Scenes from the “Sausage Factory”

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Rick Weiler (Weiler ADR Inc.)

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The recently released decision in L-Jalco Holdings Inc. v. Lawrynowicz & Associates, 2018 ONSC 4002 (CanLII) will be of great interest to mediators, lawyers and clients alike. The case offers a rare glimpse inside the “sausage factory” that is commercial mediation and highlights mediator persistence and creativity in reaching a settlement of a complex commercial matter. The case also reviews and applies the factors to be considered when a Court is asked to enforce a settlement

agreement.

First, the background. The plaintiffs commenced four separate actions in negligence, breach of fiduciary duty and contract against their former solicitors and certain appraisers for damages arising from a mortgage transaction. All parties in all of the actions agreed to a full day mediation of all of the actions before Michael Silver (a well known and highly experienced commercial mediator based in Toronto Ontario) to be held October 14, 2016.

The mediation proceeded with all parties in attendance and represented by counsel, except for a Mr. Cavanaugh, a named defendant in one of the actions. The discussions were lengthy and hard-fought on all sides. Apparently, near the end of the mediation, as the parties were closing in on an agreed settlement amount of CAN$750,000 to be paid in agreed proportions by the various defendants, Mr. Cavanaugh made it known that there may be an impediment to his paying his share – $50,000 – as he had concerns about negative tax implications to doing so. There were further discussions about what to do to deal with that eventuality and the mediator proposed several alternatives which were ultimately memorialized in the Minutes of Settlement. The Minutes of Settlement were executed that evening after all parties had full opportunity to read them and obtain their counsel's advice.

Here we have to pause for a tip the hat to Mr. Silver for both his persistence in prodding the parties and their counsel towards settlement and for his creativity in being the one to propose the various if an adverse tax opinion upset the original deal.

The settlement, as agreed to, provided that if Mr. Cavanaugh obtained a opinion that he would experience negative tax consequences as a result of paying his $50,000 then the parties had the following options:
1. The plaintiffs could declare the settlement was null and void;
2. If they didn't exercise that option the plaintiffs could accept $700,00 from the defendants other than Mr. Cavanagh and proceed with their action against him alone; or
3. The other defendants could elect to pay the full settlement amount of $750,000 to the plaintiffs (and presumably take an assignment of the claim against Mr. Cavanagh, although this is not explicitly stated in the decision).

Mr. Cavanaugh did obtain the negative tax opinion and the plaintiffs did not

terminate the settlement when they learned of this. Discussions ensued as to which of the other two options would be pursued although it is clear that the plaintiffs were developing "settlement remorse" and, in fact, subsequently fired their lawyer. The mediator stayed very much involved in these subsequent discussions.

The remaining defendants ultimately advised the plaintiffs' new lawyer that they would proceed to pay $750,000 and finalize the settlement but, by then, the plaintiffs had had enough and took the position that the settlement was void and that the litigation would proceed.

The paying defendants then brought this motion before Madam Justice Carole Brown seeking an Order enforcing the settlement agreement reached at mediation.

Justice Brown provides a useful summary of the law in Ontario relating to the enforceability of settlement agreements:

"**The Law**

[33] Pursuant to Rule 49.09 of the Rules of Civil Procedure, where a party to an accepted offer to settle fails to comply with the terms of the offer, the other party may make a motion to a judge for judgment in the terms of the accepted offer, and the judge may grant judgment accordingly.

[34] A settlement agreement is enforceable as a contract, and the rules of contractual interpretation apply: *Dofasco Inc. v National Steel Car Limited*, 2012 ONSC 6434 (CanLII). A settlement agreement among parties should be enforced unless the court is satisfied that, in all of the circumstances, there is a real risk of a clear injustice: *Hilco Industrial Acquisition Canada ULC v Engreen Maitland Inc*., [2016] O. J. No. 3097.

[35] As to the existence of a settlement, the following factors are to be considered: (i) mutual intention to create a legally binding relationship; and (ii) an agreement on all of the essential terms of the settlement: *Tondera v Vukadinovic* [2015] O.J. No. 5158.

[36] Where there is a mutual intention to create a legally binding relationship, the parties agree on all essential terms and make reference to finalizing mutually acceptable settlement documents, the contract is binding: *Fehrman v Goodlife Fitness Centres Inc*., [2017] O.J. No. 3731.

[37] A written agreement to settle is to be measured by an objective reading of the language used by the parties to reflect their agreement. Courts should not

be “too quick to find an ambiguity or lack of agreement in the terms of a settlement agreement”: Fehrman v Goodlife Fitness Centres Inc., supra.

[38] Following determination by the court of the existence of a settlement, the court must determine whether to exercise its discretion to enforce the settlement. The factors to be considered by the Court are as follows:1. Whether the offer was clear and unequivocal;2. Whether or not a mistake was made;3. Whether the settlement was reasonable;4. The degree of prejudice to either party if settlement is not given effect; and5. The effect of the settlement on third parties if the settlement is not enforced.See: *Marcel Equipment Ltd. v Equipements Beniot D’Amour et Fils Inc*., [1995] O. J. No. 673.

[39] The discretion to refuse to enforce the settlement should be “rarely exercised”: In litigation matters, where properly retained solicitors enter into settlements and where there are no known limitations of authority, these settlements ought to be binding upon the parties. It is the policy of the court and it is public policy to encourage the settlement of actions. Where solicitors have entered into settlement agreements on behalf of their clients, it would be contrary to both court and public policy to foster secondary litigation to overturn those settlements.See: *Homewood v Ahmed*, [2003] O. J. No. 4677 para 57

[40] The court, in deciding whether the settlement should be enforced, will consider whether the parties’ pre-settlement positions remained intact, whether there would be prejudice to the party seeking to enforce the settlement if the settlement were not enforced, the extent of the prejudice to the party seeking to resist the settlement if the settlement were enforced, and whether third parties would be affected if the settlement were not enforced: *Hilco Industrial Acquisition Canada ULC v Engreen Maitland Inc.*, supra.”

In applying this law to the facts of this case Justice Brown had little difficulty in finding that the Minutes of Settlement were enforceable.

Those reading the decision to the end will be surprised, as I was, to see the cost endorsement: “[56] The parties provided their bills of costs. I am satisfied, in all of the circumstances, that the ***plaintiffs*** (emphasis added) are entitled to their costs of this action in the amount of $34,707.17.”

In Ontario costs follow the result. As the defendants had been wholly successful how could the plaintiffs be entitled to costs? A check with one of the counsel involved in the matter confirmed that this was an error and a correction is being issued.

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