

CANADA / JUDGMENT

Tige Industries Ltd. v. 0763636 B.C. Ltd.

2020 BCSC 50

COURT

Supreme Court of British Columbia

DECIDED

15 January 2020

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2020 BCSC 50 Tige Industries Ltd. v. 0763636 B.C. Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Tige Industries Ltd. v. 0763636 B.C. Ltd.,

2020 BCSC 50

Date: 20200115

Docket: S123552

Registry: New Westminster

Between:

Tige Industries Ltd. and Lloyd McConnell

Plaintiffs

And

0763636 B.C. Ltd. and David Ferrigno

Defendants

Before: The Honourable Mr. Justice Crossin

Reasons for Judgment

Counsel for the Plaintiffs:

B. Carpenter

Counsel for the Defendants:

J.D. Maledy

Place and Date of Trial/Hearing:

New Westminster, B.C.

November 7, 2019

Place and Date of Judgment:

New Westminster, B.C.

January 15, 2020

- [1] This is an application brought by the plaintiffs in the action seeking to enforce an alleged settlement agreement entered into between the parties. The application is brought pursuant to Rule 14-1 and s. 8 of the Law and Equity Act, R.S.B.C. 1996, c. 253. The application also rests upon the inherent jurisdiction of the court to enforce a settlement agreement on a summary basis.
- [2] The plaintiffs seek orders as follows:
1. An order that the Defendants pay \$175,000.00 to Shambha Law in trust for the Plaintiffs forthwith.
 2. An order that this proceeding be dismissed following the payment of \$175,000.00 from the Defendants to Shambha Law in trust for the Plaintiffs.
 3. Special costs, or in the alternative, costs, for this application.
 4. Any other relief the Honourable Court deems appropriate.
- [3] The context of the application before the court is most efficiently provided by an appreciation of the unfolding of this litigation. This matter has been before the courts on many occasions.
- [4] The history of the litigation, at least up to August 2019, was fully and comprehensively addressed by this Court in *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2019 BCSC 1423. Madam Justice MacNaughton stated as follows:
- [4] Tige alleges that, in 2008, it performed the Services on the development lands so that 076 would be able to subdivide and develop the lands for residential housing.
- [5] It invoiced 076 for the Services. The first of Tige's invoices was paid; the next two, totalling just under \$1.1 million, were not.
- [6] On November 13, 2008, Tige filed a builders lien against title to the development lands (the "Lien"). On November 13, 2009, Tige filed the Lien Action along with a Certificate of Pending Litigation against the development lands (the "original CPL").

- [7] In the Promissory Note Action, Tige alleges that, for financing reasons and to facilitate the development of the lands, and at Ferrigno's request, it agreed to remove the original CPL in exchange for Ferrigno and 076 executing the promissory note.
- [8] McConnell says that he also agreed to put the lien action on hold. The copy of the promissory note in the record before me indicates that, at the time, there was a pending civil forfeiture action and a BC Hydro action against Tige and Mr. McConnell apparently arising from a grow operation which he was alleged to have been involved in. Ferrigno and 076 dispute the authenticity of the promissory note.
- [9] The promissory note provides:
- (a) A principal amount of \$1.1 million;
 - (b) The promissory note was repayable by 076 and Ferrigno within 180 days of Tige and McConnell providing written notice of demand for payment;
 - (c) The lien and the original CPL would be cancelled;
 - (d) The Lien Action would be "placed on hold"; and
 - (e) Ferrigno and 076 would not transfer title to the development lands without the consent of Tige and McConnell.
- [10] The agreement to put the Lien Action on hold, and that 076 and Ferrigno would not transfer the development lands, were to remain in place until the civil forfeiture and BC Hydro actions were resolved.
- [11] The lien and the original CPL were cancelled in accordance with the terms of the promissory note.
- [12] The development lands were subdivided in 2012. Since 2012, the development lands have been further subdivided in phases. A total of seven phases are planned.
- [13] On July 28, 2015, after the resolution of the civil forfeiture and B.C. Hydro actions, McConnell issued a demand to 076 and Ferrigno for payment under the promissory note.
- [14] On November 24, 2016, Tige and McConnell commenced the Promissory Note Action and a second CPL was registered against the development lands.
- [15] On November 9, 2017, 076 and Ferrigno applied to strike certain claims in the Promissory Note Action, particularly Tige's and McConnell's alternate claim of unjust enrichment, and, if successful, for an order cancelling the CPL registered against the development lands. Justice Fitzpatrick, in Reasons found at Tige Industries Ltd. v. 0763636 B.C. Ltd., 2017 BCSC 2218, refused to strike out the claims, but described the particulars of the claims as being "sparse". She permitted Tige and McConnell to amend their pleadings to more fully set out the alternate claim.

- [16] On February 7, 2019, Tige filed an amended notice of civil claim in the Lien Action, adding a claim for contractual interest of 24% per annum, and a claim in unjust enrichment covering the subdivided lands on the development lands. On February 7, 2019, the plaintiff filed further CPLs against the subdivided lands (the "Subdivided Lands CPLs").
- [17] On April 2, 2019, Tige and McConnell filed a further amended notice of civil claim in the Promissory Note Action. 076 and Ferrigno filed a further amended response to civil claim on April 23, 2019.
- [18] On May 30, 2019, the parties appeared before Justice Skolrood on a number of applications.
- [19] In the Lien Action, 076 applied to dismiss the claim for want of prosecution. Alternatively, 076 applied to have the Tige's claim for unjust enrichment struck on the basis that it was brought out of time. If successful, 076 also sought to have the Subdivided Lands CPLs discharged.
- [20] In the Promissory Note Action, 076 and Ferrigno applied to have the claim for breach of contract struck. The defendants denied signing the promissory note and argued, in the alternative, that the promissory note was for an illegal purpose, to hide an asset from the director of civil forfeiture and from B.C. Hydro, and, as a result, was unenforceable. 076 and Ferrigno also argued that the action to enforce the promissory note was frivolous, vexatious, and an abuse of process and that the unjust enrichment claim in the Promissory Note Action should be dismissed.
- [21] Justice Skolrood did not strike the Promissory Note Action. He determined that the circumstances leading to the execution of the promissory note were part of a complex series of interrelated dealings and that the issues surrounding its execution, and Tige and McConnell's claims thereunder, and the allegations of illegality, were unsuitable for summary determination.
- [22] In dealing with 076 and Ferrigno's alternative position that the unjust enrichment claim should be dismissed as out of time, Justice Skolrood referred to Justice Fitzpatrick's decision which determined that the unjust enrichment claim was properly framed in the alternative to the contract claim.
- [23] In his reasons, which can be found at *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2019 BCSC 1237, Justice Skolrood:
- (a) dismissed 076 and Ferrigno's application to strike the Promissory Note Action or to strike or dismiss the unjust enrichment claim, without prejudice to the right to raise the illegality defence at trial;
 - (b) dismissed 076 and Ferrigno's application to dismiss the Lien Action for want of prosecution, or to strike the unjust enrichment claim, without prejudice to the right to advance a limitation defence at trial;

- (c) dismissed 076 and Ferrigno's applications to cancel or discharge the CPLs in both the Promissory Note Action and the Lien Action; and
 - (d) ordered that the Promissory Note Action and the Lien Action were consolidated under the Lien Action.
- [5] The reasons for judgement of Justice Skolrood were issued July 29, 2019. That morning, counsel for the plaintiffs emailed counsel on behalf of the defendants to suggest working towards scheduling trial dates, as well as inviting the prospect of settlement discussions. In relation to trial scheduling, counsel on behalf of the defendants was suggesting a 30 - 60 day trial.
- [6] Later that same afternoon, counsel on behalf of the defendants responded by email and indicated, inter alia, that the defendants intended to bring an application to remove the CPLs. In addition, counsel advised that he would seek instructions concerning settlement.
- [7] Finally, at the end of the day on July 29, 2019, defendants' counsel, near the conclusion of a lengthy email mooting the merits of the proposed application to remove the CPLs, said this:
- "I have been instructed to increase the offer made by the defendants from \$50,000 to 100,000 in exchange from [sic] a complete release by the plaintiffs, directly or indirectly, for any claims arising to date the terms of which will be reasonably determined by the parties with reference to common business practice".
- [8] It is plain the defendants had previously made an offer during the litigation and this was an increase of that offer.
- [9] There is no evidence before me of any time limitation or conditions attached to this or any previous offer, and no evidence the offer of July 29 was withdrawn.
- [10] In any event, the plaintiffs brought the application to remove the CPLs on August 16, 2019. This application was dismissed by Madam Justice MacNaughton on August 22, 2019; as previously referenced.
- [11] On August 30, 2019, the defendants brought a second application to remove the CPLs, buttressed by additional evidence.
- [12] On September 3, 2019 the plaintiffs filed an application to amend the notice of civil claim. The application, broadly speaking, sought to expand the potential for liability, and increase the quantum of damages sought.
- [13] These applications were heard September 18, 2019. The plaintiffs' application to amend the pleadings was granted. The defendants' application did not complete and was rescheduled to continue on October 4, 2019.
- [14] Once more, at the end of the day on September 18, 2019, the defendants, through counsel, made yet another offer to settle as follows:

"I have received instructions to increase the defendants offer to settle to \$175,000 in exchange for a comprehensive release wherein Mr. McConnell (TIGE) and all of his associate companies releases any claim directly or indirectly as against the lands, Mr. Ferrigno, 076, Steel Properties, the services etc. as pled or at all."

- [15] Again, there is no evidence of any time limitations or constraints concerning the offer, nor any evidence of a response by the plaintiffs.
- [16] Prior to the resumption of the defendants' application on October 4, 2019, the plaintiffs filed another application to further amend the notice of civil claim. Once again, the further amendment sought to broaden the scope of liability and the potential for increased damages.
- [17] This second application was heard on October 4, 2019, along with the continuation of the defendants' application. The plaintiffs' application to further amend the notice of civil claim was allowed with costs payable to the defendants forthwith in any event of the cause. The decision concerning the defendants' application was adjourned to October 10, 2019 for the purpose of rendering judgment.
- [18] Prior to reconvening, the parties attempted to negotiate an agreement concerning the bill of costs in relation to the amendment application by email. There is no reference by either party concerning the outstanding offer to settle all matters.
- [19] The court delivered reasons for judgment on the morning of October 10, 2019 allowing the defendants' application and ordering removal of the CPLs contingent upon the deposit of certain security: see *Tige Industries Ltd. v. 0763636 B.C. Ltd.*, 2019 BCSC 1825.
- [20] Within minutes of the decision being delivered, counsel on behalf of the plaintiffs sent an email to defendants' counsel stating "we accept the offer below to settle this matter for \$175,000".
- [21] I conclude the reference to "the offer below" is the body of the email previously referenced containing the terms of the offer of September 18, 2019. It is this email of October 10, 2019 that, in the submission of the plaintiffs, concluded an agreement to resolve matters. It is this alleged settlement that the plaintiffs seek to enforce in the present application.
- [22] The defendants oppose the application. The defendants proffer a number of grounds in this regard.
- [23] First, the defendants argue there is an insufficient evidentiary basis to allow the application.
- [24] This point primarily rested on the submission that the evidence tendered by the plaintiffs did not conform with the evidentiary rules on these matters because it was contained in the affidavit of an assistant in the office of the plaintiffs. This issue was addressed by the refiling of the relevant material by way of the affidavit of counsel at the hearing of the matter. Ultimately, the issue was not pressed by counsel during the hearing.

- [25] Second, the defendants submit there was no consensus ad litem between the parties.
- [26] The defendants submit that the objective reasonable bystander would not find that the parties intended to contract as at October 10, 2019. Put another way, the circumstances were such that it would not be reasonable to conclude the September 18, 2019 offer remained in existence for the purpose of acceptance on October 10, 2019.
- [27] The relevant circumstances in this regard are submitted to be the following:
- a) In proceeding with the second amendment application on October 4, 2019 the plaintiffs effectively rejected the offer contained in the September 18, 2019 email.
 - b) The plaintiffs, in pursuing the second application to amend, materially changed the subject matter of the underlying action.
 - c) That the defendants had "moved on" from any previous offers as evidenced by seeking to resolve the issue of costs concerning the plaintiff's application determined on October 4, 2019.
 - d) Finally, the defendants submit that the application currently before the court does not specifically seek to include a form of release as referenced in the September 18, 2019 email. This omission, submit the defendants, demonstrates that the parties had "failed to come to a consensus on the essential terms."
- [28] The third point taken by the defendants is collateral to d) above: namely, the position that there has been repudiation of an essential term of the agreement and an acceptance of the repudiation by the defendants.
- [29] It is submitted the plaintiffs did not include in the application currently under consideration any specific relief relating to the release referenced in the September 18, 2019 offer. It is suggested by the defendants that the failure to include relief concerning the release amounted to the plaintiffs' repudiating the agreement.
- [30] The correspondence now before the court indicates that the defendants' counsel, upon receipt of the application from the plaintiffs, communicated that observation to the plaintiffs' counsel and declared his client was "accepting repudiation"; thereby, it is argued, bringing an end to the contract.

The Issue of Consensus Ad Litem

- [31] It is common ground the offer did not impose a time limitation for acceptance.
- [32] The parties agree the general principle of law to be applied in this case: an offer to settle a matter that has no time limitation for acceptance will only survive and be capable of acceptance for a reasonable time. What constitutes a reasonable time will be determined by the particular circumstances of any given case: see *Barrick v. Clark*, [1951] S.C.R. 177.

- [33] This is the test that has been followed in our courts for many years. Mr. Justice Fitch, as he then was, adopted the following submission in *The Owners, Strata Plan NW3174 v. Siddoo Kashmir Holdings Ltd.*, 2013 BCSC 509 at para. 41:
- [41] Counsel for the Strata notes that what constitutes a reasonable time depends on: (1) the nature and character of the subject matter; (2) the normal or usual course of business in negotiations; and (3) the circumstances of the offer including the conduct of the parties in the course of the negotiations: *Barrick Estate v. Clark*, [1951] S.C.R. 177.
- [34] In my view, the offer to settle communicated on September 18, 2019 remained open for acceptance on October 10, 2019 and was, in fact, accepted. The circumstances are not such that it can be reasonably said the offer had expired and was no longer capable of acceptance.
- [35] The offer was not subject to a time limitation, either expressly or by the implication of the words used in the offer.
- [36] The fact that the plaintiffs subsequently pursued the second amendment application did not "effectively" reject the offer, as submitted by the defendants.
- [37] The only reasonable inference from the material filed in this application is that there had been previous offers to settle proffered by the defendants during the course of the litigation. The fact that yet another step was taken in the litigation, in the face of yet another offer to settle by the defendants, would not have signalled, in the circumstances of this case, that the offer had been rejected by the plaintiffs; nor, in my view, would it have been reasonably viewed that way.
- [38] The defendants further submit that the fact the plaintiffs were successful in the second amendment application resulted in a material change to the underlying litigation. As a consequence, they submit it would be unreasonable to conclude the offer made prior to the granting of the second amendment application remained open for acceptance. I disagree.
- [39] There may be cases where subsequent changes in the factual or legal landscape of the particular case could produce unfairness or prejudice such that it would be unreasonable to conclude a previous offer remained open for acceptance. This is not one of those cases.
- [40] In the case at bar, the amendments had the effect of potentially increasing the exposure of the defendants to increased damages and costs. I do not discern a logical connection between that prospect, and assessing whether or not the offer could reasonably be said to be open for acceptance. Indeed, there was no submission by the defendants that the circumstances created any potential for prejudice or unfairness.

- [41] The defendants further submit, as I understand, that the discussion between counsel concerning the payment of costs regarding the second amendment application demonstrated that the defendants had "moved on". The defendants submit that these discussions implicitly conveyed a withdrawal of the September 18, 2019 offer. With respect, I do not find this persuasive.
- [42] A discussion relating to the costs issue of a discrete application does not, as a matter of logic or common sense, give rise to the inference that the defendants had withdrawn their former offer to settle the entire underlying action. Certainly there is no evidence before the court supporting this proposition. I can glean nothing in the jurisprudence that would support such a suggestion, either as a proposition standing alone, or in all the circumstances of the case at bar.
- [43] Finally, the defendants submit the fact the plaintiffs omitted to include in the application before the court the form of release contained in the offer, demonstrates the parties had failed to come to a consensus on the essential terms of the agreement.
- [44] Again, with respect, I am not with counsel on this point. In my view, the relief sought in the application does not give rise to the conclusion urged by the defendants. There is no evidence that I find compelling that the plaintiffs did not agree to enter into the required release and intend to abide by that agreement.
- [45] Indeed, unless agreed otherwise, the obligation to furnish a release once the essential term or terms are resolved, is an implied term of any settlement agreement. In my view, this omission in the pleading is of no moment. The release is an implied term of the agreement in any event.
- [46] In addition, I accept the advice of counsel on behalf of the plaintiffs that it was by mere inadvertence that the release was not specifically referenced in the application. In addition, plaintiffs' counsel points to seeking in the order "other relief the court deems appropriate" as including the release as a necessary aspect of the order enforcing the settlement as a whole.

The Issue of Repudiation

- [47] Finally, the defendants rely on the legal framework of repudiation.
- [48] As previously referenced, the defendants submit that the failure of the plaintiffs to specifically reference the provision of a release in this application, demonstrated that the parties had failed to come to an agreement on an essential term or terms. In what I gather to be an alternative submission, they further argue that these circumstance gave rise to the repudiation of the contract, which repudiation was accepted by the defendants, bringing the contract to an end.
- [49] The principles of repudiation were comprehensively articulated by Madam Justice Dickson speaking for the court in *Kuo v. Kuo*, 2017 BCCA 245 beginning at para. 37:

- [37] There is a strong public interest in favour of resolving lawsuits by agreement. As Abella J. observed in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 11, "[s]ettlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation". As a result, the policy of the courts is to promote settlement and to enforce settlement agreements: *Catanzaro v. Kellogg's Canada Inc.*, 2015 ONCA 779. This judicial policy contributes to the effective administration of justice: *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at 259, citing *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225 (Ont. H.C.).
- [38] When a dispute arises, the first question is whether the parties have agreed on all essential terms of the purported settlement: *Fieguth* at 70. The usual principles of contract formation apply. The court must analyse the evidence to determine whether, in all the circumstances, it is clear to the objective, reasonable bystander that the parties intended to contract, and whether the essential terms of that contract can be determined with a reasonable degree of certainty: *Lacroix v. Loewen*, 2010 BCCA 224 at paras. 35-36. If they have, unless otherwise agreed, an obligation to furnish a release is implied: *Fieguth* at 69-70.
- [39] After a settlement agreement has been reached, the next stage is its completion: *Fieguth* at 70. Unless the agreement is terminated, the parties must fulfill their obligations, express and implied. Termination by repudiation occurs when a party evinces an intention not to be bound by the agreement and the innocent party elects to accept the repudiation: *Guarantee Co. of North America v. Gordon Capital Corp.*, [1999] 3 S.C.R. 423 at para. 40. A fundamental breach of a primary obligation may also constitute a repudiation because it deprives the other party of substantially the whole mutually intended benefit of the agreement and thus amounts to a refusal to perform: *Mantar* at para. 11; *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2007 BCCA 88 at para. 109.
- [50] In addition, the issue of communication of a purported repudiation was also addressed in *Kuo*. Madam Justice Dickson went on to state as follows:
- [40] An intention not to be bound by an agreement may be evinced by words or conduct: *Guarantee Co.* at para. 40. Depending on the circumstances, this may include silence in response to a request for performance when and after the request is made. In some circumstances, a repudiation may be ongoing, which, unless the agreement is affirmed, provides the innocent party with a continuing right to accept it. However, regardless of how it manifests, the refusal to perform must be clear and unequivocal to amount to a repudiation: *Dosanjh v. Liang*, 2015 BCCA 18 at paras. 43-44; *Doman Forest Products* at paras. 108-109.
- [51] It is my conclusion, this argument cannot succeed for the same reason the defendants' earlier submissions cannot succeed. The omission simply did not, in my opinion, reasonably give rise to a conclusion the plaintiffs did not intend to be bound by agreement, including the proposed release contained in the offer; nor, in my view can it be said that a fundamental breach of the agreement occurred.

- [52] With the greatest of deference, the application of the principles of repudiation to these facts appears to me to be artificial in the extreme.
- [53] Finally, on the evidence before the court, it certainly cannot be said there was a clear and unequivocal refusal, by words or conduct, on the part of the plaintiffs, to not be bound by that aspect of the agreement that required a release.
- [54] Consequently, I find the offer of September 18, 2019 was accepted by the plaintiffs and the agreement was concluded. I find the agreement remains viable and enforceable.
- [55] I order that upon the plaintiffs executing a release in accordance with the offer of September 18, 2019, the defendants shall pay to counsel on behalf of the plaintiffs the amount of \$175,000 in full and final settlement of these matters. Finally the parties shall execute a consent dismissal order in relation to these proceedings.
- [56] The plaintiffs will be entitled to their costs of this application at Scale B.

"Mr. Justice Crossin"

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