objectively in light of the practical circumstances of the case and ask whether the parties intended to be legally bound by what was already agreed or, in other words, whether an "honest, sensible business [person] when objectively considering the parties' conduct would reasonably conclude that the parties intended to be bound or not" by the agreed-to terms: *G Percy Trentham Ltd v Archital Luxfer Ltd.* (1992), [1993] 1 Lloyd's Rep 25, 63 B.L.R. 44 (C.A.) at paras. 50 and 86; Ward at para. 61; *Hughes v. City of Moncton*, 2006 NBCA 83, 304 N.B.R. (2d) 92 at para 6. Put another way, looking not through the eyes of lawyers, but through the eyes of reasonable businesspeople stepping into the parties' shoes, was there something essential left to be worked out? See *Investors Compensation v. West Bromwich Building Society*, [1998] 1 All E.R. 98; [1998] 1 W.L.R. 896 (H.L.); *Chartbrook v. Persimmon Homes*, [2009] UKHL 38, [2009] A.C. 1101; *Re Sigma Finance*, [2009] UKSC 2, [2010] 1 All E.R. 571. Another way of putting it is to ask how "a reasonable [person], versed in the business, would have understood the exchanges between the parties": *Bear Stearns Bank plc v. Forum Global Equity Ltd.*, [2007] EWHC 1576 (Q.B.D.

Comm.) at para 171.

- [33] When courts find that there has been an agreement on essential terms, they will often imply non-essential terms into the agreement: McCabe, above at para 20; Fieguth, above; Hughes, above at para. 6. The lack of agreement on non-essential terms will not stand in the way of a finding of an agreement. Put another way, "it is not necessary that the original contract include all the ancillary terms that are already implicit in its content": Ward, above at para. 54. "Even if certain terms of economic or other significance to the parties have not been finalized, an objective appraisal of their words and conduct may lead to the conclusion that they did not intend agreement of such terms to be a pre-condition to a concluded and legally binding agreement": RTS Flexible Systems, above at para. 45. For example, assuming an agreement on essential terms is otherwise in place, courts can imply terms concerning the granting of a release, the manner of payment and the timing of payment: Fieguth, above at para 21; Hodaie v. RBC Dominion Securities, 2012 ONCA 796 at para. 3; Imperial Oil Ltd. v. 416169 Alberta Inc., 2002 ABQB 386, 310 A.R. 338. Often these will be "mere formalities or routine language" Bawitko, above at p. 106.

#### The Essential Terms of the Settlement Agreement

- [34] The first question is thus what an objective bystander would see as the essential issues for settlement in this case.
- [35] In order to arrive at the answer to that question, some history of the family and the relationship between the parties is informative.
- [36] During their lifetimes, the parties' parents sold their recreational property to the plaintiff and his then wife. The defendant asserts that this sale was taken into account in the parents' estate planning, and further asserts that the plaintiff and his wife failed to pay \$262,500 of the sale price to the parents.
- [37] As I have stated above, the plaintiff sought a variation of his mother's will, and alleged that the defendant was guilty of misuse of his parents' powers of attorney and of fraud.
- [38] In the plaintiff's affidavit of September 9, 2020, he swore, in part, that:
18. Discussions at the [Judicial Settlement Conference] centred around the following fundamental terms:
    - (a) Disposition of my mother's jewellery, comprising five rings, which had not been previously disclosed by Eleanor and excluded from an accounting of the chattels of my mother's estate
    - (b) Return of my personal property, comprising cameras and other photographic equipment and my grandfather's pocket watch, which have remained in my sister's possession,
    - (c) Disposition of my father and mother's remains, and

- (d) The amount by which the funds paid into Court, totalling \$965,388.10, would be divided between Eleanor and myself.

...

19. All of the parties and counsel initially met jointly with Madam Justice MacNaughton and discussed the following:

- (d) With respect to the division of monies:

- (i) In the afternoon of the JSC, we met separately with Madam Justice MacNaughton.

(ii) Towards the end of the day, in private discussions with Madam Justice MacNaughton, I reluctantly agreed to be paid the sum of \$250,000 as the cash component of the will variation act. As I understood it, all of the other matters discussed and referenced above were very much part of the overall "settlement agreement".

(iii) Madam Justice MacNaughton asked that my counsel and I wait outside while she spoke to my sister and Ms. Selby. After 30 minutes or so Madam Justice MacNaughton came out of the courtroom and stated that my sister was not in an emotional state to decide on the settlement and needed some time to make a final decision. Madam Justice MacNaughton asked whether I could agree to giving my sister two weeks to decide (or until February 26, 2020), which I acceded to.

23. The two-week deadline (February 26, 2020) that had been agreed to at the JSC on February 12, 2020 had passed and my counsel advised that he had not received any response. The next day, however, on February 27, 2020, my counsel received a letter from Ms. Selby stating that "Ms. Hutton accepts Mr. Hutton's offer to settle the action in consideration of the payment to him of \$250,000."

24. Included with Ms. Selby's February 27, 2020 letter was:

- (a) A final "Settlement Agreement & Releases" executed by Eleanor,  
(b) A Consent Order for the payment of monies out of Court,  
(c) A Consent Order dismissing the herein proceedings.

51. At the time of the JSC on February 12, 2020 I believed that all of the issues outlined at paragraphs 18 and 19 to this my Affidavit collectively formed the terms of a settlement. It was and continues to be my belief that the "settlement" is not simply just about money but all the other non-financial issues that were discussed and, I thought, agreed at the JSC.

- [39] In his submissions on this application, counsel for the plaintiff asserted that:

While in private caucus, Madam Justice MacNaughton suggested that the amount of the "estate pie" was in the region of \$700,000 to \$750,000, represented by the \$965,000 held by the Court less approximately \$250,000 on account of legal fees, expense claims and executor fees. Harold advised Madam Justice MacNaughton of his significant concerns with respect to the putative claims made in Eleanor's Form P40 affidavit for

- (a) \$180,000.00 of "estimated" legal fees to Candace Cho Law Corporation (d.b.a. Onyx Law Group) and MacLeod & Company,
- (b) the \$124,316.67 allegedly paid by Eleanor on account of putative loans and expenses for the benefit of John and/or Anne before and after their respective deaths in 2015, and
- (c) the proposed executor fees claimed by Eleanor of \$126,105.74.

Harold believed that these very material concerns and apparent discrepancies in accounting would eventually be dealt with at the Registrar's Hearing for the passing of accounts that had been scheduled for five days commencing on May 11, 2020. There was no discussion of or agreement to the cancellation of the Registrar's Hearing for the passing of accounts, which Harold understood as being Eleanor's statutory duty as executor and trustee of Anne's estate.

[40] The plaintiff also asserted that his recollection and belief from the settlement conference was that:

- (a) The Defendant agreed that upon her death Anne's jewellery would be bequeathed to the Plaintiff's daughters, Vanessa and Lauren Hutton, and that the Defendant would execute, in her will, an irrevocable bequest for said jewellery,
- (b) The Defendant agreed to return or give the Plaintiff his grandfather's pocket watch and certain cameras and photographic equipment,
- (c) There was no agreement regarding the disposition of John and Anne's ashes,
- (d) The Plaintiff was prepared to receive \$250,000 in cash from the estate as settlement of the cash portion of the will variation claim, and
- (e) At the request of the Defendant, the Plaintiff was prepared to leave his offer open for acceptance for two weeks; until February 26, 2020.

[41] In the same response, the plaintiff asserted that:

When the Plaintiff received the February 27, 2020 draft Settlement Agreement & Releases from the Defendants' counsel he was shocked to discover that the draft Settlement Agreement & Releases was silent regarding Anne's jewellery, his grandfather's pocket watch, his cameras and photographic equipment, and the final disposition of John and Anne's cremains as well, the cash offer \$250,000 had not been accepted on or before February 26, 2020.

- [42] The plaintiff effectively invites me to conclude that he instructed Madam Justice MacNaughton to convey an offer that was limited in scope to the defendant for only a part of the disputes between them, reserving to himself the right to continue pursuing the defendant for the wrongdoings he alleged against her as attorney, executrix and trustee.
- [43] I reject this invitation. There was no limit on what was being settled in exchange for the payment of \$250,000 mentioned in the letter from his counsel dated February 28, 2020, in response to the defendant's acceptance of what she contended to be the settlement. There is simply no basis upon which such a conclusion could be supported by what was said at the settlement conference. Indeed, the comments of both the parties and MacNaughton J. during the settlement conference are contrary to such a conclusion.
- [44] In *Salminen* at para. 25, Mr. Justice Williams reiterated that for parties to be bound in a contractual relationship, there must be a manifest meeting of the minds or consensus ad idem on all essential elements of what the contractual relationship will be, and that the absence of a formal signed and properly witnessed agreement does not change the binding nature of the contract. He concluded that 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.
- [45] At para 27, Williams J. wrote:
- 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, 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.
- [46] The plaintiff's professed recollection of what was agreed to at the settlement conference has been proven unreliable at best, and dishonest at worst.

- [47] Contrary to the plaintiff's assertions, he clearly made an offer at the settlement conference for a payment to him of \$250,000 that was open for acceptance until February 28, 2020, not February 26, 2020.
- [48] The offer was never withdrawn before February 28, 2020 and was accepted by the defendant on February 27, 2020.
- [49] I find that it was the intention of the parties to resolve all issues between themselves, and that in so doing they clearly contemplated a consent dismissal of this action, whereby each would bear their own costs. I reject the plaintiff's submission that, because he succeeded in obtaining a settlement that exceeded the inheritance which he would have been entitled to under his mother's will, he should recover his costs in this action as the "successful party".
- [50] I also reject the submission of the plaintiff that the defendant was somehow agreeing to pay him in only one of the capacities by which she was identified in the style of cause. As a general principle, for an agreement to be binding, there must be agreement as to who the parties to the agreement were. The plaintiff contends that it was unclear in what capacity his sister was to make the payment of \$250,000 to him, or for what consideration.
- [51] I reject the plaintiff's after the fact assertions that his offer was in settlement of only a part of the litigation between him and his sister, or that his settlement offer was intended to be with his sister in only her personal capacity. That is simply inconsistent with the positions of the parties taken before MacNaughton J., and contrary to common sense. The parties to the settlement were the plaintiff, and the defendant in her capacities listed in the style of cause.

### **Disposition of the Jewellery, Pocket Watch, Camera Equipment, and the Parties' Parents' Remains**

- [52] The plaintiff further submits that there should be a finding that there was a verbal agreement on February 12, 2020, that Anne's jewellery would be bequeathed by the defendant to the plaintiff's daughters.
- [53] He also contends that it was a term of the offer that Eleanor would cause the cremated remains of John and Anne to be interred at Ocean View Burial Park, Burnaby.
- [54] I find that there was clearly no agreement reached at the settlement conference with respect to the parties' grandfather's pocket watch, their mother's jewellery, the camera equipment or the disposition of the parents' ashes. While those matters could have been included as essential terms of the settlement offer, they were not. I find that the settlement offer was not contingent upon the resolution of those matters.
- [55] The pocket watch, the jewellery and the camera equipment were all property that the defendant took under the will of Eleanor Anne Hutton. The failure on the part of the plaintiff to make them essential terms of his settlement offer left them to be disposed of pursuant to that will.

[56] As I have already noted, on March 12, 2020, the defendant agreed to deliver their grandfather's pocket watch and camera equipment to the plaintiff, but I find that was the result of a separate agreement, and was not an essential term of the agreement that arose from the settlement conference of February 12, 2020.

[57] Section 5(1)(a) of the Cremation, Internment and Funeral Service Act, S.B.C. 2004, c. 35. [Act] provides that:

5(1) Subject to this section and section 8 (3) (b) (i) [requirement for authorization before funeral services or disposition], the right of a person to control the disposition of the human remains or cremated remains vests in, and devolves on, the following persons in order of priority:

(a) the personal representative named in the will of the deceased;

[58] The remains of the parties' parents have been interred at the direction of the Eleanor Irene Hutton at St. Francis-of-the-Wood Anglican Church in West Vancouver, as she was entitled to direct, pursuant to the provisions of the Act.

#### Repudiation

[59] The plaintiff submits in the alternative, that if a settlement agreement was reached, the defendant repudiated it.

[60] Repudiation is where "without justification, a party, by words or conduct, evinces an intention to refuse the performance of the contract and not to be bound by it": Salminen at para. 35. The plaintiff argues that the defendant repudiated the agreement in three substantial instances and one minor instance, namely:

(a) By persistently refusing to acknowledge and include in the putative settlement agreements of February 27, 2020, March 12, 2020, March 29, 2020, that at the February 12, 2020 settlement conference she agreed to irrevocably bequeath Anne's jewellery to the Plaintiff's daughters.

(b) The putative settlement agreements of February 27, 2020, March 12, 2020 and March 29, 2020 provided that each party would bear their own costs.

(c) In the March 29, 2020 letter of the Defendant's counsel, paragraph 2 references Article 2.02(a) of the putative settlement agreement and states:

"2. Article 2.02(a) - Ms. Hutton agrees that the pocket watch, cameras and equipment should be made available for pickup by Mr. Hutton, at the first opportunity, once the signed Settlement Agreement & Releases is provided: the two Consent Orders are submitted to the Registry for entry; and appropriate arrangements can be made that conform to the province's directives regarding social distancing during the COVID-19 pandemic."

- (d) Recitals D and E of Appendix "A" to the Notice of Application replaces what was Recital D of the draft Settlement Agreement & Releases dated February 27, 2020 and March 12, 2020. The insertion of Recital D in Appendix "A" to the Notice of Application substantially broadens the recitals and now precludes a possible derivative action by Anne's Estate for the articulated malfeasance and misfeasance of the Defendant.
- [61] I have already addressed the first two of these instances and reject them as any indicia of repudiation of the settlement between the parties.
- [62] The third and fourth require a consideration of whether, by insisting on a dismissal of the action against the defendant and a release in the terms she proposed, the defendant should be taken to have repudiated the settlement that was reached.
- [63] In *Kuo v. Kuo*, 2017 BCCA 245 Madam Justice Dickson determined at paras. 39 and 40:
- [39] After a settlement agreement has been reached, the next stage is its completion: Fieguth at 70. Unless the agreement is terminated, the parties must fulfill their obligations, express and implied. Termination by repudiation occurs when a party evinces an intention not to be bound by the agreement and the innocent party elects to accept the repudiation: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40. A fundamental breach of a primary obligation may also constitute a repudiation because it deprives the other party of substantially the whole mutually intended benefit of the agreement and thus amounts to a refusal to perform: *Mantar* at para. 11; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para. 109.
- [40] An intention not to be bound by an agreement may be evinced by words or conduct: *Guarantee Co.* at para. 40. Depending on the circumstances, this may include silence in response to a request for performance when and after the request is made. In some circumstances, a repudiation may be ongoing, which, unless the agreement is affirmed, provides the innocent party with a continuing right to accept it. However, regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 43-44; *Doman Forest Products* at paras. 108-109."
- [64] In *Fieguth* the court considered the enforceability of a disputed settlement. Chief Justice McEachern listed the position taken by the party disputing that a settlement had been reached. That party contended that there was no evidence of any discussion of, or any agreement by the parties on:
- (a) the terms of any release which the Appellant may have required the Respondent to execute and deliver;
  - (b) the method of payment of funds;
  - (c) the timing for payment of funds;

- (d) method of dealing with income tax implications, if any; or
- (e) any requirement of the Appellant for an indemnity agreement for the Respondent.

[65] Chief Justice McEachern answered those complaints as follows:

The answer to those points is, in my view:

- (a) It was an implied term of the agreement that the employer was entitled a simple release of the claim for wrongful dismissal which had been put forward in earlier correspondence;
- (b) In the case of a routine settlement of this kind negotiated between lawyers, no agreement on the method of payment would be necessary. That proposed by the plaintiff's lawyer in his letter of acceptance was in accordance with usual practice although, because of the provisions of the Income Tax Act, only the net after deducting the mandatory twenty percent could properly be paid;
- (c) Payment within a reasonable time after acceptance could be implied;
- (d) The present provisions of the Income Tax Act, appear to leave no room for discussion of "tax implications". If the plaintiff and his advisors believed there was some way in which the transaction could be structured so as to avoid liability for tax, it was for them to propose that rather than accepting the offer as made, which was a basis of calculation which undoubtedly would give rise to tax;
- (e) The defendant not having stipulated for an indemnity agreement, was not entitled to anything of the kind.

[66] Even if the plaintiff had sought repudiation of the settlement agreement in this case, such was not accepted by the defendant.

[67] To determine whether the defendant could be said to have repudiated the settlement agreement, I must consider whether her attempts to add terms to the settlement agreement evinced an intention not to be bound by the agreement.

[68] In *Salminen*, Williams J. considered the effect of further negotiations following a putative settlement, concluding at paras. 30-32 that:

30 in *Ridgeway-Pacific Construction Ltd. v. United Contractors Ltd.*, [1978] B.C.J. No. 478 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.

32 Where the alleged agreement contemplates the execution of a further formal contract or where, as here, further negotiations take place after the conclusion of the alleged agreement, the court must determine whether the parties intended to create a binding contract or simply reached a basis for future agreement: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2009 BCSC 1303 at para. 329, [2009] B.C.J. No. 1900 [Le Soleil]. It is trite law that "an agreement between two parties to enter into an agreement by which some critical part of the contract matter is left to be determined is no contract at all": *May & Butcher Ltd. v. The King*, [1929] All E.R. Rep. 679, [1934] 2 K.B. 17 (H.L.), at 20.

[69] To determine if an agreement was repudiated, the court must consider if a party's conduct amounts to a rejection of their obligations under the agreement, considering the totality of the circumstances from the perspective of an objective reasonable person: *Salminen* at para. 35. Repudiation of a settlement was considered by Williams J. in *Salminen* at para. 38, where he wrote:

38 In *Fieguth v. Acklands* (1989), 37 B.C.L.R. (2d) 62, 1989 CarswellBC 88 (C.A.), a case concerning the validity of a settlement agreed upon between lawyers, the defendant sent settlement funds to the plaintiff having deducted income tax and the plaintiff refused to accept the funds and proceeded to litigation on the basis that, by deducting the taxes, the defendant varied the terms of the settlement, such that no final agreement was reached. The Court of Appeal held:

39 ... If there was an agreement of settlement, as both courts found, then the consequences of subsequent conduct relating to the exchange of funds and documents would not discharge either party unless it could be said that the party alleged to have repudiated the contract exhibited an unwillingness to carry out its terms. ...

[para. 40 omitted]

41 ... One can tender whatever documents he thinks appropriate without rescinding the settlement agreement. If such documents are accepted and executed and returned then the contract, which has been executory, becomes executed. If the documents are not accepted then there must be further discussion but neither party is released or discharged unless the other party has demonstrated an unwillingness to be bound by the agreement by insisting upon terms or conditions which have not been agreed upon or are not reasonably implied in these circumstances.

[70] In my view, the agreement that was accepted by the defendant on February 27, 2020, remains intact. The subsequent negotiations between the parties were an attempt to reach a supplementary agreement, the failure of which is irrelevant to the enforceability of the February 27, 2020 agreement. In attempting to negotiate for the release, the defendant proposed she did not lead the plaintiff to believe that there was no firm agreement at all.

## Release

[71] In this case, I have no evidence that the parties ever discussed a release in any correspondence or discussion before or at the settlement conference. I am satisfied that a release in the terms that the defendant proposed after February 27, 2020, was not a term of the settlement offered by the plaintiff.

[72] In *Umholtz v. Umholtz* (2004), 238 D.L.R. (4th) 735 (Ont. S.C.J.) at para. 7, Mr. Justice Corbett wrote:

[7] In my view, on exchange of releases is an integral part of any settlement; see *Bogue v. Bogue* (1999) 46 O.R. (3d) 1 (C.A.): even where there is "no express discussion about a release, the settlement of an action implie[s] an obligation to furnish [one]." See also: *Abouchar v. Conseil scolaire de langue française d'Ottawa-Carleton Section publique et al.* (2002), 58 O.R. (3d) 675 (S.C.J.); *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (O.C.J. Gen Div.).

[73] The plaintiff agrees that if there is a binding settlement agreement of the will variation action, a release of claims confined to the parameters of that action is appropriate. He contends, however, that the scope of any release should be resolved on the basis of the objectively determined intention of the parties referencing the language of the release against the factual matrix. The plaintiff points out, correctly in my view, that he has no authority to release the defendant on behalf of his mother's estate. The corollary to that point is that, having settled his claim with respect to that estate, he has no standing to criticize or interfere in the disposition of that estate.

[74] I therefore order the plaintiff to execute a release as stating follows:

Estate of Eleanor Anne Hutton

**Release and Discharge/Indemnity**

Know all Men by these Presents that I, Harold Lyell Hutton, of #1405, 2020 Bellevue Avenue, West Vancouver, British Columbia, Hereby Declare that I am a beneficiary of the estate of the late Eleanor Anne Hutton, who died on the 10th day of November, 2015 (the "Deceased").

I RELEASE AND FOREVER DISCHARGE Eleanor Irene Hutton, the Executrix of the estate of the Deceased ("Executrix"), her heirs, executors, administrators, successors and assigns, of and from all actions, suits, payments, accounts, reckonings, claims and demands whatsoever in law or equity, which I may now or hereafter have arising in any manner out of the administration of the estate of the Deceased.

I AGREE TO INDEMNIFY AND HOLD HARMLESS the Executrix and her heirs, executors, administrators, successors and assigns against any liability incurred by the Executrix and against any claims and demands made against the Executrix whatsoever in law or equity which may arise out of the administration of the estate by the Executrix including, without limitation, and claim for taxes, duties, premiums, assessments, imposts, levies and other charges of any kind whatsoever imposed by any governmental authority, together with all interest, penalties, fines, additions to tax or other additional amounts imposed thereof, to the extent of my proportionate share of the estate.

I ACKNOWLEDGE that the Executrix is relying upon this Release and Discharge/Indemnity in making a full and final distribution of the estate of the Deceased.

IN WITNESS WHEREOF I have hereunto set my hand and seal this \_ day of , 202.

SIGNED, SEALED AND DELIVERED in the

)

presence of:

)

)

)

(Signature of Witness)

)

)

(Name of Witness - printed)

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(Address of Witness - printed)

[75] I have already found that it was the intention of the parties to resolve this case by a consent dismissal of this action.

[76] The plaintiff proposes that his share of the funds from their mother's estate presently held in Court, be paid directly from Court to his solicitor, in trust, upon execution of a settlement agreement and a consent dismissal order.

### Costs

[77] As I have found that a binding settlement of the issues that existed between the parties was concluded on February 27, 2020, I order that neither party will recover any costs of this action up to and including that date.

[78] The basis upon which an award of special costs should be considered was set out in the well-known decision of the Court of Appeal in *Garcia v. Crestwood Forest Industries Ltd.*, (1994), 9 B.C.L.R. 242 (C.A.), summarized at para. 17:

the single standard for the awarding of special costs is that the conduct in question properly be categorized as "reprehensible". [ ] It encompasses scandalous or outrageous conduct but it also encompasses milder forms of misconduct deserving of reproof or rebuke. Accordingly, the standard represented by the word reprehensible, taken in that sense, must represent a general and all-encompassing expression of the applicable standard for the award of special costs.

[79] Most of the prolongation of the litigation after February 27, 2020, was due to the plaintiff's refusal to honour the settlement reached on that date. I find that the plaintiff's conduct in refusing to honour the settlement agreement can be fairly described as both scandalous and reprehensible. Some of the delay, however, is attributable to the defendant's insistence on a form of release that was far broader than that to which she was entitled.

[80] For the preparation and attendance at the applications heard on September 24, and October 9 and 15, 2020, I order that the plaintiff pay special costs to the defendant.

[81] With the exception of the preparation and attendance at the applications heard on September 24, and October 9 and 15, 2020, the defendant is awarded her costs against the plaintiff at Scale B of the Supreme Court Civil Rules, B.C. Reg. 168/2009.

### Conclusion

[82] I order that:

a) This action is dismissed by consent of the parties;

- b) The plaintiff will execute a release of all of his claims against the defendant in the form set out above;
- c) The sum of \$250,000 be paid to the plaintiff or his solicitor from the funds in Court to the credit of this action;
- d) The balance of the funds in Court to the credit of this action be paid out of Court to the defendant or her solicitor;
- e) There will be a permanent stay of all other orders in this action with respect to steps to be taken by the defendant, except for orders required for the probate of her mother's estate;
- f) Payment of costs by the plaintiff to the defendant as set out above.

"The Honourable Chief Justice Hinkson"

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