

CANADA / JUDGMENT

Schilperoort v. Huang

2024 BCSC 222

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 222 Schilperoort v. Huang

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Schilperoort v. Huang,

2024 BCSC 222

Date: 20240212

Docket: S2110401

Registry: Vancouver

Between:

Jesse Schilperoort and Diana Cruz Gonzalez

Plaintiffs

And

Joanne Huang

Defendant

Before: The Honourable Justice Funt

Reasons for Judgment

Counsel for the Plaintiffs:

J.J. Watson

Counsel for the Defendant:

N.V. Chan

K. Chaudhary, Articled Student

Place and Date of Hearing:

Vancouver, B.C.

October 16, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 12, 2024

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1.	introduction	
[1]	The defendant, Ms. Huang, applies to dismiss this action on the basis that the dispute between her and the plaintiffs, Mr. Schilperoort and Ms. Gonzales, was settled shortly before the notice of civil claim was filed on November 12, 2021.	
[2]	For the reasons that follow, I will dismiss the defendant's application. I will also strike portions of the defendant's response to civil claim that plead that the matter had been settled.	

2. rule 9-7 - Summary trial

- [3] In resolving the application before me, I have applied the summary trial rules set forth in Rule 9-7 of our Supreme Court Civil Rules.
- [4] In *Trial Lawyers Association of British Columbia v. British Columbia (Attorney General)*, 2021 BCSC 348, rev'd on other grounds 2022 BCCA 163, leave to appeal ref'd, [2022] S.C.C.A. No. 262, Chief Justice Hinkson stated:
- [72] The plaintiffs have also invoked the summary trial provision under Rule 9-7, as an alternative. In *McLean v. Law Society of British Columbia*, 2015 BCSC 1431, at para. 37, rev'd on other grounds, 2016 BCCA 2534, Madam Justice Gerow accepted that novel points of law requiring contextualization by way of a record can be resolved by way of summary trial.
- [73] In *Ferrer v. 589557 B.C. Ltd.*, 2020 BCCA 83, Mr. Justice Groberman observed:
- [26] In *Hryniak v. Mauldin*, 2014 SCC 7, the Supreme Court of Canada added its voice to the observation that the summary trial procedure should be accepted as a means of improving access to justice where it provides a fair and just process that is proportionate to the matters being litigated:
- [27] There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.
- [28] This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible -- proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always that with the most painstaking procedure.
- [74] Mr. Justice Groberman concluded:
- [36] While the judge did not specifically mention it, I would observe that one of the most important considerations in determining whether a single issue should be separated out and determined in a summary trial is the question of whether it is intertwined with other issues. In this case, there is very little connection between the Limitation Clause and other issues in the litigation.

3. background

- [5] The plaintiffs allege that the defendant defamed each of them through a series of emails and posts on internet websites.
- [6] The plaintiffs plead that the emails were sent to their "friends, family, and professional contacts".
- [7] With respect to the facts supporting a settlement, the defendant pleads the following additional facts in her response to civil claim:
3. In or around October 18, 2021, the plaintiffs, through their counsel made an offer to settle all possible claims the plaintiffs may have against the defendant in exchange for a payment of \$2,854.91 to Mr. Schilperoort and an apology letter to the plaintiffs.
 4. In or around October 19, 2021, the defendant, through her counsel, accepted the settlement offer.
 5. On or around October 26, 2021, the plaintiffs, through their counsel, advised they were not going to sign the agreed upon release, in breach of the settlement agreement.
 6. The defendant did not accept the plaintiffs' repudiation.
 7. The defendant, at all material times, was and remains ready willing and able to complete her portion of the settlement agreement.
4. Settlement Agreement
- [8] During the settlement discussions starting in the summer of 2021, Mr. Schilperoort was represented by Mr. Watson. Ms. Gonzalez was not represented at the time. Mr. Watson now acts for both plaintiffs. Ms. Gonzales has sworn that she first retained Mr. Watson on October 30, 2021.
- [9] As may be seen from the defendant's response to civil claim, the key dates are in or around October 18 and 19, 2021. The defendant pleads that in or around October 18, 2021, the plaintiffs made an offer to settle all possible claims and that in or around October 19, 2021, she accepted that offer.
- [10] The structure of the proposed settlement consists of a release with schedules. One schedule was to be an agreed-upon apology letter under the defendant's name to be sent to the recipients who would be listed on a separate schedule.
- [11] In a July 15, 2021 email letter from Mr. Watson to the defendant's counsel, he wrote (in part):
- With regard to the letter of apology that we demand your client issue, if your client addresses the apology to Jesse, Diana, friends, family & contacts and provides it to my client, he can forward it to the relevant people.
- I do not represent Diana Gonzalez but the information that my client has given me is that she is agreeable to releasing her claims in this regard should your client agree to this settlement offer.

[Emphasis added.]

[12] The foregoing email makes it clear that Mr. Watson was acting only for Mr. Schilperoort at that time.

[13] As of that time, the form of the apology letter had not been settled.

[14] Further emails were exchanged between Mr. Watson and the defendant's counsel. On August 23, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

I wish to reiterate at this time that the offer we made on August 13, 2021 was contingent on a release signed by both Mr. Schilperoort and Ms. Gonzalez. Please ask Ms. Gonzalez to contact me directly with her position, or please provide me with her contact information so that I can reach out.

With respect to the confidentiality provision that we included in our offer, I understand that the apology letter will have to be distributed to the recipients of Ms. Huang's communications. However, the scope of this distribution can and should be limited. Please provide us with the list of people that Mr. Schilperoort hopes to share the apology letter with, along with a copy of the email he will send with the apology letter (which we will want to be copied on), and the release can be drafted accordingly. We also insist on the inclusion of a provision that prohibits unauthorized republishing of the apology letter beyond the list of included recipients.

[15] Further email discussions followed. On August 26, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

For clarity, the conditions we've requested around confidentiality are expanded upon below:

1. We wish to limit who Mr. Schilperoort and Ms. Gonzalez can send Ms. Huang's apology letter to, as well as with whom they can discuss its contents and the facts giving rise to the apology and release. We do not, for example, wish to see the letter published broadly on Mr. Schilperoort['s] or Ms. Gonzalez's social media pages or throughout their networks.
 - a. For this reason, we have requested a list of their intended recipients, and have requested to be copied on all emails sent by either Mr. Schilperoort and Ms. Gonzalez attaching the apology letter, so that we can maintain a record of who Mr. Schilperoort and Ms. Gonzalez have sent it to.
 - b. We have requested the inclusion of a clause that prohibits Mr. Schilperoort and Ms. Gonzalez from republishing the apology letter without Ms. Huang's written consent for much the same purpose.
2. We wish to review the written content of any emails sent attaching the apology letter, as anything said therein will be directly associated with the letter itself. We want to ensure, for example, that the email does not misconstrue the apology or promote its dissemination.

If Mr. Schilperoort and Ms. Gonzalez wish to provide their set list of recipients with further context should questions arise, nothing we've requested will preclude that.

I note at this time that Ms. Huang does not have any information in her possession that would assist her in putting together a list of the recipients.

Please advise as to whether you would like to draft the release, and I can provide drafts, of the confidentiality clauses we seek to have included.

[16] On September 20, 2021, Mr. Watson sent an email to the defendant's counsel, which reads (in part):

Please see the attached draft release and settlement agreement. My client is willing to settle on these terms and so is Diana Cruz Gonzalez.

Please let me know if your client is agreeable.

[17] On September 27, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

Please find attached the revised release. I have now been able to speak to my client, so I understand the reasoning behind her requests better now. I suggest we arrange a call and I can talk you through the changes.

You will see schedule B and C are blank, that was done on purpose so that your client can fill them in.

My client has also expressed concern that we will not be able to verify that Diane is signing the agreement. To quell my client's concern are you able to request to see Diana's ID and confirm to me you have seen it? My client said that you confirming you have seen the id would be sufficient.

[18] On October 6, 2021, Mr. Watson sent an email to the defendant's counsel, which reads (in part):

Just following up on our phone call last week. My client is willing to settle on the terms put forth in the release that I provided to you, not on the terms that your client has suggested. That is the offer that is on the table. Please let me know if your client accepts that offer.

[19] On October 13, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

Please find attached the release and settlement agreement proposed by my client.

As a term of my client's acceptance, you need to confirm in writing Ms. Gonzalez has sent you a copy of her ID and her signature on the release matches her ID. Further, the contents of schedule B will have to be reviewed by my client (as a technical matter to avoid it being an agreement to agree), but I don't expect her to have any objections to the names your clients list in the release.

My client has advised me she intends to move to Taiwan next month as she has been unable to find employment in Canada since she lost her job as a result of COVID-19. She would like this matter wrapped up before she leaves, therefore this is my client's final offer.

[20] From the foregoing October 13, 2021 email, it is clear that as of that date, there was not an agreement. The defendant's counsel refers to the release and settlement as "my client's final offer" (emphasis added). Further, two terms were added:

- a) Mr. Watson was required to confirm that Ms. Gonzalez's signature matches her "ID"; and
- b) Schedule "B" (the list of recipients) would need to be reviewed by the defendant.

[21] On October 18, 2021, Mr. Watson sent an email to the defendant's counsel, which reads (in part):

My client is willing to sign the Release that your client proposed, including listing recipients of the apology letter, but the date needs to be changed to November 2019 to reflect the fact that your client's actions started then.

Please let me know if that is agreeable.

[22] On October 19, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

Yes, my client is agreeable to that change.

Please put together the full release, including the list of names for my client's approval.

My client has indicated she would like to receive the irrevocable instruction that Jesse and Diana provide, and your written confirmation of the verification of Diana's ID prior to signing the release. I trust this can be done on standard undertakings.

Glad we can finally put this to rest.

[23] On October 26, 2021, Mr. Watson sent an email to the defendant's counsel, which reads (in part):

My client had started to look at names to include in a Schedule "B" and is uncomfortable providing those names. My client has also pointed out that there is an explicit statement in the release that it does not constitute an admission of liability. I appreciate that that is standard language in releases, but that contradicts the apology letter Ms. Huang was willing to write. In addition, I have been unable to obtain any sort of consent of Ms. Cruz Gonzalez to agree to this release.

All in all, my client is not willing to settle at this time.

[Emphasis added.]

[24] On October 28, 2021, the defendant's counsel sent an email to Mr. Watson, which reads (in part):

My client remains ready, willing and able to complete the agreed upon settlement. My client does not accept your client's repudiation.

5. law

[25] The analysis of the application engages several rules, which I set forth below using leading authorities.

a) Counsel is acting as the agent of the client

[26] In *Sekhon v. Khangura*, 2009 BCSC 670, Justice Ker stated:

[110] It is settled law that a solicitor acting for a party in settlement negotiations is acting as the agent of the client. The solicitor is presumed to have the authority to bind the client to the terms of settlement. There is no obligation on other parties to make enquiries regarding a solicitor's authority to settle a matter on a client's behalf. It is in the interests of the administration of justice that solicitors be free to complete settlements with solicitors without having to enquire about or be concerned with the actual authority of the solicitor: *Scherer v. Paletta*, [1966] O.J. No. 1017 (C.A.); *Adamoski v. Mercer*, [1984] B.C.J. No. 2872 (S.C.) at para. 6; *Harvey v. British Columbia Corps of Commissionaires*, 2002 BCPC 69 at para. 30.

[111] In *Scherer*, Evans J.A. (as he then was) stated at para. 9-11:

[9] Bowstead on Agency, 12th ed., pp. 65-6, reviews the scope of the implied authority of a solicitor and counsel and states that the relationship of a solicitor to his client is in general one of agent to principal.

[10] The authority of a solicitor arises from his retainer and as far as his client is concerned it is confined to transacting the business to which the retainer extends and is subject to the restrictions set out in the retainer. The same situation, however, does not exist with respect to others with whom the solicitor may deal. The authority of a solicitor to compromise may be implied from a retainer to conduct litigation unless a limitation of authority is communicated to the opposite party. A client, having retained a solicitor in a particular matter, holds that solicitor out as his agent to conduct the matter in which the solicitor is retained. In general, the solicitor is the client's authorized agent in all matters that may reasonably be expected to arise for decision in the particular proceedings for which he has been retained. Where a principal gives an agent general authority to conduct any business on his behalf, he is bound as regards third persons by every act done by the agent which is incidental to the ordinary course of such business or which falls within the apparent scope of the agent's authority. As between principal and agent, the authority may be limited by agreement or special instructions but as regards third parties the authority which the agent has is that which he is reasonably believed to have, having regard to all the circumstances,

and which is reasonably to be gathered from the nature of his employment and duties. The scope of authority is, therefore, largely governed by the class of agent employed provided that he is acting within the limit of his ordinary avocation or by relation of the agent to the principal or by the customs of the particular trade or profession.

[11] A solicitor whose retainer is established in the particular proceedings may bind his client by a compromise of these proceedings unless his client has limited his authority and the opposing side has knowledge of the limitation, subject always to the discretionary power of the Court, if its intervention by the making of an order is required, to inquire into the circumstances and grant or withhold its intervention if it sees fit; and, subject also to the disability of the client. It follows accordingly, that while a solicitor or counsel may have apparent authority to bind and contract his client to a particular compromise, neither solicitor nor counsel have power to bind the Court to act in a particular way, so that, if the compromise is one that involves the Court in making an order, the want of authority may be brought to the notice of the Court at any time before the grant of its intervention is perfected and the Court may refuse to permit the order to be perfected. If, however, the parties are of full age and capacity, the Court, in practice, where there is no dispute as to the fact that a retainer exists, and no dispute as to the terms agreed upon between the solicitors, does not embark upon any inquiry as to the limitation of authority imposed by the client upon the solicitor.

b) Full documentation is not necessary for there to be a binding settlement

[27] In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62, 1989 CanLII 2744 (C.A.), Chief Justice McEachern, writing for our Court of Appeal, stated:

[44] 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.

c) Counter-offers

[28] In *Sotiropoulou v. Beaudin*, 2014 ONCA 168, the Ontario Court of Appeal stated:

[4] Counsel submits that the terms of the respondents' counter-offer were not essential terms of the agreement. However, the law is clear. As Professor Fridman notes, "[m]ore than once has it been said that an acceptance must correspond precisely to the terms of the offer": G.H.L. Fridman, *The Law of Contract in Canada*, 6th ed. (Toronto: Carswell, 2011), at p. 57. Otherwise, the purported acceptance is "at most a counter-offer, and a further communication of assent will be required from the offeror" before a contract is formed: S.D. Waddams, *The Law of Contracts*, 6th ed. (Toronto: Canada Law Book, 2010), at para. 60.

d) Undertakings

[29] In dismissing the appeal of a decision of a Law Society panel, Justice Hollinrake, writing for our Court of Appeal in *The Law Society of British Columbia v. Heringa*, 2004 BCCA 97 (in approving the reasoning of the panel) stated:

[10] [] The heart of the panel's reasoning is, in my opinion, found in these words:

[37] Undertakings are not a matter of convenience to be fulfilled when the time or circumstance suit the person providing the undertaking; on the contrary, undertakings are the most solemn of promises provided one lawyer to another and must be accorded the most urgent and diligent attention possible in all of the circumstances.

[38] The trust and confidence vested in lawyer's undertakings will be eroded in circumstances where a cavalier approach to the fulfillment of undertaking obligations is permitted to endure. Reliance on undertakings is fundamental to the practice of law and it follows that serious and diligent efforts to meet all undertakings will be an essential ingredient in maintaining the public credibility and trust in lawyers.

6. analysis

a) Mr. Watson is acting as the agent of Mr. Schilperoort

[30] As counsel for Mr. Schilperoort, Mr. Watson was Mr. Schilperoort's agent and could bind him to a settlement with documentation to be completed.

[31] The fact that Mr. Watson had clearly stated that he was not counsel for Ms. Gonzalez militates against an argument that Mr. Watson had implied authority for her.

[32] Ms. Chan, who was counsel for the defendant at the hearing, refers to Mr. Watson's September 20, 2021 email where Mr. Watson states (in part):

My client is willing to settle on these terms and so is Diana Cruz Gonzalez.

[33] It is common for a counsel to act for one plaintiff and for that counsel to try to coordinate with the other plaintiff(s) to the action who may be unrepresented. This does not result in counsel having the authority to bind the other plaintiff(s).

[34] From the defendant's counsel's October 13, 2021 email to Mr. Watson, it is clear that then defendant's counsel understood such at the time. In the October 13, 2021 email, the defendant's counsel states:

As a term of my client's acceptance, you need to confirm in writing Ms. Gonzalez has sent you a copy of her ID and her signature on the release matches her ID. []

[35] If Mr. Watson were the agent of, or had implied authority for, Ms. Gonzalez, such a term would not be necessary. I find that Mr. Watson did not have actual or implied authority to bind Ms. Gonzalez to a settlement. Counsel for one plaintiff who coordinates matters with an unrepresented plaintiff does not give rise to implied authority.

[36] Without Ms. Gonzalez's express agreement, there could not be a settlement on the proposed terms. On this basis alone, the defendant's application may be dismissed. There was no suggestion that Ms. Gonzales had agreed to the asserted settlement directly.

b) No binding settlement

[37] I also find that Mr. Schilperoort and Ms. Huang did not reach an agreement on the essential terms of the settlement.

[38] The defendant says that the essential terms for an agreement existed as of October 19, 2021 based on the defendant's counsel's email to Mr. Watson on that date.

[39] However, I note that the defendant's counsel's October 19, 2021 email is responding to Mr. Watson's October 18, 2021 email, which refers only to "My client" without any further reference to Ms. Gonzalez. Even putting aside this aspect, I do not find that there was an agreement on the essential terms.

[40] The defendant's counsel's October 19, 2021 email was a counter-offer. The defendant sought three conditions in particular:

- a) the defendant would have the right to approve the names of the recipients who would receive the defendant's apology letter;
- b) Mr. Watson had to provide written confirmation verifying Ms. Gonzalez's ID prior to her signing the release; and
- c) both Mr. Watson and the defendant's counsel had to give undertakings.

[41] As noted by the defendant's counsel's October 13, 2021 email, the defendant's review of the list of proposed recipients would be necessary to avoid an "agreement to agree".

[42] Further, the list of recipients was not one of easy classification, such as any director or officer of XYZ Co. Ltd. as of, say, October 31, 2021.

[43] As noted, the plaintiffs plead that the defamatory emails were sent to their "friends, family, and professional contacts".

- [44] The alleged defamatory statements were also vile. As a result, it was in the defendant's interests to have the list of recipients be as short as possible. Given this context, I find that an agreed-upon list of recipients was an essential term of any settlement. While the defendant's counsel had previously stated in his October 13, 2021 email that he did not expect his client to have any objections, an expectation and certainty are not the same.
- [45] Requiring Mr. Watson to provide written confirmation verifying Ms. Gonzalez's ID prior to her signing the release was also a new term by way of the counter-offer. At the time, it was known that Ms. Gonzalez was not Mr. Watson's client.
- [46] Finally, in his October 19, 2021 email, the defendant's counsel refers to "standard undertakings" in relation to "irrevocable instruction(s)" from each of the plaintiffs, even though Ms. Gonzalez was not Mr. Watson's client at the time.
- [47] Any counsel gives particular thought to the circumstances of an undertaking and is fastidious as to the wording of the undertaking. Counsel are aware of the importance of undertakings and the related professional obligations and responsibilities.
- [48] The factual framework was not straightforward or common, such as the form of undertakings given in relation to the purchase and sale of Blackacre with a few charges registered in the Land Title Office.
- [49] The asserted settlement terms were also not as straightforward as the settlement of an action for an agreed sum of money to be paid by a defendant to the plaintiff.
- [50] For the asserted settlement, I am not satisfied that the matter could be addressed "in accordance with the common practices which prevail amongst members of the bar": Fieguth at para. 44.
- [51] It is not unusual for counsel to state that he or she cannot give a sought undertaking. In other words, I am not satisfied that the undertaking sought would not be an important term necessary for the finalization of the settlement sought.
- [52] In short, I do not find that the defendant through her counsel, accepted a settlement offer from the plaintiffs in or around October 19, 2021. The defendant's counsel's October 19, 2021 email was a counter-offer that was never accepted. In sum, there was never an agreement among the parties on the essential terms: Fieguth at para. 44.

7. conclusion

- [53] The defendant's application is dismissed.
- [54] The following paragraphs of the defendant's response to civil claim will also be struck:
- Part 1: Response to Notice of Civil Claim Facts, Division 3 - Additional Facts, paragraphs 3 to 7;
 - Part 2: Response to Relief Sought, paragraph 4; and

· Part 3: Legal Basis, paragraphs 6 and 7.

8. costs

[55] If the parties wish to address costs, I ask that they arrange through Supreme Court Scheduling a 9 a.m. 55-minute hearing before me within 30 days of these reasons.

"Funt J."

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