

CANADA / JUDGMENT

Placer Dome Inc. v. Ruzzo

2006 BCSC 1564

COURT

Supreme Court of British Columbia

DECIDED

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2006 BCSC 1564 Placer Dome Inc. v. Ruzzo

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Placer Dome Inc. v. Ruzzo,

2006 BCSC 1564

Date: 20060926

Docket: S053902

Registry: Vancouver

Between:

Placer Dome Inc.

Plaintiff

And:

Amelia Ruzzo

Defendant

Before: The Honourable Mr. Justice Cullen

Oral Reasons for Judgment

In Chambers

September 26, 2006

Counsel for the Plaintiff:

M.D. Andrews, Q.C.; M. Pontin

Counsel for the Defendant:

P. Ritchie, Q.C.

& R. Parks

Place of Trial/Hearing:

Vancouver, B.C.

- [1] THE COURT: The issue in this case is whether there was an enforceable settlement agreement reached in relation to Amelia Ruzzo's claim against Placer Dome Inc. ("PDI") for wrongful dismissal and whether, if there was, PDI is entitled to specific performance of the agreement and a declaration that PDI is entitled to damages for the cost of defending proceedings launched by Ms. Ruzzo against PDI in the State of Nevada, said to be in breach of the terms of the settlement agreement.
- [2] Ms. Ruzzo began her employment with PDI as the vice-president of Information Systems in February 2004. She had been hired from her position as an information specialist with Lockheed Martin, an "American defence contractor" in New Jersey. As an incident of her employment with Lockheed Martin, Ms. Ruzzo had a high level of security clearance.
- [3] The defendant moved from New Jersey to Vancouver to take up her duties with PDI, for which she was paid salary, bonuses and benefits amounting to approximately \$450,000 Canadian per year. In November of 2004, some nine months after the defendant started her employment with PDI, her job became subject to a corporate reorganization which changed its nature and diminished her responsibilities. On February 14th, 2005, the defendant received a letter from PDI terminating her employment. The defendant alleges that she was never given the job that she left Lockheed Martin to accept and was never given any reason for her termination in February 2005. She has since returned to the United States, where she is actively seeking to reinstate and raise the level of her security clearance to reacquire employment in the industry she left in favour of the position at PDI.
- [4] Following her termination, Ms. Ruzzo retained Charles Weiler as counsel to represent her in her claim against PDI for wrongful dismissal. PDI was represented by Bruce Grist. Mr. Weiler and Mr. Grist negotiated for a settlement, the scope of which included monetary damages, tax considerations, a mutually agreeable letter of reference and the terms of release. Negotiations between Mr. Weiler and Mr. Grist proceeded until May 10th, 2005, when Mr. Weiler sent Mr. Grist an email which read as follows:

Further to our conversation today, I confirm that Ms. Ruzzo accepts Placer Dome's offer to settle set out in your letter dated April 29th, 2005 and clarified in your letter dated May 9th, 2005 for the amount of \$500,000 new money and the other terms set out therein. As well, and further to our conversation today, Rex McLennan will set out reasons for Ms. Ruzzo's termination in Placer Dome's reference letter (in effect, that it was not due to any issue regarding her competence or character). I confirm that you can terminate Ms. Ruzzo's benefits.

- [5] Mr. Weiler's email to Mr. Grist was the culmination of negotiations that began on February 25th, 2005 with a demand letter seeking settlement of her claim in the amount of US \$2.5 million plus an incentive payment of \$82,000. The proposed settlement figure included the sum of \$500,000 for damages for loss of reputation, which, according to the defendant, she suffered because prior decisions by PDI executives led to massive cost overruns in the information system that she was notionally responsible for.
- [6] On April 6th, 2005, after further negotiations which included an offer to settle made by PDI, Mr. Weiler wrote Mr. Grist rejecting the PDI offer and countering with an offer to settle for \$850,000 in U.S. dollars. In the calculation of the proposed settlement, no reference was made to damages for loss of reputation, but the offer included the following:

A mutually agreeable letter of reference for Ms. Ruzzo written by Rex McLennan on Placer Dome letterhead with a positive statement about the character and competence of Ms. Ruzzo ... Upon executing the terms of the settlement, Ms. Ruzzo will sign a full and final release mutually agreeable to the parties of all her claims against Placer Dome.

- [7] In an affidavit sworn January 25th, 2006, Mr. Weiler deposed as follows, at paragraph 8 and 9, with respect to the reference letter:
8. At one or more times during the settlement negotiations I told Mr Grist that Ms. Ruzzo's security clearance to work in the defence contracting industry in the United States was a significant concern for her. I advised Mr. Grist that PDI's termination of her employment in the circumstances of corporate misbehaviour could affect her security status. I told Mr. Grist that her security status was important to Ms. Ruzzo as it could impact on her ability to find proper employment. The importance of the requirement for a mutually agreeable reference letter arose in this context.
9. As of May 10, 2005 the settlement negotiations had proceeded to the point where most, but not all of the issues were resolved, s indicated in my email of May 10, 2005, which is referred to as Exhibit "G". We settled the monetary amount for \$500,000. We agreed that Rex McLennan would provide a reference letter to Ms. Ruzzo under PDI letterhead that would be mutually agreeable to the parties. PDI agreed that the reference letter would include the reasons for Ms. Ruzzo's termination and a positive statement about her character and competence. We agreed also that PDI would comply with any request by Ms. Ruzzo on the manner in which the settlement proceeds were to be paid out to her so as to provide her with the greatest possible tax advantage, provided that the request was lawful. We had not settled all the terms of the Release or the contents of the reference letter.
- [8] With the April 6th, 2005 letter, Mr. Weiler sent Mr. Grist a copy of a draft statement of claim which included the following allegations.

25. Under the management of Loney and then Harris the implementation of IBS has experienced significant delays and cost overruns. In one 1 (on) year, the estimated cost of the IBS implementation at Placer Dome ballooned from its original estimated cost of \$20 million to \$120 million. This cost represents more than a third of Placer Dome's total earnings for 2004.
26. Despite her lack of authority over IBS implementation, Ms. Ruzzo tried repeatedly to persuade Loney, Harris and McLennan to change the IBS implementation strategy to one that better reflected the best interest of the shareholders. Her advice was ignored.
27. Ms. Ruzzo repeatedly told McLennan that misrepresentations were being made by Loney to the Board of Directors regarding the estimated cost to complete the IBS implementation and the status of the IBS project.
28. Ms. Ruzzo's job title and job description indicate to persons outside of Placer Dome that she was responsible for, and had the authority to manage the implementation of IBS at Placer Dome. As a result, Ms. Ruzzo has suffered an unwarranted loss of reputation due to the disastrous mismanagement of the implementation of IBS at Placer Dome.
29. On or about February 14, 2005, approximately one year after joining Placer Dome Ms. Ruzzo's employment was terminated.
- [9] Mr. Grist responded to Mr. Weiler's counter-offer on April 15th with an offer to settle for \$438,000 Canadian, "subject to the considerations set out in paragraphs 3 to 7 and 9 to 14 of Mr. McLennan's letter (the letter of termination) of February 14th, 2005" and requiring Ms. Ruzzo "to execute a release of any and all claims against Placer Dome Inc. or any party related to Placer Dome as a condition of settlement." Mr. Grist also wrote:

Our client is prepared to provide a mutually agreeable letter of reference for Ms. Ruzzo written by Mr. McLennan on Placer Dome letterhead.

[10] On April 21st, 2005, Mr. Weiler sent Mr. Grist the following email:

Further to our conversation this morning I ask that Placer Dome write a new cheque for the incentive compensation amount. It should be made out to Laxton & Co. in trust.

Further to the terms of my without prejudice offer this morning for (\$600,000.00 new money) I was to clarify that the following terms from my settlement letter dated April 6, 2005 are included in the most recent offer:

Mr. McLennan will write a mutually agreeable reference letter for Ms. Ruzzo.

Placer Dome will pay out the settlement monies in any lawful manner that is tax advantageous to Ms. Ruzzo.

[11] On April 29th, 2005, Mr. Grist responded to Mr. Weiler's offer of April 21st, 2005 with an offer to settle for \$500,000 Canadian "subject to the same conditions set out in our letter of April 14th, 2005." It is uncontroversial that Mr. Grist's reference to April 14th should have been to April 15th, 2005.

[12] Subsequently, on May 9th, 2005, Mr. Grist wrote to Mr. Weiler in connection with the April 29th, 2005 offer, in part, as follows:

Further to our discussion of May 3rd, 2005 and our letter of April 29th, 2005, we write to confirm the terms of our client's offer of April 29th, 2005 with respect to the issues you have raised:

1. Our client will provide Ms. Ruzzo with a mutually acceptable letter written by Mr. McLennan on Placer Dome letterhead, which letter of reference will contain a positive statement on Ms. Ruzzo's character and competence;
2. We confirm that the settlement funds would be distributed in any lawful manner tax advantageous to Ms. Ruzzo. Ms. Ruzzo has made a claim alleging various grounds of action. Our client will be denying liability with respect to any aspect of the claim and the settlement will be a total amount of \$500,000 in exchange for a release provided by Ms. Ruzzo of any and all claims and/or actions by Ms. Ruzzo against our client, its related entities and personnel. The release will contain an indemnity clause with respect to any potential tax liability that our client may incur with respect to payment of the settlement funds.

...

4. The amount of the settlement funds will be paid as soon as reasonably possible, provided that an executed Release has been received by our offices, even if the letter of reference has not been finalized.

The letter is subject to paragraphs 3 to 6 and 10 to 14 of Mr. McLennan's letter of February 14th, 2005.

Paragraphs 10, 11, 12, 13, 14 and paragraph 3 will be encompassed within the formal Release.

Finally, the claim for benefits by Ms. Ruzzo has been addressed by the Company's offer of settlement. Upon confirmation that the offer is acceptable, we will be arranging to cancel the benefit coverage that has been provided for Ms. Ruzzo.

[13] Mr. Grist's reference to the defendant's claim for benefits being addressed by the company's offer of settlement was in reference to a calculation for lost benefits in the amount of \$63,750 representing 25 percent of 12 months salary contained in Mr. Grist's letter of April 15th, 2005 and carried forward into his letter of April 29th and May 9th, 2005. It was in response to Mr. Grist's letter of May 9th, 2005 that Mr. Weiler wrote his email on May 10th, 2005 asserting agreement to the settlement and confirming Ms. Ruzzo's benefits could be terminated.

[14] In relation to PDI's confirmation that it would pay the funds "as soon as reasonably possible, even if the letter of reference has not been finalized", Mr. Weiler deposed as follows in paragraph 13 of his affidavit:

During a telephone conversation with Mr. Grist on May 3, 2005, I asked him whether PDI would pay out the settlement monies to Ms. Ruzzo even if the contents of the reference letter had not been agreed to. I was concerned about delay in resolving the contents of the reference letter. Mr. Grist later responded to this concern in his letter of May 9, 2005, which is Exhibit "F" of my Affidavit. I understood from speaking to him and from his written response that if Ms. Ruzzo wanted the settlement monies without delay and before the reference letter was finalized, it would be her option to obtain the funds by signing a release.

[15] On May 18th, 2005, Mr. Grist sent Mr. Weiler a form of release. On May 26th, he sent a "draft reference letter" for Ms. Ruzzo, asking Mr. Weiler "to advise us if you have any concerns." The draft letter reads as follows:

I write this letter on behalf of Ms. Amelia Ruzzo, who was employed by Placer Dome Inc. (PDI) in the position of Vice-President, Information Systems Group.

PDI is a Canadian based international gold mining company with mines in Australia, Canada, Chile, Papua New Guinea, South Africa, Tanzania, and the United States. PDI employs approximately 13,000 people worldwide and has annual revenues of approximately \$1.8 billion (US).

Amelia commenced her employment with PDI on March 1, 2004, in the position of Vice-President, Information Systems reporting to me. In that position, Amelia was responsible for providing strategic direction and business oversight for global information system technology at PDI. She was responsible for moving the information systems global strategy forward and for implementing global initiatives for all IS Technologies. She directed the evaluation of vendors, services, pricing, and established contracts and services for support, purchase and maintenance of computer and network equipment and software. She provided leadership in establishing corporate standards and procedures for the exchange of data and how her area related to office systems currently in issue.

Amelia performed her responsibilities diligently, competently and with integrity. However, the implementation and integration of information systems across a number of companies and a number of different options required PDI to make organizational changes, which were not anticipated at the time Amelia was hired. A reorganization in late 2004 led to the creation of a new division with responsibility for integrating a global standardized business process redesign project (AMS Project) with the global enabling IT strategy that Amelia was responsible for implementing and sustaining through her Information Systems Group. The reorganization created a new executive position of Sr. Vice-President, AMS Project reporting directly to me, and to whom Amelia subsequently reported, along with two other executives.

Amelia felt that the reorganization adversely impacted upon her ability to perform the duties and responsibilities that she had been hired to perform as her authority, accountability and responsibility, and reporting relationship were all changed from the original position she accepted. As a result, she chose to leave PDI.

While regrettable, we understood Amelia's rationale which was the result of her careful evaluation, and which was clearly and considerately explained to me in the months following the reorganization. We respect her decision and I am confident that she will re-establish her successful career as an information systems executives. I would be pleased to offer my personal support to a prospective employer.

[16] Mr. Grist did not receive any response to his letters and enclosures to Mr. Weiler from him or from anybody else.

[17] On June 10th, 2005, Mr. Grist wrote Mr. Weiler summarizing the negotiations between them, including the impugned agreement, and confirming that he had received no response to his letters which had sent the form of release and the draft reference letter, and advising Mr. Weiler that he had been told by his client that Ms. Ruzzo was now represented by counsel in the United States who has taken the position the settlement agreement was not completed. In his affidavit sworn January 9th, 2006, Mr. Grist deposed as follows, at paragraph 19:

On June 29, 2005, I spoke to Weiler. He asked that I sent a PDF form of my letter marked Exhibit "L". He stated that he would send the PDF form of the letter to Ruzzo by e-mail. On June 29, 2005, I sent Weiler a PDF form of my letter of June 28, 2005, Exhibit "L".

[18] On June 13th, 2005, Mr. Weiler wrote Mr. Grist confirming that he no longer acted for Ms. Ruzzo. On June 27th, 2005, Daniel J. Hurson, a lawyer in the District of Columbia in the United States, sent two letters to Mr. Gold of PDI. In the first letter, Mr. Hurson set forth detailed allegations of events "that collectively lead (Ms. Ruzzo) to believe that PDI has misled the investment community regarding cost overruns and lack of internal controls with respect to the IBS system PDI is now attempting to install company-wide." After setting forth the nature of Ms. Ruzzo's concerns, Mr. Hurson concluded:

As a separate matter, if necessary, Ms. Ruzzo will also demonstrate in court that she was fired because she refused to "go along with the program" and make her concerns vocal. This is the subject of another letter I am sending you today. As for continuing duties under the securities laws, this letter serves as notice to PDI by Ms. Ruzzo of matters which PDI would do well to address immediately.

[19] In the second letter of the same date, Mr. Hurson informed Mr. Gold that Ms. Ruzzo "has elected to reject the proposed settlement of \$500,000 Canadian for three basic reasons." The first reason related to the impact of the tax ramifications and exchange rate between U.S. and Canadian currency. The second reason was that Ms. Ruzzo was "beginning to understand and appreciate the impact on her career of the fact that she was summarily fired for no legitimate reason," and declined to "be a party to the phoney story" in the

recommendation letter to the effect that she elected to leave PDI. The third reason related to a concern with the alleged misconduct of PDI in covering up the cost of the IBS program to the investment community. Mr. Hurson asserted that any trial of Ms. Ruzzo's case would "describe in full the warning she gave regarding the problems with IBS and internal controls at the IT structure at PDI." Mr. Hurson offered to settle Ms. Ruzzo's claim for \$2 million in United States dollars.

- [20] On July 14th, 2005, Mr. Grist sent a letter to Mr. Hurson, including, among other things, an offer to amend Mr. McLennan's letter to say that PDI terminated Ms. Ruzzo's employment. Mr. Grist denied any wrongdoing on the part of his client and asserted PDI had fully informed its auditors on the IBS project of all the matters referred to in Mr. Hurson's letter. Mr. Grist asserted that all the claims advanced by Mr. Hurson in his letter on behalf of Ms. Ruzzo were advanced by Mr. Weiler in his draft statement of claim and were the subject of a binding and enforceable settlement. Mr. Grist concluded his letter:

Please provide us with the executed release and any comments on the reference letter which are consistent with the agreement with Mr. Weiler. Also provide us with instructions as to payment of the settlement amount.

- [21] Mr. Hurson did not respond to Mr. Grist's letter. In her affidavit sworn January 23rd, 2006, Ms. Ruzzo deposed as follows:

I retained Mr. Charles Weiler, a Vancouver lawyer, in regards to my claims for wrongful dismissal. Subsequently, the Plaintiff retained counsel, Mr. Bruce Grist. Mr. Weiler forwarded to Plaintiff's counsel a draft Statement of Claim regarding a proposed lawsuit. MR. Weiler engaged in a series of discussions with Mr. Grist regarding a possible settlement. Settlement negotiations continued between Mr. Weiler and counsel for the Plaintiff until late May 2005, when negotiations broke off.

18. One of the conditions of any proposed settlement was that the Plaintiff provide a mutually agreeable letter of reference. It was essential for my purposes that the reference letter be precise and exacting respecting my employment with the Plaintiff in that I anticipated returning to the United States to find employment in an industry where a security clearance is an absolute pre-condition. During my tenure at Lockheed Martin, I required security clearance as set above and I knew my best opportunity of mitigation was to go back to the defence contracting industry in the United States. I am familiar with the rigours of the security clearance process. During this process, the United States Government investigates the history of the applicant in many respects including a detailed history of prior employment experiences. The security process is meticulous and thorough. Government agents in the past have directly interviewed several of my friends, neighbours, and my professional associates. A security clearance may require a polygraph examination. For a top secret security clearance I will be required to take a polygraph test. My upcoming security applications will result in detailed research into my past experiences with the Plaintiff. I am aware that any untruthful, false or inaccurate statements in the Plaintiff's

reference letter could jeopardize my ability to obtain security clearance and profoundly affect my future professional career.

19. On May 26, 2005, counsel for the Plaintiff forwarded to me through Mr. Weiler an undated draft reference letter written by Mr. McLennan. I reviewed the draft letter and found that it was inaccurate and untruthful. The letter inaccurately stated that I had quit my employment, and the letter went on to set out reasons why I left. The truth is I was fired. The truth is I was at no time even given reasons for being fired. Attached hereto and marked at (sic) Exhibit "E" is a copy of a letter from Mr. Grist to Mr. Weiler, dated May 26, 2005, with the attached reference letter.
 20. Upon receipt of the draft reference letter, I came to realize that my position respecting future employment would be substantially compromised if I agreed to accept this reference letter. I realized that I would not obtain security clearance in the United States unless all of the facts regarding my termination were truthfully asserted in the reference letter. It also became obvious to me that the Plaintiff was not about to be forthcoming regarding those reasons.
 21. During the course of negotiations I returned to the United States. Within days of indicating preliminary acceptance of the amount of the settlement amount offered but while the negotiations remained subject to obtaining a mutually agreeable reference letter and release, I concluded that I was not prepared to settle the case. I sought an opinion from an American attorney, Dan Hurson of Washington, D.C. concerning a variety of issues including American jurisdiction.
 22. On June 13, 2005, Mr. Weiler notified Mr. Grist that he had ceased to represent me. Attached hereto and marked at (sic) Exhibit "F" is a copy of a letter from Mr. Weiler to Mr. Grist, dated June 13, 2005.
 23. I instructed Mr. Hurson to write to the Plaintiff on June 27, 2005 explaining why I had decided to reject the settlement proposal. Attached hereto and marked as Exhibit "G" is a copy of Mr. Hurson's letter, dated June 27, 2005.
 24. At no times did I sign a settlement agreement. I would not have agreed to the Release that was forwarded to Mr. Weiler on May 18, 2005 as it contained confidentiality provisions which were unacceptable to me. The proposed reference letter which the Plaintiff forwarded upset me considerably as it was untrue. Attached hereto and marked as Exhibit "H" is a copy of the draft release forwarded by Mr. Grist on May 18, 2005.
- [22] This case raises the issue of whether, when a settlement agreement contemplates steps being taken after the agreement is reached to crystallize it, the agreement is incomplete and subject to rejection until those steps are taken. In this case, it is the defendant's contention, for the reasons set out in her affidavit, Mr. Hurson's letter and Mr. Weiler's affidavit, that she regarded a mutually acceptable letter of reference to be an essential term of the agreement. It is her position that by drafting a letter that mischaracterized her departure from PDI and

failed to reference what she regarded as the reasons for her termination (an unwillingness to go along with "the program" which reflected a lack of accountability to the board of directors or investment community) PDI failed to give effect to that essential term, entitling her to treat the agreement as not binding, leaving the subject matter of her dismissal subject to ongoing negotiation or litigation.

- [23] The defendant emphasized the sensitivity of her position in seeking a higher security clearance in the United States to resume her career trajectory there and the potential impact of an unexplained or inadequately explained loss of employment from PDI on that attempt. It was the defendant's contention that the "content and tenor" of the reference letter was a critical issue for her and was an essential term of the settlement agreement. The defendant relied on *Del Ben v. 170629 Canada Ltd.*, [1999] O.J. No. 3098, where at issue was whether a settlement agreement was completed in an action for wrongful dismissal with an agreement to pay a stipulated monetary amount and the provision of a letter of reference in response to an offer to settle for the monetary amount and "a letter of reference as per the draft previously provided or something reasonably similar." When the letter of reference in that case was tendered to the plaintiff, he rejected it and thereafter the defendant submitted another offer to settle. In the circumstances, the trial judge held that there was no "effective settlement by the defendant's acceptance of any offer. The defendant's counter-offer ... is recognition of that fact." The judge found in the circumstances the documents were an integral part of the offer to settle:

With a good letter of reference from the Defendant and the Defendant's undertaking not to make any disparaging or potentially damaging remarks about the Plaintiff to potential employers, the Plaintiff's probabilities of early employment were increased. The Plaintiff could consider this when determining what monetary amount he was prepared to settle upon. In the absence of these documents the Plaintiff might not obtain employment for a longer period of time, in which case he would reasonably request a larger monetary sum representing a longer notice period.

The Defendant did not tender the documents suitable to the Plaintiff nor did it agree to do so. There was no settlement

- [24] In *Brown v. Arbutus Manufacturing Ltd.*, [2000] B.C.J. No. 2817, Melnick J. dealt with a situation in which the defendant argued that a claim for wrongful dismissal had been settled when the plaintiff offered to settle for six weeks severance and a letter of recommendation and the defendant agreed, sending him a "purported letter of recommendation" which was, in reality, merely a statement of employment, not truly a letter of recommendation. In holding that there was no settlement, Melnick J. held, in paragraph 24:

I accept the position of Arbutus that a release of this nature is one that could reasonably be implied to have been required of Mr. Brown in these circumstances. I would, quite frankly, have found in favour of Arbutus on this point but for one factor: both parties recognize that an essential part of the deal was that a letter of recommendation be provided by Arbutus to Mr. Brown. I conclude that neither of the letters dated April 19, 1999, can be described as meeting

that criteria. In this case, the letters provided by Arbutus are not unlike those before Madam Justice Epstein of the Ontario Court of Justice in *Ditchburn v. Landis & Gyr Powers, Ltd.* (1995), 16 C.C.E.L. (2d) 1, where she concluded that a reference letter which stated nothing more than the length of time that that plaintiff had worked for the defendant would likely hurt rather than help efforts to secure alternative employment. In the circumstances before her, she added two months to the notice period as a consequence, an award which was varied on appeal, ((1997) 29 C.C.E.L. (2d) 199), because the plaintiff did not demonstrate that the letter had made it more difficult to secure a new job.

[25] In *Langley v. Lo-Cost Builders Ltd. v. 474835 B.C. Ltd.*, [2000] B.C.J. No. 1187, Chief Justice McEachern set forth the test for determining, as a matter of law, whether a binding and enforceable contract has been entered into, quoting from *Smith v. Hughes*, (1871) C.R. 6 Q.B. 597, at 607:

If whatever a man's real intention may be, he so conducts himself that a reasonable man would believe that he was assenting to the terms proposed by the other party, and that other party upon that belief enters into the contract with him, the man thus conducting himself would be equally bound as if he had intended to agree to the other party's terms.

[26] Chief Justice McEachern went on to observe, at paragraph 19 of his reasons:

This dictum is often quoted as authority for the proposition succinctly stated by McLachlin J. (now C.J.C) in *Osorio v. Cardona* (1984), 15 D.L.R. (4th) 619, that, "The test for intention to create legal relations is objective." It is stated in S.M. Waddams, *The Law of Contracts*, 4th ed. (Toronto:Canada Law Book Inc., 1999), at 106 that "it is not what the signer inwardly intends but what he appears to a reasonable promisee to do that is relevant."

[27] Thus, the issue before me is whether a reasonable observer, having regard for the circumstances in which the alleged agreement was made, would think that Ms. Ruzzo, speaking through Mr. Weiler in his May 10th, 2005 email, assented to all the essential terms of the settlement agreement and thus is bound by those terms.

[28] In *Fieguth v. Acklands Ltd.*, [1989] B.C.J. No. 857 (C.A.), in the context of an appeal concerning the validity of a settlement agreement where the plaintiff agreed to settle for a monetary amount on condition that he release all claims, the defendant formulated a release that contained unusual covenants and indemnities and forwarded an amount, less deductions for income tax. In finding contrary to the trial court that a binding settlement had been reached and had not been repudiated by the defendant in forwarding the unusual release provisions, Chief Justice McEachern, for the court, held as follows:

In these matters it is necessary to separate the question of formation of contract from its completion. 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.

The next stage is the completion of the agreement. If there are no specific terms in this connection either party is entitled to submit whatever releases or other documentation he thinks appropriate. Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece. 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.

Thus, it seems to me that the plaintiff in this case could have taken the position that he would not suffer a deduction for tax or that he would not execute an overreaching release, or he could have taken the same position on the tax but only executed a general release or he could have taken some other position.

The defendant on the other hand could have stood firm on the tax but relented on the release and the matter might have been worked out or either party could have applied for summary relief under Sec. 8 of the Law & Equity Act, R.S.B.C. 1979 c. 224 or Rule 10(1)(b), or either party may have commenced an action for breach of the settlement contract and utilized R. 18A.

But on the facts of this case, the settlement contract remained on foot and I see no possibility of either party contending that the settlement contract had been terminated.

[29] On the issue of whether the defendant repudiated the contract, Chief Justice McEachern said this:

In the case at bar the defendant gave no indication that it was not ready willing and able to comply with the terms of the settlement agreement. I think the defendant was obliged to deduct tax and I do not think tendering an excessive release was anything more than an over-zealous attempt to get the best possible release. Insisting upon a release with covenants and indemnities may have been some evidence of unwillingness to complete the contract, but the parties never got to that stage because the plaintiff rushed into litigation.

It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated such as structured settlements, and the deal is usually struck

before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.

[30] In *French v. Miller*, [2004] O.J. No. 5723, Herman J. was asked to determine whether an enforceable agreement to settle a wrongful dismissal claim had been achieved where the plaintiff agreed to the defendant's offer subject to "mutual agreement with respect to the letter of reference." The defendant sent the plaintiff a draft reference letter seeking confirmation that it was acceptable. No response was received from the plaintiff, and several days later the defendant sent a signed reference letter to the plaintiff. The plaintiff took the position that the letter was "totally unacceptable and offensive" and concluded, "We do not have a settlement." Justice Herman found that the agreement was binding, stating in paragraph 8:

There was, in my opinion, an agreement, in that both parties agreed to the terms in the letter of February 26, 2004 and to "mutual agreement with respect to the letter or reference". The latter implies that both parties will make good faith efforts to achieve a letter that is mutually acceptable.

[31] Justice Herman went on to note, in paragraph 13:

It would not, in my view, be unfair to enforce a settlement. Ms. French was represented by counsel and there is no suggestion that he was acting without authority. Counsel for the respective parties entered into an agreement, one condition of which was to arrive at a mutually acceptable reference letter. The plaintiff did not engage in any negotiations or discussions concerning what would be acceptable and cannot, in my view, now claim that there was no agreement.

[32] Justice Herman went on to order that the parties had 30 days to arrive at a mutually acceptable reference letter.

- [33] Madam Justice Smith ruled to a similar effect in *Rickards Estate v. Diebold Election Systems Inc.*, [2004] B.C.J. No. 2232, finding a term of a settlement agreement requiring particulars of the employer's reporting of his mitigation earnings and a release not finalized at the time of the agreement to be matters "which could be determined in the context of normal business practice and common sense", as in *Fieguth*, supra. Accordingly, Justice Smith found a concluded executory agreement.
- [34] In the case at bar, the defendant contends that the question of the contents of the mutually acceptable reference letter were critical to the settlement agreement because of her need for a high security clearance to resume her career trajectory and offset the loss to her reputation and prospects caused by the termination of her employment. She further contends that the draft letter was fatally deficient because it mischaracterized her termination in a way that she could not be complicit in representing because of her need to be truthful in pursuit of her security clearance and because it does not represent what she believes to be true that she was terminated because she would not go along with misconduct of the defendant's employees and officers. It was Ms. Ruzzo's position that she realized the impossibility of achieving a mutually acceptable letter of reference and hence was justified in treating the alleged agreement as incomplete.
- [35] In my view, the defendant's position is not sustainable on the evidence before me. The parameters for the letter of reference set by the impugned agreement were that it be mutually acceptable and that it positively address her competence and character. There is nothing in the circumstances leading to the agreement that would justify a reasonable observer in concluding that it was an essential term of the contract that the plaintiff acknowledge that the defendant was terminated because she refused to go along with misconduct of the plaintiff's employees or officers. While that was an issue raised by the defendant's draft pleadings, the plaintiff expressly denied "liability with respect to any aspect of the claim". In those circumstances, a reasonable observer could not conclude that the requirement for a mutually acceptable reference letter would embrace the content Ms. Ruzzo now asserts as critical.
- [36] Insofar as the mischaracterization of her reasons for termination is concerned, while for the reasons Ms. Ruzzo gives it may not be acceptable to her, it appears to be of a piece with an attempt to fulfil the negotiated requirements to be positive as to her character and competence. That it misses the mark because it is not true does not end the matter. As was pointed out in *Fieguth*, "Ordinary business and professional practice cannot be equated to a game of checkers where a player is conclusively presumed to have made his move the moment he removes his hand from the piece."

- [37] Here, where the plaintiff, in its draft letter of reference, could be said to have overreached in an attempt to be favourable to the defendant, the circumstances are markedly different than those relied on by the defendant in *Del Ben* where the defendant did not provide what the plaintiff was bargaining for, a reference letter with particular parameters, or *Brown* where what the defendant provided was different in kind from what the plaintiff sought, a statement of employment as opposed to a letter of recommendation.
- [38] In the present case, as in *French v. Miller*, the agreement for a mutually acceptable letter of reference implies and imports an obligation on the parties to act in good faith in finalizing the documents contemplated by the agreement. It does not allow one party to arbitrarily or unilaterally withdraw from an executory agreement without a good faith effort to achieve what an objective and reasonable observer would conclude the agreement called for. I am satisfied that in the present case, the parties reached a binding and enforceable agreement. While in her pleadings the defendant referred to the unsatisfactory form of release, the plaintiff agreed that it ought to be amended to conform with the agreement reached and the defendant did not advance any argument in relation to the release or any other aspect of the agreement yet to be finalized.
- [39] I am satisfied that this aspect of the plaintiff's claim is susceptible to resolution under Rule 18A, and accordingly, I declare that the agreement is binding on the defendant and I order specific performance of the settlement agreement. Ancillary to the order of specific performance, I order that the parties have 30 days to reach agreement on the form of release and the mutually acceptable letter of reference. Failing agreement as to the content of the letter of reference or the release provisions, either party has liberty to apply.
- [40] Dealing with the issue of the declaration sought by the defendant, in its outline the plaintiff sought the following:
1. A declaration that the settlement agreement between the parties which was entered into on May 10, 2005 (the "Settlement Agreement") constitutes a binding agreement;
 2. An order enforcing the settlement agreement; and, in particular, an order:
 - (a) providing for the completion of the settlement agreement;
 - (b) declaring that the proceedings commenced by the defendant against the plaintiff in United States (sic) District Court, District of Nevada, United States of America, under Case No. 3.05-CV-00671-LRH-VPH (the "Nevada Proceedings") fall within the claims settled by the Settlement Agreement;
 - (c) declaring that the plaintiff is entitled to recover, as damages for the defendant's breach of the Settlement Agreement, the legal costs reasonably incurred for the defence of the Nevada Proceedings.
- [41] In its notice of motion, the plaintiff made the following application:

- (a) A declaration that the settlement agreement dated May 10, 2005 (the "Settlement Agreement") constitutes a binding agreement on Ruzzo;
 - (b) Specific performance of the Settlement Agreement; and
 - (c) Costs.
- [42] Before me, the plaintiff submitted that the claims advanced by the defendant in the Nevada claim falls within the scope of the claims which the parties agreed to settle and include in a release, and thus the proceedings in Nevada are in breach of the settlement agreement. Leaving aside the merits of the issue whether, in the circumstances, it would be appropriate to make the order sought by the plaintiff in its outline, I am not satisfied that the notice of motion encompasses the relief sought, as it goes no further than seeking specific performance of the agreement, which is separate from seeking a declaration of entitlement to equitable damages arising from its breach. I, therefore, decline to make any order in relation to the Nevada proceedings.
- [43] Counsel, I have not addressed the issue of costs. I do not know whether you are prepared to address that issue today or not.
- [44] MR. ANDREWS: I leave that to my friend, as I know Mr. Ritchie is not here today, and it may be that my friend would rather delay that matter. If so, I am quite content to do that and we could perhaps either see if we can reach agreement or, failing that, perhaps it could be addressed in written submissions.
- [45] THE COURT: Very well. I am happy to leave it to counsel to sort that aspect of it out.

"A.F. Cullen, J."

The Honourable Mr. Justice A.F. Cullen

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