
CANADA / JUDGMENT

Peter Kiewit Sons Co. Ltd. v. North Pacific Roadbuilders Ltd.

2005 BCSC 1586

COURT

Supreme Court of British Columbia

DECIDED

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2005 BCSC 1586 Peter Kiewit Sons Co. Ltd. v. North Pacific Roadbuilders Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Peter Kiewit Sons Co. Ltd. v. North Pacific Roadbuilders Ltd.,

2005 BCSC 1586

Date: 20051115

Docket: S014736

Registry: Vancouver

Between:

Peter Kiewit Sons Co. Ltd.

Plaintiff/Respondent

And

North Pacific Roadbuilders Ltd.

Defendant/Applicant

Before: The Honourable Mr. Justice Silverman

Reasons for Judgment

Counsel for the Plaintiff/Respondent

M. G. Demers

Counsel for the Defendant/Applicant

R. W. Grant

H. D. Edinger

Date and Place of Hearing:

July 4, 2005

Vancouver, B.C.

INTRODUCTION

- [1] This is an application by the Defendant for Judgment on the Plaintiff's undertaking given to this Court (the "undertaking") at the time of obtaining an interlocutory injunction on August 24, 2001, and for an Order that the question of damages should be sent for a reference, inquiry or assessment to a Master, Registrar, or Special Referee.
- [2] The Applicant is the Defendant (the "Applicant"). The Respondent is the Plaintiff (the "Respondent").
- [3] The Respondent opposes the application and adds that the question of whether or not the undertaking should be enforced against the Respondent should be adjourned to be determined by the trial judge in a related, but separate, action between the parties ("Action #2"), at the same time as the trial of that action.
- [4] There are two different, but related actions involving the parties, that will be referred to throughout this Judgment:
1. This action (Supreme Court file number S014736), which was discontinued by the filing of a Notice of Discontinuance on October 14, 2003. This application is brought by Notice of Motion within that action, although the main action has been discontinued; and
 2. Supreme Court file number S043748 (Action #2) in which the issues are the same between the parties, but their positions are reversed: North Pacific Roadbuilders Ltd. is the Plaintiff and Peter Kiewit Sons Co. Ltd. is the Defendant. Action #2 is not before me in the sense that any decision is required from me with respect to it. I refer to it only to the extent that it bears on the reasoning relating to the application before me.
- [5] In its simplest form, the Applicant's argument is that the filing of the Notice of Discontinuance in this action by the Respondent is, in and of itself, either an admission or an irrebuttable presumption in law that:
1. The initial interlocutory injunction was wrongfully obtained.
 2. The undertaking is enforceable, without the necessity for a hearing on the merits.
 3. The only hearing required is one with respect to damages.
- [6] In its simplest form, the Respondent's argument is that:

1. The filing of the Notice of Discontinuance does not have the effect of finality that the Applicant claims.
2. Equitable principles cry out for a hearing on the merits to determine whether or not the undertaking should be enforced against the Respondent.
- [7] The parties are agreed that, if the application is granted, the question of damages is to be put over to a later date.

BACKGROUND

- [8] The facts were before me by way of an Agreed Statement of Facts. I summarize them as follows:
1. On February 15, 1999, the parties signed a subcontract, whereby the Applicant agreed to do certain construction work for the Respondent, who was the main contractor with respect to the building of a dam ("the Project").
 2. The subcontract contained a "Milestone Date" of September 15, 2001, by which time the Applicant was to have completed its work. Time was of the essence.
 3. There is disagreement as to whether or not the Applicant was in breach of its obligations with respect to the time within which the work was to be completed. Nevertheless, the Respondent became concerned about the approaching Milestone Date.
 4. On August 24, 2001, the Respondent commenced this action and brought an application for an interlocutory injunction.
 5. On that date, Allan J. granted the Respondent's application for an interlocutory injunction.
 6. The interlocutory injunction allowed the Respondent to take possession of certain of the Applicant's heavy equipment (the "Equipment") on the construction site for the purpose of allowing the Respondent to complete the Applicant's work at the Project.
 7. The Respondent had alleged that it was entitled to take possession of the Applicant's Equipment under the terms of the subcontract in the event of the Applicant's default. The Respondent alleged that the Applicant was in default, or would soon be in default, of certain terms of the subcontract.
 8. The interlocutory injunction was granted on the basis that the Respondent provided its undertaking to the Court. The undertaking was to abide by any Order of the Court as to damages or other costs payable to the Applicant arising out of the injunction if it were ultimately determined that the Respondent did not have the right to take possession and use the Equipment as allowed by the injunction.

9. On November 9, 2001, the Respondent completed that work which required the Applicant's Equipment. The Respondent's counsel wrote to the Applicant indicating that the Equipment could now be returned.
10. On November 22, 2001, a Consent Order was entered setting aside those terms of the interlocutory injunction that related to possession of the Equipment.
11. Between December 1, 2001 and September 2003, the parties attempted to agree to a mediation process to resolve the numerous claims and counterclaims arising out of the work on the Project. They were ultimately unable to agree on such a process.
12. On September 30, 2003, the Applicant put the Respondent on Notice that it must file its Statement of Claim in these proceedings or the Applicant would move for a dismissal.
13. The Respondent responded by filing and delivering a Notice of Discontinuance on October 14, 2003.
14. At the same time, counsel for the Respondent wrote to counsel for the Applicant explaining that the Notice of Discontinuance had been filed in the hope of fostering a spirit of negotiation and settlement, rather than one of litigation.
15. On November 4, 2003, the Applicant filed a Counterclaim alleging, among other things, that the filing of the Notice of Discontinuance was an admission that the Respondent did not have the right under the subcontract to take possession of the Equipment and therefore the Applicant was entitled to damages on the undertaking.
16. On December 15, 2003, the Applicant offered to consent to the Respondent withdrawing the Notice of Discontinuance, so that the litigation could run its course towards a trial.
17. The Respondent responded by bringing a motion to have the Counterclaim set aside on the basis that a Counterclaim could not be filed after the filing of the Notice of Discontinuance.
18. On July 2, 2004, Warren J. granted the Respondent's application; the Counterclaim was declared a nullity and was set aside.
19. On July 5, 2004, the Applicant commenced a separate action against the Respondent for damages arising out of its work on the Project (Action #2). That action is still outstanding.
20. On February 1, 2005, the Applicant also brought this motion for Judgment to enforce the Respondent's obligation to pay damages on the undertaking, without any hearing on the merits.

APPLICANT'S ARGUMENT

- [9] The Applicant's argument is elegant in its simplicity: the Respondent's filing of a Notice of Discontinuance was the end of the matter. That filing avoids a trial, and therefore precludes any inquiry into the merits of the undertaking.

[10] The reason that the law is so draconian, argues the Applicant, is because discontinuing the action has effectively deprived the Applicant of the right to contest the merits of the interlocutory injunction. Ordinarily, such merits would have been considered at the trial of the action, but that is no longer possible. There will be no trial because of the discontinuance.

[11] The Applicant marshals a number of authorities in support of its position.

[12] Robert J. Sharpe, in *Injunctions and Specific Performance*, looseleaf (Aurora, Ont.: Canada Law Book, 1998) states at para. 2.510:

It has been held that a plaintiff who discontinues the action prior to trial is taken to admit to having no right to an injunction and an assessment of damages will be ordered ...

[13] Beverley M. McLachlin & James P. Taylor in *British Columbia Practice*, 2nd ed., looseleaf (Vancouver: Butterworths, 1979) Vol. 2 state at p. 36-3:

After discontinuance, the court may make such orders as are necessary to preserve the rights of the defendant. Thus, where the plaintiff has given an undertaking as to damages as a condition of obtaining an interlocutory injunction, an assessment as to damages sustained by the defendant for the purpose of enforcing the undertaking may be ordered after discontinuance

[14] A. A. S. Zuckerman, in "The Undertaking in Damages - Substantive and Procedural Dimensions" (1994) 53 Cambridge L.J. 546 states at pp.567-68:

We may therefore say that a plaintiff who obtains an interim injunction commits himself to establishing its necessity by proving his claim. If applicants were not held to this commitment, a plaintiff would be able to obtain the benefit of an interim injunction and avoid any risk

of compensation by simply discontinuing his action or causing it to be dismissed other than on the merits. We may conclude, therefore, that if the plaintiff fails to proceed to trial, by abandoning his action or by allowing it to be dismissed for want of prosecution or for whatever cause within his control, he will thereby ordinarily have forfeited any claim to the legitimacy and propriety of the interference with the defendant's substantive rights and may be held liable in damages.

[15] In *Vieweger Construction Co. Ltd. v. Rush & Tompkins Construction Ltd.* (1964), [1965] S.C.R. 195, 48 D.L.R. (2d) 509, the Supreme Court of Canada discussed the applicable principles for an entitlement to damages pursuant to an undertaking given in respect of an interlocutory injunction. Spence J., speaking for the Court, said that it is not necessary, in order to establish entitlement, to show that the party who obtained the injunction acted improperly. At p.207 he quoted with approval the statement by Cotton L.J. in *Griffith v. Blake* (1884), 27 Ch. D. 474, 53 L.J. Ch. 965 (C.A.):

the rule is, that whenever the undertaking is given, and the plaintiff ultimately fails on the merits, an inquiry as to damages will be granted unless there are special circumstances to the contrary.

(Emphasis in original).

[16] The Applicant also relies upon a series of cases which, while not dealing directly with undertakings, do deal with the concept that once a Notice of Discontinuance is filed, the matter is "forever at an end" but for exceptional circumstances, and the matter of costs: *Warford v. Zyweck*, (2002) 1 B.C.L.R. (4th) 41, 2002 BCCA 221 and *Adam v. Insurance Corporation of British Columbia* (1985), 66 B.C.L.R. 164, 2 C.P.C. (2d) 285 (C.A.).

[17] In *Newcomen v. Coulson* (1878), 7 Ch. D. 764, 47 L.J. Ch. 429, a discontinuance had been filed by the plaintiff while an injunction obtained by him was still in force. The Court proceeded on the assumption that the injunction had been terminated and directed a reference to assess damages under the plaintiff's undertaking. *Malins V. C.* stated at pp.765-66:

I cannot accede to Mr. Higgins's argument, that a Plaintiff can deprive a Defendant of his right to damages under the Plaintiff's undertaking by discontinuing his action. If this suit had come to a hearing I should have considered that the proper time for the Defendants to claim damages under the Plaintiff's undertaking, and if they had not done so, I should have considered their right waived. Here the Plaintiff has deprived the Defendants of their proper opportunity to ask for damages, but it would be a most dangerous doctrine to hold that he can thus evade his liability. There must be a reference as to damages in the ordinary way.

(Emphasis in original).

[18] The Court's decision in *Newcomen* was considered with approval in *Bird Construction Co. Ltd. v Paterson and Brotherhood of Painters, Decorators, Paper Hangers of America, Glass Workers Local 1725* (1960), 23 D.L.R. (2d) 182, 31 W.W.R. 322 (Alta.S.C.(A.D.)) where, after citing the above passage from *Newcomen*, the Court said this at p.185:

The plaintiff in the present proceedings cannot, by filing a discontinuance, be absolved from its undertaking to the Court to abide by any order as to damages in this Court by reason of the injunction order.

[19] *Bird Construction* involved a plaintiff who had obtained an interlocutory injunction restraining the defendants from maintaining a picket line. When the defendants applied for an Order compelling the plaintiff to deliver particulars of certain allegations made in the Statement of Claim, the plaintiff discontinued the action. The defendants then applied to have their damages assessed and for solicitor and client costs. That application was granted. At p.186, the Court approves of the decision in *B.C. Interior Vegetable Marketing Board et al v. Kamloops Produce Co.*, [1938] 1 W.W.R. 773, 52 B.C.R. 523 (B.C.S.C.), where Murphy J. stated at p.775, when considering an application for damages:

There is no need for a hearing to determine that the injunction was wrongly asked for. Plaintiffs by discontinuing the action, admit this is so.

[20] The Applicant acknowledges that, where there are special circumstances, the general rule of the consequences of filing a Notice of Discontinuance may be inapplicable. Although many cases discuss what such special circumstances are, the parties agree that the issue does not arise in this case.

RESPONDENT'S ARGUMENT

[21] The Respondent's argument is divided into four sections:

1. Notice of Discontinuance.
2. Nature of an Undertaking.
3. Trial on the Merits
4. Equitable Remedy.

1. Notice Of Discontinuance

[22] The Respondent disagrees with the Applicant with respect to the effect of the mere filing of a Notice of Discontinuance. The Respondent argues that such a filing is not automatically the end of the matter.

[23] There is a difference between an action which has been discontinued and an action which has been dismissed on the merits. This action was discontinued pursuant to Rule 36 of the British Columbia Rules of Court, the relevant subsections of which are as follows:

Discontinuance by plaintiff

- (1) At any time before an action is set down for trial, a plaintiff may discontinue it in whole or in part against a defendant by filing and delivering a notice of discontinuance in Form 26 to each party of record.

Discontinuance not a defence

- (8) Unless otherwise ordered, the discontinuance of an action in whole or in part is not a defence to a subsequent proceeding for the same or substantially the same cause of action.
- [24] Rule 36 contemplates that the party discontinuing the action can bring another proceeding for the same claim, and the discontinuance of the original proceeding will not be a defence to the subsequent proceeding. Therefore, the Respondent argues that the Notice of Discontinuance in this case cannot be the end of the matter; that would be completely inconsistent with the express intention of Rule 36(8).

- [25] The Respondent disagrees with the Applicant's contention that the Notice of Discontinuance has denied the Applicant the possibility of having the merits heard. Precisely the opposite is the case, the Respondent argues. It is the Applicant who is seeking a Judgment without any hearing on the merits. That is the whole point of this application. It is the Respondent who does not seek to avoid the Court's jurisdiction. The Respondent simply seeks a hearing on the merits.
- [26] The Respondent suggests that the Applicant's argument is disingenuous in suggesting that the Notice of Discontinuance is an admission that the interlocutory injunction was not properly obtained. How can this possibly be, the Respondent argues, when the facts clearly show that the Respondent makes no such admission at all? Further, the Applicant knows full well that the Respondent makes no such admission.
- [27] Furthermore, the Court also knows from the evidence presented on this application that the Respondent makes no such admission. The correspondence between the parties (and particularly the letter which accompanied the Notice of Discontinuance), states that the reason for the Notice of Discontinuance was the Respondent's hope of fostering a spirit of negotiation and settlement, rather than one of adversity and litigation. There was never any indication of the admission suggested by the Applicant. Indeed, the position of the Respondent in Action #2 is in precisely the same terms as in the now discontinued Statement of Claim from this action. The Respondent's position has never changed.
- [28] A Notice of Discontinuance is something which exists between the parties to the proceedings. Whatever effect it may have between the parties, it has no effect upon the Court or its jurisdiction. Therefore, it has no effect on the undertaking, because the undertaking is not something which exists between the Respondent and the Applicant. Rather, the undertaking is something which exists between the Respondent and the Court. No Notice of Discontinuance can unilaterally affect that relationship.
- [29] The interlocutory injunction, is contained within Allan J.'s Order of August 24, 2001. The undertaking is contained within the same Order. The wording of the undertaking is as follows:

The Plaintiff having provided its undertaking that it will abide by any Order granted by this Court as to damages or other costs payable to the Defendant arising out of this Order, in the event it is ultimately determined that the Plaintiff does not have the right to take possession and use the Defendant's equipment as described herein;

(My emphasis).

- [30] The Respondent argues that the wording of the Order expressly requires that there be a determination with respect to the very question that the Applicant seeks to avoid. The filing of a Notice of Discontinuance cannot satisfy the terms of the Order, in particular the phrase "ultimately determined".

[31] I.C.F. Spry, in *The Principles of Equitable Remedies*, 4th ed. (Agincourt, Ont.: Carswell, 1990) states at p.640:

Again, if the plaintiff discontinues his proceedings before they reach a final hearing it is sometimes found to be appropriate that he be required to compensate the defendant pursuant to any previous undertaking that he has given, but this is not necessarily the case, and the reasons for discontinuance, as well as any relevant supervening events and other relevant considerations, are taken into account by the court in determining what is most just in all the circumstances.

[32] On the issue of a Court enforcing an undertaking where a Notice of Discontinuance has been filed, or a permanent injunction is no longer being sought at trial, David Bean & Isabel Parry in *Injunctions*, 8th ed. (London: Thomson Sweet & Maxwell, 2004) state at s.6.07:

A defendant who has been subject to a freezing injunction on cogent grounds has no automatic right to an inquiry as to damages if the claimant seeks leave to discontinue on the basis that the defendant is not worth pursuing: it remains a matter of discretion (*Goldman Sachs International Ltd v Lyons*, *The Times*, February 28, 1995). Similarly a defendant against whom a meritorious claimant seeks no injunction at trial is not entitled as of right to an inquiry as to damages.

[33] Peter Gibson L.J. in *Cheltenham & Gloucester Building Society (Formerly Portsmouth Building Society) v. Ricketts and Others*, [1993] 1 W.L.R. 1545, [1993] 4 All E.R. 276 (C.A.) cited from *Financiera Avenida v. Shiblaq*, 7 November 1990, Lloyd L.J. on the issue of the undertakings generally said at p.1556:

Two questions arise whenever there is an application by a defendant to enforce a cross-undertaking in damages. The first question is whether the undertaking ought to be enforced at all. This depends on the circumstances in which the injunction was obtained, the success or otherwise of the plaintiff at the trial, the subsequent conduct of the defendant and all the other circumstances of the case. It is essentially a question of discretion. The discretion is usually exercised by the trial judge since he is bound to know more of the facts of the case than anyone else.

And at p.1559:

But all the circumstances of the case must, in my judgment, be considered when the court decides whether to exercise its discretion as to the enforcement of the undertaking. If there are matters on which the court cannot yet make a final determination, but which would be material to the question whether it is just to enforce the undertaking, then the court should not take the decision at that stage. It will not be able to make a final determination if material matters are in dispute and must await the trial for their resolution.

[34] In *Bird Construction*, Macdonald J.A. stated for the majority of the Court at p.189:

It is proposed that we should now deprive the plaintiff of his right to resist a claim for damages by denying him the right to assert now that the injunction was properly obtained because he has done something that he was entitled to do, namely, discontinue in keeping with the plain words of Rule 265(1). If that proposal is followed, we will deprive the plaintiff of an answer to the defendants' claim for damages and give the defendants a substantive right to recover from the plaintiff damages to which they are not entitled if, in fact, the injunction was properly issued.

2. Nature Of An Undertaking

[35] The Respondent argues that the nature of these types of undertakings, generally, and specifically in this case, militates against the Applicant's reasoning because the undertaking is not between the parties. It is between the Respondent and the Court. Therefore, it is unaffected by the Notice of Discontinuance which is effective only between the parties.

[36] Two issues arise whenever there is an application to enforce an undertaking:

1. Whether the undertaking ought to be enforced at all; and
2. Damages.

[37] Sharpe says the following about injunctions and the undertaking in damages at paras. 2.470 and 2.510:

It is well established that, as a condition of obtaining an interlocutory injunction, the plaintiff must give an undertaking to pay to the defendant any damages that the defendant sustains by reason of the injunction, should the plaintiff fail in the ultimate result. The rationale for the undertaking is to protect the defendant from the risk of granting a remedy before the substantive rights of the parties have been determined. In the event that the defendant succeeds at trial, the interlocutory injunction will have prevented the defendant from acting in accordance with his or her legal rights. The undertaking in damages shifts all or part of that risk to the party who is asking for a pre-trial remedy, the plaintiff.

The undertaking is given to the court and does not create a contractual relationship between the parties. ...

[38] The nature of an undertaking was addressed in *John F. Renshaw (Canada) Inc. v. Captiva Investments Ltd.* (1989), 70 O.R. (2d) 458 (H.C.J.) where the Court stated at p.460:

In resolving this matter, it is helpful to consider the nature of an undertaking. In *A.-G. Ont. v. Harry* (1982), 35 O.R. (2d) 248, 132 D.L.R. (3d) 73, 25 C.P.C. 67 (H.C.J.), Montgomery J. states at p.249:

It is undisputed that the undertaking is given to the court, not the party, though for the benefit of the party enjoined...

As such, an undertaking is, in part, a method whereby the court can ensure the bona fides of a party seeking an injunction. Since the undertaking is given to the court it does not create a relationship between the parties, contractual or otherwise, so as to give rise to a cause of action based on the undertaking itself.

In my opinion, the appropriate method for enforcing an undertaking is for the defendant to apply to the trial judge to permit him or her to prove the damages suffered by reason of the interim injunction: see *Norstrant v. Drumheller* (1920), 51 D.L.R. 373, [1920] 1 W.W.R. 818, 15 Alta. L.R. 558 (S.C. App. Div.). It is then within the trial judge's discretion whether or not to enforce the undertaking: *A.-G. Ont. v. Harry*, *supra*.

[39] The decision of the House of Lords in *F. Hoffmann-La Roche & Co. AG v. Secretary of State for Trade and Industry*, [1974] 2 All E.R. 1128, [1975] A.C. 295,

is to the same effect and states at p.1150:

The court has no power to compel an applicant for an interim injunction to furnish an undertaking as to damages. All it can do is to refuse the application if he declines to do so. The undertaking is not given to the defendant but to the court itself. Non-performance of it is contempt of court, not breach of contract, and attracts the remedies available for contempts; but the court exacts the undertaking for the defendant's benefit. It retains a discretion not to enforce the undertaking but if the undertaking is enforced the measure of the damages payable under it is not discretionary.

3. Trial On The Merits

[40] The Respondent argues that it is the trial judge who should determine, after trial, the answers to the following questions:

1. Was the interlocutory injunction wrongfully obtained in the first place?
2. If yes, should the Court call on the Respondent to honour its undertaking?
3. If yes, was damage caused and in what amount?

[41] The Respondent argues that only a trial judge will be in a position to hear witnesses and evidence. A judge will be the best person to determine whether or not the undertaking should be enforced. A judge will be in the best position to decide if the Respondent was wrong to obtain the interlocutory injunction in the first place.

[42] The difficulty with that argument is that, because the action has been discontinued, there will be no trial judge with respect to the action which is the foundation of this undertaking. The only action in existence, Action #2, is similar, arguably identical, but it is not the same action. The nature of an undertaking is such that there is no possibility that it can be addressed outside the confines of the action in which it exists.

- [43] It is noteworthy that the Applicant has included in its claim in Action #2 a claim for damages arising from the allegedly improper obtaining of the interlocutory injunction. The Applicant says this was included in its claim out of an abundance of caution, but concedes that the proper view of the law is that damages can only be awarded under the undertaking itself, that is, in the current (discontinued) action, and not as part of the claim in Action #2.
- [44] The parties are agreed that the Court has jurisdiction to decide whether or not the undertaking should be enforced by way of Judgment, subject to damages, within this action, but outside of Action #2. The disagreement between them is simply this: the Applicant argues that the Judgment enforcing the undertaking must be granted now, without the benefit of evidence or consideration of merits. The Respondent argues that it can only be granted if a trial on the merits determines that it is appropriate.
- [45] The Respondent also argues that, if the application is granted, there is a danger of inconsistent verdicts being granted arising out of the same facts. If I allow this application, without consideration of the merits, then the Applicant will have its Judgment. Once Action #2 proceeds to trial, the trial judge, after hearing the merits, may come to a completely different conclusion and grant Judgment for the Respondent. Surely the Court will want to avoid such a result. The only way to avoid it is to ensure that the same judge deals with both matters, while conceptually making two different decisions, one for each matter.

4. Equitable Remedy

- [46] Neill L.J. stated in *Cheltenham*, at p.1555:

The enforcement of the undertaking is itself a form of equitable relief and should be considered on equitable principles.

- [47] The Respondent argues that equitable principles must be applied to the facts of this case. The Applicant relies upon the purely technical argument that the filing of the Notice of Discontinuance is a bar to a hearing on the merits. The Respondent answers that equity requires the Court to look beyond the technicality and to determine whether or not it is fair.
- [48] The Respondent says that if the purpose of requiring an undertaking is so the Court can prevent abuses of its process, then surely it must prevent a Judgment based on the fiction that the Respondent has admitted to something which clearly it has not admitted to.
- [49] The Applicant also argues that it is entitled to the remedy it seeks in equity.
- [50] Both parties argue that their positions are advanced by s.10 of the Law and Equity Act, R.S.B.C. 1996, c.253:

Avoidance of multiplicity of proceedings

10. In the exercise of its jurisdiction in a cause or matter before it, the court must grant, either absolutely or on reasonable conditions that to it seem just, all remedies any of the parties may appear to be entitled to in respect of any legal or equitable claim properly brought forward by them in the cause or matter so that, as far as possible, all matters in controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of those matters may be avoided.
- [51] The Respondent argues that there is absolutely no prejudice which the Applicant will suffer if a Judgment is postponed until a later date, in this case, the same date as the trial of Action #2.
- [52] The Applicant argues that the Respondent is not entitled to the equitable relief it seeks, nor can it properly complain of any unfairness. The Respondent had ample notice that the Applicant intended to pursue this matter. Before the Respondent filed its Notice of Discontinuance, the Applicant's counsel wrote to the Respondent's counsel asking for its Statement of Claim; if the Respondent had filed its Statement of Claim, this would have ensured that the issue would move towards a trial on the merits. Instead, it received a filed Notice of Discontinuance. Even after that, the Applicant offered to consent to the withdrawal of the Notice of Discontinuance. The Respondent declined.
- [53] The Respondent argues that its attitude and behaviour towards the Applicant make it a perfect candidate for whatever protection equity can provide. The reason for the filing of the Notice of Discontinuance was well known to the Applicant and to the Court, and is evidenced in the various letters between counsel: the Respondent preferred mediation, negotiation and settlement to litigation. It not only said it preferred such a course, it took action to show that it meant it. That action was the filing of the Notice of Discontinuance. Surely that should not disentitle the Respondent to the benefits of relief in equity.

CONCLUSION

- [54] Based on the foregoing, and the evidence, and the written and oral submissions before me, I conclude as follows:
1. The filing of a Notice of Discontinuance, in and of itself, does not in every case constitute either an admission or an irrebuttable presumption in law that the initial interlocutory injunction was wrongfully obtained, or that the undertaking is enforceable, or that the only step left is to order an inquiry into damages.
 2. Whether a Notice of Discontinuance will be considered an admission or an irrebuttable presumption in law is dependent upon the circumstances of each case.

3. The undertaking is an aspect of the Respondent's relationship with the Court, not with the Applicant. No unilateral action (such as the filing of the Notice of Discontinuance) by either party can remove the Court's jurisdiction and discretion to deal with the undertaking.
 4. Issues relating to injunctions and undertakings are based on equitable principles. In this case, equity demands that the merits and the surrounding circumstances, of the obtaining of the interlocutory injunction and of the filing of the Notice of Discontinuance, must be considered before there can be any decision with respect to whether or not the undertaking should be enforced. It would be overly technical, and unfair, to come to any other conclusion in the circumstances of this case. The Respondent never intended to abandon its claims, and never intended to make the admissions that the Applicant suggests must be presumed. Further, its reason for filing the Notice of Discontinuance invites the assistance of equitable principles, those reasons being, a desire to foster a spirit of negotiation and settlement, rather than to aggressively pursue litigation.
 5. All the circumstances in this case demand that the merits be considered and ruled upon before there can be any determination made with respect to the enforceability of the undertaking.
- [55] For all of the foregoing reasons, I decline at this time to grant the relief sought in this application. I do not dismiss the application outright at this time for the reasons stated in the next paragraph.
- [56] I turn now to the question of whether or not the question of the enforcement of the undertaking should be adjourned to the trial date and before the trial judge of Action #2. I conclude as follows:
1. The merits of any application to enforce the undertaking cannot be heard as part of Action #2. This is because of the nature of the undertaking. It exists only within this action, and there can be no remedy relating to that undertaking within any other action.
 2. However, since the evidence relating to Action #2 will apparently be the same evidence relating to the enforcement of the undertaking, there is a good deal of logic to having the matters heard by the same trial judge.
 3. I have considered making an Order consolidating the two matters so that the evidence can be heard at the same time. However, I will not make that Order, since the issue was not addressed by counsel. Rather, I will leave counsel to determine if that approach is advisable and whether or not an application should be brought for that purpose, or whether they might consent to that procedure. In any event, I will defer that decision to the trial judge, or the judge in front of whom such a motion might be brought, either in Chambers or at a pre-trial conference, with respect to Action #2.

4. Therefore, without making a formal Order for consolidation, I order that the question of the enforcement of the undertaking, in this action, shall be adjourned to the same date and trial judge before whom Action #2 (Vancouver Registry S043748) is set to be heard. I also order that both actions be brought to Court together for any pre-trial conference or motions relating to Action #2.
- [57] It is premature to comment on the question of damages. I defer that decision to the judge who ultimately rules on the merits with respect to whether or not the undertaking should be enforced against the Respondent.
- [58] It is also premature to deal with the question of costs on this matter. Counsel have liberty to apply if they wish to address me with respect to that. Otherwise, I make no Order for costs whatsoever and defer that as well to the judge who will be making the final ruling on the merits.

"A. Silverman, J."

The Honourable Mr. Justice A. Silverman

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