CITATION: Olivieri v. Sherman, 2007 ONCA 491
DATE: 20070703
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COURT OF APPEAL FOR ONTARIO

ROSENBERG, GILLESE and LANG JJ.A.

NANCY OLIVIERI

(Plaintiff/Appellant)

And

BARRY SHERMAN, JACK M. KAY and APOTEX INC.

(Defendants/Respondents)

Sheila Block and Paul Michell for the appellant

Katherine L. Kay and Adrian C. Lang for the respondents

Heard: May 24, 2007

On appeal from the order of Justice Colin L. Campbell of the Superior Court of Justice dated August 4, 2006, with reasons reported at [2006] O.J. No. 3217.

GILLESE J.A.

[1] Dr. Nancy Olivieri was a physician and medical researcher at the Hospital for Sick Children ("HSC") and the University of Toronto.

[2] In the 1980s, Dr. Olivieri pursued clinical research in thalassemia, a genetic blood disorder. Thalassemia patients require regular blood transfusions. A side effect is the build-up of excess iron. Patients take drugs called iron chelators to remove excess iron.

[3] Dr. Olivieri and her colleagues conducted clinical trials to assess the efficacy and safety of an oral iron chelator called deferiprone. Apotex Inc., a major Canadian pharmaceutical manufacturer, sponsored the research. Dr. Barry M. Sherman is Apotex's chairman. Jack M. Kay is the president of Apotex. I will refer to Apotex, Dr. Sherman and Mr. Kay, collectively, as the "respondents".

[4] Dr. Olivieri developed concerns about deferiprone. She told Apotex of her concerns.

[5] Dr. Olivieri and Apotex disagreed on the underlying science and proper course of action in light of her concerns.

[6] On May 24, 1996, Apotex terminated the clinical trials.

[7] The dispute that underlies the present appeal relates to statements made by Dr. Olivieri about deferiprone and the events that followed the termination of the trials, and the response by the respondents to those statements.

[8] Dr. Olivieri commenced various defamation actions including:

- The "60 Minutes action" against Apotex and Dr. Sherman;
- The "National Post action" against Mr. Kay and Apotex;[1]
- The "CBC action" against Dr. Sherman.[2]

[9] In the 60 Minutes and National Post actions, Apotex counterclaimed against Dr. Olivieri for defamation and injurious falsehood.

[10] On consent, the 60 Minutes and National Post actions were consolidated into a single action, in which Dr. Olivieri sought $20 million in general damages and $10 million in aggravated and punitive damages, and Apotex sought $20 million in general and special damages.

[11] Discoveries took place in 2002, 2003 and 2004. In the 60 Minutes action, the respondents' counsel examined Dr. Olivieri for some 29 days. Dr. Olivieri's counsel examined the respondents for approximately 20 days. The parties produced more than 10,000 documents.

[12] Each party moved to compel answers to questions refused in discovery. On June 14, 2004, Master Albert ordered the parties to answer certain questions but declined to order them to answer other questions.

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[1] The National Post and certain of its employees were also defendants but Dr. Olivieri settled with them.
[2] The CBC and certain of its employees were also defendants but Dr. Olivieri settled with them.

[13] The parties appealed and cross-appealed the order of Master Albert. On September 17, 2004, Sanderson J. dismissed the respondents' appeal and allowed Dr. Olivieri's cross-appeal.

[14] Master Albert also directed a joint mediation in the 60 Minutes and CBC actions. The parties agreed to George Adams, Q.C. as mediator.

[15] The mediation took place on November 2 and 3, 2004. Dr. Olivieri attended with her counsel Paul Michell (60 Minutes action) and Christopher Ashby (CBC action). Dr. Spino and Dr. Sherman attended for the respondents, along with their counsel, David Brown, Adrian Lang, and Jessica Bookman. A CBC representative attended with counsel.

[16] The mediation began on November 2, 2004, with a plenary session of all parties and counsel. The parties and counsel then separated into three rooms (Dr. Olivieri; respondents; CBC defendants), where they remained for the rest of the day. Mr. Adams conducted "shuttle diplomacy" among the parties. No other plenary session ever took place.

[17] At the end of the first day, Dr. Olivieri made three alternative offers to the respondents, each of which contained a term that the parties would enter into a non-disparagement agreement.

[18] On the second day of the mediation, the parties reconvened in their separate rooms. Towards the end of that day, the respondents made a handwritten counter-offer to Dr. Olivieri on three sheets of "flip chart" paper (the "counter-offer"); most of the counter-offer was in the handwriting of the respondents' counsel. Dr. Spino initialled the counter-offer on behalf of the respondents. Dr. Olivieri also initialled the counter-offer.

[19] The counter-offer contained a public part (Part A) and a confidential part (Part B). A redacted copy of the counter-offer reads as follows:

> **PRIVILEGED AND CONFIDENTIAL**
>
> **Outline of Proposed Settlement Between Nancy Olivieri;**
>
> **and Apotex Inc., Jack M. Kay, and Barry Sherman**
>
> **Part A – To be made public**
>
> 1. Joint settlement statement – all litigation dismissed – claims and counterclaims.
>
> 2. Filing of consent dismissals.

3. Statement by Dr. Olivieri:

   "Dr. Olivieri acknowledges that research over the last five years has revealed that Deferiprone will assist some patients in the treatment of thalassemia and wishes Apotex well in this important work."

4. Statements by both parties: Olivieri and Apotex/Sherman/Kay:

   a. Mutual expressions of regret for language that they used in past years about each other.

   b. Agreement by same parties not to disparage each other in the future:

      i. Apotex/Sherman/Kay will not disparage Olivieri and her supporters;

      ii. Olivieri will not disparage Apotex, clinicians, researchers who use deferiprone, or deferiprone; and

      iii. Parties will only express future views about deferiprone in scientific forum.

5. All of the above to be contained in a press release.

Part B – To be confidential

1. [Deleted for confidentiality reasons]

2. Olivieri to provide Apotex with data listed in paragraph 160 of the statement of defence and counterclaim. Apotex can use this for regulatory purposes but no consequences to Olivieri.

3. Full and final mutual releases of all claims/potential claims existing as at settlement date, including all actions commenced by Olivieri [or] by Apotex.

[20] By the conclusion of the mediation on November 3, 2004, Dr. Olivieri had not accepted the counter-offer because she wanted time to consult with HSC about her legal fees. She was given 48 hours within which to accept the counter-offer.

[21] The following day (November 4, 2004), Mr. Michell e-mailed a transcription of the counter-offer to Mr. Brown and sought permission to send a copy to HSC's counsel on a confidential basis.

[22] Mr. Brown replied by e-mail that afternoon, advising that the respondents did not consent. He did not suggest there was any need for agreement on subsequent documents.

[23] Other written communication was exchanged between counsel by letter and e-mail on November 4, 2005; in one e-mail from Mr. Brown to Mr. Michell it was noted that Dr. Olivieri would not be able to complete the settlement until she had resolved outstanding issues with HSC.

[24] Dr. Olivieri decided to accept the counter-offer and so instructed her counsel. On November 5, 2004 – that is, within the 48-hour window - Mr. Michell so advised Mr. Brown by telephone. He also confirmed Dr. Olivieri's acceptance by letter (sent by FAX) that day, again attaching a transcription of the counter-offer.

[25] As well, Mr. Michell wrote to Ms. Lang on November 5, 2004, enclosing full-sized copies of the three "flip chart" pages. Again, there was nothing in her response to suggest that the agreement was conditional or subject to further documentation.

[26] On December 10, 2004, Sanderson J. ordered the respondents to pay costs of $7,050 plus GST and disbursements to Dr. Olivieri, forthwith. The respondents did not pay this order until July 2006, more than a year and a half later.

[27] There was no further communication between counsel for almost a year.

[28] On October 31, 2005, after Dr. Olivieri reached a settlement with HSC, her counsel advised counsel for the respondents that Dr. Olivieri was able to complete the terms of the settlement. The respondents, for the first time, claimed that there was no settlement agreement. They maintained that the counter-offer represented a consensus on certain principles but that a final settlement was subject to further documentation agreed on by all parties, particularly the non-disparagement agreement. They also alleged that Dr. Olivieri had continued to disparage Apotex publicly after the "settlement" had been concluded.

[29] Dr. Olivieri brought a motion to enforce the alleged settlement agreement. The respondents opposed the motion on the basis that either the parties had no meeting of the minds about the meaning of disparagement or that Dr. Olivieri had repeatedly breached the agreement by continuing to disparage Apotex.

[30] By order dated August 4, 2006, Campbell J. dismissed the motion (the "Order").

[31] Dr. Olivieri appeals.

[32] I would allow the appeal. As I explain below, the parties had a mutual intention to create a legally binding agreement and agreed on all the essential terms of the settlement; the fact that there may now be disagreement about whether the settlement has been breached does not mean that no concluded agreement ever existed.

[33] As will be seen, there is some confusion about what was decided below in respect of the respondents' alternative position that if there were a concluded agreement, Dr. Olivieri had either breached or repudiated it. Consequently, the Order and the reasons of the motion judge will be set out in some detail before the issues are analysed.

THE ORDER UNDER APPEAL

[34] The Order is very short. There are two paragraphs by way of preamble. The first recites that Dr. Olivieri made a motion for an order enforcing a settlement agreement and requiring the parties to comply with the terms of that agreement. The second lists the evidence considered. The full text of the balance of the Order reads as follows:

> 1. **THIS COURT ORDERS** that the motion be and hereby is dismissed.
>
> 2. **THIS COURT FURTHER ORDERS** that the parties may make submissions on costs.

THE DECISION BELOW

[35] At paras. 13 and 21 of the reasons, the motion judge states his conclusion that there had been no meeting of the minds between the parties sufficient to give rise to an enforceable agreement. In his view, the agreement was conditional on further elaboration and negotiation of the word "disparage" in para. 4(b) of Part A of the counter-offer and of the word "scientific" in para. 4(b)(iii) of the same.

[36] In relation to "disparage", the motion judge held that elaboration was essential to Apotex. In paras. 17 and 21, he stated:

> [17] I conclude that at least Apotex anticipated that what would be said or not said by Dr. Olivieri within the general and broad use of the word 'disparage' would be further detailed in additional documentation that would be an essential part of the settlement agreement. Dictionary definitions of the word "disparage" contain other words of

> general meaning such as to "discredit" or to "denigrate" that lack precision, particularly for ongoing public appearances.
>
> ...
>
> [21] … A more detailed delineation of what would be regarded as 'disparaging conduct' I conclude was regarded by the parties, particularly Apotex, as an essential term of the agreement, one which was not finalized. …

[37] In para. 16 of the reasons, the motion judge said this, in respect of para. 4(b)(iii) of Part A:

> [16] The pleadings in the action are replete with concerns by both parties but Apotex in particular, regarding public statements made. In the context of the history between the parties and particularly the wording of Item 4(b)(iii), that "parties will only express future views about deferiprone in scientific forum" (emphasis added), anticipates further elaboration as to what is meant by the word "scientific."

[38] Further, the motion judge reasoned that additional documentation was required in relation to para. 2 of Part B of the counter-offer. At para. 18 of the reasons, he wrote:

> [18] In addition, in the context of the pleadings and allegations, I conclude that Apotex would require the documentation provided for in [para. 2 of Part B] to be specifically part of the settlement package. It has never been provided. This history of the dealings between Dr. Olivieri and the Defendants from at least 1995 shows that the public utterances each about the other were central to their dispute and to the resolution of it.

[39] At para. 22 of the reasons, the motion judge stated that in view of his disposition, "a trial will be required" should the parties not reach a new settlement agreement. He went on in para. 23 to say, "The central issue in the trial will be the meaning attributable to the statements that were and continue to be made by the parties about each other in public forums".

ANALYSIS

[40] This appeal raises two issues:

(1) was there a concluded settlement agreement? and

(2) if there was, did Dr. Olivieri breach or repudiate it?

Was There a Concluded Settlement Agreement?

[41] A settlement agreement is a contract. Thus, it is subject to the general law of contract regarding offer and acceptance. For a concluded contract to exist, the court must find that the parties: (1) had a mutual intention to create a legally binding contract; and (2) reached agreement on all of the essential terms of the settlement: *Bawitko Investments Ltd. v. Kernels Popcorn Ltd.* (1991), 79 D.L.R. (4th) 97 (Ont. C.A.) at 103-4.

[42] There is no question but that the first requirement was met: the counter-offer was drafted during the course of a court-directed mediation involving multi-million dollar law suits and in which all parties were represented by experienced legal counsel. It is apparent that the parties intended to enter into a binding legal agreement to resolve all of the outstanding legal proceedings.

[43] In respect of the second requirement, the motion judge found that there was no meeting of the minds in respect of all of the essential terms of the contract. It will be recalled that he held that the counter-offer was conditional on elaboration of the words "disparage" and "scientific" in para. 4(b) of Part A of the counter-offer. In coming to this view, the motion judge relied on the evidence of the respondents. But, the respondents' evidence was based on discussions they and their counsel had with Mr. Adams during the mediation. Dr. Spino admitted that the respondents and their counsel never discussed the counter-offer with Dr. Olivieri or her counsel during the mediation, or told them that the counter-offer was conditional upon finalizing documentation. There was no evidence that all parties shared the view that further negotiation, elaboration or agreement was necessary.

[44] A determination as to whether a concluded agreement exists does not depend on an inquiry into the actual state of mind of one of the parties or on the parole evidence of one party's subjective intention. See *Lindsey v. Heron & Co.* (1921), 64 D.L.R. 92 (Ont. S.C. (App.Div.)). Where, as here, the agreement is in writing, it is to be measured by an objective reading of the language chosen by the parties to reflect their agreement. As was stated by Middleton J.A. in *Lindsey* at 98-9, quoting Corpus Juris, vol. 13 at 265: [3]

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[3] See also *Eli Lilly & Co. v. Novapharm Ltd.*, [1998] 2 S.C.R. 129 at paras. 54 – 5.

> The apparent mutual assent of the parties essential to the formation of a contract, must be gathered from the language employed by them, and the law imputes to a person an intention corresponding to the reasonable meaning of his words and acts. It judges his intention by his outward expressions and excludes all questions in regard to his unexpressed intention. If his words or acts, judged by a reasonable standard, manifest an intention to agree in regard to the matter in question, that agreement is established, and it is immaterial what may be the real but unexpressed state of his mind on the subject.

[45] Accordingly, in my view, it was an error in principle for the motion judge to decide this issue based on the subjective intent of one side to the bargain rather than on an objective reading of the counter-offer.

[46] Viewed objectively, there is nothing in the counter-offer to suggest that it was "an agreement to agree" or conditional in any respect. Nothing in the counter-offer, either directly or indirectly, suggests that its terms are subject to further elaboration, documentation or agreement. Had it been intended that the terms were to be conditional, one would have expected to see language that expressly made one or more terms "subject to" further agreement.

[47] Instead, the terms of the counter-offer are straightforward and unconditional: Part A of the counter-offer contains the public part of the settlement agreement. It provides that: (1) the parties will issue a joint settlement statement that all litigation is dismissed and (2) file consent dismissals; (3) Dr. Olivieri will issue a statement in the terms set out; (4) both parties will provide statements in which they express mutual regret for language used in the past about the other, agree not to disparage each other in the future, and to express views about deferiprone only in scientific forums; and that a press release will contain the foregoing. Part B, the confidential part of the settlement agreement, requires Dr. Olivieri to provide Apotex with the data listed in para. 160 of the statement of defence and counterclaim and that both parties will execute full and final mutual releases.[4]

[48] The counter-offer was not made "subject to" agreement on any of the specified documents or terms: the press release, provision of data and mutual releases were the mechanics required to complete the settlement agreement. As was stated in *Fieguth v.*

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[4] For confidentiality reasons, no mention is made of para. 1 of Part B of the counter-offer.

Acklands Ltd. (1989), 59 D.L.R. (4th) 114 at 121 (B.C.C.A.),[5] the first question to be asked when deciding whether a settlement was concluded is whether the parties reached an agreement on all essential terms. It is only thereafter that the question of completion of the agreement is considered.

[49] I acknowledge that there can be sufficient uncertainty about the meaning of words or terms in an agreement that it will be held to be unenforceable: see *Bawitko Investments* at 104. However, in my view, the language used in the counter-offer does not suffer from that problem. As the motion judge observed, the dictionary meaning of "disparage" is to "discredit" or "denigrate". While there may be disagreement about whether the conduct of one of the parties amounts to disparagement, that does not mean that the agreement is conditional nor does it require elaboration of the meaning of the word. For similar reasons, the word "scientific" needs no elaboration.

[50] The policy of the courts is to encourage the settlement of litigation: *Stonehocker v. King*, [1993] O.J. No. 2653 (Gen. Div.). The courts "should not be too astute to hold" that there is not the requisite degree of certainty in any of an agreement's essential terms: *Canada Square Corp. v. Versafood Services Ltd.* (1982), 34 O.R. (2d) 250 (C.A.).

[51] In conclusion, as the motion judge applied the incorrect test when determining whether an enforceable settlement agreement had been entered into, his conclusion must be set aside. Applying the objective principle of contract formation, I conclude that the parties reached agreement on all of the essential terms of the settlement agreement, as reflected in the counter-offer. Consequently, the appellant is entitled to a declaration that the parties entered into an enforceable settlement agreement on November 5, 2004.

Was the Settlement Agreement Breached?

[52] On the motion below, the respondents' alternative position was that if there were a concluded settlement agreement between the parties, Dr. Olivieri has repudiated or breached it. There is some confusion about whether the motion judge decided this issue.

[53] For the following reasons, it appears to me that he did not:

- the order appealed from makes no mention of this issue. It says only that the motion for enforcement of the settlement agreement was dismissed;
- the motion judge makes only one reference to the matter. In para. 16 of the reasons, he recites the respondents' position on the issue;

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[5] Followed in *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995] O.J. No. 721 (Gen. Div.), aff'd [1995] O.J. No. 3773 (C.A.).

- the respondents did not argue, on the motion, for the trial of this issue; and,
- there was very little evidence on this issue. The appellant says that the only evidence was that on one occasion the appellant was misquoted in a newspaper article and that she had written to correct the misquotation.

[54] Accordingly, I do not understand the issue of alleged repudiation or breach of the agreement to have been decided. The record does not permit this court to make such a determination.

[55] These comments are made without prejudice to the respondents' right to take such steps as they deem appropriate to pursue their allegations that Dr. Olivieri has breached or repudiated the settlement agreement.

DISPOSITION

[56] For these reasons, I would allow the appeal, set aside the Order and grant the motion, with costs to the appellant fixed at $37,000, all inclusive. In setting costs at $37,000, I have accepted the figure agreed on by the parties and understand that it is the costs of the appeal alone. The appellant is entitled to her costs of the motion below, as well. If the parties are unable to resolve that matter, they may make brief written submissions to the court within fourteen days of the date of the release of these reasons.

RELEASED: July 3, 2007 ("MR")

"E. E. Gillese J.A."
"I agree M. Rosenberg J.A."
"I agree S. E. Lang J.A."