Kluwer Mediation Blog

Ontario Court Enforces Settlement Agreement

Rick Weiler (Weiler ADR Inc.) · Tuesday, November 6th, 2018

Let me climb off my usual soap box this month and focus on more mundane matters primarily of interest to mediators (and lawyers) in my jurisdiction. A recent decision of the Ontario Superior Court illuminates the approach a judge will take when a party calls into question the enforceability of their settlement agreement. Generally, the Courts will have little patience with the phenomenon known as "settler's remorse".

In 455 Gordon Baker Holdings Limited et al. v. Toronto Transit Commission, 2018, 2018 ONSC 5989 (CanLII) the impugned settlement agreement was actually arrived at following two mediations before highly respected Toronto mediator George Adams.

The factual background is succinctly set out in the decision:

> [8] After the dispute arose between them, the parties conducted two mediations before George Adams which did not resolve the matter. However, immediately after the second mediation on November 30, 2017, plaintiffs' counsel sent an email to defendant's

counsel at 1:43 PM saying:

> "Will call you shortly….got our guys to go to X … hope that works."

The reference to X reflects a settlement amount that was redacted in the materials available to me.

[9] Defence counsel replied as follows at 3:01 PM:

"TTC agrees. Terms are as follows:

> 1) subject to TTC Board approval, TTC will pay the plaintiffs the sum of $X inclusive of all costs, interest, taxes, etc.;
>
> 2) dismissal of the claim and counterclaim on consent on a without costs basis;
>
> 3) mutual full and final releases to be exchanged in a form acceptable to counsel;
>
> 4) TTC General Counsel will recommend settlement of the action to the TTC Board on the above basis, and the offer will be presented for Board approval at either the December 11, 2017 Board meeting or a Board meeting in January 2018.
>
> 5) Terms of settlement to be confidential as between the parties.
>
> Please confirm. Thanks"

[10] Plaintiffs' counsel responded at 3:56 PM saying:

> "Thanks Pat we confirm we are settled as per below…"

The reference to "as per below" in the email of 3:56 PM referred to the terms that were set out in the emails of 3:01 and 1:43.

[11] On the face of these emails, the business concept appears to have envisaged that the settlement amount include HST. By December 5, 2017, however, plaintiffs' counsel appears to have become aware of an issue concerning the settlement. Late that day he emailed defence counsel asking whether they could discuss the settlement the following day.

[12] Counsel spoke on December 6, 2017. Their recollections of the conversation are substantially similar. During the course of that conversation, plaintiffs' counsel advised that, "it was the Plaintiffs' understanding and position that the settlement sum" did not include HST. The plaintiffs have not explained how they came to that "understanding and position" in light of the emails between counsel.

The first task was for the Court to determine whether or not there was a binding settlement. This issue turned on whether the defendant's email of 3:01 is a ***conditional acceptance*** of the plaintiff's earlier email (which would not have created a settlement binding on the plaintiff) or whether the defendant's 3:01 email was a ***new conditional offer*** subsequently accepted by plaintiff at 3:56 (which would be binding on the plaintiff). Here the Court opted for the second interpretation and found there was a binding settlement.

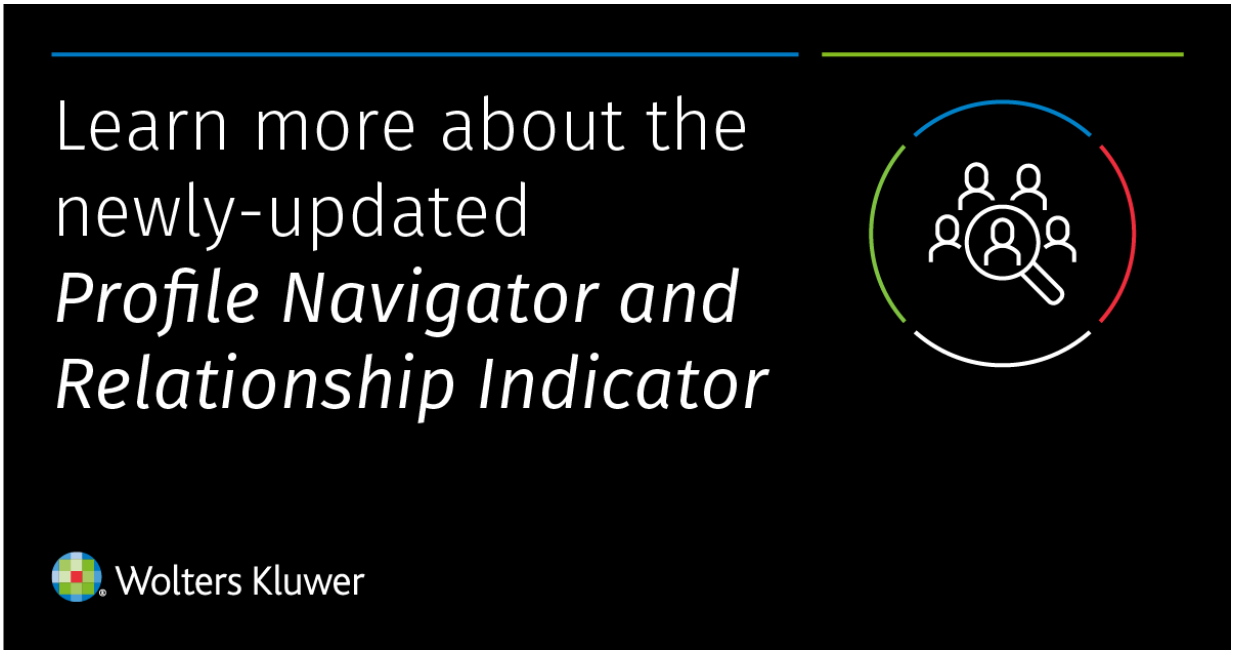
But that's not the end of the matter since the plaintiff argued that if there was a binding agreement then the Court should decline to enforce that settlement. Ontario Courts have occasionally taken that step when, for example,

> "…the evidence concerning the respondent's state of mind and condition at the time of the settlement, the truncated and brief nature of the mediation and the respondent's alleged lack of understanding about what was agreed upon at the mediation, as well as the consequences of the settlement" (at para. 4 of Srebot v. Srebot Farms Ltd., 2013 ONCA 84 (CanLII)).

Here, though, there was no such evidence before the Court. In another case, Milios v. Zagas, 1998 CanLII 7119 (ON CA), the Court of Appeal declined to enforce the settlement because there was uncontradicted evidence that the plaintiff was ***fundamentally mistaken*** about the settlement terms that he had agreed to. Evidence of the mistaken belief and how it came about was set out in ***considerable detail***. Again, no such evidence of "fundamental mistake" here.

In ordering the terms of the settlement agreement be enforced the Court noted, "Courts have a justified policy of encouraging settlement by enforcing settlement agreements: ***Olivieri v. Sherman*** 2007 ONCA 491 (CanLII), [2007] O.J. No. 2598 (C. A.)"

This, of course, is good news for the mediation process in Ontario. Only once in more than 4,000 mediations I've conducted has a settling party attempted to resile from the settlement agreement (Lynne Boulanger v. The Great-West Life Assurance Company, 2010 ONSC 451 (CanLII)). In that case, as here, the Court upheld the settlement. Still, mediators need to be mindful of the requirements for a binding settlement agreement as well as the circumstances in which a Court might find that settlement agreement unenforceable. Mediators are concerned about the durability of agreements reached in mediation and will want to do their utmost to ensure that settlements will be enforceable.



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