

# COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Diamant Cleaning Vancouver Inc. v.  
Kindred Construction Ltd.*,  
2025 BCCA 227

Date: 20250612  
Docket: CA50353

Between:

**Diamant Cleaning Vancouver Inc.**

Appellant  
(Plaintiff)

And

**Kindred Construction Ltd.**

Respondent  
(Defendant)

Before: The Honourable Mr. Justice Grauer  
The Honourable Justice Donegan  
The Honourable Justice Gomery

On appeal from: An order of the Supreme Court of British Columbia, dated  
December 11, 2024 (*Diamant Cleaning Vancouver Inc. v. Kindred Construction Ltd.*,  
2024 BCSC 2439, Vancouver Docket S241701).

## Oral Reasons for Judgment

Appearing in person on behalf of the  
Appellant:

I. Martinez

Counsel for the Respondent:

D.K. Plunkett

Place and Date of Hearing:

Vancouver, British Columbia  
June 12, 2025

Place and Date of Judgment:

Vancouver, British Columbia  
June 12, 2025

**Summary:**

*Diamant Cleaning Vancouver Inc. appeals the dismissal of its application to set aside a mutual release agreement it had purportedly entered into with the respondent, Kindred Construction Ltd. as part of a settlement by which the appellant would abandon its appeal, and the respondent would waive its costs in both courts. The application was dismissed on the grounds that the appellant’s counsel had full ostensible authority to negotiate the agreement and that the signed release was binding.*

*Ms. Martinez—Diamant’s principal—alleges that her pro-bono counsel colluded with respondent’s counsel in negotiating the settlement, did not have her full authorization and consent, failed to give her proper legal advice about the implications of signing the release, and gave her misleading information to induce her to sign it. Ms. Martinez also applies to adduce fresh evidence demonstrating that she was subject to health issues at the relevant time that impaired her ability to enter into the agreement.*

*Held: appeal and application to adduce fresh evidence dismissed.*

*Diamant has failed to demonstrate any basis for setting aside the mutual release. It has failed to establish mutual mistake, duress or unconscionability as there was no unequal bargaining power and there is evidence that the appellant was agreeable to abandoning the appeal if it could do so without costs.*

*Diamant’s counsel was clearly acting as its solicitor at the material time, and had at least ostensible authority if not, in fact, actual authority to agree to the settlement, reinforced by Ms. Martinez signing the mutual release and the notice of abandonment, carrying out Diamant’s obligations under the terms of the settlement.*

*The fresh evidence does not pass the Palmer admissibility test. It was available at the time of the underlying hearing, and it indicates neither that she was unable to understand advice from a solicitor nor that she was impaired in her ability to make appropriate decisions in the litigation.*

*Ordinary costs are awarded, as the appellant’s conduct was not reprehensible enough to justify special costs.*

[1] **GRAUER J.A.:** The appellant, Diamant Cleaning Vancouver Inc., is represented by its principal, Ms. Isabel Martinez. In the court below, Diamant applied by way of summary trial, amongst other things, for an order setting aside a mutual release agreement it had purportedly entered into with the respondent, Kindred Construction Ltd. That application was dismissed by Justice Thomas, whose reasons for judgment are indexed at 2024 BCSC 2439. Diamant appeals.

[2] Diamant brought its application before Thomas J. with the intention, if successful, of proceeding to claim \$34,865.17 that Ms. Martinez alleged was owing to it under a construction cleaning contract with Kindred. Its original claim against Kindred for that amount had been dismissed with costs by Justice Fitzpatrick on July 19, 2023 (unreported, 19 July 2023, Supreme Court Reg. S234192, Vancouver).

[3] In the litigation before Fitzpatrick J., Kindred had acknowledged that Diamant was entitled to the contract's fixed price of \$28,700 plus GST, some of which it had paid, with the balance included in funds Kindred had paid into court to release a lien Diamant had filed. Ms. Martinez has advised that her claim against Kindred for extras amounted to \$9,000 plus interest of approximately \$2,000 over the time that she was unpaid.

[4] Diamant appealed Fitzpatrick J.'s dismissal of its claim, in response to which Kindred sought security for costs. At that point, Diamant retained counsel, Mr. Li, through Access Pro Bono BC. Mr. Li successfully represented Diamant at the hearing of Kindred's application, which was dismissed by order of Justice Griffin pronounced October 18, 2023 (unreported, 18 October 2023, British Columbia Court of Appeal Chambers Docket CA49268).

[5] Following that application, after discussions with Ms. Martinez, Mr. Li initiated settlement discussions with counsel for Kindred. They agreed to a settlement that would see Kindred pay the sum of \$1, and abandon its claims against Diamant for costs pursuant to the order of Fitzpatrick J. together with any costs accruing in the Court of Appeal. In return, Diamant would abandon its appeal and execute the mutual release at issue in this proceeding.

[6] On behalf of Diamant, Ms. Martinez duly executed the mutual release and signed a notice of abandonment of the appeal on behalf of Diamant.

[7] Some months later, Ms. Martinez applied to this Court, seeking "dismissal of the mutual release agreement", effectively seeking to reinstate her abandoned

appeal. That application was dismissed by Madam Justice Newbury on January 9, 2024, without prejudice to Diamant's ability to seek to reinstate its appeal if it obtained an order in Supreme Court setting aside the mutual release. Although she was warned by Newbury J.A. that there was little prospect of success, Ms. Martinez then commenced action on behalf of Diamant against both Kindred and Mr. Li seeking to set aside the release and claiming damages against both defendants. This led to the application before Thomas J. that is the subject of this appeal.

[8] Justice Thomas concluded that Mr. Li was acting as counsel with full ostensible authority to settle Diamant's claim against Kindred and that the release was valid:

[14] The real issue is that Ms. Martinez wants more money; either payment of money that was dismissed pursuant to the order of Justice Fitzpatrick or with respect to the time she has had to spend on her appeal, and then pursuing this action against Kindred to have the release set aside.

[15] In my view, Mr. Li was clearly acting as counsel with full ostensible authority to settle the matter on Ms. Martinez's behalf. I find the release that she signed with Kindred is a valid release and extinguishes any action that she can bring against Kindred, including this action.

[9] For these reasons, Thomas J. dismissed the action against Kindred. He declined, however, to dismiss Diamant's claim against Mr. Li given the existence of a fundamental conflict between the affidavit evidence of Ms. Martinez, and that of Mr. Li. Justice Thomas concluded that such a conflict ought not to be resolved on affidavits by way of summary trial. Accordingly, though Diamant's claim against Kindred was dismissed, its claim against Mr. Li continues.

[10] On appeal from Thomas J.'s order, Ms. Martinez continues to have difficulty in separating her concerns about Fitzpatrick J.'s judgment from what was at issue before Thomas J. She maintains that Kindred was guilty of fraudulent misrepresentation in the proceedings before Fitzpatrick J., gave wrong amounts on their subcontract, and gave false evidence. Regrettably, Ms. Martinez also labours under the misapprehension that because Mr. Li negotiated the settlement with counsel for Kindred, they therefore colluded against her, with Kindred improperly influencing Mr. Li. Unsurprisingly, the evidence does not support that contention.

The reality, of course, is that no settlement ever occurs without negotiation between counsel who, as professionals, conduct those negotiations in accordance with their respective instructions and their clients' best interests.

[11] Nevertheless, Ms. Martinez maintains on this appeal that Mr. Li made a number of false statements under the influence of Kindred, and did not have her full authorization and consent to settle her appeal. She further says that Mr. Li failed to give her proper legal advice about the implications of signing the release, and gave her misleading information to induce her to sign.

[12] With respect, Diamant has failed to demonstrate any basis for setting aside the mutual release. While Ms. Martinez has raised a number of complaints concerning allegedly wrongful behaviour by Kindred in the proceedings before Fitzpatrick J., influence by Kindred on Mr. Li, and Mr. Li's failure to take proper instructions and give appropriate advice, she has not established mutual mistake, duress or unconscionability.

[13] As to unconscionability and duress, Diamant avoided liability for costs ordered by Fitzpatrick J. and possible future appeal costs. Diamant's claim had significant evidentiary difficulties as reviewed by Fitzpatrick J. There is nothing about the terms that suggest unequal bargaining power—notwithstanding Ms. Martinez's claim of undue influence on the part of Kindred, a claim that is unsupported either by the record or by logic. The settlement was, after all, negotiated after Diamant had been successful in opposing an application for security for costs and had initiated the settlement discussions. In these circumstances, Diamant was not in a vulnerable position—unless, of course, it proceeded with an unsuccessful appeal, exposing it to even more costs than those already awarded against it. There is evidence that Ms. Martinez was agreeable to abandoning her appeal if she could do so without costs and then was anxious for Kindred to sign the release after she did to ensure that she would have no liability for costs.

[14] As I see it, the only real issue before us is whether Thomas J. erred in finding that Mr. Li was acting as counsel with full ostensible authority from Diamant when he

agreed to the settlement with Kindred that gave rise to the mutual release. Diamant has shown no error in that conclusion. Mr. Li was clearly acting as Diamant's solicitor at the material time, and had at least ostensible authority if not, in fact, actual authority.

[15] It follows that, as between Diamant and Kindred, Mr. Li is presumed to have had the authority to bind Diamant to the settlement: see *Wright v Schlesiger*, 2020 BCCA 73 at paras 14–16. Here, this authority was reinforced by the release and notice of abandonment of appeal that Ms. Martinez signed on behalf of Diamant to carry out Diamant's obligations under the terms of the settlement.

[16] As between Diamant and Mr. Li, whether Mr. Li acted contrary to Ms. Martinez's instructions, or failed to advise her properly, is a matter between Diamant and Mr. Li and is not relevant to this appeal.

[17] Ms. Martinez seeks to adduce fresh evidence to demonstrate that she was subject to health issues at the time. While the evidence shows health issues dating from 2020 that were no doubt concerning, it is my view that it does not pass the test for admissibility established in *Palmer v The Queen*, [1980] 1 SCR 759, 1979 CanLII 8. It does not indicate that she was unable to understand advice from a solicitor or was impaired in her ability to make appropriate decisions in the litigation. Not only was the evidence available at the time of the hearing before Thomas J., but it was also irrelevant and would have made no material difference to the outcome.

[18] For these reasons, I would dismiss the application to adduce fresh evidence, and I would dismiss the appeal.

[19] Kindred seeks special costs of the appeal upon dismissal. I would not award them in the circumstances of this case. Taking into account Ms. Martinez's apparent psychological difficulties and the fact that the foundation of her complaint remains to be litigated in her ongoing claim against Mr. Li, I do not consider her conduct to be reprehensible to a degree that would, at this stage, justify such an award. Kindred will therefore be limited to its ordinary costs.

[20] **DONEGAN J.A.:** I agree.

[21] **GOMERY J.A.:** I agree.

[22] **GRAUER J.A.:** The appeal is dismissed with ordinary costs to the respondent.

“The Honourable Mr. Justice Grauer”