
CANADA / JUDGMENT

Sandhu v. Hennessy

2020 BCSC 515

COURT

Supreme Court of British Columbia

DECIDED

2 April 2020

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2020 BCSC 515 ALECIA MARIE PRICE vs DESH DEEPAK SRIVASTVA

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sandhu v. Hennessy,

2020 BCSC 515

Date: 20200402

Docket: S176219

Registry: Vancouver

Between:

Christine Sandhu

Plaintiff

And

Cameron Hennessy, Samuel Murphy, and

The Three Brits Enterprises Ltd.

Defendants

Before: The Honourable Madam Justice Tucker

Reasons for Judgment

The Plaintiff, appearing in person:

C. Sandhu

Counsel for the Defendant, Cameron Hennessy:

I. Sorenson

Counsel for the Defendants, Samuel Murphy and The Three Brits Enterprises Ltd.:

J. McAfee

Counsel for Naz Kohan:

P.W. Hansen

Place and Date of Hearing:

Vancouver, B.C.

March 4, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 2, 2020

I. Introduction

- [1] This is a decision on an application filed December 19, 2019 ("Enforcement Application") by the defendants Samuel Murphy and The Three Brits Enterprises Ltd. ("Three Brits") (collectively, the "Pub Defendants"). The Enforcement Application seeks to enforce a settlement agreement between the Pub Defendants and the plaintiff, Christine Sandhu. The application came before me on March 4, 2020.
- [2] Neither Ms. Sandhu nor the defendant Cameron Hennessy filed responses to the Enforcement Application. Ms. Sandhu participated in the hearing by teleconference, representing herself on the application. Ms. Sandhu was permitted, without objection, to speak to the Enforcement Application notwithstanding her failure to file a response.
- [3] This decision also deals with an application dated March 3, 2020 (filed March 4, 2020), brought by Naz Kohan. She seeks leave to withdraw as Ms. Sandhu's counsel of record in the proceedings ("Withdrawal Application").

II. Background

- [4] On April 2, 2019, Ms. Sandhu filed an amended notice of civil claim ("Amended Claim"). The Amended Claim alleges she was sexually assaulted by Mr. Hennessy in his home after being at a pub ("Pub") together.

- [5] The Pub is operated by Three Brits and managed by Mr. Murphy. Mr. Hennessy is a Pub employee, but was not working the night of the alleged assault. Another Pub employee, "Taylor" (who may be "Mr. Taylor" or "Taylor Smith" - the Amended Claim is inconsistent) was working at the bar that night, as was Mr. Murphy. The Amended Claim alleges that Mr. Murphy and Taylor served Ms. Sandhu alcohol at the Pub.
- [6] The Amended Claim asserts claims of assault, battery, infliction of mental distress, conspiracy and negligence. Mr. Hennessy is alleged to be liable for assault, battery, infliction of mental distress and conspiracy. The Pub Defendants are said to be liable for conspiracy and negligence.
- [7] Shortly, the negligence claim alleges that Ms. Sandhu was overserved at the Pub and that the Pub Defendants failed to take reasonable steps to ensure Ms. Sandhu's safety, including failing to supervise and monitor the service of alcohol and alcohol consumption at the Pub. The conspirators are alleged to be Mr. Hennessy and Taylor. The conspiracy allegations include conspiracy to unlawfully overserve Ms. Sandhu. Three Brits is alleged to be vicariously liable for Mr. Murphy, Mr. Hennessy and other Pub staff (e.g., Taylor).
- [8] The Pub Defendants made a formal offer to settle on January 22, 2019.
- [9] Matters proceeded in the litigation and various applications were filed and discoveries conducted through November 2019.
- [10] On November 25, 2019, Ms. Kohan, Ms. Sandhu's then counsel of record, asked if the January settlement offer was still open for acceptance. The Pub Defendants said it was, but that acceptance of the offer was conditional on agreement to execute a covenant not to sue and to file a notice of discontinuance as against the Pub Defendants.
- [11] Ms. Kohan accepted the offer on November 26, 2019, and Ms. McAfee sent her a draft covenant for review. On December 9, 2019, Ms. Kohan proposed some changes. The proposed changes were accepted by Ms. McAfee, who forwarded the agreed form of covenant ("Covenant") to Ms. Kohan at 9:48 a.m. on December 16, 2019, for execution.
- [12] The Covenant includes the following terms:

WHEREAS:

A. CHRISTINE SANDHU (the "Covenantor") has claimed injury, loss, damage and expense as a result of an alleged sexual assault that occurred on or about June 30, 2015, in the City of Vancouver, Province of British Columbia (the "Incident").

B. The Covenantor has commenced an action against the Defendants, SAMUEL MURPHY AND THE THREE BRITS ENTERPRISES LTD. ("the Defendants") in the Supreme Court of British Columbia, Vancouver Registry Action Number S176219, (the "Action") as a result of the Incident.

C. The Covenantor and the Defendants have agreed to resolve and settle all issues or potential issues as between themselves arising out of or in connection with the Action and the Incident.

D. The Covenantor intends to continue the Action against CAMERON HENNESSY.

1. THE COVENANTOR HEREBY COVENANTS NOT TO CONTINUE TO MAINTAIN THE ACTION AGAINST THE DEFENDANTS, OR COMMENCE ANY NEW ACTION WITH RESPECT TO THE INCIDENT AGAINST THE DEFENDANTS, or any one or more of their heirs, executors, servants, successors or assigns in respect of any causes of action, claims, or demands of any nature whatsoever, which the Covenantor now has or at any time hereafter may have against the Defendants, arising out of any cause, matter or thing whatsoever existing up to and inclusive of the date of this Covenant Not to Continue or Maintain the Action or Commence New Action, and in particular, but without in any manner restricting the generality of the foregoing, THE COVENANTOR HEREBY COVENANTS NOT TO CONTINUE OR MAINTAIN THE ACTION AGAINST THE DEFENDANTS, OR COMMENCE ANY NEW ACTION AGAINST THE DEFENDANTS, OR COMMENCE ANY NEW ACTION WITH RESPECT TO THE INCIDENT AGAINST THE DEFENDANTS, in respect of any and all causes of action claims and demands arising out of, directly or indirectly, or in any way connected with the Incident or any damages which heretofore have been or hereafter may be sustained in consequence of arising out of or in any way connected with any of the allegations made or which could made in the Action or in relation to the Incident;

5. As a condition precedent to the waiver of costs and disbursements, the Covenantor covenants to:

(a) at the first reasonable opportunity notify the Court of the Covenant Not to Continue or Maintain the Action or Commence a New Action herein and obtain an order of the Court to amend its Amended Notice of Civil Claim as follows:

(i) deleting the Defendants from the style of cause;

(ii) inserting the following paragraph into the Amended Notice of Civil Claim;

"The Plaintiff expressly waives any right to recover

from CAMERON HENNESSY any portion of the

loss which the Plaintiff claims and which the court

may attribute to the fault, liability or responsibility

of SAMUEL MURPHY and THE THREE BRITS

ENTERPRISES LTD. or any one or more of their

heirs, executors, administrators, officers, directors,

servants, employees, agents, partners, successors, or

assigns for which CAMERON HENNESSY, might

reasonably be entitled to claim contribution,

indemnity or an apportionment against SAMUEL MURPHY and THE THREE BRITS ENTERPRISES LTD. or any one or more of their heirs, executors, administrators, officers, directors, servants, employees, agents, partners, successors, or assigns pursuant to section 1 or 4 of the Negligence Act, R.S.B.C. 1996, c. 333 or any successor or equivalent legislation."

(iii) deleting any other reference to the Defendants within the body of the Amended Notice of Civil Claim;

(b) forthwith discontinue the Action against the Defendants without any costs, either by consent or having sought the necessary leave, and filed the said Discontinuance in the Court Registry.

[Emphasis added]

[13] At 2:26 p.m. on December 16, 2019, Ms. Kohan delivered a notice of intention to withdraw as counsel and provided Ms. Sandhu's personal email address for direct contact purposes.

[14] On December 18, 2019, Ms. McAfee wrote Ms. Kohan enclosing a filed objection to the withdrawal ("Objection") on behalf the Pub Defendants and stating:

Our instructions are to proceed with an application to enforce the terms of the settlement reached between the Plaintiff and our clients prior to the Notice of Withdrawal and in this regard, we ask Ms. Kohan to provide us with her available dates for hearing in January 2020.

Given Ms. Kohan is the third counsel the Plaintiff has retained in connection with this matter and prior withdrawals have protracted this litigation, including derailing of a previous Summary Trial, we ask that Ms. Kohan arrange to have the Plaintiff participate in this hearing by telephone.

[15] No other objection was filed.

[16] On December 19, 2019, the Enforcement Application was filed with a January 15, 2020 hearing date.

[17] On January 8, 2020, Ms. McAfee's office emailed Ms. Kohan advising that Ms. McAfee was working directly with Ms. Sandhu on "closing documents" for the settlement and the January 15, 2020 hearing date would not proceed. The same day, Ms. Kohan emailed Ms. McAfee back stating:

Please confirm that in light of your direct communication with Ms. Sandhu, there could be no possible basis to maintain the objection and whether you could please withdraw it.

[18] Ms. McAfee replied within minutes stating:

Hi Naz - if you don't mind can we bf until next Wednesday when I hope to be in receipt of the Amended NOC. At that point I am happy to withdraw the objection.

[19] On February 5, 2020, Ms. Kohan emailed Ms. McAfee as follows:

I am following up on your previous email. Can you please withdraw the objection?

[20] To which email, Ms. McAfee again replied within minutes saying:

Hi Naz - the Plaintiff has not circulated the Amended Notice of Claim for approval. We have given her until the end of the week to do so, failing which we will reset our application and give you notice. Sorry I hoped this would be resolved by now.

[21] On February 19, 2020, Ms. McAfee's office emailed Ms. Kohan that the Enforcement Application would be reset for March 4, 2020, as "the Plaintiff has failed to circulate an Amended Notice of Civil Claim for filing", and on February 24, 2020, emailed Ms. Kohan a copy of the application materials. On February 25, Ms. Kohan emailed back stating that she had ceased acting for Ms. Sandhu and seeking confirmation the application materials had also been sent directly to Ms. Sandhu. By email of same date, Ms. McAfee's office confirmed the materials had also been sent to Ms. Sandhu.

[22] At the March 4, 2020 hearing, Ms. McAfee and Ms. Sandhu advised the Court that the settlement implementation had stalled due to disagreement on whether para. 5(a)(iii) of the Covenant ("Reference Prohibition") prohibited Ms. Sandhu from retaining language in four paragraphs of the Amended Claim ("Disputed Paragraphs") in her further amended claim. This dispute was the sole remaining issue under the Enforcement Application.

[23] On March 4, 2020, Mr. Hansen, counsel for Ms. Kohan, attended in chambers seeking short leave to have the Withdrawal Application heard that day and, in fact, to have it heard prior to the Enforcement Application.

[24] Ms. Sandhu confirmed that she was representing herself for purposes of the Enforcement Application hearing. As Ms. Kohan was in the court gallery, Ms. Sandhu was asked whether she understood that Ms. Kohan was not representing her at the hearing. Ms. Sandhu confirmed that.

[25] I opted to hear the Enforcement Application, and then consider the request for short leave. After hearing the Enforcement Application, I granted short leave and heard the Withdrawal Application.

III. The Enforcement Application

[26] The material in support of the Enforcement Application was not updated to address the developments between December 19, 2019 and the hearing date. However, the affidavit filed in support of the Withdrawal Application filled the gap to a significant extent. Although Ms. McAfee worked directly with Ms. Sandhu regarding the settlement following Ms. Kohan's notice of intention to withdraw, Ms. McAfee continued to update Ms. Kohan given the Objection, and much of that correspondence was in Ms. Kohan's affidavit.

[27] While it is not unusual for the court to rely on representations from counsel with regard to matters such as the status of a settlement agreement, it should be kept to a minimum where, as here, the implementation of the settlement is the subject matter of the application itself. That said, Ms. Sandhu and Ms. McAfee were in clear and express agreement on their representations, which were largely confirmed by the content of Ms. Kohan's affidavit.

A. Jurisdiction

[28] The relevant order sought under the Enforcement Application reads:

An Order enforcing the terms of the Settlement Agreement reached on or about December 16, 2019, whereby the Plaintiff offered to execute a Covenant Not to Continue or Maintain the Action or Commence New Action on terms specified by her and file a Notice of Discontinuance as against the Applicants in exchange for the Applicants agreement to waive their costs.

[29] There is no dispute as to the existence of a binding settlement agreement. Ms. Sandhu signed the Covenant and returned a signed copy to Ms. McAfee. There is no dispute that Ms. Sandhu is obliged to file a further amended claim that complies with the Covenant in order to fully implement the settlement. The sole issue sought to be determined is whether the Disputed Paragraphs can be retained in light of the Reference Prohibition.

[30] I questioned whether I had jurisdiction to determine that issue. Ms. McAfee relies on the court's inherent jurisdiction and s. 8 of the Law and Equity Act, R.S.B.C. 1996, c. 253, citing, in particular, the decision of Justice Sewell in *Roumanis v. Hill*, 2013 BCSC 1047 [*Roumanis*]:

[55] The question of the proper procedure to adjudicate the enforceability of a settlement was addressed in *McKenzie v. McKenzie*, [1975] B.C.J. No. 1114 (B.C.S.C.). In that case Macfarlane J., as he then was, reviewed the authorities and concluded that the court ought to enforce a settlement upon application in the action if justice could be done by proceeding summarily.

[56] In *Robertson*, Lambert J.A., speaking for the court stated as follows:

8 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.

9 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, cannot 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.

[57] In my view, I should proceed summarily unless I am satisfied that there is a genuine issue as to whether the settlement agreement is binding pursuant to the law of contract.

[31] In Roumanis, Sewell J. relied on s. 8 of the Law and Equity Act:

8 (1) A cause or proceeding pending in the court must not be restrained by prohibition or injunction, but every matter of equity on which an injunction against the prosecution of that cause or proceeding might have been obtained before April 29, 1879, either conditionally or unconditionally, may be relied on by way of defence.

(2) Nothing in this Act disables the court from directing a stay of proceedings in a cause or matter pending before it, if it thinks fit.

(3) Any person, whether or not a party to a cause or matter pending before the court, who would have been entitled, but for this Act, to apply to the court to restrain the prosecution of it, or who may be entitled to enforce, by attachment or otherwise, any judgment, decree, rule or order, contrary to which all or any part of the proceedings in the cause or matter may have been taken, may apply to the court, by motion in a summary way, for a stay of proceedings in the cause or matter, either generally or so far as may be necessary for the purposes of justice and the court must make any order that is just.

[32] I am not convinced s. 8 of the Law and Equity Act is of any assistance here. Ms. Sandhu is willing to remove all of the paragraphs of the Amended Claim that assert a cause of action against the Pub Defendants and the others protected from liability by the Covenant. None of the Disputed Paragraphs assert a claim. I am not being asked to stay any cause or matter from proceeding.

[33] This Court has made orders ancillary to a declaration of binding settlement that go beyond merely staying proceedings. For example, in *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2020 BCSC 50, Justice Crossin, having found a binding settlement, ordered the parties to execute the agreed upon release, make the payment provided for in settlement, and execute a consent dismissal order. It is not clear whether this type of ancillary order relies on s. 8 of the Law and Equity Act or is based on the court's inherent jurisdiction alone. Either way, I agree that there is authority to support an order that Ms. Sandhu execute and file the discontinuance promised under the Covenant. But, she is willing to do that in any event; that is not the issue.

- [34] The Reference Prohibition is not about liability. Ms. McAfee described the underlying concern it addresses as reputational interest. I think that is accurate.
- [35] However, I am satisfied that the court's inherent jurisdiction and s. 10 of the Law and Equity Act provide jurisdiction for the determination sought. The question of whether the Disputed Paragraphs can be retained must be determined in order for the existing settlement to be implemented and, significantly, in order for the agreed upon notice of discontinuance to be filed.
- [36] Section 10 of the Law and Equity Act reads:

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 that 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.

- [37] In *Sievert v. Napier*, 2006 BCSC 613 [Sievert], Justice Melnick relied on inherent jurisdiction and s. 10 of the Law and Equity Act to resolve a dispute in which the parties agreed there was a settlement agreement, but disagreed as to what was required to comply with the settlement terms:
- [20] In my view, the plaintiffs are bound by the terms of their settlement agreement which is that the sole asset in the estate in which they are entitled to a half interest is valued at \$570,000 less an amount to repair the water damage. Ms. Napier has put forward her two repair estimates (in my view she is no more entitled to have them "updated" than are the plaintiffs entitled to have an updated appraisal). Now the plaintiffs must put forward their two appraisals (if they wish to have more than the one they appear to have already obtained).
- [21] Ms. Napier shall have 90 days to obtain financing from the date that the last of the plaintiffs' two estimates are obtained (not from the date when the parties agree on the amount). In that way, the intent of the wording of the original amending agreement of September 2, 2004, will be honoured.
- [22] I add this: the settlement agreement also includes a compromise of the plaintiffs' claims for physical and sexual abuse.
- [23] There is liberty to apply with respect to the question of the value of the repairs if the parties cannot agree upon an amount. In that regard, however, I take from the exchange of correspondence with respect to the request of the plaintiffs to be able to obtain two additional appraisals, that there was a recognition on the part of Ms. Napier that another qualified individual might well provide an estimate that was lower than the two that she had obtained. The sense of what the parties appear to have agreed on is that the value of the only

asset of the estate, the house, would be reduced by an amount to effect reasonable and necessary repairs. One would expect that would be the lowest price for which those repairs can properly be done.

- [38] Similarly, the Ontario Supreme Court has relied upon its inherent jurisdiction not only to declare the existence of a binding settlement agreement, but to make a further declaratory order effectively implementing the terms of the agreement (i.e., a declaration of entitlement to manage the disputed property): *PSB Equity Inc. v. Kutner*, 177 A.C.W.S. (3d) 947, [2009] O.J. No. 2385 (S.C.J.) at paras. 36-40 and 51-53.
- [39] In terms of inherent jurisdiction to control proceedings, prevent delay and avoid multiple proceedings, the present facts are more compelling than those in *Sievert*. The settlement sought to be enforced does not resolve the litigation entirely, but only the dispute as between certain parties. The terms of the settlement agreement reached bear directly upon the pleadings in the ongoing litigation. The disagreement regarding the Disputed Paragraphs impacts and delays the proceeding against Mr. Hennessy. Mr. Hennessy faces extremely serious allegations and has for some time already. He, and the court system itself, have an interest in the pleadings being closed and the matter proceeding to trial.

B. The Disputed Paragraphs

- [40] The Disputed Paragraphs are paragraphs 22 and 23 of Part 1, and paragraphs 3 and 18(c) of Part 3 of the Amended Claim. They are reproduced below, along with some additional paragraphs for context and with added underlining. Ms. McAfee's position is that the Reference Prohibition obliges Ms. Sandhu to delete all of the underlined language.

Part 1: STATEMENT OF FACTS

22. Throughout the course of their time sitting together, Ms. Sandhu was provided with a number of alcoholic beverages by a second bartender, Taylor Smith. Some of those drinks were paid for and other were provided by Mr. Taylor on a complimentary basis. Mr. Smith provided those drinks largely at Mr. Hennessey's direction.
23. At no point did Mr. Murphy, Mr. Taylor or any other staff take steps to ensure that Ms. Sandhu was not overly intoxicated.

Part 3: LEGAL BASIS

Liability of Mr. Hennessey

1. Mr. Hennessey committed the torts of sexual assault and battery.
2. Mr. Hennessey's conduct was flagrant and outrageous.

3. Mr. Hennessey also acted in concert, by agreement or with a common design or intention with Mr. Taylor. Mr. Hennessey and Mr. Taylor engaged in unlawful conduct, including the torts identified herein and breach of s. 61 of the Liquor Control and Licensing Act, SBC 2015, c. 19. That conduct was directed towards Ms. Sandhu for the predominant purpose of causing injury. In the alternative, Mr. Hennessey should have known that injury was likely to result.
18. In support of her claim, Ms. Sandhu also pleads and relies on:
- (c) the Liquor Control and Licensing Act, SBC 2015, c. 19.
- [41] Ms. Sandhu's position on the merits was a simple assertion that the Disputed Paragraphs are not inconsistent with the Reference Prohibition. Ms. McAfee's position is the mirror opposite- that the paragraphs obviously are inconsistent.
- [42] The issue, thus put, is a question of contractual interpretation. Thus, I refer to *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53, [2014] 2 S.C.R. 633, in which the Supreme Court of Canada re-examined the principles of contractual interpretation. At paragraphs 47 and 48, the Court stated:

Regarding the first development, the interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine "the intent of the parties and the scope of their understanding" (*Jesuit Fathers of Upper Canada v. Guardian Insurance Co. of Canada*, 2006 SCC 21, [2006] 1 S.C.R. 744, at para. 27, per LeBel J.; see also *Tercon Contractors Ltd. v. British Columbia (Transportation and Highways)*, 2010 SCC 4, [2010] 1 S.C.R. 69, at paras. 64-65, per Cromwell J.). To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed... . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

(*Reardon Smith Line*, at p. 574, per Lord Wilberforce)

The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement (see *Moore Realty Inc. v. Manitoba Motor League*, 2003 MBCA 71, 173 Man. R. (2d) 300, at para. 15, per Hamilton J.A.; see also *Hall*, at p. 22; and *McCamus*, at pp. 749-50). As stated by Lord Hoffmann in *Investors Compensation Scheme Ltd. v. West Bromwich Building Society*, [1998] 1 All E.R. 98 (H.L.):

The meaning which a document (or any other utterance) would convey to a reasonable man is not the same thing as the meaning of its words. The meaning of words is a matter of dictionaries and grammars; the meaning of the document is what the parties using those words against the relevant background would reasonably have been understood to mean. [p. 115]

- [43] Having done so, I agree with Ms. Sandhu with the exception of the express mention of Mr. Murphy found in Part 1, para. 23 of the Amended Claim.
- [44] First, "Defendants" is a defined term in the Covenant: "SAMUEL MURPHY AND THE THREE BRITS ENTERPRISES LTD. ("the Defendants")". The "Defendants" is a vastly narrower class than those protected from liability under the Covenant.
- [45] Second, the "Defendants" will continue to be referenced in the further amended claim by virtue of paragraph 5(a)(ii). It is not possible for Ms. Sandhu to both comply with the Covenant and make her pleadings wholly generic with regard to the Pub Defendants. Due to para. 5(a)(ii), indirect statements elsewhere in the further amended claim will be, when read in context of the entire claim, identifiably made in relation to the Defendants. That being the case, the possibility of indirect identification in the further amended claim was reasonably apparent at the time the Covenant terms were agreed upon.
- [46] Third, the Covenant deals with "indirect" impacts expressly in para. 1, indicating such matters were considered in the drafting and negotiation process.
- [47] Finally, the Covenant is a settlement document. Attempts to be exhaustive in that legal context typically produce the sort of language found in para. 1. The Reference Prohibition is not drafted in that or a similar manner.
- [48] On the whole, I am persuaded that had "reference" in the Reference Prohibition been intended to extend to wording that can be read in context as indirectly relating to the Defendants, more precise language would have been employed. The term "reference" for purposes of the Reference Prohibition is limited to direct reference, and does not to extend to indirect allusion.
- [49] Under the Reference Prohibition, Ms. Sandhu agreed to delete any "reference" to the "Defendants". Taylor is not a "Defendant". The Reference Prohibition does not prohibit Ms. Sandhu from identifying Taylor by name or using the term "staff".
- [50] The Reference Prohibition does not prevent Ms. Sandhu from alleging Taylor and Mr. Hennessey are co-conspirators, although other terms in the Covenant address the extent of any claim for liability.

- [51] The Reference Prohibition does not prohibit Ms. Sandhu from identifying Mr. Hennessey and Taylor as "employees" or referring to s. 61 of the Liquor Control and Licensing Act, S.B.C. 2015, c. 19. It is true that, on reviewing the entire further amended claim, a reader will likely infer that Mr. Hennessy and Mr. Taylor are employed by Three Brits, and even that Three Brits is the holder of any relevant liquor license, but that is not sufficient to bring the related paragraphs under the protection of the Reference Prohibition.
- [52] Other than the inclusion of Mr. Murphy in para. 23 of Part 1, the Disputed Paragraphs are consistent with the Reference Prohibition and may be retained in compliance with the Covenant.
- [53] As Ms. Sandhu did not file a response to the Enforcement Application, there will be no order for costs with respect of the Enforcement Application.

IV. The Withdrawal Application

- [54] I note, for the record, that Ms. Kohan's evidence was that she filed her notice of intention to withdraw following a breakdown in the client-solicitor relationship.
- [55] I offer no comment on whether the Objection was warranted in the circumstances. Whatever she thought of Ms. McAfee's position on the point, and whatever her basis for deciding to withdraw as counsel of record, Ms. Kohan took no steps to seek leave of the court to withdraw at any time prior to March 3, 2019.
- [56] Instead, like the counsel in *Sandhu v. Household Realty Corporation Limited*, 2011 BCSC 1708, she sat back and waited for other proceedings to bring the matter to a head:
- [6] I turn to the substance of the application. I have reviewed the plaintiffs' correspondence dated November 24, 2011, July 5, 2011, July 8, 2011, June 30, 2011, June 9, 2011, as well as their written submissions of December 8, 2011. Further I have reviewed correspondence from the defendants' counsel dated November 2 and 29, 2011. The reason there is some uncertainty about a matter that is ordinarily straight forward lies in the history of the proceeding. I reviewed that history in my decision (2011 BCSC 498). In summary, Mr. Merchant and the plaintiffs had a falling out. Mr. Merchant did not file a notice of intention to withdraw as he should have. On November 24, 2010 Master Young ordered him to do that and he did. On December 17, 2010 the plaintiffs filed an objection as provided for in the Rules. Rule 22-6 contemplates that if a notice of objection is filed, and if the lawyer still wishes to be removed as counsel of record then the lawyer is to apply for an order (Rule 22-9). Notwithstanding the plaintiffs' notice of objection, Mr. Merchant did not apply as contemplated by the Rules. The status of Mr. Merchant as counsel of record was brought to a head by the defendants who wanted to make an application to have the plaintiffs' claims dismissed. When they were unable to serve anyone who would accept service, they applied for directions. It was that application which prompted Master Young's order.

- [57] Ms. Kohan's position is that the Withdrawal Application became very urgent on March 3, 2020 because otherwise the Enforcement Application would take place before she withdrew. Ms. McAfee was served unfiled materials for the Withdrawal Application late in the day on March 3, 2020 (with knowledge she had a scheduled court hearing in Vancouver on March 4, 2020), and the court was asked to grant short leave for an immediate hearing on the merits.
- [58] Ms. Kohan could have applied for leave to withdraw any time after service of the Objection; she chose not to. She could have promptly applied for leave following Ms. McAfee's February 19, 2020 advice to her that the March 4, 2020 hearing was proceeding; she did not. The purported "urgency" in the matter of leave was entirely self-created.
- [59] Ms. Kohan has leave to withdraw as counsel of record for Ms. Sandhu. There is no order for costs with regard to the Withdrawal Application.

"Tucker J."

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