

CANADA / JUDGMENT

Sumas Remediation Services Ltd. v. Crowe MacKay LLP

2018 BCSC 782

COURT

Supreme Court of British Columbia

DECIDED

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2018 BCSC 782 Sumas Remediation Services Ltd. v. Crowe MacKay LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sumas Remediation Services Ltd. v. Crowe MacKay LLP,

2018 BCSC 782

Date: 20180511

Docket: S169817

Registry: Vancouver

Between:

Sumas Remediation Services Inc.

Plaintiff

And

Crowe MacKay LLP

Defendant

Before: The Honourable Madam Justice Burke

Reasons for Judgment

Counsel for the Plaintiff:

S. Javadi

Counsel for the Defendant:

S. Turner

Place and Date of Hearing:

Vancouver, B.C.

December 21-22, 2017

Place and Date of Judgment:

Vancouver, B.C.

May 11, 2018

INTRODUCTION

- [1] Sumas Remediation Services Ltd. ("Sumas") is seeking the return of monies paid by it to Crowe MacKay LLP ("Crowe MacKay") for accounting services.
- [2] The defendant, Crowe MacKay, seeks to have this claim determined pursuant to Rule 9-7 of the British Columbia Supreme Court Civil Rules, B.C. Reg. 168/2009. Crowe MacKay submits the matter is suitable for determination by way of summary trial as the plaintiff's case is bound to fail based on a release signed by Sumas. Crowe MacKay seeks an order dismissing the claim in its entirety.
- [3] Sumas submits this matter is not suitable for a summary trial for a number of reasons. It points to the complexity of the matter, conflicts in the evidence, and a difference in the interpretation of the release signed between various parties to this and other related litigation.

BACKGROUND

- [4] Sumas is an environmental remediation company. Crowe MacKay is an accounting firm.
- [5] In December 2015, Sumas retained Crowe MacKay to provide accounting services. There is some dispute about the nature of the retainer agreement and the nature of the services requested. At that time, Sumas had two shareholders, Mr. Dale O'Krane and SES Ventures ("SES"), a company controlled by Mr. Saeed Javadi.
- [6] This litigation stems primarily from Mr. Javadi accusing Mr. O'Krane of using the finances of Sumas to conduct the audit for his own personal ends. Mr. Javadi, however, now seeks to recoup the costs incurred during the audit from the auditor, Crowe MacKay.
- [7] Messrs. O'Krane and Javadi, as well as SES and Sumas, have been involved in various pieces of litigation. These included:
- An action by O'Krane against SES for specific performance of the share purchase contract;

- An oppression remedy and derivative leave petition by SES against O'Krane, his wife, his personal holding company, and various shell companies for the alleged diversion of corporate funds;
- An unfair competition action by Sumas against Mr. Javadi and parties related to Javadi alleging a breach of fiduciary duties as a director of Sumas; and
- An action by SES on behalf of Sumas against O'Krane, his wife, and his personal holding company for the alleged misappropriation of corporate funds.

I will refer to these collectively as the "Shareholder Actions".

- [8] As the then president and sole director of Sumas, Mr. O'Krane caused Sumas to retain Crowe MacKay to prepare a response to allegations made by Mr. Javadi about Mr. O'Krane in the oppression proceedings, including allegations he used company money to build his personal residence in West Vancouver.
- [9] In July 2016, Mr. Javadi, SES, Sumas, Mr. O'Krane and multiple other parties entered into a comprehensive release which brought to an end all of the outstanding litigation between Javadi and O'Krane, including the Shareholder Actions (the "Release").
- [10] There is no dispute that Crowe MacKay provided accounting services to Sumas, nor is there a dispute that Sumas paid for those services in the amount of approximately \$185,000, including taxes and disbursements.
- [11] Sumas, now controlled by Mr. Javadi, has raised a number of issues with respect to the scope of the services provided by Crowe MacKay.
- [12] Sumas seeks a declaration that Crowe MacKay provided services solely for the benefit of Mr. O'Krane, rather than for Sumas. It seeks the return of the money it paid to Crowe MacKay on the basis that the fees charged to Sumas ought to have been charged to and paid for by Mr. O'Krane. Sumas also submits that the fees themselves were excessive.
- [13] For the purpose of this application, Crowe MacKay submits that the precise nature of those services need not be resolved. Rather, Crowe MacKay submits that the essential point of this application is that Sumas is precluded from bringing this action by the terms of the Release that Sumas gave its former director and shareholder, Mr. O'Krane, in 2016.
- [14] While Crowe MacKay's main defence to this action is that Mr. O'Krane had authority to retain Crowe MacKay, Crowe MacKay seeks the dismissal of this action on the basis of a third party benefit to the Release.

Position of the Parties

- [15] Crowe MacKay maintains the Release is an effective defence against this action by Sumas. It cites *Taberner v. World Wide Treasure Adventures Inc.* (1994), 96 B.C.L.R. (2d) 98 (C.A.), to argue that a term in a release that the releasor will not commence an action against the releasee or against "any other [party] who may have a claim of the indemnity or contribution against the releasee" is an effective bar to an action against such third party: at para. 5.
- [16] Although Crowe MacKay is not a party to the Release, it argues it is entitled to assert its protections as a third-party beneficiary under the Release as per the principles articulated in *Marble (Litigation Guardian of) v. Saskatchewan*, 2003 SKQB 282; see also *London Drugs Ltd. v. Kuehne & Nagel International Ltd.*, [1992] 3 S.C.R. 299 and *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] 3 S.C.R. 108.
- [17] Crowe MacKay contends that it is a party who may have a claim of indemnity against Mr. O'Krane, the releasee, further assuring its inclusion as a party to be protected by the Release as per its terms.
- [18] Sumas submits that this action is not suitable for a summary trial application for a number of reasons. These are stated as follows:
- Document discovery has not been completed;
 - The pleadings are not complete;
 - There have been no examinations for discovery;
 - There is no evidence of urgency or prejudice to the defendant from this action;
 - The factual and legal issues are complex;
 - There are numerous conflicts in the evidence, particularly in regard to Crowe MacKay's knowledge of the litigation between shareholders, the role of counsel and the role of the directors of Sumas;
 - It would be unjust to decide the issues in this proceeding without additional witnesses who have been subpoenaed;
 - Issues relating to the defendant's breach of standard and duty of care, the appropriateness of invoices charged by the defendant to Sumas, and determinations as to whether Mr. O'Krane acted within his proper authority at Sumas should not be disposed of in a summary trial; and
 - The interpretation of the Release is not suitable for summary disposition.

ISSUE

- [19] Is this matter suitable for disposition by summary trial?

Legal Principles

[20] The power to conduct a summary trial is contained within Rule 9-7 of the British Columbia Supreme Court Civil Rules. The most relevant sections of these rules are as they relate to this matter as follows:

Adjournment or dismissal

- (11) On an application heard before or at the same time as the hearing of a summary trial application, the court may
- (a) adjourn the summary trial application, or
 - (b) dismiss the summary trial application on the ground that
 - (i) the issues raised by the summary trial application are not suitable for disposition under this rule, or
 - (ii) the summary trial application will not assist the efficient resolution of the proceeding.

Judgment

- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
 - (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
 - (ii) the court is of the opinion that it would be unjust to decide the issues on the application,
 - (b) impose terms respecting enforcement of the judgment, including a stay of execution, and
 - (c) award costs.

[21] The oft cited case of *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A) at 214-215 established the factors a chambers judge is entitled to consider in determining whether a matter is suitable for summary trial. These include:

- the amount involved;
- the complexity of the matter;
- any prejudice likely to arise by reason of delay;
- the cost of a conventional trial;
- the course of the proceedings;
- any other matters which may arise for consideration.

See also *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263, aff'd on appeal 2006 BCCA 369.

- [22] The determination as to whether a matter is suitable for summary trial is ultimately discretionary. That discretion is not lightly interfered with: *Morin v. 0865580 B.C. Ltd.*, 2015 BCCA 502 at paras. 46 and 47.

Application of the Legal Principles

- [23] The argument in this case centred on the interpretation of the Release and whether that can properly be done in the absence of extrinsic evidence. The application also dealt with the complexity of the evidence as it has been presented and whether the court had a satisfactory record on which to conduct a summary trial. I have separated the analysis accordingly.
- [24] The amount involved in this litigation, the cost of a trial, and possible prejudice to the parties appear, by themselves, to militate in favour of proceeding under Rule 9-7.
- [25] Crowe MacKay seeks to have the matter resolved by summary trial to avoid the additional delay and cost associated with a conventional trial.
- [26] Crowe MacKay essentially argues that the interpretation of the Release upon which it relies is determinative of this matter. I turn to the question of whether that can be done on a summary trial basis.

Interpretation of the Release

- [27] Crowe MacKay relies on a number of general applications of the law in furthering its claim that the protection of the waiver should extend to Crowe MacKay as a third party. They cite *Marble* at para. 42 in which Baynton J. states:

The court [in citing *Fraser River Pile & Dredge Ltd. v. Can-Dive Services Ltd.*, [1999] S.C.J. No. 48 at para. 32 [*Fraser River*]] held that as a general rule, the doctrine of privity provides that a contract cannot confer rights nor impose obligations on third parties. Accordingly, a third-party beneficiary is precluded from relying on the terms of an insurance policy between the owner and the insurer. However, a principled exception is required in certain circumstances. It is dependent on the intention of the contracting parties. The intention of the parties is determined on the basis of two critical and cumulative factors:

1. The parties to the contract must intend to extend unconditionally the benefit in the contract to the third party that relies on it;
 2. The activities performed by the third party must be the ones contemplated and intended as coming within the scope of the benefit in the contract.
- [28] In contrast, Sumas submits the court should consider the context in which the Release was created in order to more clearly ascertain who may enjoy its protection.
- [29] Much turns on the how the Release is worded and what effect additional context may have on interpreting the Release. As noted by Bennett J.A. in *The Owners, Strata Plan BCS 327 v. IPEX Inc.*, 2014 BCCA 237:

[26] The law is very clear. While releases signed in the course of a settlement of a dispute are often worded in a broad and general fashion, appearing to cover the end of the world, they must be considered in the context of the dispute. This context often provides a limiting background from which an inference that the parties meant to apply it to the claims from the dispute may readily be made [citations omitted].

[30] In *Barwin v. IKO Industries Ltd.*, 2015 ONSC 5994, at para. 19 (also citing *Ipex*), the Court states the following:

The substantive law relating to the interpretation of a release stipulates that whether subsequent claims fall within the scope of those previously released requires a determination of what was "in the contemplation of the parties" when the release was given. Determining what was in the contemplation of the parties in turn requires consideration of both the words used by the parties and a broad range of surrounding circumstances. The contextual analysis must be an objective one; it matters not what a party to a release personally believed, but rather what a reasonable bystander would say was in the specific contemplation of the parties under the circumstances [Citations omitted; emphasis added.]

[31] Furthermore, a fundamental proposition is that "a release is to be interpreted so that it covers only those matters which were specifically in the contemplation of the parties at the time the release was given": *LeRoy v. TimberWest Forest Corp.*, 2015 BCSC 2005 at para. 18, citing the rule in *London and Southwestern Railway v. Blackmore* (1870), L.R. 4 H.L. 610, 39 L.J. Ch. 713 (U.K. H.L.).

[32] In *LeRoy*, the release at issue was drafted broadly and appeared to include claims of "whatsoever kind and howsoever arising, whether known or unknown", rather than simply absolving an individual party. Based on the particular matrix of the matter, the judge felt additional context was needed to properly interpret the release and decided that the matter was not suitable for summary trial.

[33] The case of *R. v. Imperial Tobacco Canada*, 2012 ONSC 6027, includes additional helpful summaries of the relevant law. While those are somewhat lengthy, they are helpful and set out below:

[25] Releases are subject to the same principles that guide contractual interpretation: see Geoff R. Hall, *Canadian Contractual Interpretation Law*, 2007 (Markham: Lexis Nexis).

[26] Hall goes on to explain that releases are subject to a special rule, which is derived from an 1870 decision of the House of Lords: *London and South Western Railway v. Blackmore* (1870), L.R. 4 H.L. 610. In that case, the rule was expressed in this way:

The general words in a release are limited always to that thing or those things which were specially in the contemplation of the parties at the time when the release was given. But a dispute that had not emerged or a question which had not at all arisen, cannot be considered as bound and concluded by the anticipatory words of a general release.

[27] The rules governing the analysis are neatly summarized in *Bank of British Columbia Pension Plan v. Kaiser*, 2000 BCCA 291 (CanLII), [2000] B.C.J. No. 903; 137 B.C.A.C. 37 (B.C.C.A.) quoting from *Chitty on Contracts*:

Chitty on Contracts sums up the relevant case law with respect to the interpretation of a discharge of a contract or release as follows (pp. 1084-5):

1. No particular form of words is necessary to constitute a valid release. Any words which show an evident intention to renounce a claim or discharge the obligation are sufficient.
2. The normal rules relating to the construction of a written contract also apply to a release, and so, a release in general terms is to be construed according to the particular purpose for which it was made.
3. The court will construe a release which is general in its terms in the light of the circumstances existing at the time of its execution and with reference to its context and recitals in order to give effect to the intention of the party by whom it was executed.
4. In particular, it will not be construed as applying to facts of which the party making the release had no knowledge at the time of its execution or to objects which must then have been outside his contemplation.
5. The construction of any individual release will necessarily depend upon its particular wording and phraseology.

[28] The Supreme Court of Canada's decision in *Consolidated Bathurst Export Ltd. v. Mutual Boiler and Machinery Insurance Co.*, 1979 CanLII 10 (SCC), [1980] 1 S.C.R. 888 is an often cited source of these hallmarks of contractual interpretation:

Even apart from the doctrine of *contra proferentem* as it may be applied in the construction of contracts, the normal rules of construction lead a court to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract. Consequently, literal meaning should not be applied where to do so would bring about an unrealistic result or a result which would not be contemplated in the commercial atmosphere in which the insurance was contracted. Where words may bear two constructions, the more reasonable one, that which produces a fair result, must certainly be taken as the interpretation which would promote the intention of the parties. Similarly, an interpretation which defeats the intentions of the parties and their objective in entering into the commercial transaction in the first place should be discarded in favour of an interpretation of the policy which promotes a sensible commercial result. It is trite to observe that an interpretation of an ambiguous contractual provision which would render the endeavour on the part of the insured to obtain insurance protection nugatory, should be avoided. Said another way, the courts should be loath to support a construction which would either enable the insurer to pocket the premium without risk or the insured to achieve a recovery which could neither be sensibly sought nor anticipated at the time of the contract.

[29] Another decision that is frequently cited is *Eli Lilly & Co. v. Novopharm Ltd.*, [1988] 2 S.C.R. 129. The principles that emerge from it may be summarized as follows:

- the goal of contract interpretation is "to search for an interpretation which, from the whole of the contract, would appear to promote or advance the true intent of the parties at the time of entry into the contract";
- the contractual intent of the parties is determined by reference to the words used, read in light of the surrounding circumstances or put another way, in context;
- evidence of one party's subjective intention is not permissible; and
- extrinsic evidence is unnecessary when a document is clear and unambiguous on its face.

[34] In this case, the Release is very broadly worded. It reads in part;

[Sumas] .hereby releases, remise and forever discharge .the O'Krane parties and their respective . Agents Successors . and assigns from any and all claims Of any nature or kind, whatsoever and howsoever arising, whether known or unknown, whether in law or in equity or pursuant to a statute . Including any matter which is in any way connected with, or which arises directly or indirectly from, or relates to, the actions, or any one or more of the . O'Krane parties' shareholding, directorship, employment, or involvement in [Sumas] in any business dealings that they may have had which are ancillary or otherwise related to [Sumas].

[35] In the same release, Sumas and others released O'Krane from:

any and all claims Of any nature or kind, whatsoever . Whether known or unknown . Connected with any event act or omission prior to or existing up to an inclusive of the date of this mutual release, including any matter which is in any way connected with, or which relates directly or indirectly from, or relates to the actions or the O'Krane party shareholding, directorship, employment, management of, or involvement in [Sumas], and any business dealings that they may have had which are ancillary or otherwise related to SRS (Sumas) .

[36] If the court is satisfied on the documentary evidence before it, that it can either use a plain reading (if "the provisions of the release are not ambiguous" as per *Marble*) or it has enough evidence to understand the context between the parties, a summary trial may be appropriate.

[37] *Crowe MacKay* relies on the Release and, in particular, a term to the effect that the releasor will not commence an action against the releasee or against any other party who may have a claim of indemnity or contribution against the releasee, as an effective bar to an action against such a third party. Given, however, the lack of specificity of the Release, and, in light of the contradictory and complex evidentiary record currently before the court, it is clear the court must carefully examine the intention of the parties in order to determine whom may be covered by the Release.

- [38] In my view, it is not self-evident or obvious that Crowe MacKay is covered by the Release, even in light of clauses relating to indemnity and contribution. For reasons that will be outlined below, it is also clear extrinsic evidence not currently before the court will likely be of assistance in determining to whom the benefits of the Release were intended to apply.
- [39] In *Bank of British Columbia Pension, Re*, 2000 BCCA 291, Ryan J.A. said a release "will not be construed as applying to the facts of which the party making the release had no knowledge at the time of execution": at para. 17. In this case, there is significant debate and conflict in the evidence as to whether the facts were in the knowledge of Crowe MacKay and/or Sumas.
- [40] While Crowe MacKay argues their coverage by the Release can be determined from the language of the Release itself without the need to resort to extrinsic evidence, I conclude, as stated by the Court of Appeal in *Ipex*, that the interpretation of the Release cannot be properly completed in the absence of extrinsic evidence. As in *LeRoy*, the need for interpretation of the Release and the complexity of the background facts makes this matter unsuitable for summary disposition.

Factual Considerations

- [41] The "complexity of the matter" is the most pressing element of the Inspiration Management factors for the purposes of this application. Some of the evidence before the court which highlights the difficulty in determining this matter summarily is set out as follows.
- [42] The timeframe during which the accounting services and payment for those services was while the parties were litigating amongst themselves. As a result, Sumas maintains that Mr. O'Krane should have personally paid Crowe MacKay as some of that litigation involved his actions while a director of Sumas. In response, Crowe MacKay points to correspondence of February 2016, many months prior to the signing of the Release, which indicates that Mr. Javadi was of the view that monies should be paid to Crowe MacKay directly. Crowe MacKay says, therefore, that this matter would have been within the knowledge of the parties at the time the Release was signed and therefore would place Crowe MacKay within the contemplation of the protection of the Release.
- [43] On this point, I note that on February 4, 2016, counsel for Mr. Javadi considered Crowe MacKay's engagement letter of January 7, 2016, noting Crowe MacKay had been paid \$92,000 to that date. Counsel took the position that these expenses should be borne by Mr. O'Krane personally and Mr. O'Krane should reimburse the company. Crowe MacKay says these are the same allegations Mr. Javadi on behalf of Sumas now makes in this action. Crowe MacKay says Mr. Javadi was well aware of the allegations his lawyers were making at the time.

[44] Sumas says, however, that Mr. O'Krane's personal counsel, Mr. Sean Boyle, had given instructions to Sumas to pay Crowe MacKay. Sumas points out that on January 23, 2016, O'Krane retained and then replaced Sumas' counsel Mike Wagner with John Sullivan of Harper Grey LLP. The extent of Sullivan's role was to instruct Crowe MacKay to stop its work on February 1, 2016.

[45] In paragraph 19 of its Amended Response to Civil Claim, Crowe MacKay states that, if Mr. Boyle did not have the authority to instruct Crowe MacKay on behalf of Sumas, Crowe MacKay did not know of this lack of authority. This, however, appears to be contradicted by the affidavit of October 3, 2017 of Russell Law, a partner at Crowe MacKay, who says:

The only direct dealings that Crowe MacKay had with lawyers at the time were with Mr. Darcy Wray, who made the initial contact on behalf of [Sumas]. Mr. Sean Boyle, who was acting for Mr. O'Krane and John Sullivan, who as I have indicated, told us he had been retained by [Sumas] in mid to late January 2016.

[46] On February 29, 2016, Sumas commenced the derivative action against Mr. O'Krane, his wife, and a related company. That action, however, did not claim the fees paid to Crowe MacKay, despite the claims being articulated in the February 4, 2016 letter.

[47] In March 2016, after Sumas filed the derivative action, O'Krane indicated that he wished to settle the various Shareholder Actions.

[48] A settlement agreement which would eventually become the Release was negotiated to settle the Shareholder Actions as between Mr. O'Krane, SES, and the other parties named in those actions. In total, 16 parties to those actions were released; Crowe MacKay was not listed as a party to the Release.

[49] The Release was executed effective July 31, 2016. O'Krane departed Sumas as president, director and shareholder as of that date. SES became the sole shareholder and its director, Saeed Javadi, became the president and sole director of Sumas.

[50] Sumas says O'Krane and Mr. Boyle did not disclose to SES or its counsel that O'Krane's personal counsel provided instructions to Crowe MacKay.

[51] In a letter dated February 1, 2016, Mr. Boyle wrote to counsel for SES:

It was not until January 8, 2016, over a month after your client was made aware of their retainer and during the audit (at that point well-advanced) that Mr. Javadi requested that the audit be halted. Upon making inquiries with the auditor, counsel for the Company advised that the audit was nearly complete such that Sumas's interests were better served by permitting Crowe MacKay to complete their work.

- [52] Sumas says the audit was not "nearly complete". The total invoices paid by Sumas at the time the defendant's work was suspended on February 1, 2016 was \$185,420. On January 8, 2016, \$92,137.50 in fees had been paid to the defendant; less than 50% of the costs eventually incurred.
- [53] On February 5, 2016, Mr. Boyle wrote to counsel for SES, stating: "our firm has not been involved with Crowe MacKay's engagement". Sumas says this was not true. They maintain that Mr. Boyle was involved in and provided instructions to the defendant with respect to both the Financial Statement Audit Contract (the document which authorized Crowe MacKay to audit the 2009-2015 financial statements of Sumas) and the Consulting Contract (a secondary contract which purported to replace the original contract).
- [54] SES says it was not aware of Mr. O'Krane, Mr. Boyle, and Mr. Wray's conduct at the time it signed the Release. SES did not discover that Mr. Boyle and Mr. Wray had provided instructions to Crowe MacKay until document discovery in this action.
- [55] Ultimately, while the court was provided with some examination for discovery material and various affidavits, the material is simply insufficient to resolve the identified disputes set out above for the purposes of ruling summarily on this matter.

The Nature of the Action

- [56] Beyond the contradictory and unclear nature of the evidence, much of which would likely be augmented by viva voce evidence, additional examinations for discovery, completed pleadings, and further document discovery, issues exist with regards to the nature of the action between Sumas and Crowe MacKay.
- [57] Sumas says its cause of action against Crowe MacKay arises out of the terms of the Financial Statement Audit Contract and the Consulting Contract. Sumas claims against Crowe MacKay for breach of contract, breach of fiduciary duties, breach of duty and standard of care, and negligence. Sumas further claims that the fees charged to it by the defendant were excessive.
- [58] Sumas points out that Crowe MacKay has not issued a third-party notice against O'Krane. Crowe MacKay says, however, if it is found liable to Sumas for any breach, it will claim against O'Krane for contribution and indemnity. This, Crowe MacKay argues, will engage the no claim-over clause of the Release.
- [59] From all of this, Sumas asserts that Crowe MacKay is, in essence, asking the court to summarily try a hypothetical third-party action without the third party or the related evidence being before the court. It seeks to do this concurrently as part of its application to summarily dismiss Sumas's action.
- [60] As the defendant with no current claim against Mr. O'Krane, Crowe MacKay has not set out a cause of action other than pleading that it relied on Mr. O'Krane's purported authority as president of Sumas.

- [61] The above evidence indicates that there may be debate as to what Crowe MacKay knew about the Shareholder Actions, what role the various counsel played at different points in time, particularly in regards to whether they were in fact representing certain parties or giving instructions, as well as what role the directors of Sumas played throughout all of this.
- [62] Fundamentally, however, the question of whether there is a claim over O'Krane is very much a live dispute that cannot be resolved in these proceedings. This is critical to Crowe MacKay's reliance on the Release.
- [63] A determination as to whether Mr. O'Krane had the appropriate authority from shareholders to appoint Crowe MacKay to conduct the audit, or whether his conduct was done in the best interest of Sumas or was in breach of Mr. O'Krane's fiduciary duties, is a triable issue not suitable for summary trial. As in *Journey's End Toronto Hotel Number One Partnership v. Murray Estate*, 2000 CanLII 22775 (ON SC), Sumas is faced with "attempting to prosecute its claim and being obligated to contend with a collateral matter that is not properly before the court, involving a non-party who was also not before the court" at para. 42.
- [64] For this and the reasons set out above, I conclude this matter is not suitable for summary trial. All these considerations will be for a judge at trial to determine.
- [65] The application of Sumas for summary judgement of its claim in a definitive amount appears to be in reaction to this application. Crowe MacKay's defence is that Mr. O'Krane authorized this contract on behalf of Sumas. This claim cannot be summarily determined and would not be appropriate for summary trial based on the jurisprudence cited by Sumas itself.
- [66] This application is therefore dismissed.
- [67] Costs will be in the cause.

The Honourable Madam Justice E. Burke

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