SUPREME COURT OF NOVA SCOTIA

Citation: *Whynot v. Blue Cross Life Insurance Company of Canada*, 2023 NSSC 270

Date: 20230808
Docket: *Bridgewater*, No. 497638
Registry: Halifax

Between:

Wendy Lee Whynot

Plaintiff

v.

Blue Cross Life Insurance Company of Canada

Defendant

Judge: The Honourable Justice Diane Rowe

Heard: May 2, 2023, in Halifax, Nova Scotia

Oral Decision: July 28, 2023

Counsel: Angus Smith, for the Plaintiff
Ian Dunbar, for the Defendant

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By the Court, orally:

Background

[1] This is a motion by the Defendant, Blue Cross Insurance Company ("Blue Cross") to enforce settlement pursuant to *Nova Scotia Civil Procedure Rule* 10.04(1) (the "*Rules*") . Blue Cross is seeking the Court's order on the basis that its counsel and counsel for the Plaintiff, Wendy Lee Whynot ("Whynot") achieved a settlement agreement, by way of exchanged correspondence. Blue Cross seeks that the Court order the matter is settled, confirm the terms of the settlement, and leave the parties to agree on the costs of the action and the motion or else have the issue of costs proceed to an assessment pursuant to the *Rules*.

[2] Whynot contends that there is no agreement between the parties. It submits that no full and final agreement was formed through the exchange of correspondences, but rather a partial settlement. Further, it pleads that as the purported agreement does not address the issues of punitive damages and damages for mental distress, as well as solicitor-client costs and the execution of a release, that it is deficient and this motion must fail. It seeks dismissal of the motion, and that the civil jury trial scheduled for September 2023 take place to determine these issues.

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Issue

[3] Was there an enforceable settlement of the entire action reached between the parties, or only a partial settlement?

Law

[4] Settlement agreements are ordinary contracts (as per *Langthorne v. Humphreys*, 2011 NSSC 44 at para 24), to which the law of contract applies.

[5] Justice Wright, in *Certified Design Consulting Inc v. Alex Lane Properties Inc.*, 2015 NSSC 367, found that negotiations held over the course of weeks via email between the parties had resulted in a binding settlement agreement, despite the subsequent refusal of counsel for the defendant to finalize the terms of the mutual release and consent dismissal order. He summarized four legal principles in assessing whether a settlement agreement had been concluded at paras 30-34 as follows:

> [30] There are four related legal principles to be applied in the disposition of this case which can be summarized as follows:
>
> > 1. To be enforceable, there must be agreement between the parties as to all essential terms. The determination of what terms are essential, however, varies with the nature of the transaction and the context in which the agreement is made.
> >
> > 2. One party's subjective intent has no independent place in this interpretative exercise. Rather, the determination of whether all essential terms of the agreement have been reached is to be assessed from the

> perspective of an objective, reasonable bystander in light of all the material facts.
>
> 3. Where the agreement calls for the execution of a further document, the question is whether the further documentation is a condition of there being an agreement, or whether it is simply an indication of the manner in which the agreement already made will be implemented.
>
> 4. In appropriate cases, the essential terms do not all have to be expressed; they may have to be implied in order to give effect to the agreement reached.

> [31] The articulation of these legal principles can be found collectively in the decisions of the Nova Scotia Court of Appeal in *United Gulf Developments Ltd. v. Iskandar,* 2008 NSCA 71, *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co. Ltd.et al.*, 2000 NSCA 95 and *Sinanan v. Woodyer*, 1999 NSCA 74 (CanLII), [1999] N.S.J. No. 166.
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> [32] Significantly, the offer to settle that was ultimately made on September 14th came from ALP. The terms of the offer were simple, namely, that both parties would end their contractual relationship and go their separate ways on the condition that the lien and the lawsuit be removed, with ALP taking over the responsibility for the cabinetry contract with the sub trade. No monies were to change hands otherwise.
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> [33] In his cross-examination, Mr. LaFramboise maintained that any settlement was to be subject to the review and approval of his lawyer as a condition precedent. He also testified that by saying in the offer that both parties would part their separate ways, he intended that to mean parting ways only in respect of existing deficiencies then known to the parties "but not if I found something else". He further testified that he did not intend his offer to preclude the possibility of making further claims against third parties in any way.
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> [34] As articulated by the Nova Scotia Court of Appeal in *United Gulf Developments* (at para. 82), the court must determine "from the perspective of an objective, reasonable bystander, in light of all the material facts, whether the parties intended to contract and whether the essential terms of that contract could be determined with a reasonable degree of certainty". The court went on to say that evidence of one party's subjective intent has no independent place in this interpretative exercise. [emphasis added]

[6] *United Gulf, supra*, also indicates at para 82 that "… While evidence of one party's subjective intent has no independent place in this interpretative exercise, it has long been settled that whether the legal effect of a document is conditional on

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future agreements must be decided having regard, not only to the terms of the document, but to the “genesis and aims of the transaction.”: **Hillas & Co., Ltd. v. Arcos, Ltd.**, [1932] All E.R. Rep. 494 (H.L.) per Lord Wright at 502; **Canada Square Corp. v. Services Ltd.** (1982), 34 O.R. (2d) 250 at 258.” [emphasis added].

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[7] Further, in *Certified Design, supra* at para 41, Justice Wright noted that:

> [41] It was recognized by the Nova Scotia Court of Appeal in *Sinanan* (at para. 47) that there are appropriate cases where the court must imply a term to a contract in order to give effect to it. On the subject of releases, the Court of Appeal cited with approval (at para. 38) the following passage from *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.* [1995] O.J. No. 721:
>
>> It is well established that settlement implies a promise to furnish a release unless there is agreement to the contrary. On the other hand, no party is bound to execute a complex or unusual form of release: although implicit in the settlement, the terms of the release must reflect the agreement reached by the parties. This principle accords with common sense and normal business practice.

Findings of Fact with Analysis

[8] The action concerns Whynot’s claim for long term disability benefits under an insurance policy held with Blue Cross.

[9] The litigation was longstanding. The correspondences exchanged between counsel were provided to the Court in the affidavits filed in support of the motion filed by both of Blue Cross’ counsel, Mr. Ian Dunbar, dated April 17, 2023, and Mr. Robert Mroz, dated April 17, 2023, as well as the affidavit of Whynot’s

counsel, Mr. Angus Smith, April 19, 2023 in response. None of the affiants were cross examined on the contents of the affidavits, and with the exception of one sentence in Mr. Smith's affidavit at paragraph 5 that was struck at the outset of the hearing, the affidavits were accepted by the Court and form the basis for the evidentiary findings set out.

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[10] The entirety of the exchange between counsel is relevant, as per *Piper v Piper*, 2018 NSCA 53.

[11] On February 5, 2021, Whynot presented an "opening settlement offer" sent by email. This opening offer contained a table, with arrears calculations of $26,800.00 and a net present value of the LTD policy of $331,691.10 based on a 2.5% discount rate. Whynot offered to settle the proceeding as follows "The offer to settle is the all-inclusive amount of $300,000."

[12] A Date Assignment Conference was held in June 2021, with dates set for a civil jury trial in late 2023, and a joint settlement conference ("JSC") was set down for May 2, 2022. Disclosure by Whynot was requested by Blue Cross, in advance of the JSC, with some disclosure occurring. Blue Cross's counsel, Mr. Dunbar, advised Whynot's counsel, Mr. Smith, that it was requesting the May 2, 2022 JSC

to be adjourned as it intended to make an offer toward settlement outside of the JSC process when it obtained the outstanding requested materials.

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[13] The JSC was adjourned to November 2022. On September 23, 2022, Mr. Dunbar contacted Mr. Smith with an enquiry on the outstanding document disclosure. In the email, Mr. Dunbar expressed concern to Mr. Smith that the November JSC may not be achieved without disclosure occurring in advance. On the same date, a response from Mr. Smith's legal assistant was sent providing a folder with documents, however the documents were unresponsive to the request for records made by Blue Cross in April 2022.

[14] On October 26, 2022, Mr. Smith provided some additional information that Blue Cross had requested.

[15] Two days after, on October 28, 2022, Mr. Dunbar then wrote to Mr. Smith via email to confirm that Blue Cross would not participate in the November JSC, as Blue Cross sought to resolve the matter between counsel (Exhibit "N" of Dunbar Affidavit). In that email, as a counteroffer to Smith's February 5, 2021 offer, Mr. Dunbar wrote "My instructions are to advance an initial all-inclusive offer of $75,000.00 to resolve this claim." The counteroffer included arrears of $25,711.08 net of CPP and CERB payments; two years of future benefits, based on

a monthly benefit of $1885.62; and a contribution toward costs and disbursements of $5000.00.

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[16] In exchange for this, Blue Cross indicated the proceeding would be dismissed on a without costs basis, the Plaintiff would execute a release and the Plaintiff would surrender the policy, per Mr. Dunbar's follow up email sent the same day as the counteroffer, and then he wrote "… but assume it would be understood that if the offer is accepted we would require…" these related actions as it was "… in the usual course".

[17] On November 1, 2022, Mr. Smith indicated he would seek instructions before responding. There was no further response, so Mr. Dunbar followed up with another contact on December 9, 2022.

[18] As there was still no additional response, Mr. Dunbar then emailed Mr. Smith on January 18, 2023 with correspondence that included some of the following statements:

> ….. We had assumed that the file would be able to be settled between counsel as an alternative to the JSC given the new medical evidence. … My instructions at this point are to offer two options for settlement. The first is a reinstatement of benefits, payment of arrears and tariff costs, in exchange for a release (non-surrender) and dismissal order. In the alternative, my client remains open to negotiating a lump sum settlement and our offer of $75,000 all- inclusive in exchange for a release (full surrender) and dismissal remains on the table. ….. (Dunbar Exh R)

[19] On January 19, 2023, Mr. Smith sent an email to Mr. Dunbar and indicated the attached letter was "…. Our settlement position for Wendy Whynot's claim." Mr. Smith wrote that:

> The Plaintiff demands reinstatement of her LTD benefits. Alternatively, the Plaintiff would accept a lump sum settlement of $300,000.
>
> ….
>
> Blue Cross faces significant risk in proceeding to trial in September. If the Plaintiff's benefits are reinstated at trial we expect they will be. The Defendant faces significant exposure for mental distress damages, punitive damages and legal costs. …
>
> Finally, if the Plaintiff is successful at trial we will seeks costs on a solicitor client basis…

[20] The letter concludes with:

> <u>Offer</u>
>
> The Plaintiff seek reinstatement of her long-term disability benefits which have been unreasonably denied.
>
> Alternatively, the Plaintiff is wiling to settle her claim including extra contractual damages, legal costs and disbursements for $300,000.

[21] In response, Mr. Dunbar wrote on the same day that Blue Cross accepted Whynot's offer to resolve the proceeding based on a reinstatement (as a commencement) of the LTD benefits and to pay the outstanding arrears, writing that "… we accept your client's offer of this morning to resolve this matter based on a reinstatement of benefits". As he also wrote "… My client will pay arrears up to the date that benefits begin. As it is not specified in your letter, costs will be payable on the settlement tariff scale. …. I have asked my client to provide an up-

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to-date arrears calculation. Once I have that I will let you know. Based on that we can identify the applicable amount of costs, and proceed to exchange closing documents…"

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[22] Mr. Smith replied with:

> Thank you Ian, I will let Wendy know.
> Please send me the details of the arrears to date.
> Thank you and have a good weekend.

[23] Mr. Dunbar then sent the calculation on January 24, 2023, and a net amount of $30,551.88 for arrears. One week later, on February 1, 2023, Mr. Smith requested a cheque for the LTD arrears in this amount, but then raised new issues, indicating that reinstatement would not settle the entire claim, but that there was only a partial settlement. Smith wrote that he was seeking "… solicitor/client costs and punitive damages so we will need to proceed to trial in the fall…" and further that he was seeking 5% interest on the past benefits plus payment of disbursements in full. He also noted "As a procedural matter I intend to amend the pleadings to reflect the reinstatement…"

[24] Mr. Dunbar replied with surprise, indicating Blue Cross' intent to move to enforce settlement, if required.

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[25] Mr. Smith did receive and cash the arrears cheque in the amount sent by Blue Cross. He also provided banking information for Ms. Whynot, with her benefits reinstated in the amount indicated by Blue Cross. He did, however, refuse payment of costs in accordance with Tariff F of the *Rules*, with no release of the action forthcoming.

[26] On a plain reading of the entirety of the exchanges, read contextually, there was initially an offer by the Plaintiff Whynot in February 2021 for an "all inclusive settlement" of $300,000.00, representative of the calculations of the value of the policy and costs.

[27] There was then a clearly articulated counteroffer by Blue Cross in October 2022, after its receipt and review of documents as requested of Whynot, of a lump sum, that was representative of past arrears, two years benefits and an amount for costs. This counteroffer by Blue Cross also sets out clearly the terms for settlement as well as reference to costs and the execution of further related documentation indicating settlement "…in the normal course".

[28] When Mr. Dunbar received Mr. Smith's "offer" of January 19, 2023, after two prompts to receive a response to Blue Cross' counteroffer, there were two options put forward by Mr Smith: reinstatement of Whynot's long term disability

benefits, and alternatively (with the word "alternatively" reiterated twice in this correspondence) a lump sum settlement of $300,000.00.

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[29] Blue Cross accepted the option of reinstating Ms. Whynot's long term disability benefits, inclusive of arrears, which was characterized as benefits due to her since the denial of coverage. A calculation was concluded, with an amount representing that amount sent to Whynot's counsel. Payments were reinstated. This consideration was accepted by Whynot.

[30] On a review of the circumstances, as it gives some insight to the intent to contract, there had been two JSCs scheduled and adjourned with counsel understanding that a resolution might be possible outside of the court process, while still being mindful that a civil jury trial was set down and that there would be related procedural steps required to meet the requirements of the *Civil Procedure Rules* in advance of trial. The risk of exposure to damages for mental distress, punitive damages and legal costs was highlighted by Mr. Smith in his offer sent on behalf of Whynot of January 19, 2023.

[31] Whynot maintains that the agreement effected only a partial settlement. There is then no disagreement on the existence of a concluded settlement

agreement, or intent of the parties to contract, and consideration. Whynot disputes the scope of the agreement.

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[32] The Court has considered this, but notes that it was only after the calculation of arrears that Whynot raised its perspective that just a partial settlement was intended, and that the claims for mental distress, punitive damages and solicitor/client costs would continue.

[33] This is difficult to accept, on a plain reading of the correspondences exchanged and the general circumstances between the parties. Mr. Smith's response to Mr. Dunbar's email correspondence, in which it states plainly "… we accept your client's offer of this morning to resolve this matter based on a reinstatement of benefits" was a response of "thank you" (reiterated twice) with an indication only that his client would be informed of the acceptance. Read plainly, the reiteration of thanks, and the brief nature of the acknowledgement from Mr. Smith would from the perspective of an objective, reasonable bystander, in light of all the material facts, consider an agreement concluded. The preliminary correspondences had addressed costs, as well as Tariff costs pursuant to the *Rules*, and usual practice experience, as well as a release. There is nothing in Mr. Smith's response of January 19th, 2023, in the context of the exchanges, to indicate this matter was not fully resolved on the essential elements of the agreement, which, in

this matter, is the settlement of litigation concerning a breach of contract in exchange for consideration accepted.

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[34] Blue Cross pleads that this is an action in contract on the pleadings as filed by Whynot, with the position taken by Whynot concerning a claim for punitive damages, mental distress and solicitor client costs insupportable, particularly as matters for a jury trial.

[35] On a review of the pleadings, the Court notes that there is no specific pleading of independently actionable conduct to support a claim for punitive damages (as per *Industrial Alliance Insurance and Financial Services v Brine* 2015 NSCA 104, see also *Whiten v. Pilot Insurance Co* 2002 SCC 18) and there are no amendments to the pleadings. There is a pleading in the action concerning "mental distress re: *Hadley v Baxendale*" however this heading would be subsumed in a LTD claim for a breach of contract of insurance, absent independently actionable wrong which was not plead with any particularity.

[36] Whynot has submitted that the lack of agreement on a release indicates that the settlement agreement was not concluded in full. In response, Blue Cross directs the Court to consider the *Edwards v Canada (Attorney General)* 2023 NSSC 67 decision, in which Justice Gatchalian held that, as a matter of law, absent an

agreement to the contrary, a general release will be implied as per paragraphs 35 and 37. This was a practical approach to the facts, in keeping with the *Certified Design, supra* decision in which it was also held that a settlement implies a release unless the contrary is stated. In this matter, with settlement achieved, and prior allusion to a release to be provided "in the normal course" this aspect of the agreement can be implied.

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[37] Finally, the issue of costs was raised by Whynot as another element unaddressed in the agreement. On my review of the correspondences, this element was addressed by Blue Cross in its correspondence to Whynot specifically and also, on one occasion, in the initial offer by Whynot. Costs were implicit, in the discussion concerning settlement. Mr. Dunbar's reference to Tariff F of the *Civil Procedure Rules* is appropriate as it is mandated to apply in the context of settlement, rather than an offer for a potential measure. In the event the parties are unable to come to an agreement on costs in accordance with this Tariff, the *Rules* provide an assessment mechanism. Further, the asserted claim for solicitor-client costs by Whynot is not supportable as an action, as these costs are not a stand alone claim.

Conclusion

[38] The motion is granted to Blue Cross and, pursuant to *Rule* 10.04, the Court will declare that the matter has been settled with the terms as recognized in this decision, which shall be reflected in the Order of the Court. The action is to be dismissed.

[39] On the matter of costs of both the action and the motion, if the parties are unable to come to a resolution, the parties are to proceed to an assessment in accordance with the provisions of the *Civil Procedure Rules*, as per Tariff “F”.

Diane Rowe, J.

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