

CANADA / JUDGMENT

Shoolestani v. Crease Harman LLP

2020 BCSC 452

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 452 Shoolestani v. Crease Harman LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Shoolestani v. Crease Harman LLP,

2020 BCSC 452

Date: 20200330

Docket: S1811526

Registry: Vancouver

Between:

Amir Yashar Shoolestani

Plaintiff

And

Crease Harman LLP

Defendant

Before: The Honourable Madam Justice Matthews

Reasons for Judgment

The Plaintiff, appearing on own behalf

A.Y. Shoolestani

Counsel for the Defendant:

P. Arvisais

Place and Date of Hearing:

Vancouver, B.C.

February 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 30, 2020

Introduction

- [1] The defendant, Crease Harman LLP, was counsel for the Assessor of Area #10, North Fraser Region, on a stated case pertaining to the 2007 property assessment of a property owned by the plaintiff, Amir Shoolestani. During the course of the stated case Mr. Shoolestani was arrested. Mr. Shoolestani brought this claim against Crease Harman alleging abuse of process, malicious prosecution, fraud, extortion, perjury, negligence, gross negligence, misrepresentation, misconduct, bad faith, and wrongdoing. He seeks \$250,000 in damages, including aggravated and punitive damages. Crease Harman applies to dismiss the action brought by Mr. Shoolestani pursuant to R. 9-7 of the Supreme Court Civil Rules based on what it says is a binding settlement agreement.
- [2] Mr. Shoolestani asserts that no settlement agreement was concluded. He argues, in the alternative, that if there was, the Assessor or Crease Harman repudiated it or he repudiated it and Crease Harman accepted the repudiation. He argues that the Assessor's failure to raise the settlement agreement at the time the stated case was dismissed by consent is such that it is an abuse of process for Crease Harman to rely on the settlement agreement in defense of this claim.
- [3] The issues are:
- a) whether there was a settlement agreement between the parties;
 - i. if so, whether the Assessor or Crease Harman repudiated the settlement agreement;
 - ii. if so, whether Mr. Shoolestani repudiated the settlement agreement; and
 - iii. whether the Assessor or Crease Harman accepted Mr. Shoolestani's repudiation of the settlement agreement; and
 - b) whether Crease Harman's failure to raise the existence of the settlement agreement during the final resolution of the stated case amounts to an abuse of process.
- [4] I note that Crease Harman was not a party to the stated case. Rather, it was counsel for the Assessor in the stated case. However, the negotiations pertaining to the settlement of Mr. Shoolestani's claim for damages included a term releasing the Assessor and its agents and counsel. Mr. Shoolestani did not argue that the settlement agreement, if made, did not cover

Crease Harman. Likewise, Crease Harman did not argue that Mr. Shoolestani's submission that it is estopped or barred by abuse of process doctrines such as *res judicata* from arguing that the settlement agreement precludes this claim is misplaced because it was not a party to the stated case. Accordingly, I am deciding this case on the basis that Crease Harman was released by the terms of the settlement agreement and if the settlement agreement was made and is enforceable, Crease Harman is entitled to rely on it in defence of this claim.

- [5] Mr. Shoolestani's arguments addressed abuse of process first. However, since whether there was a settlement agreement and whether it was the subject of an accepted repudiation is central to the abuse of process argument, I will address the settlement agreement first.

Settlement

- [6] The central issue on these applications is whether there is an enforceable settlement agreement of Mr. Shoolestani's claims. Mr. Shoolestani asserts that no agreement was concluded. He argues that if it was, he repudiated it and Crease Harman accepted the repudiation. He argues further that, even if the settlement agreement was made and not the subject of accepted repudiation, the doctrine of abuse of process precludes Crease Harman from relying on it.
- [7] I will review the background to the previous litigation and this litigation as the applicability of the doctrine of abuse of process depends on what occurred in the previous litigation. Where I state a party's assertion, submission or argument, I am not finding facts.
- [8] The previous litigation had its roots in Mr. Shoolestani's appeal of the 2007 property tax assessment of his property in Burnaby, BC. The Property Assessment Appeal Board confirmed the value of the property. On November 5, 2007, the Board filed a stated case with the court under s. 65 of the Assessment Act, R.S.B.C. 1996, c. 20. Crease Harman acted as counsel for the Assessor of Area #10, North Fraser Region, in the stated case.
- [9] It is disputed as to whether any steps were taken in the stated case. On July 30, 2014, the Assessor brought an application to dismiss it for want of prosecution. Master Muir issued the order, which included a provision of that Mr. Shoolestani pay the Assessor's costs.
- [10] Registrar Nielsen assessed costs at \$3,963.40 at a hearing on March 26, 2015. Following a subpoena to debtor hearing on December 1, 2015, Registrar Nielsen issued an examiner's report which was filed December 23, 2015. After finding that Mr. Shoolestani had not attended the hearing, Registrar Nielsen fixed January 22, 2016 as the date Mr. Shoolestani must appear before the court under R. 13-3(8) of the Supreme Court Civil Rules.
- [11] On January 22, 2016, Crease Harman, as counsel for the Assessor, appeared before Mr. Justice Sigurdson. Justice Sigurdson ordered that Mr. Shoolestani be served personally before the Assessor could pursue a potential committal order under R. 13-3(8). On March 23, 2016, Mr. Justice Macintosh ordered apprehension and committal of Mr. Shoolestani after seeking confirmation that Mr. Shoolestani had been served.

- [12] Mr. Shoolestani asserts he was not given notice of any of the applications and was not personally served with the application as directed by Mr. Justice Sigurdson. Mr. Shoolestani deposed that he was contacted by the court sheriff on December 12, 2016, with respect to the committal order. There is nothing in the application records that addresses this eight-month gap. However, Mr. Shoolestani attended court the following day and was taken into custody. On the same day, December 13, 2016, Madam Justice Dillion ordered Mr. Shoolestani's release on his undertaking that he would attend court on January 20, 2017.
- [13] On January 5, 2017, on Mr. Shoolestani's application, Master Muir granted Mr. Shoolestani a stay of the action related to the stated case and time extensions to appeal orders made in that action. Subsequently, on October 2, 2017, Mr. Shoolestani filed notices of appeal of Master Muir's order dismissing the stated case made July 30, 2014, Registrar Nielsen's cost assessment made March 26, 2015, the examiner's report issued December 23, 2015 and he sought leave to appeal Justice Macintosh's committal order made March 23, 2016.
- [14] Mr. Shoolestani's amended notice of appeal with respect to Mr. Justice Macintosh's order, filed on November 1, 2017, sought damages for malicious prosecution and abuse of process, including punitive damages resulting from his arrest.
- [15] Prior to hearings on any of these appeals, the Assessor changed counsel. New counsel agreed to waive the Assessor's entitlement to costs, to vacate Justice Macintosh's order, to release Mr. Shoolestani from his undertaking to the court, and to set aside all subpoenas to debtor. It is clear that the Assessor's willingness to abandon its costs and set aside Mr. Justice Macintosh's order and the subpoenas to debtor in the stated case were not connected to the resolution of Mr. Shoolestani's claim for damages. Counsel for the Assessor stated the Assessor's intention of doing so "unconditionally" and made that statement without reference to the claim for damages.
- [16] After the Assessor agreed to do so, Mr. Shoolestani offered to settle his claim for abuse of process and malicious prosecution for \$4,500 by email on February 28, 2018. At that time Mr. Shoolestani's damages claim was made in the appeal he sought to bring of Mr. Justice McIntosh's order. In the email accompanying the offer, Mr. Shoolestani stated that he intended to pursue his claims as part of his then pending appeals, but if he was not permitted to do so, he would bring a separate claim in Supreme Court. The Assessor's counsel replied to Mr. Shoolestani's offer accepting it and agreeing to pay \$4,500 in exchange for a release of all claims between Mr. Shoolestani, the Assessor and Crease Harman as counsel for the Assessor. Mr. Shoolestani replied saying he appreciated counsel's efforts in getting the settlement offer accepted.
- [17] Counsel for the Assessor sent Mr. Shoolestani a draft release. The parties had some back and forth on the terms of the release between March 2 and March 5, 2018. It appears that during the same timeframe Mr. Shoolestani must have also raised an issue regarding the amount of the settlement, because on March 5, 2018, counsel for the Assessor emailed Mr. Shoolestani the following:

However, as previously advised, my client does not agree to revise the settlement amount. If you insist on [resiling] from the settlement amount, I will not waste any more time trying to sort out the details of the settlement documents.

Let me know if you will agree to any form of release in consideration for payment of \$4,500, and I will seek instruction. If not, I assume I will see you on the 14th.

[18] On March 14, 2018, the parties appeared before the Court of Appeal on Mr. Shoolestani's application for leave to appeal in the stated case. Counsel for the Assessor advised the Court of Appeal chambers judge of the Assessor's agreement to agreed to waive the Assessor's entitlement to costs, to vacate Justice Macintosh's order, to release Mr. Shoolestani from his undertaking to the court, and to set aside all subpoenas to debtor in the stated case. The Court of Appeal denied leave to appeal on the basis that it was moot.

[19] The parties arranged to appear before Mr. Justice McIntosh for the purpose of affecting the Assessor's agreement. On April 3, 2018, Justice Macintosh ordered: (a) that all costs orders be set aside; (b) no costs were payable; (c) the order of Justice Macintosh made on March 23, 2016 be set aside; (e) the order of Justice Dillion made on December 13, 2016 be set aside; and (f) all subpoenas to debtor be set aside. Mr. Justice Macintosh's April 3, 2018 order also provided:

This Order is not intended to prejudice any claim Mr. Shoolestani has or may have against the Assessor including, among other things, general, aggravated and punitive damages for abuse of process, malicious prosecution, fraud, perjury, negligence, misrepresentation, misconduct, and wrongful order for arrest and jail time of Mr. Shoolestani.

[20] Counsel for the Assessor advised Mr. Justice Macintosh that the Assessor did not object to including the above paragraph in the order. The parties agree this order brought the stated case to an end.

[21] Following the April 3, 2018 order of Justice Macintosh, Mr. Shoolestani demanded \$25,000 to settle the claims he advances in this case. The Assessor did not negotiate further. Instead, on three occasions, counsel for the Assessor sent Mr. Shoolestani a cheque for \$4,500 in keeping with the settlement that the Assessor and Crease Harman seek to enforce, notwithstanding that no release had been finalized.

[22] On the first occasion, the cheque was sent by registered mail. The address did not include Mr. Shoolestani's apartment number, just the address of the apartment building. It was returned as uncollected. Mr. Shoolestani asserts that the evidence does not show it was sent to even that address and in any event, the Assessor had his full address because it was on the Court of Appeal notice of appeal and so the Assessor knew how to find him. I note that Mr. Shoolestani also had sworn affidavits in the stated case in which he stated his address was the same address to which the registered mail and covering letter were addressed, i.e. without an apartment number. I find that the cheque was sent to an incomplete address by error, which is both explained and minor. Counsel for the Assessor emailed Mr. Shoolestani

advising that the cheque had been sent and returned as not collected. Counsel for the Assessor advised that it would be resent and advised Mr. Shoolestani to collect his mail.

- [23] The evidence shows the cheque going by registered mail a second time on May 18, 2018, to the same address. On this occasion it was returned as "address incomplete". On September 17, 2018, counsel for the Assessor emailed Mr. Shoolestani again and asked for an address to which the cheque could be sent and provided the alternative of Mr. Shoolestani attending at his office to pick up the cheque.
- [24] Mr. Shoolestani replied by email to counsel for the Assessor and provided a mailing address completely different from the address in his notice of application for leave to appeal. In that email, he asserted that he was willing to settle for \$25,000, and if he received a cheque for less than \$25,000, he would consider it to be an installment. He also stated that if he did not receive the full \$25,000 by the end of September 2018, he would file his notice of civil claim.
- [25] Mr. Shoolestani filed this notice of civil claim on October 25, 2018. The Assessor is not named as a defendant but Crease Harman is. Mr. Shoolestani claims damages for abuse of process or malicious prosecution, fraud or extortion, perjury, negligence, gross negligence or misrepresentation, misconduct, bad faith or wrongdoing, his arrest, imprisonment and jail time, and emotional, health and financial damages. The factual basis for the claims are the actions taken by Crease Harman (as counsel for the Assessor) in the stated case and are the same claims made in the notice of appeal in the stated case. They are also the same claims described, albeit more generally, by Mr. Shoolestani in his February 28, 2018 email offering to settle his damage claims for \$4,500.
- [26] Crease Harman filed a response to civil claim on November 14, 2018. Crease Harman pleads principally that Mr. Shoolestani is barred from advancing his damages claim in this action by reason of a settlement agreement entered into by the parties.
- [27] On November 13, 2018, Crease Harman (by the same counsel who acted for the Assessor at the conclusion of the stated case including during the settlement negotiations) sent Mr. Shoolestani a cheque for \$4,500 to the new address he had provided with a cover letter stating that the cheque was for the settlement concluded in March 2018. On November 23, 2018, Mr. Shoolestani sent an email stating that he had received the cheque and that counsel for the Assessor could not force him to accept an amount he had not agreed to. He said he would send back the cheque and reiterated his demand for \$25,000.
- [28] Mr. Shoolestani did not return the cheque. He cashed it on April 29, 2019. Mr. Shoolestani concedes that he deposited the \$4,500 cheque. However, he points to his email of May 9, 2019 to counsel for Crease Harman, in which he said:

I consider the \$4,500 as part of my cost of litigation including the costs of the two Court hearings of Mar 14, 2018 and Apr 3, 2018. Nevertheless, following my email of Sep 17, 2018, to avoid expending further resources on litigation, I am willing to extend my offer to settle the case for a without prejudice settlement of \$25,000. If you agree today, I am willing to accept your \$4,500

cheque dated Nov 7, 2018 as partial payment of the \$25,000 settlement amount. Thus, please confirm whether you agree to pay the remainder amount of \$20,500. This offer expires today May 8, 2019.

[Emphasis in original.]

[29] On this application, Mr. Shoolestani swore an affidavit stating that:

Based on my email of Sept 7, 2018 to the Respondent, I considered the \$4,500 as part of my cost of the litigation, including the costs of the two Court hearings of Mar 14 and Apr 3, 2018 which happened after the settlement negotiations failed on Mar 5th.

Offer and Acceptance

[30] Mr. Shoolestani relies on *Salminen v. Garvie*, 2011 BCSC 339, in which Mr. Justice Williams outlined general contract principles in the context of a settlement negotiation. *Salminen* was decided in the family law context but it has been cited in both family and other civil cases.

[31] A settlement agreement is a form of contract and as such it is made when "the terms of a proposed agreement are accepted, without qualification, by one party (the offeree) as presented by the other party (the offeror)": *Salminen* at para. 26. The burden of proving the existence of the settlement agreement is on the party seeking to enforce it or rely on it, on a balance of probabilities: *Salminen* at para. 25. The focus of the analysis is objective evidence: *Salminen* at para. 27.

[32] The purported settlement agreement was made by way of an email exchange between Mr. Shoolestani and counsel for Crease Harman over three days, February 28 to March 2, 2018. At the time, the parties were also negotiating the consent order that would bring about the end of the stated case, as subsequently ordered by Justice Macintosh on April 3, 2018. During that exchange, the parties communicated the following:

- a) Mr. Shoolestani, in an email dated February 28, 2018, after outlining the matters that would be included in the consent order, said:

Hence, the only relief that remains to be settled is my damages and costs. As you are aware, I have sought damages for abuse of process and malicious prosecution, and/or misconduct, resulting in the wrongful order for my arrest and jail time that have damaged my health condition. For brevity, I do not repeat the supporting facts, evidence and case laws you already have.

I trust the Court of Appeal will entertain the reliefs I have sought for the damages I have suffered. But, even if the Court of Appeal finds my application moot as you suggest, I have an option to file a separate notice of civil claim in the Supreme Court for the damages I have suffered. Actionable wrong shall not go unpunished. In addition, I have suffered additional costs, time loss and stress preparing court documents including applications and affidavits in both the Supreme Court and

the Court of Appeal to set aside the wrongful orders made against me by the Registrar, Master and Judge of the Supreme Court. The Assessor may choose to have the sentencing for punishment pronounced in Court publicly or pay a punitive damage in the form of a reasonable settlement amount.

Considering that the Assessor was willing to commit perjury and subsequent misrepresentations to court and malicious actions against me to gain a sum of \$4,500 at my loss and suffering, I trust it would be more than reasonable to settle my damages and costs in return for receiving at least an amount equivalent to the Assessor's fraudulent \$4,500 bill of costs. I am sure the Court will make a much tougher sentencing for the Assessor's wrongdoings.

Please advise whether the Assessor agrees to the without prejudice settlement amount of \$4,500.

b) Counsel for Crease Harman, in an email dated March 1, 2018, responded to the settlement offer as follows:

As for your claim of damages, although the claim is disputed, all parties have already spent more time on this matter than it is worth. Your offer is accepted. Crease Harman will be sending me a cheque for \$4,500 payable to you in consideration for a release of all claims and an end to all litigation as between you, the Assessor, and Crease Harman.

c) Mr. Shoolestani, in an email dated March 2, 2018, replied:

I appreciate your efforts in getting the settlement offer accepted.

I look forward to receiving the draft consent order and release soon.

[33] Promises were made by both parties based on consideration. In exchange for the \$4,500 settlement amount, Mr. Shoolestani would release the Assessor and Crease Harman of all claims Mr. Shoolestani may have against it. I conclude that there was an offer and acceptance on terms that are certain.

[34] Subsequent to the acceptance of the offer the parties exchanged documentation. The parties did not settle on the terms of the documentation prior to Mr. Shoolestani advising that he would not accept \$4,500 to settle his claims. Mr. Shoolestani argues that during this timeframe the Assessor demonstrated that it was not ready, willing and able to perform and so there was no contract, or if there was, it was repudiated by the Assessor.

[35] In *Fieguth v. Acklands Ltd.* (1989), 37 B.C.L.R. (2d) 62 at para. 44 (C.A.), the Court of Appeal, per McEachern C.J.B.C., addressed the circumstances in which failure to agree on settlement documentation goes to whether there was no agreement at all, gives rise the repudiation of an agreement, or has no legal bearing:

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.

[36] Applying these principles to this case, given the Assessor's unqualified acceptance of Mr. Shoolestani's offer, the parties' subsequent conduct relating to the settlement documentation does not affect the existence of the settlement agreement. See also: G.H. Treitel, *The Law of Contract*, 11th ed. (London, UK: Sweet & Maxwell, 2003) at 17-18; and Salminen at para. 29.

Repudiation

[37] However, the parties' subsequent conduct raises a question of whether either the Assessor or Mr. Shoolestani repudiated the settlement agreement, and if so, whether the other party accepted that repudiation: Salminen at para. 44.

[38] Mr. Justice Williams set out the law on repudiation in Salminen:

[35] Repudiation occurs where, without justification, a party, by words or conduct, evinces an intention to refuse the performance of the contract and not to be bound by it: Fridman, *supra*, at p. 606; *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, [1999] S.C.J. No. 60 (QL) at para. 40. The totality of the circumstances must be considered in determining whether a party repudiated a contract through conduct that amounts to a rejection of his or her obligations under that contract: *Terrien Bros. Construction Ltd. v. Delaurier*, 2006 BCSC 1645 at para. 51, [2006] B.C.J. No. 2896 (QL) (Chambers), *aff'd* 2007 BCCA 623, 75 B.C.L.R. (4th) 63. The test, as with consensus ad idem, is that of an objective reasonable person: *Business Depot Ltd. v. Lehndorff Management Ltd.* (1996), 24 B.C.L.R. (3d) 322, [1996] B.C.J. No. 1061 (QL) (C.A.) at paras. 66-67.

[36] The effect of repudiation depends on the response of the non-repudiating party. As the Court of Appeal stated in *Ginter v. Chapman*, [1967] B.C.J. No. 27 (QL), 1967 CarswellBC 63 at para. 11 (C.A.), *aff'd* [1968] S.C.R. 560, 1968 CarswellBC 77, "Repudiation of a contract by one party is of no consequence in law unless the other party accepts it as such and communicates the acceptance to the repudiator within a reasonable time." The party faced with the other's repudiation has two options: *Norfolk v. Aikens* (1989), 41 B.C.L.R. (2d) 145, 64 D.L.R. (4th) 1 (C.A.). They are, as expressed in *ASEAN Technology Partners Inc. v. Canada* (National Research Council), 2007 BCSC 1539, [2007] B.C.J. No. 2273 (QL) at para. 109, *aff'd* 2009 BCCA 126, [2009] B.C.J. No. 561 (QL):

If the non-repudiating party treats the contract as still being in full force and effect then it remains in effect for both sides. However, if the non-repudiating party accepts the repudiation, the contract is terminated (*Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423, 178 D.L.R. (4th) 1). Acceptance of repudiation can be inferred through conduct that indicates that the non-repudiating party does not intend to continue with the contract (*American National Red Cross v. Geddes Brothers*, [1921] 61 S.C.R. 143, 55 D.L.R. 194).

Did the Assessor repudiate the settlement agreement?

- [39] I do not accept that the back and forth about release language demonstrates an unwillingness to perform the essential elements of the contract amounting to repudiation by the Assessor. As the Court of Appeal explained in *Fieguth*, such negotiations are commonplace and unless the settlement documentation is an essential element of the agreement, hard or protracted negotiations about settlement documentation do not demonstrate repudiation.
- [40] In this case, the back and forth demonstrates that Mr. Shoolestani took the perspective that if the settlement agreement was not executed in final form any consent order that ended the stated case needed to address his damages claim, even if a new action was required. The Assessor, on the other hand, viewed ending the stated case as independent of the settlement agreement.
- [41] I conclude that the evidence at the time the agreement was made demonstrates that the settlement of Mr. Shoolestani's claim for damages was separate from what the Assessor committed to do, and did do, to end the stated case; the Assessor abandoned its costs order on the stated case and the orders leading to Mr. Shoolestani's arrest were set aside, among other things. Both Mr. Shoolestani and the Assessor stated so. The hearings in the Court of Appeal and before Mr. Justice Macintosh were about the conclusion of the stated case in that manner.
- [42] Mr. Shoolestani relies on evidence from his brother who overheard a conversation between Mr. Shoolestani and counsel for the Assessor and deposed that counsel for the Assessor stated that he did not bring a cheque for the settlement amount of \$4,500 to either the Court of Appeal hearing or the hearing before Mr. Justice Macintosh because a settlement had not been reached. It is clear that at the time of these hearings, the parties had not finalized the settlement documentation. In my view, the hearsay evidence provided by Mr. Shoolestani's brother is not of assistance and I place no weight on it.
- [43] Mr. Shoolestani deposed and submitted that the Assessor "explicitly instructed" him to continue with litigation in the March 5, 2018 email in which counsel for the Assessor advised that he would seek instructions on the settlement documentation but if Mr. Shoolestani was resiling from the amount of the settlement, there was no point in doing so. I do not find that to be a direction to Mr. Shoolestani to continue with his litigation. I find it to be part of the back and forth on the settlement documentation as well as an acknowledgement that Mr. Shoolestani was seeking to change the essential contract term, the settlement amount. In

due course I will address whether that was repudiation by Mr. Shoolestani and whether it was accepted by the Assessor. At this juncture, I find that the email was not repudiation by the Assessor.

- [44] Mr. Shoolestani argued that the settlement agreement was not addressed at the Court of Appeal hearing on March 14, 2018, or the hearing before Mr. Justice Macintosh on April 3, 2018, because there never was a binding agreement or because the Assessor had repudiated it. I do not regard the silence about the settlement agreement at either hearing to be significant because I have accepted that the conclusion of the stated case and the settlement negotiations pertaining to Mr. Shoolestani's damages claim were separate matters. It follows that the failure of the Assessor to address the settlement agreement at either hearing is not evidence that there was no settlement agreement.
- [45] Mr. Shoolestani also submits that the failure to properly address the registered mail to deliver the settlement funds should be construed as unwillingness on Crease Harman's part to perform the settlement. I have found that the problems with the address to which the first two cheques were delivered is explained. I do not find this error to be evidence of being unwilling or unable to perform the settlement agreement amounting to repudiation.
- [46] I conclude that the Assessor did not demonstrate an unwillingness or incapability to perform the essential elements of the agreement such that it repudiated the settlement agreement.

Did Mr. Shoolestani repudiate the settlement agreement? If so, did the Assessor accept the repudiation?

- [47] Crease Harman submits that the problems with concluding the settlement agreement were, at most, repudiation on Mr. Shoolestani's part but any such repudiation was not accepted by the Assessor or Crease Harman. Crease Harman submits that eventually Mr. Shoolestani accepted payment pursuant to the settlement agreement by cashing the cheque.
- [48] Mr. Shoolestani submits that counsel for Crease Harman accepted his repudiation in two ways. First, by email; and second, by not raising the issue of the settlement agreement before the Court of Appeal or Mr. Justice Macintosh.
- [49] The email communication which Mr. Shoolestani says is an acceptance of repudiation is the same email he characterized as the Assessor explicitly instructing him to continue with the litigation. I set out the relevant portion again:

However, as previously advised, my client does not agree to revise the settlement amount. If you insist on [resiling] from the settlement amount, I will not waste any more time trying to sort out the details of the settlement documents.

Let me know if you will agree to any form of release in consideration for payment of \$4,500, and I will seek instruction. If not, I assume I will see you on the 14th.

- [50] Crease Harman submits that this, along with subsequent statements that Mr. Shoolestani could not pursue his claim for damages in the stated case but would have to do so in a separate action, was not an acceptance of Mr. Shoolestani's repudiation but rather an observation that the claim for damages could not be pursued in the stated case. The email clearly says that the Assessor "does not agree to revise the settlement amount", while acknowledging the ongoing negotiations of the settlement documents. The words "if not, I assume I will see you on the 14th" may be taken to mean that if Mr. Shoolestani was maintaining his position that the settlement amount was no longer agreed to, then the stated case hearing would have to take place. Such an interpretation would be contrary to Crease Harman's position that the Assessor consistently maintained that the stated case hearing was a separate matter. On the other hand, those words could be interpreted to be merely acknowledging that regardless of whether there was a settlement, there would be a Court of Appeal attendance regarding the stated case on March 14. I find it to be the latter as that it is consistent with the reality. Regardless, those words are at most an acknowledgement of Mr. Shoolestani's repudiation; they are not acceptance of that repudiation.
- [51] I find that this exchange and Mr. Shoolestani's subsequent offers to settle his claim for increased amounts were attempts to repudiate the settlement agreement. However, none of these repudiations were accepted by Crease Harman.
- [52] With regard to the Assessor's failure to raise the settlement agreement with the Court of Appeal or Mr. Justice Macintosh, for the same reasons that it was not a repudiation by the Assessor it is not evidence of the Assessor accepting of Mr. Shoolestani's repudiation.
- [53] With regard to the related argument that Crease Harman's delay in enforcing the agreement until this action was commenced is evidence of acceptance of repudiation, in *ASEAN Technology Partners Inc. v. Canada (National Research Council)*, 2007 BCSC 1539 at para. 110, *aff'd* 2009 BCCA 126, the court found that the non-repudiating party's "failure to move ahead with the contract constitutes acceptance of the repudiation." However, since a settlement agreement acts as a defence to an action, Crease Harman's was not called upon to enforce it until the commencement of the current action and is not precluded by the delay to assert the "the contract as still being in full force and effect": *ASEAN* at para. 109.
- [54] In this case, there was nothing for Crease Harman to move ahead with. Counsel for the Assessor attempted to send the settlement funds on three occasions despite the fact that the settlement documentation was not agreed upon. There was nothing for the Assessor or Crease Harman to do other than pay the settlement amount. Once Mr. Shoolestani commenced the current action, Crease Harman sent the settlement funds for a third time, and on that occasion successfully. Ultimately, Mr. Shoolestani accepted and deposited those funds.

[55] Mr. Shoolestani's actions following the March 2, 2018 settlement agreement with respect to the terms of the release cannot discharge or release him from his obligation under the agreement. I conclude that the settlement agreement is enforceable.

Abuse of Process

[56] Mr. Shoolestani submits Crease Harman is either: (a) estopped from bringing the current application; (b) the application is res judicata; or (c) the application is jurisdiction and statute barred. These arguments are aspects of the doctrine of abuse of process.

[57] The basis of the abuse of process argument advanced by Mr. Shoolestani is that the Assessor should have raised the existence of a settlement agreement as it relates to the claims brought in this action before the Court of Appeal and Justice Macintosh during the resolution of the stated case. Since the Assessor could have raised the existence of a settlement of these claims at that time but did not, Mr. Shoolestani submits that Crease Harman's reliance on the settlement agreement now is an abuse of process.

[58] The doctrine of abuse of process, among other things, seeks to avoid re-litigation and judicial process that could result in duplicative or inconsistent findings of fact or that attempt to avoid the consequences of a previous adjudication by challenging it in a different forum rather than properly appealing it. The doctrine prohibits litigation that violates "principles such as judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63 at para. 37; *British Columbia (Workers' Compensation Board) v. Figliola*, 2011 SCC 52 at para. 33; *Quinn v. British Columbia*, 2018 BCCA 320 at para. 81, leave to appeal ref'd [2018] S.C.C.A. No. 463.

[59] Mr. Shoolestani relies on the decision of the Ontario Court of Appeal in *Aba-Alkhail v. University of Ottawa*, 2013 ONCA 633 at para. 12, leave to appeal ref'd [2013] S.C.C.A. No. 491:

the abuse of process doctrine can apply not only to bar re-litigation of issues that were actually determined in the administrative process, but also to issues that could have been determined (Lipsitz at para. 88). This gives further incentive to raise all issues at the administrative proceeding and to participate "with full vigour".

See also *Behn v. Moulton Contracting Ltd.*, 2013 SCC 26 at paras. 37-42; *Quinn* at para. 84; *Ontario v. Lipsitz*, 2011 ONCA 466 at paras. 83, 88, leave to appeal ref'd [2011] S.C.C.A. No. 407.

[60] Mr. Shoolestani submits that if there was an enforceable settlement agreement Crease Harman could, and should, have raised the issue of the settlement agreement at the hearing before Justice Macintosh ending the stated case, and before the Court of Appeal. Mr. Shoolestani submits Crease Harman's failure to do so prevents it from doing so now and amounts to an improper and indirect appeal of the April 3, 2018 order made by Mr. Justice McIntosh concluding the stated case provided that Mr. Shoolestani's right to claim damages was not affected by the dismissal of the stated case.

- [61] I understand that Mr. Shoolestani's position is that silence about the settlement at the appearance before Mr. Justice Macintosh precludes a defence to this case based on the settlement agreement because if the settlement agreement existed, the parties could not have agreed to the provision in the order that this case could be brought. I do not accept this argument for two reasons.
- [62] First, Mr. Shoolestani's claim for damages was not properly part of the stated case and so not properly before either the Court of Appeal or Mr. Justice Macintosh. Had the Assessor (or Crease Harman), objected to the provision in Mr. Justice Macintosh's order because the proposed claim had already been settled, Mr. Justice Macintosh could not have ordered that Mr. Shoolestani was precluded from making this claim because this claim was not before Mr. Justice Macintosh. The same is true of the proceedings in the Court of Appeal.
- [63] Second, the order is permissive in that it permits Mr. Shoolestani to file a claim with respect to damages if he decides to do so. The order does not limit any potential defences to such an action. Failure to address a defence to a claim that was not yet raised, even though it was proposed to be raised, does not offend the principles that underlie abuse of process.
- [64] In addition, Mr. Shoolestani asserts that he was directed, by the terms of the order, by an exchange he had with Mr. Justice Macintosh, and by Madam Justice Stromberg-Stein in the Court of Appeal, to commence this claim. He argues that allowing this claim to be defended on the basis of the settlement agreement amounts to an indirect appeal of the April 3, 2018 order, and the exchanges with the Justices, and so this Court does not have the jurisdiction to dismiss the action on the basis of the settlement agreement.
- [65] The provision in the order made by Mr. Justice Macintosh does not support this argument. As stated above, the provision is permissive; it does not require Mr. Shoolestani to commence an action. The court only speaks through its orders and it reasons but in any event the transcript of the hearing before Mr. Justice Macintosh demonstrates that there was no direction or order that Mr. Shoolestani must commence this action. There is no evidence that Madam Justice Stromberg-Stein directed or ordered Mr. Shoolestani to commence this action.
- [66] In such circumstances, failure to raise the settlement agreement at the hearings in the stated case does not invoke issue estoppel or res judicata. The defence to the claim is not barred by the doctrine of abuse of process. I conclude that nothing that was done in the stated case precludes this Court from dismissing this action based on the settlement agreement.
- [67] Given my findings that the settlement agreement was made and was not the subject of an accepted repudiation, I find the settlement agreement provides a defence to Mr. Shoolestani's claim. Therefore, I dismiss the claim.

Costs

- [68] Both Crease Harman and Mr. Shoolestani seek special costs, or alternatively, costs on their respective applications.
- [69] Mr. Shoolestani submits late filing of the application book, which Crease Harman concedes was 19 minutes late, and Crease Harman's unwillingness to file a joint application book, satisfies the test for special costs.
- [70] The Court of Appeal recently summarized the law on special costs in *Smithies Holdings Inc. v. RCV Holdings Ltd.*, 2017 BCCA 177 at paras. 56-57, as punitive as opposed to compensatory and being appropriate where there had been reprehensible conduct from which the court seeks to disassociate itself, citing: *Young v. Young*, [1993] 4 S.C.R. 3 at 134-138; *Grewal v. Sandhu*, 2012 BCCA 26 at para. 106; *Fullerton v. Matsqui (District)* (1992), 74 B.C.L.R. (2d) 311 at para. 23 (C.A.). The type of conduct that meets the threshold for special costs ranges from "milder forms of misconduct deserving of reproof or rebuke" to "scandalous or outrageous conduct": *Garcia v. Crestbrook Forest Industries Ltd.* (1994), 9 B.C.L.R. (3d) 242 at para. 17 (C.A.).
- [71] A technical breach of the Rules, by 19 minutes, is not reprehensible. It is not deserving of reproof or rebuke. Crease Harman's position that the applications should not be heard jointly, and as a result a joint book was inappropriate, was not unreasonable. Crease Harman's conduct does not meet the threshold of reprehensible conduct, even considering the lower end of the threshold.
- [72] With regard to Crease Harman's claim for special costs, during the hearing I cautioned Mr. Shoolestani about his choice of language in referring to submissions made to the court by members of Crease Harman during the stated case and by counsel on this application as perjury, falsehoods and false misrepresentations. Mr. Shoolestani persisted.
- [73] It is clear from the pleadings and the evidence that Mr. Shoolestani is of the view that his characterizations are accurate. They are the basis of his claim. I found his claim to have been settled and so I did not decide the merits of it and in particular, whether such language has a factual basis. For the same reason, there is no basis on which I can or should conclude that such conduct warrants special costs.
- [74] With regard to costs generally, despite that Crease Harman has succeeded on this application and in the cause, given that orders for costs gave rise to the unfortunate history of this matter, I am disposed to order that the parties shall bear their own costs. If they wish to make submissions on costs generally, they may do so by filing written submissions of no more than five pages through the Registry within 30 days of these reasons for judgment.

Conclusion

- [75] Mr. Shoolestani's claim is dismissed. Subject to consideration of further written submissions made in accordance with the direction given above, the parties shall bear their own costs.

"Matthews. J"

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