PRACTICE ISSUES

Summary judgment ordering specific performance of a settlement reached during a binding Judicial Dispute Resolution was upheld, notwithstanding that a consent order or consent judgment had not been signed between the parties.

***Green v Khattab*, 2018 ABQB 523**

FACTS AND ISSUES:

Ms. Khattab and Douglas Green had been involved in a domestic relationship. Mr. Khattab commenced a family law action against Douglas Green seeking relief in the form of support and payment of debts (the Family Action). Janet Green commenced an action against Ms. Khattab seeking to recover principal and interest on a loan she had allegedly made to Ms. Khattab (the Civil Action). Ms. Khattab subsequently issued third party proceedings against Douglas Green in the Civil Action.

The parties agreed to participate in a binding Judicial Dispute Resolution to resolve both the Family and the Civil Actions. The parties entered into an "Agreement for Binding Judicial Dispute Resolution" (the Agreement) which provided that the decision would be binding upon the parties and enforceable in the Court of Queen's Bench of Alberta, that the binding JDR had been chosen by the parties instead of a trial, that there was no appeal, and that any Agreement between the parties would have been executed after having retained independent legal advice.

Each party retained counsel prior to the JDR process. Counsel for each of the parties then executed a Certificate of Independent Advice. Ms. Khattab's counsel confirmed that Ms. Khattab executed the Agreement "of her own volition and without any fear, threats, compulsion or influence from the other parties, or any other person." A settlement agreement was agreed upon between the three parties and the terms of the settlement agreement were read into the Court record before the JDR Justice. No consent order or consent judgment was ever signed.

Almost one month after the draft judgment was forwarded to Ms. Khattab's counsel, Ms. Khattab retained new counsel. Ms. Khattab's new counsel advised Mr. and Ms. Green that Ms. Khattab would not consent to any order or judgment arising out of the JDR proceedings. Counsel for all three parties appeared before the JDR Justice who confirmed that an agreement had been reached but declined to issue a judgment based on its terms because there was no written agreement permitting him to hear or decide such an application. The JDR Justice concluded that he no longer had jurisdiction to do anything further.

The Greens filed an action for specific performance of the Agreement and subsequently brought a successful application for summary judgment against Ms. Khattab. Ms. Khattab claimed that the agreement was granted under duress, that she was denied her right to participate meaningfully in the JDR process, and that she felt bullied and threatened to accept an unjust resolution of the Family and Civil Actions. Master Smart held that "the parties obviously consciously made a decision based on legal advice to enter into a JDR agreement and signed an agreement which acknowledged that it would be a binding process." The Master also noted that Ms. Khattab had legal representation throughout the entire JDR process. Lastly, Ms. Khattab's decision to purport to avoid the settlement agreement was not communicated to the Greens for approximately one month, which was too long in the circumstances. The Master granted summary judgment for specific performance of the Settlement.

Ms. Khattab appealed.

HELD: For the Plaintiffs Mr. and Ms. Green; appeal dismissed.

The Court found it unnecessary to choose which of the two tests suggested by the Alberta Court of Appeal is the correct test for summary judgment. Justice Macklin found that either one of the tests for summary judgment would have been satisfied.

a. ***Stefanyk v Sobeys Capital Incorporated*, 2018 ABCA 125** stated that the test for summary judgment is as follows:

> . . . There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (a) allows the judge to make the necessary findings of fact, (b) allows the judge to apply the law to the facts, and (c) is a proportionate, more expeditious and less expensive means to achieve a just result . . . Parties to a summary disposition application are expected to put their "best foot forward", meaning that gaps in the record do not necessarily prevent summary disposition . . .

b. ***Whissell Contracting Ltd v Calgary (City)*, 2018 ABCA 204** held that "[s]ummary judgment may be appropriate 'if the moving party's position is unassailable or so compelling that its likelihood of success is very high and the nonmoving party's likelihood of success is very low'" which "is an onerous standard and rightly so" because "a grant of summary judgment ends a dispute without affording the litigants full access to the civil procedure spectrum".

Justice Macklin ultimately found that no triable issues continued to exist and, accordingly, summary judgment was in appropriate in this case.

a. The Court found that granting summary judgment would not contrary to Rule 4.19(b):

> [22] Rule 4.19 provides that:
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> > The only documents, if any, that may result from a judicial

dispute resolution process are

> (a) an agreement prepared by the parties, and any other document necessary to implement the agreement,
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> (b) a consent order or consent judgment resulting from the process, and
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> (c) a transcript of proceedings made in open court at the time of the judicial dispute resolution process which records the outcome of the judicial dispute resolution process.

[23] The rule provides an exhaustive list of the documents that may result from the JDR process. In this case, there is an Agreement prepared by the parties which is the Agreement for Binding Judicial Dispute Resolution which was prepared by counsel for Lillian Khattab and executed by all parties on November 3, 2016. There is also a Transcript of the proceedings done in open Court at the conclusion of the settlement discussions which confirmed and recorded the settlement reached.

[24] Rule 4.19 contemplates that the JDR process itself would conclude in an agreement. The process followed in this case was that of a Binding JDR. No decision from the JDR Justice was needed as the parties reached an agreement. That agreement must still be considered as one resulting from the JDR process.

[25]While there is no consent order or consent judgment resulting from the process, this was a result of the refusal by the Appellant to authorize her counsel to execute the Consent Judgment. In my view, this does not make the agreement any less enforceable. Indeed, if such were the case, then any party to an otherwise valid settlement agreement could simply refuse to sign the confirming order or judgment so as to renege on the agreement. Allowing a party to do so would be contrary to public policy, an affront to the JDR process and constitute a waste of time and resources. Further, and in any event, the transcript of the proceedings which recorded the outcome has been produced. The evidence as to the terms of the settlement is clear.

b. The binding Agreement was held to be in compliance with the rules of natural justice.

    i. Justice Macklin did not accept Ms. Khattab's evidence that "she was essentially threatened with 'punitive financial repercussions' if she were to discuss or argue her case" or that "she felt intimidated when told by the Court that her 'portion of the settlement would fall' and that Janette Green's 'portion of the settlement would rise' if she spoke further."

    ii. Ms. Khattab was represented by counsel at all material times and there was no contrary evidence available. The Settlement

Agreement was reached among the parties in the context of settlement discussions. The JDR Justice was never called upon to make a decision but simply asked that counsel read into the Record the terms of the Settlement reached between the parties. There was no indication on the Record of an attempt for Ms. Khattab to be heard at any time during the open Court proceedings.

c. This action was held not to be the appropriate forum to consider allegations that Ms. Khattab's counsel failed to protect her interests.

[36] Once again, it bears noting that the Transcript of the Court proceedings confirming the Settlement Agreement contains no decision or direction by the presiding justice in any way. The Agreement is set out by counsel for Mr. Green and counsel for Ms. Khattab confirms the agreement. In other words, the presiding justice did not outline any settlement agreement, let alone force one upon Ms. Khattab.

[37] Regarding the Appellant's complaints of her counsel's representation of her interests, this is not the appropriate forum to consider those allegations.

d. The Court found that there was no evidence of injustice caused by haste.

[38] The Appellant says that the whole process, from signing the Agreement for Judicial Dispute Resolution through to the purported resolution of the issues, was done in such haste as to constitute an injustice. She points out that the whole settlement negotiations took about one half hour for a matter that might have taken up to 12 days of trial.

[39] This allegation fails to consider the amount of time each party and their counsel would have spent preparing for the JDR, considering each of the other parties' positions as outlined in their briefs, considering all of the evidence that had been adduced earlier and throughout the litigation and the recognition that a desire to reach any settlement must necessarily involve some compromise by each party. In many cases there is a seemingly small gap between respective parties' positions at the commencement of negotiations and yet no settlement is reached. In others, there is a wide gap in positions at the commencement of negotiations and an agreement is reach fairly quickly. Sometimes there is no rhyme or reason to the length of time necessary to achieve a settlement upon which all parties can agree.

[40] Even if the negotiations took but a half hour or one hour, each party participating in the negotiation process would have had ample time to consider the pros and cons of their own position as well as those of the other two parties. Perhaps the parties were not far apart to begin their negotiations or perhaps they recognized common ground at an early stage and were able to achieve an overall settlement in short order. It is not for this Court to consider how

short or long negotiations may have been leading up to a finalized settlement agreement as an indication of any injustice.

e. The Court found that there was no evidence of vulnerability on the part of Ms. Khattab to justify judicial intervention.

> [41] The Supreme Court of Canada has stated that judicial intervention would be justified where agreements were found to be procedurally and substantively flawed: ***Miglin v Miglin***, 2003 SCC 24 (CanLII) and ***Rick v Brandsema***, 2009 SCC 10 (CanLII). The Court held that "there must be persuasive evidence brought before the Court that one party took advantage of the vulnerability of the other party . . ." (***Miglin*** at para. 82). An agreement need not be enforced if one party's exploitation of the vulnerabilities of the other during the negotiation process resulted in an agreement that deviated substantially from what may be reasonable. However, the Court also stressed that "parties should generally be free to decide for themselves what bargain they are prepared to make."(***Brandsema*** at para.45). In this case, the parties to the within action chose to negotiate a settlement based on information available to them at the time of the negotiation. There is no evidence to support a finding that the negotiated settlement was unfair or unreasonable.
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> [42] The Appellant argues that the duress she experienced or her vulnerability resulted from the comments or attitude of the JDR Justice, not those of any of the other parties. Once again, I do not accept her argument in this respect for both the reasons expressed earlier plus, again, the fact that she was represented by counsel throughout.

f. There had already been partial performance of the Settlement Agreement to the benefit of the Ms. Khattab, to the prejudice of the Greens.

> [44] … First, upon reaching the Settlement Agreement, there was no call on the JDR Justice to provide a decision binding upon the parties. Accordingly, he did not do so and the Respondents lost their right to have a binding decision as contemplated by the Agreement for Binding Dispute Resolution.
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> [47] … the Respondents abandoned an appeal from a summary judgment decision of the Master in relation to the Civil Action…

COMMENTARY:

This is the latest case that considered the enforceability of a settlement agreement reached during a binding JDR process. Despite not having a signed consent order or consent judgment, an agreement reached during a binding JDR may be enforceable where parties have voluntarily entered into the binding JDR process and have received independent legal representation throughout the JDR process. It remains uncertain which test for summary judgment will be used by Alberta courts. It is also unclear whether summary judgment will be granted in a case where only one of the tests for summary judgment is satisfied.