Court of King's Bench of Alberta

Citation: Brookfield Place (Calgary) LP v Cru Juice Inc (Jusu Bars), 2025 ABKB 711

Date: 20251208
Docket: 2101 02928
Registry: Calgary

2025 ABKB 711 (CanLII)

Between:

Brookfield Place (Calgary) LP
by its General Partner Brookfield Place (Calgary) GP Inc

Plaintiff
(Respondent)

– and –

Cru Juice Inc carrying on business as Jusu Bars,
Bruce Wayne Mullen, 8931429 Canada Inc formerly
known as Jusu Bars Inc and Better Plant Sciences Inc

Defendants
(Applicants)

Reasons for Decision of the
Honourable Justice D. Jugnauth

I. Introduction

[1] This decision determines the appropriate remedy for negligent conduct by a lawyer who failed to inform her client of court orders imposing procedural requirements, non-compliance with which resulted in her clients' Statement of Defence being struck.

[2] For the following reasons, the consent order granted by Justice S.A. Moore, filed March 12, 2025, is varied by replacing the date of "March 21, 2025" as it appears in paragraphs 1-3 of the Order with the date "October 3, 2025". Further, the Defendants shall forthwith pay the reasonable thrown-away costs of the Plaintiff on a full indemnity, solicitor and client basis.

II. Background

[3] The facts are not contested.

[4] The underlying dispute between the Defendants (collectively "893 Canada") and the Plaintiff (hereinafter "Brookfield") arises from Brookfield's allegation that 893 Canada breached the terms of a commercial lease for retail space. As a result of an alleged "midnight move" in 2020, Brookfield sued 893 Canada to enforce its rights under the lease.

[5] As part of this action, Brookfield sued the corporate actors (for which Mr. Mullen was the corporate representative) and Mr. Mullen personally. At all material times all Defendants were represented by NN of a law firm based in British Columbia.

[6] On July 23, 2024, Mr. Mullen was questioned in relation to undertakings he had given as part of his original questioning in 2023. The July 2024 questioning resulted in a further 53 new undertaking requests, some of which were accepted while others were taken under advisement.

[7] On December 20, 2024, NN entered into consent order on behalf of 893 Canada, which was granted by Applications Judge Mattis and filed on January 2, 2025. Among other obligations, this order imposed upon 893 Canada a deadline of January 17, 2025 to provide complete and proper undertaking responses to all undertakings requested at the July 23, 2024 questioning.

[8] In an application dated January 28, 2025, Brookfield sought to have Mr. Mullen and 893 Canada Inc. held in contempt for not providing complete and proper undertaking responses pursuant to the January 2 Order. In addition to a declaration of contempt, Brookfield sought to have the Court strike the Defendants' Statement of Defence and award Brookfield costs on a full indemnity basis.

[9] On February 13, 2025, NN consented to a further order granting Brookfield's application for contempt, in part. Pursuant to the terms of this order Mr. Mullen was directed to appear before the Court on March 12, 2025 to show cause why 893 Canada should not be held in contempt.

[10] The balance of the contempt application (i.e. the liability and sanction phases of a contempt proceeding) was adjourned to March 12, 2025, including all other relief sought by Brookfield.

[11] On March 12, 2025, NN consented to a third order that imposed March 21, 2025 as a new deadline for 893 Canada to provide complete and proper responses to all undertakings requested at the July 23, 2024 questioning of Mr. Mullen.

[12] Importantly, the March 12 Order imposed the following consequences on 893 Canada for failing to provide the undertaking responses by the specified date:

(i) the Statement of Defence of the Defendants was to be struck without a further order of the court;

2025 ABKB 711 (CanLII)

(ii) Brookfield would be permitted to have the Defendants noted in default; and

(iii) Brookfield would become entitled to full indemnity costs for the entire action.

[13] Between January 2 and March 28, 2025, NN had written communications with Mr. Mullen and the former operations manager of Jusu Bars for the purpose of obtaining information and records responsive to the undertakings. On March 21, 2025, on behalf of her clients, NN provided to Brookfield's counsel a schedule of undertaking responses and attachments.

2025 ABKB 711 (CanLII)

[14] At no time did NN seek instructions or approval from her clients in relation to any of the above orders; nor did NN ever provide copies of those orders to her clients or make her clients aware of their existence; nor did NN inform, advise, or get approval for the undertaking responses she provided to Brookfield on March 21, 2025.

[15] On August 10, 2025, Mr. Mullen became aware for the first time of the court orders referred to above, and that NN had previously provided undertaking responses on his behalf. On his review of those responses, Mr. Mullen was of the view that some of NN's undertaking responses were incomplete or inaccurate.

[16] On August 19, 2025, the Defendants retained new counsel to bring this application before me, which seeks to: (i) vary the terms of the March 12 Order to vary the undertaking response deadline to October 3, 2025; and (ii) award Brookfield its reasonable thrown away costs on a full indemnity basis. The proposed extension is to facilitate an opportunity for Mr. Mullen to acquire the necessary records to provide complete and accurate undertakings as originally requested by Brookfield.

[17] NN deposed to her conduct described above in an affidavit affirmed on August 28, 2025. She deposed that during the relevant periods she was enduring significant mental health challenges that were affecting her practice. She has since sought professional help, resigned from the firm, and is not currently practicing law. The Law Society of British Columbia has been made aware of NN's conduct.

III. Positions of the Parties

[18] 893 Canada argues that rules 9.15 and 13.5 of the *Alberta Rules of Court*, Alta Reg 124/2010 confer authority for a court to vary a deadline in an interlocutory procedural order. Counsel contends that doing so would ensure a fair outcome by allowing the case to proceed and be adjudicated on the merits. 893 Canada also argues that its offer to compensate Brookfield for its reasonable thrown away costs on a full indemnity basis cures any prejudice to Brookfield occasioned by varying the undertaking response deadline as requested.

[19] Brookfield advances the position that the March 12 Order, while procedural in nature, had substantive effect given that non-compliance with its terms operated to strike the Defendants' Statement of Defence without further intervention of the court. Brookfield argues that varying the March 12 Order to cure NN's misconduct would penalize the opposing party by undermining the parties' interest in finality, and denying Brookfield the opportunity to note 893 Canada in default and pursue default judgment.

[20] Further, Brookfield asserts that 893 Canada is not left without a remedy for the failings of counsel given the uncontested facts, admitted by NN in her affidavit, give rise to a negligence action against NN, who is insured by the British Columbia Lawyers Indemnity Fund.

IV. Analysis

[21] In ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2020 ABCA 333 [***Custom Metal***] the Alberta Court of Appeal dealt with a similar issue, which guides the analysis in this case. A short summary of ***Custom Metal*** follows.

[22] Custom Metal Installations Ltd. and Winspia Windows (Canada) Inc. had entered into a supply agreement for the provision and installation of a curtain wall system for a Calgary condominium project. Following a dispute, Winspia filed builder liens and a Statement of Claim to enforce them.

[23] During the litigation Custom Metal obtained a consent order requiring Winspia's corporate representative to attend for questioning on a specified date, with the consequence that a failure to attend would result in Winspia's Statement of Defence to Counterclaim being struck. The representative did not attend and the Statement of Defence to Counterclaim was struck.

[24] An applications judge dismissed Winspia's application to vary the consent order and restore its defence. On appeal, the chambers judge restored Winspia's Statement of Defence to Counterclaim, finding that the consent order was procedural in nature and subject to the court's discretion under the *Alberta Rules of Court*, Alta Reg 124/2010. The Court of Appeal dismissed Custom Metal's further appeal, agreeing that the chambers judge's discretionary approach was appropriate in the circumstances.

a. The court may vary a procedural consent order when it is just to do so

[25] In its reasons, the Court of Appeal discussed three approaches courts have used to determine whether to interfere with consent orders: (i) the contractual method; (ii) discretion based on an assessment of prejudice; and (iii) discretion based on the interests of justice to hear the dispute on the merits.

[26] I do not propose to repeat the Court of Appeal's discussion in this regard save for two points which I consider form the *ratio decidendi* of that case. First, as a preliminary step, before deciding to vary a consent order the court must determine whether the consent order at issue is final or interlocutory.

[27] Final consent orders are those that dispose of the dispute by settling the ultimate issues between the parties. Interlocutory procedural consent orders are those that engage the power of the court to govern the litigation and move the litigation forward: ***Custom Metal*** at paras 42 and 57.

[28] This difference is important since final consent orders carry a much greater risk that court intervention might upset the delicate balance struck between the parties in such a way that the

2025 ABKB 711 (CanLII)

parties may not have otherwise settled their dispute based on the proposed variation being contemplated by the court: ***Custom Metal*** at paras 43 and 50.

[29] Interlocutory procedural orders do not carry such a risk since there is no real contract between the parties: ***Custom Metal*** citing ***Siebe Gorman & Co v Pneupac Ltd***, [1982] 1 All ER 377 (CA) per Lord Denning at 380.

[30] Second, when dealing with interlocutory procedural orders, the Court of Appeal expressly rejected the approach that a consent order can only be varied for the same reasons that a contract can be set aside. Rather, the Court of Appeal preferred a discretionary approached based on "what is just in the circumstances": ***Custom Metal*** at paras 57 and 59.

2025 ABKB 711 (CanLII)

b. The March 12 Order was an interlocutory procedural consent order

[31] Brookfield argues that the March 12 Order was procedural in nature but substantive in effect given the penalty for non-compliance was the striking of the Defendants' Statement of Defence, among other consequences. On this basis Brookfield urges an interpretation of the consent order as one akin to a final order that ought not be interfered with based on the considered agreement between the parties, and the parties' interest in finality.

[32] With the greatest of respect, there is no interpretation of the March 12 Order that suggests the order ends the lawsuit by settling the ultimate issues between the parties. In this case, the fundamental issues in dispute appear to be: (i) what liability, if any, attaches to 893 Canada's decision to cease operations and vacate the leased space prior to the expiration of the lease; and (ii) if liability attaches, what is an appropriate quantum of damages.

[33] The March 12 Order does not speak to liability nor damages. It only speaks to a specific date by which 893 Canada must provide complete and proper undertaking responses requested from Mr. Mullen's July 2024 questioning. A stipulated consequence of non-compliance, including striking an action or a Statement of Defence, does not operate to convert a procedural consent order into a final consent order.

[34] This is evident from the Court of Appeal's decision in ***Custom Metal*** where Winspia's Statement of Defence to Counterclaim was struck when Winspia failed to produce its corporate representative for questioning on a specified date. In dismissing the appeal, the Court of Appeal agreed with the chamber judge's characterization of the order at issue as a procedural interlocutory order governed by rule 9.15: ***Custom Metal*** at paras 22, 59 and 64. For similar interpretations and conclusions see: ***Gates Estate v Pirate's Lure Beverage Room***, 2004 NSCA 36; ***Atkins v Holubeshen***, [1984] OJ No 309 (Ont HC), 43 CPC 166 at para 32; ***BeeTown Honey Products Inc (Bankruptcy)*** (2003), 67 OR (3d) 511 (ONSC) aff'd 2004 CanLII 34508 (ONCA).

c. Varying the March 12 Order is just in the circumstances

[35] Rule 9.15(4) is reproduced below:

Setting aside, varying and discharging judgments and orders

9.15(4) The Court may set aside, vary or discharge an interlocutory order

(a) because information arose or was discovered after the order was made,

(b) with the agreement of every party, or

(c) on other grounds that the Court considers just.

[36] Having determined that the March 12 Order is an interlocutory procedural order, I am of the view that it would be just in the circumstances to vary the terms as proposed by 893 Canada. This includes awarding Brookfield its reasonable thrown away costs on a full indemnity basis. I reach this conclusion for several reasons.

[37] First, owing to NN's misconduct, Mr. Mullen did not discover the existence of the January 2, February 13, or March 12 orders until mid-August. It is common ground that 893 Canada's counsel was acting without instructions or approval when she consented to citing the Defendants in contempt and committed Mr. Mullen to obligations he was never apprised of.

[38] Mr. Mullen's discovery of the same in August 2025 is clearly information that arose or was discovered after the March 12 Order was made, and satisfies the condition in rule 9.15(4)(a) to exercise discretion in favour of varying an order.

[39] Second, I find the overarching context informative. The February 13 Consent Order was entered into after Brookfield brought an application to hold the Defendants in contempt for non-compliance with the January 2 Order. When the matter returned to court on March 12, NN agreed to an obligation on the part of the Defendants that they were never made aware of.

[40] In these circumstances, any application by Brookfield to hold any of the Defendants in contempt was bound to fail since Brookfield could not adduce evidence that the alleged contemnors had actual knowledge of the court order said to have been breached: ***Carey v Laiken***, 2015 SCC 17 at para 34.

[41] In other words, if striking the Statement of Defence was to be the remedy for contempt following a judicial determination, that remedy could not have lawfully issued. In my view, it would not be equitable to grant through the back door a remedy that Brookfield could not have obtained through the front door.

[42] Third, despite Brookfield's argument based on the wealth of legal authority that holds a client responsible for the acts or omissions of his or her lawyer, I agree with the chambers judge in ***Custom Metal*** that "it stretches that authority too far to say that a client must *always* be responsible": ***Custom Metal Installations Ltd v Winspia Windows (Canada) Inc***, 2019 ABQB 732 at para 51 [emphasis added].

2025 ABKB 711 (CanLII)

[43] The very existence of rules such as 9.15 and 13.5 (Variation of Time Periods) admit of judicial discretion to do what is just between the parties: ***Custom Metal*** at paras 58 and 61. This includes circumstances where – as here – the issue arises on account of one party's counsel.

[44] The central holding in ***Custom Metal*** reconciles what might otherwise appear to be competing lines of authority. As noted above, the Court of Appeal stipulated the first step in the analysis is to determine whether the order at issue was a final consent order or an interlocutory procedural consent order.

[45] Applying the discretionary approach to determine whether to vary a consent order is only engaged when dealing with the latter. "Once it has been determined that a consent order is interlocutory and procedural in effect *and not in the nature of a final determination on a matter of substance*, the Court may determine what is just in the circumstances": ***Custom Metal*** at para 59 [emphasis added].

[46] In argument, Brookfield advanced four cases to support its position that clients are liable for the commitments that their lawyers bind them to: (i) ***Chheng v Lovatt***, 2025 ABCA 55; (ii) ***Arslan v Sekerbank TAS***, 2016 SKCA 77; (iii) ***Correia v Danyluk***, 2001 ABCA 148; and (iv) ***Sign-O-Lite v Bugeja***, [1994] OJ No 1381 (ONCJ). I do not take issue with this statement of law as far as it goes.

[47] The unifying feature of all four cases is the nature of what was sought to be varied: orders and settlement agreements that disposed of the litigation by resolving the ultimate issue between the parties, or orders that otherwise represented a negotiated settlement of interests. In other words, these cases do not deal with interlocutory procedural orders which lie at the heart of the discretion in rule 9.15(4) engaged in this case.

[48] Specifically, the Court in ***Chheng*** was dealing with a Consent Final Property Order negotiated between the parties. The Court in ***Arslan*** was dealing with a negotiated preservation order that the Court held "will generally involve a settlement of interests or a compromise of positions by one or both of the parties": ***Arslan*** at para 95.

[49] Similarly, the context in both ***Correia*** and ***Sign-O-Lite*** were settlement agreements that disposed of the litigation between the parties where the authority of counsel to enter into those agreements was being challenged. All four of these cases are factually and legally distinguishable to the circumstances before me, and do not assist in resolving the present dispute.

[50] Fourth, 893 Canada comes with clean hands having acted with diligence to seek a remedy from the court. Mr. Mullen only discovered NN's misconduct on August 10 when he was contacted by other lawyers at NN's firm that had taken over the file. By August 19, 893 Canada had retained new counsel to bring the extant application to vary the terms of the March 12 Order. By August 27 the application had been filed returnable on September 5, 2025.

[51] The Defendants' swift and purposeful conduct in this regard favours exercising my discretion to grant a remedy versus an Applicant that is dilatory in seeking a remedy upon discovering untoward circumstances.

2025 ABKB 711 (CanLII)

[52] Fifth, the remedy sought ameliorates any prejudice to Brookfield. In its draft form of order and during oral argument 893 Canada is clear that it is willing to pay reasonable thrown away costs on a full indemnity basis to compensate Brookfield for its legal expenses associated with the January 2, February 13 and March 12 orders. In these circumstances I see no prejudice to Brookfield but for the passage of a modest amount of time.

[53] I am not persuaded that denying Brookfield the opportunity to note the Defendants in default amounts to prejudice capable of tipping the scales against granting the relief sought. The net effect of the remedy is to restore Brookfield to the position it wanted to be in prior to 2025 – equipped with 893 Canada's undertaking responses so it could advance the prosecution of its claim.

[54] To this point, I am mindful that the *Rules of Court* are intended to promote a fair and just determination of disputes between the parties on the merits. While it is true that the rules confer authority to award remedies dispositive of actions otherwise than on their merits, those results are meant to be an exception to the general rule.

V. Conclusion

[55] In the result, the Order of Justice S.A. Moore filed March 12 is hereby varied by replacing the date of "March 21, 2025" as it appears in paragraphs 1-3 with the date "October 3, 2025".

[56] Further, 893 Canada shall forthwith reimburse Brookfield for its reasonable thrown away costs on a full indemnity solicitor and client basis in relation to Brookfield's legal expenses associated with the applications underlying the Orders dated January 2, 2025, February 13, 2025 and March 12, 2025.

[57] While 893 Canada was successful in the extant application and would presumptively be entitled to a costs award, I note that 893 Canada has proposed that no costs be awarded in its favour. In the circumstances before me, which aim to eliminate the prejudice to Brookfield owing to NN's misconduct, I agree this is an appropriate concession. Therefore, each side will bear its own costs in relation to this application.

[58] Counsel for 893 Canada is directed to prepare the Order arising from these reasons.

Heard on September 17, 2025.
Dated at the City of Calgary, Alberta this 8th day of December 2025.

D. Jugnauth
J.C.K.B.A.

2025 ABKB 711 (CanLII)

Appearances:

E.W. Halt KC, Peacock Linder Halt & Mack LLP
for the Applicants

M. O'Brien, MLT Aikins LLP
for the Respondent

2025 ABKB 711 (CanLII)