IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Smith v. SaNOtize Research and Development Corp.*, 2024 BCSC 1034

Date: 20240617
Docket: S236116
Registry: Vancouver

Between:

Trent Leroy Smith

Plaintiff

And:

SaNOtize Research and Development Corp., Gilly Regev, Tirta Liu, Bank Communications Ltd. and Chris Miller

Defendants

Before: The Honourable Justice K. Loo

Reasons for Judgment Re: Costs

Not appearing:	T.L. Smith
Counsel for the Defendants:	N.T. Hooge M.K. Shergill
Written submissions:	April 11, 2024 (defendants)
Place and Date of Judgment:	Vancouver, B.C. June 17, 2024

Table of Contents

Introduction

[1] I pronounced reasons for judgment in this matter on March 6, 2023, indexed at 2024 BCSC 386 (the “Reasons”).

[2] Following my issuance of the Reasons, the defendants sought and I granted leave to the parties to make written submissions as to costs. Written submissions were received from the defendants but none was received from the plaintiff, despite the deadline for submissions being significantly extended at his request.

[3] The underlying proceeding involved a dispute between the plaintiff, Trent Smith, who is a former director of a now-dissolved corporation, Bovicor Pharmatech Inc. and some of the other former directors of Bovicor. Those other former directors are now shareholders, directors and officers of SaNOtize Research and Development Corp.

[4] Broadly speaking, the plaintiff alleged that the personal defendants took intellectual property and corporate opportunities from him, or from Bovicor, for use in SaNOtize. He alleged that the defendants excluded him when they did this, and in doing so, the defendants breached duties owed to him as a shareholder and director of Bovicor.

[5] The defendants argued that Mr. Smith’s claims are statute-barred by the *Limitation Act*, S.B.C. 2012, c. 13, and by a settlement agreement and consent dismissal order entered into among Bovicor, the personal defendants and Mr. Smith in 2017 (the “Settlement Agreement”). They also took the position that the plaintiff’s claims were bound to fail and did not raise any triable issues.

[6] In the Reasons, I dismissed most of the plaintiff’s claims as being statute-barred under the *Limitation Act* and struck out and dismissed all of his claims as being barred by the Settlement Agreement. I held that I was unable to dismiss the plaintiff’s claims on the basis that they were bound to fail (except in relation to limitation issues).

Issue

[7] The sole issue on this application is whether the defendants are entitled to indemnity costs on the basis of a provision in the Settlement Agreement.

Discussion

[8] The defendants rely on s. 18 of the Settlement Agreement which provides:

> Smith and Daorui [sic] shall jointly and severally indemnify and hold harmless Bovicor and its Affiliates and their respective officers, directors, employees, contractors, representatives and agents from and against any and all liabilities (including actual legal costs assessed at 100% of special costs and disbursements) based upon, arising out of, or resulting from any breach by the Parties in their performance of the Agreement.

[9] Further, s. 4 of the Settlement Agreement contains the release provided by Mr. Smith and his company DaoRui:

> Each of Mr. Smith and DaoRui, hereby release, discharge and forever hold harmless Bovicor, its parent companies, subsidiaries, related companies and any predecessors, successors, related and affiliated entities, assigns, officers, directors, shareholders, employees, contractors, insurers, partners, investors, and agents and each of their respective predecessors, successors and assigns (collectively, the "Releasees"), from any and all manner of actions, causes of action, suits, debts, damages, covenants, contracts, costs, expenses, compensation, demands, losses and claims whatsoever, whether at common law, in equity, or under any legislation from time to time in force in any jurisdiction which the Releasees operate including but not limited to British Columbia, Alberta and the United States of America, known or unknown, and, without limiting the generality of the foregoing, for damages or loss sustained by DaoRui or Mr. Smith by reason of, or in any way arising out of the matters that were raised or could have been raised in the Action …

[10] The defendants submit that they are entitled to indemnity costs under s. 18 because "Mr. Smith has breached the Settlement Agreement by filing and pursuing this proceeding, which the Court has found to be covered by the terms of the Release and barred by the Settlement Agreement".

[11] Mr. Smith appeared without counsel at the hearing and, as indicated above, has not responded to this application for costs. In his absence, I have considered whether there are any valid arguments that s. 18 is inapplicable or does not have the effect that the defendants submit that it does.

[12] I note that in their notice of application, the defendants quote from the release provision in the Settlement Agreement, then assert that the "plaintiff's commencement of this proceeding is a direct violation of this clause".

[13] However, insofar as I can see, there is no provision in the Settlement Agreement expressly stating that the filing or pursuit of an action for claims that fall within the release in s. 4 is a breach of the Settlement Agreement. As indicated above, Section 18 provides an indemnity for costs, including legal costs, "based upon, arising out of, or resulting from *any breach by the Parties in their performance of the Agreement*".

[14] In these circumstances, it is necessary to consider whether the parties intended the indemnity provision in s. 18 to apply to circumstances such as this, wherein the plaintiff has advanced an action for claims that have already been released.

[15] A resolution of this issue requires a consideration of the principles of contractual interpretation. In *Trevali Mining Corp. (Re)*, 2023 BCSC 1943 at para. 39, Justice Fitzpatrick set out a helpful summary of those principles, including the following:

a) The goal of contract interpretation is to ascertain the objective intentions of the parties at the time of formation of the contract.

b) The contract must be read as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances.

c) The exercise of contractual interpretation begins with a reading of the actual words used by the parties and a legitimate interpretation will be consistent with the language that the parties employed to express their agreement. A meaning that strays too far from the actual words fails to give effect to the way in which the parties chose to define their obligations.

d) The meaning of words is often derived from a number of contextual factors, including the purpose of the agreement and the nature of the relationship created by the agreement. An interpretation that ignores context in which the contract was formed will not accurately discern what the parties intended to achieve, even if the interpretation is "literally correct".

[16] Applying these principles and reading the Settlement Agreement as a whole, I have concluded that the parties did intend for the indemnity provision to apply if an action is advanced for claims already released.

[17] The context of the Settlement Agreement was, of course, a settlement of all of the claims between the parties. Given that one of the primary benefits received by the defendants under the Settlement Agreement was the release in s. 4 and the fact that they could no longer be sued by the plaintiff in relation to the events giving rise to the claim, it would not make commercial sense to apply the indemnity provision to proceedings enforcing other terms of the Settlement Term but not the release.

[18] In my view, the objective intention of the parties at the time of the formation of the contract was that the indemnity provision would apply if the plaintiff were to sue for released claims. In other words, bringing an action for claims released by s. 4 would be a breach of the Settlement Agreement under s. 18.

[19] In light of the foregoing, it is my view that the plaintiffs' contractual right to costs in s. 18 should be enforced. In *Kittirath v. Doan*, 2009 BCSC 702 at para. 37, this Court held that where parties have expressly agreed in writing for one to pay the other's solicitor-client costs, the court will enforce that term, absent special circumstances. On this issue, see also *Freshslice Properties Ltd. v. RTM Holdings Ltd.*, 2013 BCSC 135 [*Freshslice*].

[20] Special circumstances have been held to include situations involving fraudulent conduct, abuse of process, or gross misconduct in the commencement

and/or conduct of the litigation: *Kittirath* at para. 39. None of these is found in the case at bar.

Conclusion

[21] For all of these reasons, I have concluded that the defendants are entitled to costs pursuant to s. 18 of the Settlement Agreement.

[22] The appropriate costs order in these circumstances is the one made in *Freshslice* at para. 124 and in *0923063 B.C. Ltd. v. JM Food Services Ltd*., 2019 BCSC 553 at para 110:

> I direct the Registrar of the Supreme Court to conduct an assessment under Rule 18-1(1) of the *Supreme Court Civil Rules* to determine the amounts recoverable by the defendants under the Settlement Agreement for reasonable legal fees and expenses, as costs of the action, in accordance with these reasons and the Reasons at 2024 BCSC 386. I direct that the Registrar certify the result of the assessment pursuant to Rule 18-1(2).

"The Honourable Justice Loo"