Court of King's Bench of Alberta

Citation: Intact Insurance Company v 1063878 Alberta Ltd, 2025 ABKB 315

Date: 20250523
Docket: 1903 15175
Registry: Edmonton

Between:

Intact Insurance Company

Not a Party to the Appeal
(Plaintiff)

- and -

1063878 Alberta Ltd, Jeff Jessamine, Dan Edwards, also known as Daniel Edwards, also known as Daniel E. Edwards, and Matthew Mackay

Appellants
(Defendants)

-and-

1465046 Alberta Ltd

Appellant
(Third Party Defendant)

-and-

Brent Poirier

Respondent
(Defendant)

-and-

Canar Rock Systems Ltd, 561845 Alberta Ltd, Earl Sprague, Sherry Sprague, and Shirley Beattie

Not Parties to the Appeal
(Defendants)

-and-

13652306 Alberta Ltd

Not a Party to the Appeal
(Third Party Defendant)

Reasons for Decision
of the
Honourable Justice G.R. Fraser

Appeal from the Order by
L.R. Birkett, The Honourable Applications Judge
Dated the 21st day of March, 2023

[1] This matter comes before me as an appeal of the March 21, 2023, decision of Applications Judge Birkett. The parties involved are Brent Poirier ("**Mr. Poirier**"), 1063878 Alberta Ltd. ("**106**"), Jeff Jessamine ("**Mr. Jessamine**"), 1465046 Alberta Ltd. ("**146**"), Dan Edwards ("**Mr. Edwards**") and Matthew Mackay ("**Mr. Mackay**"). The decision granted Mr. Poirier's application for Summary Judgment and ordered that the other parties indemnify him.

Background

[2] This matter relates to a Unanimous Shareholder Agreement (USA) and a Share Purchase Agreement (SPA) involving multiple parties in the construction business. Mr. Poirier was the sole shareholder and director of Dynamometry Projects Inc.("**Dynamometry**"). Dynamometry, 106, 146 and Mr. Mackay became shareholders in 1352306 Alberta Ltd. ("**135**"). This was done for the purpose of 135 purchasing Sprague Rosser Contracting Co. Limited ("**Sprague**") in May 2009.

[3] At the time of the purchase of Sprague, Dynamometry, 106, 146, Mr. Mackay and the shareholders of Dynamometry, 106 and 146 (which include Mr. Poirier, Mr. Jessamine and Mr. Edwards) entered into a Unanimous Shareholder Agreement in relation to the ownership of shares in 135. The agreement provided that upon a shareholder's departure, the remaining shareholders of 135 would indemnify the departing shareholder from liability in relation to any covenants or personal guarantees given by that shareholder in relation to 135.

[4] All the parties executed a general application and indemnity agreement in June 2009. They entered into the indemnity agreement in order to obtain a performance bond from AXA in relation to 135 and Sprague.

[5] On October 13, 2010, MGN Constructors Inc. ("**MGN**") filed a Statement of Claim against Sprague claiming that Sprague abandoned a construction project causing MGN damages and that AXA was liable due to the performance bond.

[6] In July 2011, Mr. Poirier sold Dynamometry's shares in 135 to 106, Mr. Jessamine's company. The SPA included an indemnity clause that required 106 and Mr. Jessamine to use best efforts to have Dynamometry and Mr. Poirier released from any guarantees provided in relation to 135 and Sprague. If the releases were not obtained within 90 days, the remaining parties to USA were to provide written indemnities to Mr. Poirier and Dynamometry. The SPA also contained a clause that required all parties to act promptly to implement the full extent of the provisions of the agreement.

[7] After the sale of the shares closed, releases in favour of Mr. Poirier from RBC and Western Surety were obtained. No release was obtained from AXA. Mr. Poirier never received any written indemnity from anyone relating to AXA.

[8] At some point, AXA, which became Intact, settled the claim with MGN. Intact then sought to enforce the indemnity agreements signed in 2009 when Sprague obtained the performance bond. It filed a Statement of Claim naming all of the parties that signed the indemnity agreement.

[9] In January 2022, Intact settled with 106, Mr. Jessamine, Mr. Edwards, and Mr. Mackay. A discontinuance was filed related to those parties. Intact continued to pursue Mr. Poirier. He reached a settlement with Intact in May 2022, settling the claim against him for $40,000.

[10] Mr. Poirier sought, and was granted, Summary Judgment against the defendants based on the indemnity agreements contained in the SPA and the USA. It is this decision that the Appellants have appealed.

[11] The Appellants have filed new evidence in this appeal. Mr. Jessamine filed new affidavits on May 11, 2023, and January 8, 2024. Mr. Poirier filed response affidavits June 30, 2023, and April 3, 2024.

[12] The new evidence makes this appeal a *de novo* hearing. In ***Lesenko v Wild Rose Ready Mix Ltd***, 2024 ABKB 333, Justice Feasby provided an in-depth analysis of *de novo* appeals starting at para 57 of the decision. I agree with his analysis regarding the incongruity of the continued use of the *de novo* or correctness standard of review for appeals of Applications Judge decisions.

[13] Our Court does not have the luxury of the inefficiencies that such an approach imposes on the Court. Our lead-times are long, delaying the public's access to Justice. The current process does not encourage parties to present their best case before the applications judge. If they are unsuccessful, they can appeal and file new evidence to try and correct any deficiencies. This results in delay and additional costs. I share Justice Feasby's hope that, in due course, this matter will be considered again by the Court of Appeal and the Rules of Court Committee. Until the reconsideration happens, the correctness standard of review applies, and will be applied in this matter.

[14] Mr. Poirier is seeking summary judgment. The Alberta Court of Appeal outlined the four central considerations in ***Weir-Jones Technical Services Incorporated v Purolator Courier Ltd***, 2019 ABCA 49 at para 47:

a) Having regard to the state of the record and the issues, is it possible to fairly resolve the dispute on a summary basis, or do uncertainties in the facts, the record or the law reveal a genuine issue requiring a trial?

b) Has the moving party met the burden on it to show that there is either "no merit" or "no defence" and that there is no genuine issue requiring a trial? At a threshold level the facts of the case must be proven on a balance of probabilities, or the application will fail, but mere establishment of the facts to that standard is not a proxy for summary adjudication.

c) If the moving party has met its burden, the resisting party must put its best foot forward and demonstrate from the record that there is a genuine issue requiring a trial. This can occur by challenging the moving party's case, by identifying a positive defence, by showing that a fair and just summary disposition is not realistic, or by otherwise demonstrating that there is a genuine issue requiring a trial. If there is a genuine issue requiring a trial, summary disposition is not available.

d) In any event, the presiding judge must be left with sufficient confidence in the state of the record such that he or she is prepared to exercise the judicial discretion to summarily resolve the dispute.

[15] The Appellants on this appeal submit that there are two triable issues, whether there was an express repudiation of the SPA, and when the limitation period should have ended. The Appellants submit that *viva voce* evidence will be required to resolve credibility and conflicting evidence.

[16] I disagree, and I am confident that on the state of the record before me it is possible to fairly resolve this dispute.

The Share Purchase Agreement

[17] The matter involves terms of a contract. The parties agree that both the USA and the SPA contain causes regarding indemnification. The agreements also contain causes indicating that the document represented the entire agreement between the parties and could not be modified without the consent of all the parties in writing.

[18] From the affidavits, I am prepared to find that sometime in July or August 2012, Mr. Jessamine had a conversation with Mr. Poirier. In this conversation, Mr. Jessamine told Mr. Poirier that he would not receive the final $30,000 payment required by the SPA and that he would not receive the written indemnity.

[19] In the initial appeal, it was argued that the SPA did not create an obligation to indemnify Mr. Poirier. It only created an obligation to deliver a written indemnity. This argument was rejected by Applications Judge Birkett. I find that she was correct.

[20] It is settled law that the interpretation of a written contractual provision must be grounded in the text and read in light of the entire contract. The relevant text reads as follows:

> if, notwithstanding such best efforts, all releases as aforesaid are not obtained within 90 days after closing, the remaining parties to the USA shall deliver to vendor (Dynamometry) and Brent (Poirier) their indemnity in writing indemnify the vendor and Brent from any and all liabilities thereunder.

[21] As stated above, despite best efforts by the parties no release was obtained from AXA. On a plain reading of the text in light of the entire contract, 106 should have provided its indemnity after the 90 days expired. A plain reading of the term does not set a deadline of 90 days to provide indemnity as is suggested by the Appellants.

[22] Also on a plain reading, I find that 106 was to indemnify Mr. Poirier from "any and all liabilities thereunder". They were not simply to provide a written document. That would not make sense when read in combination with the entire contract.

[23] Although the SPA states that the remaining parties to the USA shall provide the indemnification, only 106, Mr. Poirier and Dynamometry are parties to the agreement. Mr. Jessamine, Mr. Mackay, and Mr. Edwards are not parties to the SPA. There is no evidence that would make them parties to the contract. Therefore, they are not subject to the terms of the SPA.

[24] Mr. Jessamine submits that 106 repudiated the contract in August 2012. The repudiation happened during a conversation between Mr. Poirier and Mr. Jessamine. His affidavit indicates that he told Mr. Poirier that he would not be receiving his last payment of $30,000 from 106 and that the indemnities would not be provided. This occurred as part of the conversation in which Mr. Poirier was being accused of "gross misrepresentations and negligence" and that Mr. Poirier had caused "financial and reputational damage" to the Sprague companies. The conversation as described by Mr. Jessamine would not have been friendly.

[25] Mr. Poirier denies that there was any mention of repudiation during the conversation. His affidavit dated June 30, 2023, states that a conversation took place during a chance meeting in Edmonton. They discussed a reduced final payment due to taxes owing. Mr. Poirier followed up on the conversation with emails. Those emails are attached as an exhibit to his affidavit. The emails are not consistent with the conversation as described by Mr. Jessamine. I find his memory of the events to be unreliable. However, I do not need to evaluate his evidence in order to make my decision.

[26] Repudiation occurs where a party to a contract indicates by words or conduct an intention not to honour its obligations under the contract. A chance encounter on the street resulting in a discussion that neither party can recount with any detail cannot suffice as notice of a company's intent to repudiate a contract.

[27] In ***Guarantee Co. of North America v Gordon Capital Corp***., [1999] 3 SCR 423, the Court wrote at paragraph 40 "the effect of a repudiation depends on the election made by the non-repudiating party. If that party treats the contract as still being in full force and effect, the contract "remains in being for the future on both sides. Each [party] has the right to sue for *past or future breaches*"".

[28] In this case, Mr. Poirier and Dynamometry treated the SPA as still being in full force and effect. There is no evidence that 106 expressly informed Mr. Poirier of its intention to repudiate the SPA. 106 is responsible for indemnifying Mr. Poirier.

The Unanimous Shareholder Agreement

[29] The parties to the USA were 106, Mr. Jessamine, Mr. Mackay, 146, Mr. Edwards, Dynamometry, Mr. Poirier, 135, and Sprague. Although Mr. Poirier sold his shares to 106, that did not relieve the other parties of their obligations under the USA.

[30] The relevant causes of the USA are found in Article XV, which read:

> 15.1 Each of the parties severally agrees to indemnify each of the other parties hereto against, and reimburse each of the other parties for, any and all liabilities which such other party or parties may incur or become subject to and amounts which such other party or parties may pay or be required to pay which are in excess of the proportionate share of the liabilities and obligations of the parties under the terms of this Agreement, provided that nothing in this section 15.1 shall in any way be deemed to or shall require any party to incur any liability or provide any funds other than as may be expressly provided for in any other provisions of this Agreement.
>
> 15.2 No consent or waiver, expressed or implied, by any party hereto of any breach or default by any other party hereto in the performance of his obligations hereunder shall be deemed to construed to be a consent to or waiver of any other breach or default in the performance by such other party of the same or any other obligations of such party hereunder. Failure on the part of any party to complain of any act or failure to act of any other party or to declare the other party in default, irrespective of how long such failure continues, shall not constitute a waiver by the first mentioned party of his rights hereunder.
>
> …
>
> 15.5 The Shareholders and Secondary Shareholders agree to sign all such documents and do all such things as may be necessary or desirable (including causing his shares to be voted, whether at a meeting of Shareholders or by way of resolution in writing) to more completely and effectively carry out the terms and intentions of this Agreement and to cause the Corporation and SR to act in the manner contemplated by this Agreement. Each Shareholder shall ensure that his nominees, if any, on the Board of Directors of the Corporation and SR acts in such a manner as to give effect to the provisions of this Agreement. If a Shareholder's nominee fails to act in such manner as to give effect to the provisions of this Agreement, such Shareholder shall cooperate in taking all such actions as may be necessary from time to time to remove any such nominee from the Board of Directors. Each Shareholder shall and does hereby give all consents, and shall cause his nominee Directors, if any, to give such consents, if any, which may be necessary for the purpose of effecting any transfer of any Shares of the Corporation which is required or permitted by this Agreement.
>
> 15.12 If at the time of any sale of Shares as contemplated in this Agreement:
>
> …

> (b) there are any securities or covenants lodged by the selling Shareholder(s) or Secondary Shareholder(s) with any person or institution or any personal guarantees given by the Selling Shareholder(s) or Secondary Shareholder(s) or their nominee(s) to secure any indebtedness, liability or obligation of the Corporation, the remaining parties to this Agreement shall use their best efforts to have the selling Shareholder(s) and Secondary Shareholder(s) and any nominee(s) released therefrom. If, notwithstanding such best efforts, the releases as aforesaid are not obtained, the remaining parties shall deliver to the Selling shareholder(s) and Secondary Shareholder(s) their indemnity in writing indemnifying the Selling Shareholder(s) and Secondary Shareholder(s) and their nominee(s) from any and all liabilities thereunder.

These clauses, when read in the context of the entire agreement, clearly indicate that the shareholders agree to indemnify each other. Clause 15.2 does not require a party to act quickly upon becoming aware of a breach. Instead, the clause specifically states that failing to act does not constitute a waiver. I find that the parties to the USA are required to indemnify Mr. Poirier.

[31] In this case, Mr. Poirier claims that he was unaware that any claims were made against the construction bond until he was served with AXA/Intact's Statement of Claim. This is disputed by the other parties. They submit Mr. Poirier should have been aware of the claim because Sprague's 2010 financial statements indicated a claim of $25 million by MGN. They also submit that the parties discussed the action brought by MGN.

[32] Regardless of when Mr. Poirier knew about MGN's claim, the issue of the indemnities did not become important until he was served with the Statement of Claim. Perhaps it would have been prudent to raise the issue of the indemnities sooner, but there was no reason to start a court action regarding the indemnities until their existence became relevant.

[33] In ***Condominium Plan 9421549 v Main Street Developments Ltd***, (2004), 2004 CanLII 48788 (AB KB), Justice Clackson wrote at para 63:

> It is not every nick, bump, bruise, failing or deficiency that warrants action. Thankfully, we Canadians are still reasonably tolerant and non litigious. The question of whether an injury warrants proceedings is not strictly an issue of fault, nor even potential economic gain. What warrants proceedings embraces a consideration of the extent of the injury in comparison to the economics of prospective action. This assessment involves a blended objective/subjective analysis.

[34] This decision is now over 20 years old. It is likely that both the financial and time costs of starting the lawsuit have increased considerably. This makes it even more important for any potential litigant to assess the financial and time costs of a potential lawsuit in comparison to the extent of the injury.

[35] I agree with Applications Judge Birkett's finding that until it became apparent to Mr. Poirier that he needed the indemnity, and it was not going to be provided, there was no point in suing anyone. Mr. Poirier is claiming legal fees of over $120,000 in this action. Although the legal fees might have been less if this action were started earlier, they likely still would have been considerable. It would not make sense to expend those funds unless the indemnity was needed. His action is not time-barred.

[36] I agree with Applications Judge Birkett's reasoning, and grant Mr. Poirier's request for Summary Judgment. He is entitled to be reimbursed for the $40,000 he paid Intact. He is also entitled to be fully compensated for his legal fees related to settling Intact's claim. I understand from the submissions made to Applications Judge Birkett that the parties would like to make submissions regarding costs of this action due to offers been made. The parties may make written submissions to me of no more than eight pages plus any required attachments within 30 days of this decision.

Heard on the 9th day of May, 2025.
Dated at the City of Edmonton, Alberta this 23rd day of May, 2025.

G.R. Fraser
J.C.K.B.A.

Appearances:

Jose A. Delgado,
Bishop & McKenzie LLP
for the Appellants (Defendant, Third Party Defendants)

Artem Barsukov
Bennett Jones LLP
for the Respondent (Defendant)