IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *2197 Otter Point Properties Nominee Ltd. v. GT Mann Contracting Ltd.,* 2026 BCSC 558

Date: 20260331
Docket: Vancouver
Registry: S252763

Between:

2197 Otter Point Properties Nominee Ltd.

Plaintiff

And

GT Mann Contracting Ltd. and Graeme Mann

Defendants

Before: The Honourable Justice Matthews

Reasons for Judgment

Counsel for the plaintiff:	K.H.N. Soe S. Gordon
Counsel for the defendants:	D. McKenzie H. Meiteen
Place and Date of Hearing:	Vancouver, B.C. March 2, 2026
Place and Date of Judgment:	Vancouver, B.C. March 31, 2026

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Overview

[1] Robert G. Foster and the defendant, GT Mann Contracting Ltd., contracted to construct a residential development on lands located at 2193 and 2197 Otter Point Road in Sooke, British Columbia. The contract between Mr. Foster and GT Mann Contracting provides the parties the option to require disputes be arbitrated. The plaintiff, 2197 Otter Point Properties Nominee Ltd. ("2197 Otter Point Properties"), is on title to the lands but is not a named party to the contract. After a mediated attempt to resolve a dispute that arose under the contract, 2197 Otter Point Properties commenced this litigation including a claim in breach of the contract.

[2] GT Mann Contracting seeks to refer this matter to arbitration. GT Mann Contracting has brought two applications in furtherance of that goal. The first is to stay the matter. The second is to strike the portion of the affidavits of 2197 Otter Point Properties on the stay application that append offers to settle and to strike portions of the application response referring to the offers because the impugned evidence and references to the evidence are covered by without prejudice privilege.

[3] 2197 Otter Point Properties opposes the application to refer the matter to arbitration on the basis that the parties to the litigation are not parties to a contract with an arbitration clause, and because it asserts that GT Mann Contracting took steps in the proceeding by issuing offers to settle. In addition, it argues that GT Mann Contracting is estopped from enforcing the arbitration clause on the basis that it, by the making of the offers to settle and by the language of the offers to settle, represented that it intended to have the merits of the dispute adjudicated at trial.

[4] 2197 Otter Point Properties opposes the application to strike its affidavit appending offers to settle and references to the settlement offers, on the basis of an exception to without prejudice privilege. The asserted exception is representation estoppel associated with 2197 Otter Point Properties detrimentally relying on a promise or assurance made in the without prejudice communication that the dispute would be resolved through litigation in the Supreme Court of British Columbia.

Background to the Dispute, the Applications, and Arbitration Agreement

The Project

[5] Mr. Foster and GT Mann Constructing contracted to build a rental housing development called Park View. They used a standard from construction contract, CCDC 14, 2013. They made the contract on May 31, 2022.

[6] Section 8.1.1 of the contract provides that disputes shall be settled in accordance with Part 8 of the General Conditions, which include the ability to give the other party notice to arbitrate, no later than 10 working days after a mediation to resolve the dispute is terminated.

[7] The project was completed on July 1, 2024.

The Disputes and Mediation

[8] On August 7, 2024, GT Mann Constructing filed a lien in the amount of $3,483,753.36 pursuant to the *Builders Lien Act,* S.B.C. 1997, c. 45. GT Mann Constructing, Mr. Foster and 2197 Otter Point Properties consented to an order for the discharge of the lien on the posting of a lien bond.

[9] The parties attended a mediation at which GT Mann Contracting was represented by counsel and by Graeme Mann, the principal of GT Mann Contracting. Mr. Foster attended mediation. Mr. Foster asserts he attended the mediation as a representative of 2197 Otter Point Properties and in his personal capacity. On December 16, 2024, the mediation adjourned without settlement.

[10] On April 6, 2025, 2197 Otter Point Properties commenced this action in which it claims damages for breach of the May 31, 2022, contract, fraud, breach of fiduciary duty, breaches of duty of care, negligence and negligent misrepresentation by GT Mann Contracting and the personal defendant, Graeme Mann, who is the principal of GT Mann Contracting

[11] In the notice of civil claim, 2197 Otter Point Properties describes itself as the “Owner” but does not plead what it “owns”. It pleads that the Owner entered into a

written contract with GT Mann Contracting on May 31, 2022. The particulars it pleads about the contract align with the May 31, 2022 contract that is in evidence on these applications, except that 2197 Otter Point Properties is not named as a party to the May 31, 2022 contract. 2197 Otter Point Properties does not make any pleading regarding the fact that its name does not feature in the contract as a party and Mr. Foster's does.

[12] On June 12, 2025, GT Mann Contracting and Graeme Mann filed a jurisdictional response to the notice of civil claim. On June 13, 2025, GT Mann Contracting terminated the mediation and gave notice referring the matter to arbitration. On July 8, 2025, it filed the application to stay this proceeding.

Legal Principles on Applications to Stay in Favour of Arbitraiton

[13] This application is made pursuant to s. 7 of the *Arbitration Act*, S.B.C. 2020, c. 2 which reads as follows:

> **Stay of proceedings**
>
> **7** (1) If a party to an arbitration agreement commences legal proceedings in a court against another party to the agreement in respect of a matter agreed to be submitted to arbitration, a party to the legal proceedings may apply, before filing a response to civil claim or a response to family claim or taking any other step in the proceedings, to that court to stay the legal proceedings.
>
> (2) In an application under subsection (1), the court must make an order staying the legal proceedings unless it determines that the arbitration agreement is void, inoperative or incapable of being performed.
>
> (3) An arbitration may be commenced or continued and an arbitral award made even though an application has been brought under subsection (1) and the issue is pending before the court.

[14] In *Peace River Hydro Partners v. Petrowest Corporation*, 2022 SCC 41 at paras. 81–82, the Court described provisions such as those found in s. 7(1) as establishing technical prerequisites to a stay. The technical prerequisites are:

a) an arbitration agreement exists;

b) a party to the arbitration agreement has commenced legal proceedings against another party to the agreement;

c) the legal proceedings are in respect of a matter agreed to be submitted to arbitration; and

d) the application is brought timely, i.e., before the applicant takes a step in the proceeding.

See also: *Davidson v. Lyra Growth Partners Inc.,* 2024 BCCA 133 at para. 28; and *Touvongsa v. Lahouri*, 2024 BCCA 405 at para. 18, citing *Prince George v. McElhanney Engineering Services Ltd.*, 9 B.C.L.R. (3d) 368 at para. 22, 1995 CanLII 2487 (C.A.).

[15] The general rule for stay applications under s. 7 is that if the applicant makes out an arguable case on the technical prerequisites, the court must stay the proceeding in favour of arbitration: *Clayworth v. Octaform Systems Inc.,* 2020 BCCA 117 at para. 21; *Dell Computer Corp. v. Union des Consommateurs*, 2007 SCC 34 at para. 84; *Peace River Hydro Partners* at para. 84.

[16] The arguable case test and the subsequent case law reflects the principle of "competence-competence" which gives precedence to the arbitral process by allowing arbitrators the opportunity to rule on their own jurisdiction in the first instance: *Peace River Hydro Partners* at para. 39; *Dell Computer Corp.* at para. 69; *Clayworth* at para. 24.

[17] There are exceptions, developed through jurisprudence, to the arguable case test. The court is permitted to consider a challenge to arbitral jurisdiction itself on:

a) pure questions of law;

b) questions of mixed fact and law that can be determined with only a superficial regard to the record; and

c) where there is no real prospect that a *bona fide* jurisdictional challenge will be resolved by an arbitrator.

[18] The first two common law exceptions were identified in *Dell Computer Corp.* at paras. 84–85, and the third was identified in *Uber Technologies Inc. v. Heller*,

2020 SCC 16 at paras. 44–46. The first two exceptions to the general rule overtake the competence-competence principle because courts have particular expertise in deciding such questions: *Peace River Hydro Partners* at para. 42. The third exception arises to ensure that the issue if jurisdiction is addressed if there is no realistic prospect that an arbitrator will do so: *Uber*.

[19] The common law exceptions are not absolute. As Justice Deschamps notes in *Dell Computer Corp.*, courts must still consider whether the challenge to the arbitrator's decision is merely a tactic to delay the arbitration:

> 86 Before departing from the general rule of referral, the court must be satisfied that the challenge to the arbitrator's jurisdiction is not a delaying tactic and that it will not unduly impair the conduct of the arbitration proceeding. This means that even when considering one of the exceptions, the court might decide that to allow the arbitrator to rule first on his or her competence would be best for the arbitration process.

[20] Both the second and third exceptions require the court to review evidence. Under the second exception, this is described as a "superficial review" of the evidentiary record. The majority in *Uber* explain that "the essential question" under this exception "is whether the necessary legal conclusions can be drawn from facts that are either evident on the face of the record or undisputed by the parties" (at para. 36).

[21] Under s. 7(2) of the *Arbitration Act,* even if the s. 7(1) technical prerequisites requirements for a stay have been met, a party seeking litigation can avoid a stay by showing that the arbitration clause is void, inoperable, or incapable of being performed. In *Peace River Hydro Partners*, the Court described this provision as giving rise to statutory exceptions: at paras. 86–87. The standard is the balance of probabilities, thus more stringent than the s.7(1) standard. If the applicability of a statutory exception is only arguable, it should be resolved by an arbitrator: *Peace River Hydro Partners* at para. 89.

[22] In *Peace River Hydro Partners* at paras. 138–139, Justice Côté considered the meaning of the term "inoperative" and held that it included where the agreement to arbitrate has "for some reason" ceased to have future effect or have become

inapplicable, such as due to frustration, discharge by breach, waiver or a subsequent agreement between the parties.

Preliminary Issue - Admissibility of Settlement Offers

[23] 2197 Otter Point Properties argues that three offers to settle made by GT Mann Contracting are relevant to GT Mann Contracting's application to stay in favour of arbitration because those offers contain representations that the dispute will be litigated in this court and not arbitrated. The offers were dated December 19, 2024, April 22, 2025, and May 20, 2025.

[24] GT Mann Contracting takes the position that the December 19, 2024, communication is not admissible on the basis that it is a without prejudice communication.

[25] Although the April 22, 2205, and May 20, 2025, letters are also without prejudice communications, GT Mann Contracting has agreed to the admissibility of redacted versions of them, and 2197 Otter Point Properties is content to have the court view only those redacted versions. However, 2197 Otter Point Properties takes the position that by agreeing to the admissibility of redacted versions, GT Mann Contracting has waived privilege over all of the entirety of those offers.

Legal Principles

[26] Settlement privilege, also often referred to as without prejudice privilege, is a class privilege which excludes evidence in the form of documents, or evidence of communications. The rationale is that the very existence of a settlement offer, in some circumstances, and the contents of settlement offers in some circumstances, contain admissions or could be construed as admissions. If a party might be confronted with an argument that they have made an admission in a settlement offer or admitted weakness, for example, by making a settlement offer, they might not make settlement offers. There is an exceedingly strong public interest in encouraging the settlement of disputes such that the existence of offers and their

contents are inadmissible: *Middelkamp v. Fraser Valley Real Estate Board*, 71 B.C.L.R. (2d) 276 at paras. 18–20, 1992 CanLII 4039 (C.A.).

[27] Rule 9-1 of the *Supreme Court Civil Rules* recognizes the privilege and incorporates it, promoting settlement by allowing parties to bring offers that were not accepted to the attention of the Court after the litigation has been concluded for the purpose of improving the offering party's position on costs. Rule 9-1 (2) strictly adheres to the without prejudice privilege by providing that the "fact that an offer to settle has been made must not be disclosed to the court or jury, or set out in any document used in the proceeding, until all issues in the proceeding, other than costs, have been determined".

[28] The Court in *Middelkamp* recognized that there would have to be exceptions to the class privilege, and mused about the circumstances that might give rise to an exception such as fraud or a term of the settlement requiring a party to it to give evidence; however, since an exception was not argued in *Middelkamp*, no decision was made on what exceptions might arise in what circumstances.

[29] In *Dos Santos v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 20, the Court of Appeal held that because the public policy behind settlement privilege is compelling, an asserted exception must be proven to engage a competing public interest that outweighs the public interest in encouraging settlement.

The December 19, 2024, Offer

[30] GT Mann Contracting does not object to evidence that the offer was made, i.e., its existence, but objects to evidence of the contents of the offer.

[31] 2197 Otter Point Properties must persuade me that there is a public interest in admitting this evidence that outweighs the public interest in keeping settlement communications out of evidence in the proceedings to which they relate.

[32] 2197 Otter Point Properties asserts that the December 19, 2024, letter amounts to a step in the litigation precluding a s. 7(1) stay and/or contains a representation giving rise to representation estoppel causing 2197 Otter Point Properties to detrimentally rely on a representation that the dispute would be litigated in the British Columbia Supreme Court.

[33] With regard to a step in the proceeding, I observe that the litigation had not been commenced when the offer was made. 2197 Otter Point Properties argues that nonetheless, in the offer GT Mann Contracting stated that it reserved the right to argue for costs pursuant to Rule 9-1 of the *Supreme Court Civil Rules*. 2197 Otter Point Properties submits that I must review the offer to determine whether what was said amounts to a step in the proceeding.

[34] In my view, given the importance of the without prejudice privilege, in order to persuade me that an offer made prior to litigation being commenced could be viewed as a step in the proceeding, 2197 Otter Point Properties must, as a threshold matter, persuade me that an offer to settle made before litigation has commenced could amount to a step in the proceeding.

[35] Below, I address the caselaw pertaining to what can amount to a step in the proceeding. In summary, it is an objective inquiry, involving something that seeks to invoke the authority of the court, such as an application or a precursor to an application to the court, such that one can conclude the party has confirmed the correctness of the proceeding and its willingness to have the dispute resolved by a court of law, instead of by arbitration.

[36] Objectively, a without prejudice communication prior to litigation commencing is not confirming the correctness of a legal proceeding that has not been commenced, even with a reference to costs pursuant to the *Supreme Court Civil Rules*. That sort of reference, in the context of litigation having not been commenced, is best seen as the party using all of the tools it has to persuade the other party to consider its offer seriously and as a hedge against potential litigation, which a party cannot assume will be foreclosed by an arbitration clause given the

caselaw. The former is a reason to keep the offer cloaked with privilege. The latter does not amount to a concession that litigation is the correct route and is not a compelling reason to overcome the privilege.

[37] 2197 Otter Point Properties also asserts that the December 19, 2024, offer is a representation that litigation in a court of law is the correct procedure, giving rise to representation estoppel. 2197 Otter Point Properties argues that there is a public interest in preventing without prejudice privilege being used to obscure the true state of affairs, specifically representation estoppel, from the court, citing *Fisher v. Airfoam Industries ltd. (Quad-Lock Building Systems),* 2025 BCSC 758 at paras. 25–26. In that case, Justice Francis, then of this Court, held that it makes sense that without prejudice communications may fall into an exception if they contain a statement that could form the basis of an estoppel claim as a promise or assurance on which the plaintiff detrimentally relied.

[38] In *Fisher*, Francis J. considered estoppel by convention and estoppel by representation. Estoppel by representation is the type of estoppel relied on by 2197 Otter Point Properties in this case. It requires proof of a representation intended to induce a course of conduct on the part of the person to whom the representation is made; an act or omission resulting from the representation by the person to whom the representation was made; and detriment as a consequence of the act or omission: *Mee Hoi Bros. Company Ltd. v. Borving Investments (Canada) Ltd.*, 2013 BCSC 1640 at para. 40.

[39] Accordingly, while the requirement of proof of a representation can be the basis to admit without prejudice communications to explore whether the communications contain such a representation, the question of whether an argument based on representation estoppel overcomes the without prejudice privilege must be considered in the context that if the representation is proved, the party arguing representation estoppel must also prove detrimental reliance. Detrimental reliance requires a finding that the party seeking to establish the estoppel changed

their course of conduct by acting, or abstaining from acting, in reliance upon the assumption, thereby altering their legal position: *Fisher* at paras. 67 and 79.

[40] While 2197 Otter Point Properties argues that it commenced this litigation based on representations it asserts are in the December 19, 2024, offer to settle, it has not led or pointed to any evidence in that regard. Neither Mr. Foster nor any other representative of 2197 Otter Point Properties swore an affidavit to that affect. In effect, 2197 Otter Point Properties asks the Court to draw an inference based on timing: the December 19, 2024, offer preceded the commencement of the litigation and, therefore, it must be that 2197 Otter Point Properties commenced the litigation because of a representation made in the December 19, 2024, offer. There is no actual evidence that 2197 Otter Point Properties did anything, omitted to do something, or changed course in reliance on a representation made in that offer that the parties were litigating and not arbitrating.

[41] More crucially, there is no evidence nor any inference that could be drawn from evidence that there has been any detriment to 2197 Otter Point Properties as a result of the December 19, 2024, settlement offer.

[42] Given that 2197 Otter Point Properties has not attempted to lead any evidence on detrimental reliance, there is no point to admitting the without prejudice communications to see if they contain representations. Accordingly, there is no compelling reason, that overwhelms the policy of protecting without prejudice communications, to admit this evidence. I conclude it is inadmissible.

April 22, 2025, and May 20, 2025, Offers

[43] 2197 Otter Point Properties also takes the position that GT Mann Contracting waived the privilege by agreeing to admit redacted portions of the April 22, 2025, and May 20, 2025, offers and quoting from them in its application for a stay. They argue that settlement privilege can be waived by such a step, but it cannot be partially waived, and such an agreement may amount to implicit waiver: *Do Process*

LP v. Infokey Software Inc., 2015 BCCA 52 at para. 22; and *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 143.

[44] In the agreement that redacted versions of the April 22 and May 20, 2025, offers would be made evidence, GT Mann Contracting and Mr. Mann stipulated that they were not waiving settlement privilege on the balance. It was the agreed-upon admissible parts of the 2025 offers that they quoted from.

[45] The cases relied on by 2197 Otter Point Properties on waiver all stress fairness as the heart of the consideration as to whether the privilege can be maintained in the face of implicit waiver. In this case, the agreement to put redacted versions of the two 2025 offers in evidence was an attempt to narrow the issues and get to the resolution of these applications. GT Mann Contracting and Mr. Mann made that agreement while expressly maintaining they were not waiving their settlement privilege over the balance of the communications.

[46] Fairness, and the public interest in encouraging parties to resolve issues or disputes, mandates letting parties make such agreements. Fairness and the public interest in encouraging parties to resolve issue mandates against an approach where the parties make an agreement and then the other party makes an argument that the making of the agreement defeats the very argument sought to be avoided by making the agreement.

[47] I conclude that the agreement to put redacted versions of the April 22 and May 20, 2025, offers into evidence while continuing to assert privilege to the balance of them does not amount to waiver of the privilege over the balance.

The Section 7(1) Technical Prerequisites and Common Law Exceptions

[48] 2197 Otter Point Properties disputes that the first and third s. 7(1) technical prerequisites are not satisfied because it is not a party to an agreement containing an arbitration clause, and because GT Mann Contracting took steps in the proceedings by issuing settlement offers.

[49] There is no dispute that the second technical prerequisite, that the subject matter of the litigation is a matter that was agreed to be submitted to arbitration, is satisfied.

Parties to the Contract

[50] The contract lists Mr. Foster and GT Mann Contracting as the parties.

[51] As discussed above, 2197 Otter Point Properties defines itself as the "Owner" in the notice of civil claim. On this application, it has led affidavit that it is on title to the properties that were agreed to be developed pursuant to the May 31, 2022, contract.

[52] According to the title search on which 2197 Otter Point Properties relies, Mr. Foster is not on title to the lands on which Park View was constructed pursuant to the May 31, 2022 contract. He is a director and officer of the legal owner, 2197 Otter Point Properties. There is no explanation in the evidence as to why a person who is alleged to not be a legal owner contracted to build a development on properties he does not own.

[53] 2197 Otter Point Properties argues that because it is not a party to the May 31, 2022, contract containing the arbitration clause, the first s. 7(1) prerequisite is not met, and this claim cannot be stayed in favour of arbitration.

[54] In *Peace River Hydro Partners*, the Court rejected a narrow interpretation to the meaning of "party" in the British Columbia *Arbitration Act* then in place, which was not materially different from the version applicable to this application on this issue. The Court held that "an entity connected with a signatory to a contract containing an arbitration agreement may become bound as a 'party' by operation of law. Such associated entities may include 'subsidiaries, assignees, trustees and <u>others claiming through or under the named party to the arbitration agreement</u>" (McEwan and Herbst, at § 2:37; emphasis added in *Peace River Hydro Partners*).

[55] There is a distracting question of how it is that 2197 Otter Point Properties can sue on a contract that it asserts it is not a party to. 2197 Otter Point Properties argues that question looks at the problem the wrong way. It argues that the problem is that GT Mann Contracting makes internally inconsistent arguments because it asserts that 2197 Otter Point Properties is not a party to the contract, while arguing that the contract requires them to mediate the dispute.

[56] In my view, given the contract, GT Mann Contracting's position makes sense and 2197 Otter Point Properties' position does not. GT Mann Contracting could pursue its position that the wrong plaintiff has commenced the claim by applying for dismissal of the claim on the basis that 2197 Otter Point Properties cannot sue on a contract to which it is not a party. However, if GT Mann Contracting were to do so, 2197 Otter Point Properties would likely respond by applying to add Mr. Foster as a plaintiff, an application it said it is contemplating making. At the same time, 2197 Otter Point Properties would argue that GT Mann Contracting's application to strike is a step in the proceeding precluding seeking a stay.

[57] Under the competence-competence principle, it is not for this Court to determine whether 2197 Otter Point Properties is a party to the contract. It is for this Court to determine whether it is arguable that 2197 Otter Point Properties is a party to the contract. If it is arguably a party to the contract, the question of whether it is a party to the contract should be decided by the arbitrator unless that question is a pure question of law or a question of mixed fact and law that requires only a superficial review of the record.

[58] As I have described, in the notice of civil claim, 2197 Otter Point Properties pleads that it is the "Owner". That is a definition that echoes the May 31, 2022, contract, which is said to be between the owner of the lands to be developed and GT Mann Contracting. 2197 Otter Point Properties also pleads that it is a party to the May 31, 2022, contract. The only conclusion that can be reached given that 2197 Otter Point Properties pleads that it is a party to the contract is that it is claiming

through its sole shareholder who is a party to the contract and because of its status as the title holder to the lands that were the subject of the contract.

[59] I conclude that on 2197 Otter Point Properties' pleading and its evidence that it is a legal owner of the lands, there is an arguable case that it is a party to the May 31, 2022, agreement.

[60] With regard to whether any of the common law exceptions to s. 7(1) permit me to determine the jurisdiction issue instead of referring it to arbitration, I conclude that the argument that 2197 Otter Point Properties is not is not a party to an arbitration clause is not a pure question of law. It is not an argument that can be resolved by only a superficial review of the evidence, because there is no evidence that explains why the non-legal owner's name is on the contract and why, despite that, 2197 Otter Point Properties commenced this claim suing on the contract.

[61] In addition, Justice Deschamps' admonition in *Dell Computer*, that the common law exceptions must be used cautiously and not used to permit a party who is acting tactically to delay arbitration, resonates in this case. The conundrum of why 2197 Otter Point Properties commenced this litigation is of the making of 2197 Otter Point Properties, the director and sole shareholder of which is Mr. Foster. This situation gives rise to the concern that Mr. Foster is trying to avoid arbitration through this proceeding by directing his corporate entity to commence the proceeding including suing on a contract on which it is not a named party and, in that way, seeking to neutralize the agreement to arbitrate.

[62] Having concluded that it is arguable that 2197 Otter Point Properties is a party to the contract based on its pleading that it is and the wide meaning of party described in *Peace River Hydro Partners*, I conclude that the first s. 7(1) prerequisite is satisfied.

Steps in the Litigation

[63] There is no question on timeliness in terms of the time that passed between the service of the notice of civil claim and the filing of the jurisdictional response and

the application to stay. The jurisdictional response was filed within the times provided for the *Supreme Court Civil Rules*, and this application was made concurrent with filing the jurisdictional response. Delays of much longer have been held to be timely: *Fisher* at para. 44.

[64] Given my ruling on without prejudice privilege, the question is whether the portions of the April 22, 2025, and May 20, 2025, offers that are agreed to be admissible evidence demonstrate a step or steps in the proceeding by making offers to settle that refer to Rule 9-1 of the *Supreme Court Civil Rules*.

[65] Parties who take steps in litigation are not permitted to later demand that a case be referred to arbitration. The rationale for this technical prerequisite is to preclude the situation where a party takes the benefit of the litigation process while preserving the ability to reject that process in favour of arbitration and lulling the other party into expending resources on litigation in the meantime: *Larc Developments Ltd. v. Levelton Engineering Ltd*., 2010 BCCA 18.

[66] In *Peace River Hydro Partners* at para. 97, the Court quoted with approval from the leading British Columbia authority on what constitutes steps in a proceeding, *Larc Developments* at para. 15, in turn citing the standard for more than a century, *Ives & Barker v. Willans*, [1894] 2 Ch. 478 at 484, and providing that a step in the proceedings is “something in the nature of an application to the Court, and not mere talk between solicitors … nor the writing of letters”. It must be something, viewed objectively, that amounts to an election to proceed with the action: *Peace River Hydro Partners* at paras. 97–98.

[67] 2197 Otter Point Properties argues that a step that is a necessary precursor to making an application pursuant to the *Supreme Court Civil Rules* is a step in a proceeding. In *Fofonoff v. C and C Taxi Service Limited*, 3 B.C.L.R. 159 at paras. 7–9, 1977 CanLII 358 (S.C.), the question was whether a demand for particulars was a step in the proceeding. Because the *Supreme Court Civil Rules* (then the *Rules of Court*) requires a party to make a written demand for particulars prior to applying to the court to compel particulars, in *Fofonoff* Justice Ruttan held that a written demand

for particulars was a step in the proceeding. This conclusion was later approved by the Court of Appeal in *Larc Developments* at para. 16. 2197 Otter Point Properties argues by analogy that because a party must make an offer invoking Rule 9-1 to later argue for costs consequences attendant on the other party unreasonably refusing to settle, making a formal Rule 9-1 offer is a step in the proceeding.

[68] In *Montaigne Group Ltd. v. St. Alcuin College for the Liberal Arts Society*, 2024 BCSC 1465 at paras. 42-47, Justice Laurie described a motion to strike a claim as impliedly affirming the correctness of the court proceedings, addressing the substance of the claim, taken for the purpose of advancing the applicant's position in the litigation, all done before seeking a stay for the strategic purpose of trying to strike the claim before applying for it to be stayed.

[69] As the Court of Appeal explained in *Larc Developments* at para. 16, the question is whether the party has affirmed a willingness to have the matter resolved by the court instead of arbitration: see also *Peace River Hydro Partners* at para. 98. In the context of this question, demands for particulars and applications to strike claims, on the one hand, and offers to settle the dispute that gave rise to the claim on the other hand, are qualitatively different. A demand for particulars or an application to strike engages with the litigation in the court. An offer to settle is simply an attempt to resolve the underlying dispute, equally consistent with resolving it in or out of court. Using the tool of Rule 9-1 is not necessarily an election to proceed with the action. As the jurisprudence amply demonstrates, parties who seek to adhere to an agreement to arbitrate are not always successful on applications to stay for reasons other than having demonstrated an election to proceed in court. Viewed in light of that reality, a party referring to Rule 9-1 in a settlement offer is not electing or affirming the correctness of litigation in a court of law, it may simply be employing a safeguard in the event the action proceeds despite the party's attempted but failed adherence to an agreement to arbitrate.

[70] That is manifest in this case because in the April 22, 2025, and May 20, 2025, letters, GT Mann Contracting stated its position that the case should be arbitrated

and referred both to Rule 9-1 and making an application for costs in an arbitration in the April 22, 2025, and May 20, 2025, offers.

[71] Finally, considering an offer to settle a step in the litigation has public policy repercussions that undermine the rationale for without prejudice privilege. Parties should be encouraged to resolve disputes, including disputes where litigation has been commenced. Holding that settlement offers are steps in the litigation precluding seeking a stay for arbitration would have a chilling effect on the worthwhile endeavour of settlement attempts. For that reason, I would also find that a settlement offer, formal or informal, is not a step in a proceeding.

Section 7(2) - Whether the Arbitration Clause is Void, Inoperable, or Incapable of being Performed

[72] 2197 Otter Point Properties argues that the arbitration clause is void, inoperable, or incapable of being performed due to representation estoppel and waiver.

Estoppel

[73] 2197 Otter Point Properties asserts that the settlement offers contained representations and give rise to estoppel by representation.

[74] In *Fisher,* Justice Francis considered the argument that an arbitration clause was inoperative because the defendant, as a consequence of its words and actions, is estopped from relying on it, including because of a shared understanding during the settlement communications that the proper forum for resolving their dispute was litigation in this Court on which the plaintiff detrimentally relied.

[75] The estoppel argument is essentially the argument about a step in the litigation repackaged under the principles of estoppel. However, as discussed above, estoppel by representation requires proof of detrimental reliance. In this case, there is no evidence that 2197 Otter Point Properties relied on the Rule 9-1 reference in the offers to its detriment.

[76] Instead, 2197 Otter Point Properties makes the bare submission that it commenced this litigation because of the content of the December 19, 2024, offer. I have ruled that offer inadmissible as a without prejudice communication, but even if it were admissible, a submission that it caused 2197 Otter Point Properties to commence this litigation is not evidence that something in it caused 2197 Otter Point Properties to commence litigation. In addition, there is no evidence or submission that commencing the litigation is detrimental to 2197 Otter Point Properties.

[77] The estoppel argument fails for lack for establishment of detrimental reliance.

Waiver

[78] 2197 Otter Point Properties submits that there is a negative obligation on parties to an arbitration clause to not seek the resolution of disputes subject to an arbitration clause in domestic courts, citing *RH20 North America Inc. v. Bergmann,* 2024 ONCA 445 at para. 41, applied in *Montaigne Group* at paras. 67–68.

[79] This argument relies on the precept that by referring to Rule 9-1 in the April 22, 2025, and May 20, 2025, offers, GT Mann Contracting was in breach of its negative obligation. I reject that argument for the reasons I have already expressed that referring to Rule 9-1, especially in the context of also expressly asserting that the matter should be arbitrated and reserved the right to bring the offers to the attention of the arbitrator for the purposes of arguments on costs, is not electing or affirming the correctness of litigation in a court of law.

Whether the Stay Should Apply to the Claim Against Graeme Mann

[80] Mr. Mann is a personal defendant who is the principal of GT Mann Contracting. 2197 Otter Point Properties argues that he is not a party to the contact, and the claims against him are independent of those against GT Mann Contracting, so the if a stay is granted, it should not apply to the claims against Mr. Mann.

[81] Whether a partial or complete stay of proceedings is ordered is for the court to decide, not for the arbitrator: *Davidson v. Lyra Growth Partners Inc.,* 2024 BCCA 133 at para. 108.

[82] The factors to be considered include whether the arbitrable and non-arbitrable issues are so intertwined that they must be heard together. If they are, a complete stay of the action will be appropriate: *Davidson* at para. 108, citing the examples of *James v. Thow*, 2005 BCSC 809 at para. 105; and *The Owners, Strata Plan BCS 3165 v. 1100 Georgia Partnership*, 2013 BCSC 1708 at para. 29. If the core of the claim concerns non-arbitrable matters, a partial stay may be more appropriate.

[83] 2197 Otter Point Properties argues that its claims in breach of fiduciary duty, negligence, and negligent misrepresentation against Mr. Mann arise out of independent duties owed by Mr. Mann and are not subject to an arbitration clause.

[84] That submission is undermined in para. 43 of 2197 Otter Point Properties' notice of civil claim in which it seeks damages against GT Mann Contracting and Graeme Mann jointly and severally on all causes of action as follows:

> 43. The Owner claims against GT Mann and Mr. Mann, jointly and severally, the following relief for their contractual breaches, duties of care, breaches of fiduciary duties and tortious behavior, as applicable:
>
> a. general damages;
>
> b. special damages;
>
> c. aggravated damages;
>
> d. punitive damages;
>
> e. interest under the Court Order Interest Act, R.S.B.C. 1996, c. 79; costs; and
>
> f. such further and other relief as this Honourable Court may deem just.

[85] In para. 3 of the notice of civil claim, 2197 Otter Point Properties pleaded that at all material times, Mr. Mann "was GT Mann's director, directing mind, and employee acting within the scope of his employment with GT Mann". In para. 9, 2197 Otter Point Properties pleaded that "Mr. Mann was directly and intimately involved in the construction of the Project as GT Mann's principal, agent, and employee".

[86] I conclude that 2197 Otter Point Properties makes claims that are inextricably interwoven against GT Mann Contracting and Mr. Mann such that they must be determined together, and they should all be referred to arbitration.

[87] In addition, the argument that 2197 Otter Point Properties makes in favour of a partial stay also rests on the proposition that the scope of the arbitration agreement does not cover the claims against Mr. Mann. If the argument is cast in terms of scope, then as long as it is arguable that the personal defendant might be, at law, a party to the arbitration agreement if they were nominees of a contracting party, or if agency or a reason to pierce the corporate veil was established, the matter should be referred to arbitration for the arbitrator to determine whether the claims against that defendant were the subject of the arbitration agreement: *Beck v. Vanbex Group Inc.*, 2021 BCSC 1619 at paras. 12, 14, and 16. A factor in the reasoning in *Beck* was that the plaintiffs alleged that the business of the defendants was inextricably interwoven and each was the agent of the other. That factor is applicable in this case.

[88] In addition, 2197 Otter Point Properties has not taken the position that the core of the claim does not fall within the scope of the arbitration agreement. I conclude that the core of the claim does fall within the scope of the arbitration agreement, and as such a complete stay is appropriate.

[89] To the extent that 2197 Otter Point Properties argues that the scope of the arbitration agreement does not cover claims against Mr. Mann, it is arguable that it does, and that matter should be referred to arbitration to be decided by the arbitrator. In addition, the core of the claim falls within the scope of the arbitration agreement and so a complete stay is appropriate..

Disposition

[90] The content of the December 19, 2024, offer is inadmissible. I allow the application to strike the affidavit material appending the December 19, 2024, offer to settle or referring to its contents and the portions of the application response that refer to its contents.

[91] The application of GT Mann Contracting that this matter be stayed pursuant to s. 7 of the *Arbitration Act* is allowed.

[92] GT Mann Contracting has been successful on both applications. Subject to any matters of which I am unaware, it shall have its costs of this application.

[93] If any party wishes to make submissions on costs due to matters about which I am unaware, they may do so by delivering written submissions of no more than five pages, by conferring with the other party about a convenient date to appear, and by making a request to appear through Supreme Court Scheduling no more than 15 days after the release of these reasons. The other party or parties shall deliver responding written submissions of no more than five pages within 15 days of the receipt of the other party's written submissions. All written submissions shall be delivered to me one week prior to the date set for the appearance.

"Matthews J."