

Court of King's Bench of Alberta

Citation: Cho v Harmony Ceramic Dental Laboratory Ltd, 2024 ABKB 571

Date: 20240926
Docket: 2001 10979
Registry: Calgary

Between:

Yu Hyun Cho

Plaintiff

- and -

Harmony Ceramic Dental Laboratory Ltd. and Myung Chul Yoon

Defendants

**Endorsement Decision
of the
Honourable Justice P.R. Jeffrey**

[1] The parties disagree on whether the Defendants right to conduct “Part 5 questioning” of the Plaintiff was waived by the Defendants when the parties agreed on the terms of a Consent Order before me on January 12, 2023.

[2] The disagreement over whether the Consent Order had this effect was raised by the Plaintiff in front of an Applications Judge (AJ), in response to an application by the Defendants to compel the Plaintiff to attend for Part 5 questioning. The AJ told them since I signed their Consent Order they should ask me for clarification.

[3] All judges are equally positioned to interpret a consent order’s meaning and application. But the AJ told them to go ask me, so that’s what they did. Because this litigation has followed an unfortunate protracted pace, I agreed to answer their request and by written process.

Law

[4] A consent order results from the parties to it reaching their own agreement. The interpretation of a consent order, therefore, is not an inquiry into what the signing judge meant by the wording of the order.

[5] The interpretation of a consent order follows the same approach as the interpretation of any other form of agreement between private parties. The Alberta Court of Appeal summarized that approach in *Canadian Natural Resources Limited v Wood Group Mustang (Canada) Inc. (IMV Projects Inc.)*, 2018 ABCA 305, at para 97:

The objective of contractual interpretation is to ascertain the intention of the contracting parties by reading the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of the formation of the contract. The words of any one provision must not be read in isolation but should be considered in harmony with the rest of the contract and in light of its purposes and ... context: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37 at para. 27, [2016] 2 SCR 23; *Tercon Contractors Ltd. v British Columbia (Transportation and Highways)*, 2010 SCC 4 at para. 64, [2010] 1 SCR 69.

[6] I found additional guidance on the interpretation of agreements in the form of consent orders from the following authorities: *Shell Canada Products v Sunterra Beef Ltd*, 2016 ABCA 250; *Larcencova v Makarenko*, 2018 ABCA 417; and *Custom Metal Installations Ltd v Winspia Windows (Canada) Inc*, 2020 ABCA 333. The Consent Order here is what the Alberta Court of Appeal calls an “interlocutory procedural consent order”, not a “final consent order”: see *Custom Metal Installations*, at paras 42 to 59.

[7] On the test for waiver, I gained assistance from the explanations in *1242311 Alberta Ltd v Tricon Developments Inc*, 2021 ABCA 418, and *Pacholok v Neil W Nichols Professional Corp*, 1991 ABCA 85. In the latter decision the Court was considering, like here, an argument that a party had waived its rights under the *Rules of Court*. There the Alberta Court of Appeal did not modify the test for waiver in any way; it described the test to be applied in paras 5 and 6:

In *Federal Business Development Bank v. Steinbeck* (1983) 42 A.R. 231 (Alta. C.A.) at 236, Chief Justice Laycraft pointed to two essentials of a true waiver:

... full knowledge of the deficiency which might be relied upon
and the unequivocal intention to relinquish the right to rely on it.

In an earlier decision of this Court, *B.A. Oil v. Ferguson* 1950 CanLII 232 (AB CA), [1951] 2 D.L.R. 37 at 44 (Alta. C.A.), Clinton J. Ford, J.A., in concurring with the majority in the result, said:

Waiver is a voluntary and intentional relinquishment of a known existing legal right, whether conferred by contract or by law. To establish waiver it must be shown that the person waiving his rights had full knowledge of their existence and their nature. The burden

of proving knowledge on the part of the person charged with the waiver is upon the party relying on it.

Consent Order

[8] The Consent Order states:

1. By Consent of the Parties, the Notice of Appeal filed February 2, 2022, is lapsed;
2. The Defendants are entitled to question John Faul on his affidavit sworn October 25, 2021, and filed November 4, 2021;
3. Any issue of waiver of privilege asserted by the Defendants can be dealt with in a Special Chambers Application before the Court of King's Bench;
4. Any dispute between the parties with respect to scheduling the Special Chambers Application may come back before this Court.
5. On either the same day as the questioning of John Faul, or the next day, the questioning of Myung Chul Yoon shall occur;
6. Upon completion of the questionings, the Action shall transfer to the Provincial Court of Alberta, Civil Division;
7. Within 2 weeks after the completion of the questionings or any related questioning on undertakings, the parties shall set the matter down for trial with the Provincial Court at the earliest possible date.

Context & Interpretation of the Consent Order

[9] The Consent Order in this case was reached between the parties while in Court, and therefore on the record, not prior to the parties coming to Court. Consequently, the transcript contains more than might normally be available on just what it was that the parties agreed to.

[10] A prime objective of the Consent Order was completing the pre-trial process and getting the matter tried as soon as possible (54 Tr 9 - 21). Yet nothing in the wording of the Consent Order itself, nor in the transcript of its formation, says expressly that the Defendants unequivocally relinquished their right to conduct Part 5 questioning of the Plaintiff. Nothing in either suggests the parties had agreed that the steps described in their Consent Order comprised an exhaustive list of the only permitted remaining pre-trial steps.

[11] The parties were identifying the various disputes that at the time were impeding their getting on to trial. They addressed the things that were 'top of mind' for counsel at the time, over which they did not agree and had bogged down the litigation. By the Court canvassing alternative processes that might protect the parties' rights on those issues, the parties were able to move past the latest interlocutory reasons for being back in Court and agree on moving the case to trial in the Provincial Court. They did not agree that the things they addressed constituted the only things thereafter they might still do before the transfer.

[12] In paragraph 1 of the resulting Consent Order, the Defendants abandoned their appeal of Master Prowse's Order adjourning an application. It was that appeal that had them back in front

of the Court on January 12, 2023. The remaining paragraphs satisfied the Defendants' core concerns that drove it to commence the appeal, so they agreed to let the appeal lapse.

[13] The "questioning" referred to in paragraph 2 speaks not of Part 5 questioning, but of questioning by way of a cross-examination on an affidavit John Faul swore when a student-at-law at the Plaintiff's lawyer's law firm. The Defendants maintained that John Faul had waived the Plaintiff's privilege and that they had a right to cross-examine him on his affidavit. Paragraph 2 assured the Defendants that the Plaintiff would not contest their right to cross-examine him on the affidavit, but also assured the Plaintiff that (i) any such questioning still had to be conducted within the scope permitted at law and (ii) the Plaintiff was not conceding John Faul had waived privilege.

[14] By paragraphs 3 and 4 the parties agreed to have this Court decide the issue of whether John Faul waived privilege. The issue has since been heard. On November 23, 2023, Justice Johnston decided John Faul did not waive the Plaintiff's privilege. Since then, as the Plaintiff's counsel observes, there was no longer any meaningful purpose for the Defendants to cross-examine John Faul on his affidavit.

[15] The Defendants have indeed chosen to not cross-examine John Faul on his affidavit. The Consent Order did not require them to do so. It was permissive not mandatory. And as stated in the transcript by the Court: "-- I am not going to oblige you to do it, but there may be questioning on the affidavit in accordance with the law" (52 Tr. 19 – 21). Counsel for the Defendants agreed.

[16] The Plaintiff agreed to the Consent Order only if the Defendants would be compelled to attend for questioning. The Plaintiff said the Defendants had already been questioned but, despite many attempts, they could not get the Defendants to attend or find a date when the Defendants counsel would make themselves available. Paragraph 5 embodies the parties' agreement around that. They agreed the Plaintiff's questioning of the Defendants would proceed on the heels of the questioning of John Faul. Paragraph 5 captured the parties' agreement to have the two questionings run consecutively or at least on consecutive days.

[17] Paragraphs 6 and 7 reflect the parties' agreement that "upon completion" of these two questionings (the questionings mentioned in paragraphs 2 and 5), the action "shall" transfer to the Provincial Court of Alberta and be promptly scheduled for trial (within the next two weeks).

[18] Given the mutual concessions in the earlier paragraphs protecting their respective concerns, both parties agreed to cease all further pre-trial steps in this Court upon the completion of the questionings, at which time the case would immediately transfer to the Provincial Court and promptly thereafter be scheduled for trial.

[19] They agreed to forego from that date on any further pre-trial processes and rights in this Court. Both parties "waived" their rights to further pre-trial steps in this Court after that date. Whatever had not yet been done, including perhaps any Part 5 questioning in this Court, was foreclosed thereafter.

[20] A deadline was agreed upon for it moving to the Provincial Court, and then promptly scheduled for trial, that is, "upon completion" of the paragraph 2 and 5 questionings. Neither side represented that they, or the other side, were foregoing all other pre-trial rights prior to the "upon

completion” date. The Defendants were not foreclosed from conducting Part 5 questioning prior to that “upon completion” deadline.

[21] The Defendants did waive the right to do so under the authority of this Court after that deadline. By paragraphs 6 and 7, in the context of the whole of the Consent Order and the surrounding circumstances known to the parties, both parties made it quite clear that they would forego all further pre-trial steps in this Court, after completion of the paragraphs 2 and 5 questionings. They knowingly and intentionally relinquished their rights to all further steps in this Court following that date. That constitutes a waiver of such rights. But that is effective after the “upon completion” date, not before. No rights were waived before the “upon completion” date except the Defendants relinquishing their appeal (paragraph 1) and the Plaintiff relinquishing their right to contest the Defendants cross-examining John Faul (paragraph 2).

[22] The parties agreed that following the “upon completion” date both will immediately end their litigation process in this Court and proceed promptly to schedule trial in the Provincial Court. This meant both were foregoing after that completion date any other pre-trial steps in this Court they may have had a right to pursue, including Part 5 questioning.

Conclusion

[23] Part 5 questioning of the Plaintiff was not waived by the Defendants for the time prior to the completion of the questionings referred to in paragraphs 2 and 5 of the Consent Order. The parties did waive their right to conduct pre-trial steps in this Court after completion of the paragraphs 2 and 5 questionings, by their agreement to transfer the matter into the Provincial Court upon their completion, to then promptly schedule trial.

Following written submissions received between July 29, 2024, and September 20, 2024.

Dated at the City of Calgary, Alberta this 25th day of September 2024.

P.R. Jeffrey
J.C.K.B.A.

Counsel:

Irma Roberts
for the Plaintiff

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