IN THE SUPREME COURT OF NEWFOUNDLAND AND LABRADOR
GENERAL DIVISION

Citation: *Molloy v. Howlett*, 2025 NLSC 74
Date: May 8, 2025
Docket: 201901G0566

BETWEEN:

JOHN MOLLOY

FIRST PLAINTIFF

AND:

ADELINE MOLLOY

SECOND PLAINTIFF

AND:

DONAL HOWLETT

FIRST DEFENDANT

AND:

GERALDINE HOWLETT

SECOND DEFENDANT

Before: Justice Peter A. O'Flaherty

Place of Hearing: St. John’s, Newfoundland and Labrador

Date of Hearing: February 17, 2025

Summary:

The Plaintiffs claimed their trespass action against the Defendants was settled between counsel. The Plaintiffs applied for a summary trial under Rule 17A.

Held: The application for a summary trial was granted. The Court determined that there was a binding and enforceable settlement agreement reached on all

essential terms in a draft Consent Order. The Plaintiffs were therefore entitled to a judgment in accordance with the terms of the draft Consent Order.

Appearances:

Joseph J. Thorne	Appearing on behalf of the Plaintiffs
John F.E. Drover	Appearing on behalf of the Defendants

Authorities Cited:

CASES CONSIDERED: *Hyrniak v. Mauldin*, 2014 SCC 7; *Young v. Noble*, 2016 NLCA 58; *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42; *McCabe v. Verge* (1999), 182 Nfld. & P.E.I.R. 135, 554 A.P.R. 135 (Nfld. C.A.); *Hollett v. Stewart*, 2011 NLTD(F) 57; *Tobin v. Cox*, 2015 NLTD(G) 53

RULES CONSIDERED: *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D

REASONS FOR JUDGMENT

O'FLAHERTY, J.:

OVERVIEW

[1] This is an application by the Plaintiffs, John and Adeline Molloy ("Applicants"), for a summary trial under Rule 17A of the *Rules of the Supreme Court, 1986*, S.N.L. 1986, c. 42, Sch. D. If the application is granted, the Applicants are seeking a judgment in their action in trespass against the Defendants, Donal and Geraldine Howlett ("Respondents") on the terms agreed in a draft Consent Order.

[2] The Applicants claim that this action was settled at a judicial settlement conference on August 24, 2021, with leave to file a Consent Order, and that a draft

Consent Order was agreed upon between counsel acting with the authority of the parties on December 15, 2021. They further claim that a binding and enforceable settlement agreement was thereby reached on the terms in the draft Consent Order.

[3] The Respondents argue that there was no *consensus ad idem* on two essential terms, the waiver by the Applicants of any future litigation in a final release, and the details of the restoration of the land. They also say that any settlement was subject to the financing and participation of a third party, their son Chris Howlett. Finally, they argue the Consent Order that was agreed between counsel was not reviewed and approved by them, and counsel lacked their unrestricted authority to settle.

[4] The parties agree that the question of whether a binding and enforceable settlement agreement was finalized on the terms agreed in the draft Consent Order is an appropriate issue for determination by the Court using the summary trial procedure under Rule 17A.

[5] On the threshold question, I am satisfied the Applicants have complied with the formal requirements of Rule 17A and there is no apparent reason not to use the summary trial procedure to decide the issue. I find it is therefore appropriate to hear the summary trial application.

[6] I am also satisfied that the Respondents have filed affidavit materials which set out specific facts showing that there is a genuine issue for trial.

[7] I find that I can decide the genuine issue for trial fairly based on the whole of the evidence. The genuine issue is not a novel or complex one, all the material facts and relevant documents are before the court, there is no difficult issue of credibility to resolve, and the law in this jurisdiction regarding the formation of a contract and the authority of counsel to settle an action on behalf of their client is well established.

[8] For the reasons below, my decision on the summary trial is that on December 15, 2021, a draft Consent Order was agreed between counsel who were each acting

with the authority of their clients, and a binding and enforceable settlement agreement was formed on the terms agreed by counsel in the draft Consent Order.

[9] The Applicants are therefore entitled to a judgment in this trespass action in accordance with the terms of the December 15, 2021, Consent Order.

FACTUAL BACKGROUND

The Trespass Action

[10] The Applicants own the 8.5-hectare parcel of vacant land which is adjacent to the 1.3-hectare parcel of land owned by the Respondents, at 530 Fowler's Road, St. John's, Newfoundland and Labrador ("NL").

[11] Both properties had been acquired by the Applicants in 2002 as a single parcel. In 2010, the Applicants subdivided the land and sold 1.3 hectares to the Respondents.

[12] On January 21, 2019, the Applicants commenced an action in trespass against the Respondents alleging that in the fall of 2018 the Respondents encroached upon the Applicants' land without permission, they placed trailers and earthen fill on their land, and they caused damage to the land and trees amounting to actionable trespass.

[13] On May 24, 2019, the Respondents filed a Statement of Defence denying the Applicants' allegations. In the alternative, if the allegations were proven true, the Respondents pleaded that they disclosed no cause of action because the placement of the trailers and earthen fill on the Applicants' land by the Respondents was "inadvertent" and had improved the accessibility, use and value of the Applicants' land. As a result, the Respondents alleged the Applicants had suffered no loss or damage.

The Judicial Settlement Conference

[14] The parties attended a judicial settlement conference on August 24, 2021, via Skype. Mr. Kyle Rees attended as counsel for the Applicants, and the Applicants were in attendance. Mr. Robin Cook attended as counsel for the Respondents, and Donal Howlett and his son, Chris Howlett, were in attendance.

[15] The Applicants allege that at the settlement conference the parties agreed to settle the trespass action upon payment by the Respondents to the Applicants of $25,000 for general damages, with the Respondents at their own risk and expense agreeing to remove the earthen fill encroaching the Applicants' land and take steps to restore the land to its previous condition before August 1, 2022.

[16] The Respondents allege that at the settlement conference the parties agreed the Respondents would make a lump sum payment of $25,000 to the Applicants for general damages, and the Respondents would arrange the necessary work and cover the cost of removing the fill that had been placed on the Applicants' land.

[17] Both parties agree that the issues of the amount of the damages and the removal of the fill were fully and finally resolved at the settlement conference. They also agree that the specific details about any restoration work to be performed by the Respondents were not fully and finally resolved at the settlement conference.

[18] At the conclusion of the settlement conference, it appears the judge was informed that a settlement had been reached but counsel needed time to finalize the restoration work details. The parties requested leave to file a Consent Order containing the terms of the settlement of the action when the details of the restoration work were finalized.

[19] A Report Following Settlement Conference was filed by the presiding justice on August 25, 2021. It stated that a settlement of the action was achieved and that leave was given for the parties to file a Consent Order.

The Communications Between Counsel August 24-December 15, 2021

[20] On August 24, 2021, Mr. Rees produced the first draft version of a Consent Order and forwarded it to Mr. Cook. The draft Consent Order had three clauses.

[21] Clause 1 dealt with the payment by the Respondents of $25,000 in general damages to the Applicants by September 23, 2021.

[22] Clause 2 dealt with restoration work. It had 4 sub-clauses dealing respectively with: (a) the location of the removal of the fill, (b) the removal of other material in addition to the fill, (c) the restoration of the land to its original elevation and grade, and (d) ensuring the bank remaining on the Respondents' land would not erode.

[23] Clause 3 provided that if the restoration work was not performed by the Respondents before August 1, 2022, the Applicants were permitted to undertake the restoration work and apply for a judgment for the amount they had paid for the work.

[24] On November 8, 2021, Mr. Cook wrote Mr. Rees and advised that sub-clause 2(b) which related to the removal of trees and detritus in addition to the fill, and sub-clause 2(d) which related to ensuring the bank would not erode after the fill was removed, were not agreed upon at the settlement conference.

[25] Mr. Cook advised that sub-clause 2(c), which related to removal of fill such that the Applicants' land be restored to the "original elevation and grade", should from a practical perspective be treated as a "best efforts" obligation only.

[26] Mr. Rees replied on the same date and agreed to remove the two sub-clauses objected to by counsel. He also agreed that Mr. Cook's proposal made sense to modify the language under sub-clause 2(c) requiring restoration to the "original elevation and grade" to reflect a best efforts/practical perspective.

[27] Mr. Rees wrote however that by removing the sub-clause 2(d) his clients were not giving up any rights if a new cause of action arose, and if the grading/sloping of the boundary led to erosion onto the Applicants' land then his clients could potentially sue the Respondents again.

[28] Mr. Cook replied that given the payment of damages and cost incurred by his client to remove the fill his clients did not want to have any risk of a future lawsuit and the issue would have to be addressed in the final release.

[29] On November 18, 2021, Mr. Cook sent Mr. Rees an email repeating his position that he could not "sign off" on a settlement that left his clients potentially exposed to further litigation relating to the removal of the fill.

[30] Mr. Rees replied attaching a second draft version of the Consent Order to reflect the more limited terms that counsel had discussed. He advised there had been no agreement at the judicial settlement conference that the Applicants would forego any action against the Respondents if there was a future trespass or encroachment.

[31] On December 8, 2021, Mr. Cook sent an amended third draft version of the Consent Order. This draft proposed that the restoration work clause, now Clause 1, be amended to provide the Respondents "shall, prior to August 1, 2022, at their own risk and expense, restore, *as reasonable as possible*, the Plaintiffs' property…".

[32] Likewise, in the third draft version of the Consent Order the "original elevation and grade" sub-clause, now sub-clause 1(b), was also amended to read "Removal of the fill shall be such that the Property is restored, *as reasonable as possible*, to the original elevation and grade…".

[33] The third draft version of the Consent Order also proposed that the payment of damages term, now Clause 2, be amended to add a new sentence reading "The Parties agree that the $25,000 payment constitutes all and any payments the Plaintiffs are or may become entitled to in relation to the Restoration".

[34] Finally, a new Clause 4 was added in the third draft version of the Consent Order, which provided that if the Respondents were unable to fulfill the terms of the Consent Order due to "unforeseeable circumstances beyond their control", it would not constitute non-compliance with Clause 3 of the Consent Order.

[35] On December 9, 2021, Mr. Rees replied to Mr. Cook's proposed amended draft version of the Consent Order and advised him it was agreeable to his clients with one minor change to amend a typographical error in the civic address.

[36] Mr. Rees followed up on December 14, 2021, to ask whether they could file the Consent Order and Mr. Cook would send his office the funds to be held in trust.

[37] On December 15, 2021, Mr. Cook sent the following message to Mr. Rees:

> I made a slight change to the order. Please see attached. If this is agreeable to your clients, I will request the funds from my client. The funds are to be held in trust by you until the Restoration is completed and we have obtained an executed Notice of Discontinuance and Release.

[38] On December 15, 2021, Mr. Rees responded as follows to Mr. Cook:

> I'm fine with your change, but please incorporate the civic address clarification I had in my previous draft. Then we are good.

[39] Mr. Cook replied to this email, acknowledging that his final change had been made on the wrong draft and apologizing for his error. No further reply was sent by Mr. Cook to the email set out in paragraph 38 above.

[40] The next time there was any communication between counsel was on January 17, 2022, when Mr. Rees wrote Mr. Cook to follow up on the status of the matter.

The Final Version of the Draft Consent Order

[41] The draft Consent Order, as it stood after the exchange of emails on December 15, 2021, read as follows:

CONSENT ORDER

Before the Honourable Justice Paquette of the Supreme Court of Newfoundland and Labrador, General Division on the day of A.D., 202__.

UPON THE PARTIES attending at a settlement conference in the matter on August 24, 2021 **AND UPON HEARING** Kyle Rees, Counsel for the Plaintiffs, and Robin Cook, Counsel for the Defendants at settlement conference **AND UPON** the Counsel for all Parties advising the Court of the Parties' agreement to enter into the within Consent Order, **IT IS HEREBY ORDERED THAT**:

1. The Defendants shall, prior to August 1st, 2022, at their own risk and expense, restore, as reasonable as possible, the Plaintiffs' property located at 530 Fowlers' Road, in the City of St. John's, Newfoundland and Labrador to the state it was in prior to the Defendants' trespass (the "Restoration"). For greater certainty, the Restoration shall be limited to:

    (a) Removal of all fill placed on the 1.13 acre portion of the Plaintiffs' property and adjacent Crown Land and road access as marked inside the red boundary line in the October 31, 2019 survey attached hereto as Schedule 'A';

    (b) Removal of fill shall be such that the Property is restored, as reasonable as possible, to the original elevation and grade as existed prior to the Defendants' trespass;

2. The Defendants shall pay to the Plaintiffs the amount of $25,000 as general damages prior to December 31, 2021 (the "Payment"). The Parties agree that the Payment constitutes all and any damages the Plaintiffs are or may become entitled to in relation to the Restoration and the Defendants' trespass;

3. In the event of non-compliance with the terms of the within Order by the Defendants before August 1st, 2022, the Plaintiffs shall be permitted to engage a contractor to undertake the work outlined herein and may apply to this Court to have a judgement entered against the Defendants for the cost of same;

4. The Parties acknowledge and agree that should the Defendants be unable to fulfill the terms of this Order due to unforeseeable circumstances beyond their

> control, this will not constitute non-compliance within the meaning of paragraph 3 of this Order.

[42] In argument, the Respondents conceded that the terms in the Consent Order, as it stood after the exchange of emails on December 15, 2021, were agreed to between counsel. As counsel put it, it would be absurd to argue otherwise.

The Communications Between Counsel Following January 17, 2022

[43] On January 17, 2022, Mr. Rees sent a follow up email to Mr. Cook to inquire whether he had received the settlement funds from his client.

[44] On February 2, 2022, Mr. Cook advised Mr. Rees that Chris Howlett was out of the country and that when he returned Mr. Cook would address the issue of the settlement funds with him.

[45] On April 5, 2022, Mr. Cook again advised Mr. Rees that he was trying to reach Chris Howlett. In his email, counsel referenced discussions they had held to the effect that if deal could be facilitated, Chris Howlett would be necessary to make that happen.

[46] On April 17, 2022, Mr. Cook again advised Mr. Rees that he did not have instructions to sign the Consent Order and referenced needing to speak with Chris Howlett before proceeding.

[47] Similar follow up emails were exchanged until on December 6, 2022, Mr. Cook advised Mr. Rees that he had reached out to his clients and if he was unable to get instructions he may need to seek to be removed as solicitor of record.

[48] The Respondents did not pay the $25,000 or perform the restoration work.

PROCEDURAL BACKGROUND

The First Application

[49] On June 29, 2023, the Applicants brought an application to enforce a judgment on an accepted Rule 20A offer. On August 22, 2023, the return date for the first application, the application was not set down by me for hearing because Rule 20A did not have any apparent application in this case.

The Second Application

[50] On August 22, 2023, the Applicants filed an application for judgment of the accepted offer set out in the Consent Order. The second application largely mirrored the first application except that it also argued that counsel for the Respondents can bind the Respondents in settlement discussions. In the alternative, the application requested that a summary trial or an expedited trial be ordered.

[51] On the return date for the second application, November 14, 2023, the application was set down for hearing on September 16, 2024. Briefs were ordered to be filed by the judge in chambers. No brief was filed by either party.

The Applications by Original Counsel to Withdraw

[52] On August 16, 2024, counsel for the Respondents, Mr. Cook, applied to withdraw on the basis that he would be required to give evidence on the application.

[53] On September 12, 2024, new counsel for the Respondents, Mr. Drover, applied to postpone the second application. On September 16, 2024, the second application was postponed by me as case management judge. On the same date, Mr.

Cook and Mr. Rees were permitted to withdraw as counsel, and new counsel, Mr. Thorne, took sole carriage of the matter for the Applicants.

The Amendment of the Pleadings and the Third Application

[54] The Applicants amended their Statement of Claim on September 23, 2024, to add a claim for breach of contract in relation to the alleged settlement agreement. The Respondents filed an Amended Statement of Defence on October 3, 2024, denying there was a *consensus ad idem* on all material terms. I will say more below about the specific allegations in the Amended Statement of Defence.

[55] On November 5, 2024, the Applicants brought this application under Rule 17A to enforce the alleged settlement agreement on the terms agreed in the draft Consent Order, supported by the Affidavits of John Molloy and Kyle Rees.

[56] The Respondents filed Affidavits in reply of Donal Howlett and Robin Cook. The Rule 17A application was heard on February 17, 2025, and Mr. Howlett was cross-examined on his Affidavit.

ISSUES

[57] The issues for determination on this application are as follows:

1. Is this an appropriate case for summary trial under Rule 17A?
2. Is whether the draft Consent Order constitutes a binding and enforceable agreement to settle the Applicants' trespass action a genuine issue for trial?
3. If it is, is it appropriate to decide the issue on the existing record?
4. If it is appropriate, does the draft Consent Order constitute a binding and enforceable agreement to settle the Applicants' trespass action?

ANALYSIS

The Threshold Question: Is this Case Appropriate for Summary Trial?

[58] The threshold question was described by our Court of Appeal as a preliminary determination of "whether the applicant has provided some evidentiary basis for the assertions made and whether the nature of the case is such that it is potentially capable of being dealt with in the attenuated manner contemplated by a summary trial, bearing in mind the comments of the Supreme Court of Canada in *Hyrniak v. Mauldin*, 2014 SCC 7, about the salutary use of such procedures to ensure access to justice in appropriate cases": *Young v. Noble*, 2016 NLCA 58.

[59] When the threshold question was raised, prior to the cross-examination of Donal Howlett, counsel for the Respondents advised his clients did not contest the threshold question. I then decided that it was appropriate to hear the summary trial application. I will explain how I assessed the two factors set out in *Young v. Noble* in deciding the threshold question.

[60] On the first factor, based on my review of all the affidavit evidence that was filed, I found that the Applicants had clearly provided an evidentiary basis for the assertions made which, if unanswered, could establish the claim that a settlement was reached, bringing the Applicants within the formal requirements of Rule 17A.

[61] I note in particular that the Affidavit of Mr. Molloy at paragraph 4, and the Affidavit of Mr. Rees at paragraph 4 both deposed that the key terms of the settlement agreement regarding the amount of general damages and removal of the fill were reached at the judicial settlement conference held on August 24, 2021.

[62] Both affiants further deposed that it was agreed at the settlement conference that former counsel for the parties would discuss the specific language around the restoration of the land in order to arrive at a Consent Order.

[63] The Affidavit filed by Mr. Rees included copies of the email correspondence referred to in paragraphs 20-40 above, covering the time frame August 24, 2021 to December 15, 2021, and refers to the versions of the draft Consent Order that was later agreed between Mr. Cook and Mr. Rees on December 15, 2021.

[64] Finally, in paragraph 17 of Mr. Rees' Affidavit, he deposed to his belief that the parties reached an agreement on the key terms of settlement of the action at the judicial settlement conference on August 24, 2021, and his belief that counsel settled the terms of the Consent Order reflecting the settlement on December 15, 2021.

[65] The second factor is whether, at that preliminary stage, the nature of the issue appeared to be such that it was potentially capable of being dealt with through the summary trial procedure. In the authorities, this is described as determining if there is any apparent reason evident at that stage that would make it inappropriate to invoke the summary trial procedure to decide the issue.

[66] As noted, the Respondents agreed I can potentially use the summary trial procedure to find the necessary facts to decide the issue in dispute and no reason was provided or was otherwise evident at that stage making it inappropriate to do so.

[67] Upon my review of the pleadings, the evidence and the materials filed I was satisfied that the issue was one that was potentially capable of being dealt with in the attenuated manner contemplated by a summary trial, and there was no apparent reason evident at this stage making it inappropriate to use the summary trial procedure. I found it was therefore appropriate to hear the summary trial application.

Is the Binding Effect of the Consent Order a Genuine Issue for Trial?

[68] The Applicants have filed affidavit evidence to show that the issue of whether the draft Consent Order constitutes a binding and enforceable agreement to settle the Applicants' trespass action does not constitute a genuine issue for trial.

[69] I referred to the main thrust of that evidence at paragraphs 61-64 above. The Respondents did not cross-examine the deponents on any of this affidavit evidence.

[70] I must therefore decide if the issue to be decided, whether the draft Consent Order constitutes a binding and enforceable settlement agreement, constitutes a genuine issue for trial. Under Rule 17A.03(1), if there is no genuine issue for trial then the moving party, here the Applicants, are entitled to summary judgment.

[71] In *Brook Construction (2007) Inc. v. North Atlantic Cement and Construction Ltd.*, 2020 NLCA 42, at paragraph 29, our Court of Appeal wrote that a genuine issue for trial is an issue that is "not spurious" and is one that "relates to a material fact or point of law that is necessary to be decided to resolve the ultimate controversy between the parties." The Court of Appeal confirmed that if the responding party, here the Respondents, put forward no evidence that could constitute a defence then clearly there will not be a genuine issue for trial.

[72] The Respondents responded to the evidence filed by the Applicants supporting their application for summary trial and the existence of a binding and enforceable settlement agreement by filing affidavit material under Rule 17A.02(2) to set out specific facts showing that there is a genuine issue for trial.

[73] Mr. Cook in his Affidavit dated November 19, 2024, at paragraph 3, deposed to his virtual attendance as counsel for the Respondents at the settlement conference, from the place of business of Chris Howlett on August 24, 2021. He deposed that both Donal Howlett and Chris Howlett attended the settlement conference.

[74] In an email on November 8, 2021, in responding to the first draft of the Consent Order, Mr. Cook reminded counsel for the Applicants that the fact that Chris Howlett and his business were agreeable to assist with the resolution of the matter, despite not being parties, was a benefit to the Applicants because a judgment against the Respondents would be worth no more than the paper it is written on.

[75] In his Affidavit including at paragraphs 13-14, 22, 25-27, and 34-35, Mr. Cook deposed to Chris Howlett's level of participation in the settlement discussions and him being the main point of contact in giving instructions. Mr. Cook further deposed that he made Mr. Rees aware in a telephone discussion that Chris Howlett's participation in and financing of the settlement was necessary and essential.

[76] Mr. Cook further deposed that any risk of a future lawsuit was a live issue and the issue would have to be addressed in the final release. In his Affidavit in paragraphs 34-35 he details the concerns that Chris Howlett had raised in January 2022 about the potential for further legal action by the Applicants once the fill was removed by the Respondents, if soil eroded back on the Applicants' land.

[77] Mr. Cook therefore deposed in paragraph 42 of his Affidavit that counsel "did not reach a settlement in November of 2021, as negotiations were still ongoing, evidenced by the many emails and draft Consent Orders".

[78] In paragraph 43 Mr. Cook deposed to again advising Mr. Rees on April 5, 2022, that he was trying to reach Chris Howlett, and telling Mr. Rees "If a deal can be facilitated, Chris will be necessary to make that happen, as we have discussed".

[79] Even though the absence of actual authority of counsel in settling the Consent Order was not pleaded by the Respondents, the issue was raised in case management and I ordered that no further brief or amendment of the pleadings was required.

[80] In paragraphs 11-12 of his Affidavit of November 2024, Donal Howlett deposed that the final version of the draft Consent Order was not agreed upon by the Respondents because to the best of his recollection it was not reviewed by him, and he was not provided with any draft settlement documents for his review.

[81] Donal Howlett also deposed in paragraph 13 of his Affidavit that after the settlement conference he understood there still needed to be further discussions

about, in particular, the fact the Applicants wanted to retain the right to start further court actions in the future if they felt there was damage caused by soil erosion.

[82] The affidavit and documentary evidence filed by the Respondents satisfies me that the responding party has set out specific facts showing that the issue of whether the draft Consent Order constitutes a binding and enforceable agreement to settle the Applicants' action is not spurious and that there is a genuine issue for trial.

Is it Appropriate to Decide the Question on the Whole of the Evidence?

[83] The parties submit that the genuine issue can be decided based on the record and it would not be unjust to do so. The position of the parties is an important factor. I must still decide however whether I have a sufficient comfort level that I will be able to make the necessary findings of fact with this record and that I should do so.

[84] I am satisfied that all of the relevant emails and draft settlement documents exchanged between counsel are before the court. There is no material witness who has not provided evidence necessary to determine the issue in dispute, and there is no difficult question of credibility to be resolved which might make adjudicating the issue on the existing record inappropriate or unfair.

[85] Furthermore, the issue I must decide is not novel or complex and the law regarding the settlement of an action through communications of counsel is well established. It would not be unfair to decide the issue on the existing record.

[86] A summary trial will also in this case serve the goals of timeliness, affordability and proportionality referenced in *Hyrniak v. Mauldin*. The parties have been engaged in a trespass action in this Court since 2019. The issues involved are relatively straightforward and they require a decision to move forward. Depending on its outcome the Rule 17A application may serve to fully resolve the main action.

[87] The parties have filed pleadings, they have undertaken discovery, and they have attended a judicial settlement conference in 2021. As a result of their disagreement about the binding effect of the draft Consent Order, they have incurred additional cost in a series of applications and the main action remains unresolved.

[88] I conclude it is therefore both possible and appropriate to decide the issue of whether the draft Consent Order constitutes a binding and enforceable agreement to settle the Applicants' action using the summary trial procedure. I will allow the Applicants' application for summary trial under Rule 17A.

Is the Consent Order Binding and Enforceable on the Respondents?

[89] The issue to be decided on this summary trial is whether the terms in the draft Consent Order constitute a binding and enforceable agreement to settle this action.

The Applicable Legal Principles

[90] The parties agree on the basic legal principles applicable in this case.

[91] A settlement agreement does not require any formalities to be valid. Accordingly, a contract of settlement is capable of being formed by a conversation, an exchange of letters, or an exchange of email, provided the requisite elements of offer, coincident acceptance, consideration, intention to create legal relations and certainty of terms are present: *McCabe v. Verge* (1999), 182 Nfld. & P.E.I.R. 135, 554 A.P.R. 135 (Nfld. C.A.).

[92] Even if there is no uncertainty about the terms of their agreement, if the parties agree that their legal obligations are deferred until a formal contract or document has been approved and executed, the original or preliminary agreement constitutes an

"agreement to agree" and cannot constitute an enforceable contract: *Hollett v. Stewart*, 2011 NLTD(F) 57, at paragraph 34.

[93] The legal principles applied in cases involving the compromise settlement of a court action by counsel acting with the authority of a party are set out in *Tobin v. Cox*, 2015 NLTD(G) 53.

[94] Generally, a lawyer has authority to bind their client to a settlement agreement reached by counsel unless the client has limited their authority, and the opposing counsel is aware of the limitation: *Tobin v. Cox*, at paragraph 3.

The Positions of the Parties

[95] The Respondents submit there was no *consensus ad idem* on two essential terms of the settlement. They argue that finality of all litigation between the parties was a fundamental part of any settlement and the lack of an agreement on a final release covering any future lawsuits, and the lack of certainty on land restoration to be performed meant there was no complete, binding and enforceable settlement.

[96] The Respondents further submit that putative settlement agreement was contingent on the financing and participation of a third party, Chris Howlett.

[97] Finally, the Respondents submit that the draft Consent Order agreed upon between counsel was not reviewed and approved by them, and counsel lacked their unrestricted authority to settle.

[98] The Applicants submit there was a *consensus ad idem* on all essential terms as reflected in the Consent Order agreed upon by counsel. They submit the Consent Order constitutes a complete, binding and enforceable settlement agreement, and it was not made "subject to" the form of a final release covering any future lawsuits.

[99] The Applicants submit that the involvement of Chris Howlett, a non-party to the litigation, in funding or otherwise participating in the settlement is a red herring. They submit that the financial or other participation of Mr. Howlett was never referenced in the settlement documents or negotiations as a term of settlement.

[100] The Applicants submit that the test applied on settlement authority of counsel requires that the Respondents show their counsel lacked their unrestricted authority to settle *and* that the lack of authority of their counsel to settle was communicated to opposing counsel. The Applicant submits that neither of the required elements of the applicable legal test have been met by the Respondents on the facts.

The Application of the Law to the Facts

[101] I will turn first to the Respondents' argument that there was no *consensus ad idem* on two essential elements of the putative settlement agreement. The argument has two branches, the first being the lack of an agreement on a final release covering any future lawsuits and the second being the lack of certainty on the land restoration work that would be performed by the Respondents under the settlement agreement.

[102] The first argument is premised on the submission that finality of all litigation between the parties was a fundamental part of any settlement for the Respondents. In support of that submission counsel pointed to two emails from former counsel for the Respondents on November 8, 2025 and November 18, 2025, respectively.

[103] In his November 8, 2025, sent at 10:46 a.m., Mr. Cook states:

> We can't have any risk of a future law suit given the cost that will be incurred by my clients and the $25,000 payment. This issue will have to be addressed in the Release.

[104] In his November 18, 2025, sent at 12:42 p.m., Mr. Cook states:

> As I had previously indicated, I can't sign off on a settlement arrangement that leaves my client potentially exposed for any further law suits related to the removal of the fill. In addition to $25,000, they will be incurring significant costs to remove the fill. Their obligations end there.

[105] Counsel for the Respondents submitted that I should infer from the emails the finality of all litigation between the parties was a fundamental part of any settlement, and it was implied in both the November 8 and November 18 emails that a suitable release was required of any further lawsuits related to the future removal of the fill.

[106] Given the emails from Mr. Rees on November 8 and November 18, which advised former counsel that his clients would not be foreclosed from litigating if a new cause of action arose after the future removal of the fill, the Respondents submit there was no *consensus ad idem* on the finality of all litigation between the parties.

[107] I do not find the argument of the Respondents availing. I will explain why.

[108] I am unable to infer from the two emails from former counsel for the Respondents on November 8 and November 18 that finality of all litigation between the parties was a fundamental part of any settlement for the Respondents, let alone a condition of settlement. I further find that those emails do not imply that a suitable release was required of any further lawsuits related to the future removal of the fill.

[109] Rather, I find that the exchanges of emails identified a hypothetical situation that could arise based on the manner in which the Respondents carried out the future removal of the fill, and counsel took different positions on the hypothetical situation.

[110] Furthermore, the argument fails to consider the context of the November 8 and November 18 emails. These emails were part of the ongoing discussions prior to counsel for the Respondents responding on December 8, 2021, to the Applicants' second version of the Consent Order with the third amended draft Consent Order. It is to that document I must look to find the Respondents' settlement position.

[111] In my view, *if* the finality of all litigation between the parties was a fundamental part of any settlement for the Respondents, it would be incumbent on the Respondents to make it a condition of any settlement that a suitable release would be required of any further lawsuits related to the future removal of the fill. That would have been simple to propose in the context of settling the final Consent Order.

[112] But did not occur when the third version of the Consent Order was sent to counsel for the Applicants on December 8, 2021. Instead, counsel for the Respondent added a new sentence to the payment clause, now Clause 2, reading "The Parties agree that the $25,000 payment constitutes all and any payments the Plaintiffs are or *may become* entitled to in relation to the Restoration".

[113] I am satisfied that this sentence was an attempt, by limiting the monetary damages claimable, to address a hypothetical situation that could arise based on the manner in which the Respondents carried out the future removal of the fill. Whether or not it would have that intended effect is a matter that I do not need to decide.

[114] The point is that on December 8, 2021, the Respondents failed to make it a condition of any settlement that a suitable release would be required of any further lawsuits related to the future removal of the fill. It does not lie in their mouths now to say it was a fundamental part of any settlement agreement with the Applicants.

[115] The second *consensus ad idem* argument is that the lack of certainty and finality about the essential terms of land restoration renders the Consent Order an incomplete "agreement to agree".

[116] I do not find this argument availing either. I will explain why.

[117] The Respondents' argument that the land restoration work agreed upon was uncertain or not finally agreed again relies upon the content of emails that were exchanged between counsel in the negotiations prior to Mr. Rees agreeing to the restoration clause in the third amended draft Consent Order on December 9, 2021.

[118] As may be seen from the factual background section however, on August 24 and November 18, 2021, Mr. Rees had previously provided two draft versions of the Consent Order with different restoration clauses, the second more limited than the first and containing two sub-clauses rather than four sub-clauses.

[119] On December 8, 2021, Mr. Cook proposed a third version of the restoration clause in the amended Consent Order attached to his email on December 8, 2021. This version of the restoration clause was accepted by Mr. Rees on behalf of his client on December 9, 2021, subject to one typo, because Mr. Cook identified the civic address as 580 Fowlers' Road. Those are the uncontestable facts.

[120] What Mr. Cook proposed and Mr. Rees agreed to was the following clause:

> 1. The Defendants shall, prior to August 1st, 2022, at their own risk and expense, restore, as reasonable as possible, the Plaintiff's property located at 580 Fowlers' Road, in the City of St. John's, Newfoundland and Labrador to the state it was in prior to the Defendants' trespass (the "Restoration"). For greater certainty, the Restoration shall be limited to:
>
> (a) Removal of all fill placed on the 1.13 acre portion of the Plaintiffs' property and adjacent Crown Land and road access as marked inside the red boundary line in the October 31, 2019 survey attached hereto as Schedule 'A';
>
> (b) Removal of fill shall be such that the Property is restored, as reasonable as possible, to the original elevation and grade as existed prior to the Defendants' trespass;

[121] I find there is nothing unclear or uncertain about the terms of what Mr. Cook proposed and Mr. Rees agreed to in Clause 1. The location of the fill to be removed is identified, and both the timing of the work and the standard of the restoration work are agreed. I find the required certainty of the restoration terms to clearly be present.

[122] I will also address the "agreement to agree" arguments raised by the Respondents.

[123] It could possibly be argued that at the settlement conference the parties made an “agreement to agree”, and the Consent Order was the further agreement or final document they contemplated. But I am not persuaded that either the facts or the legal reasoning in the “agreement to agree” cases have any application to this case.

[124] In this case, by agreeing to the terms of a Consent Order on December 15, 2021, counsel did not expressly or implicitly agree that any of its terms were subject to a further agreement or a final document. Nothing in the wording of the Consent Order makes it “subject to” a further agreement or document.

[125] It would be unusual if it did. A Consent Order is enforceable on its terms. It is a clear articulation of the intention of the parties to be bound by the terms in the Consent Order and to carry out the course of action in the Consent Order. I find that the Consent Order is the only “agreement” the parties had stipulated to agree upon.

[126] I will next address the Respondents’ argument that the settlement agreement was contingent on the financing and participation of a third party, Chris Howlett.

[127] There is affidavit evidence filed that Chris Howlett was involved in the negotiation and finalization of the Consent Order. He attended the settlement conference with his father and counsel. In an email on November 8, 2021, Mr. Cook advised counsel for the Applicants that the fact that Chris Howlett and his business were agreeable to assist with the resolution of the matter was a benefit to the Applicants because a judgment against the Respondents would be worthless.

[128] In his Affidavit, Mr. Cook also deposed to Chris Howlett’s extensive participation in the settlement discussions and described him as his main point of contact after the settlement conference. Mr. Cook further deposed to making Mr. Rees aware in a telephone discussion that Chris Howlett’s participation in and financing of the settlement was necessary and essential.

[129] While this argument was specifically pleaded by the Respondents in paragraph 10 of the Amended Statement of Defence it was not pressed in the Respondents' written or oral submissions. I will address it for completeness.

[130] I do not find this argument of the Respondents availing. I will explain why.

[131] First, Chris Howlett was never a party to this trespass action and the settlement of the action was never made conditional upon his financing of the damages or participation in the work.

[132] Secondly, there were three main versions of the Consent Order, one amended by counsel for the Respondents, and Chris Howlett is not referred to in any version.

[133] In particular, he is not referred to as the person who would pay the damages to the Applicants or finance the payment of the damages by the Respondents, and there is no reference to him carrying out or arranging the restoration work.

[134] Thirdly, Mr. Cook did not at any time hold out that Chris Howlett had offered or was prepared to be bound by the terms of the Consent Order. In fact, he reminded Mr. Rees that Chris Howlett was not a party and he was not bound to do anything.

[135] In such circumstances, the fact that Chris Howlett ultimately decided not to proceed with funding the $25,000 general damages payment and the cost of removing the fill from the Applicants' party may explain why the damages were not paid and the work was not done, but it is legally irrelevant to whether the terms in the draft Consent Order constitute a binding and enforceable settlement agreement.

[136] Finally, the Respondents argue that their former counsel lacked their authority to agree to the Consent Order and make a binding and enforceable settlement agreement on December 15, 2021.

[137] In this province, the law on the settlement authority of counsel is settled. A lawyer has authority to make a binding settlement agreement on behalf of a client unless the authority is limited by the client and the limitation is known to the opposing lawyer: *Tobin v. Cox*, at paragraph 3.

[138] Under the applicable test, the Respondents therefore must show that their former counsel lacked their unrestricted authority to settle *and* that the lack of authority of their former counsel to settle was communicated to opposing counsel.

[139] I do not find this argument of the Respondents availing. I will explain why.

[140] First, I am satisfied that there was an express or implied understanding coming out of the settlement conference that counsel had unrestricted authority to negotiate a final Consent Order on behalf of their clients. There is nothing in any of the emails exchanged between counsel after the settlement conference that suggests otherwise.

[141] Secondly, the Respondents have disclosed the emails sent to them by their former counsel reporting on the progress of the negotiations and forwarding them copies of the versions of the Consent Order proposed by Mr. Rees and by Mr. Cook.

[142] While there are no emails to their counsel in reply disclosed, the Affidavit of Mr. Cook confirms he consulted Donal Howlett and Chris Howlett about each of the versions and obtained instructions prior to presenting the third draft Consent Order to Mr. Rees on December 8, 2021.

[143] I appreciate that when he swore his Affidavit Mr. Donal Howlett may have not recalled being provided with the draft settlement documents by his former counsel but having heard his evidence and considered it in light of the whole of the evidence, I do not accept his recollection as reliable and I find he did see the draft settlement documents sent to him by Mr. Cook.

[144] I am not satisfied that the Respondents have established that their former counsel lacked their unrestricted authority to agree on the terms in the final version of the Consent Order, as it stood on December 15, 2021, and thereby make a binding and enforceable settlement agreement on their behalf.

[145] Thirdly, and even if I had been satisfied that the Respondents had shown their former counsel lacked their authority to settle the action on their behalf, the Respondents concede that there is absolutely no evidence to show that the lack of authority of their former counsel to settle was communicated to opposing counsel.

[146] On the issue I must decide on the summary trial I conclude that on December 15, 2021, a draft Consent Order was agreed between counsel who were each acting with the authority of their clients, and a binding and enforceable settlement agreement was formed on the terms in the draft Consent Order.

Costs

[147] The Applicants request their costs of this application and their costs of the proceeding. I will order that the Applicants shall have their costs of this application, and their costs of the proceeding, excluding the first and second applications referred to in paragraphs 49-51 above, to be taxed.

SUMMARY AND DISPOSITION

[148] The Plaintiff's application for summary trial under Rule 17A is allowed.

[149] My conclusion on the summary trial is that that on December 15, 2021, a draft Consent Order was agreed between counsel who were each acting with the authority of their clients, and a binding and enforceable settlement agreement was formed on

the terms in the draft Consent Order. The draft Consent Order may therefore be forwarded to the Court for filing.

[150] The Applicants shall have their costs of this application, and the proceeding, excluding the first and second applications for which no costs are ordered, taxed pursuant to Rule 55, Appendix 1, Scale of Costs, Column 3.

[151] I am grateful to both counsel for their very helpful briefs and submissions.

[152] Order to be filed accordingly.

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PETER A. O'FLAHERTY
Justice