Federal Court Cour fédérale

Date: 20181029

Docket: T-577-18

Citation: 2018 FC 1081

Ottawa, Ontario, October 29, 2018

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

CANADIAN STANDARDS ASSOCIATION

Applicant

and

P.S. KNIGHT CO. LTD. AND
GORDON KNIGHT

Respondents

ORDER AND REASONS

[1] This is a continuation of a motion by the Canadian Standards Association (CSA) seeking an interlocutory injunction to prevent the Respondents, P.S. Knight Co. Ltd. and Gordon Knight, (collectively Knight or the Respondents), from further reproducing, selling or distributing the CSA's 2018 edition of the Canadian Electrical Code (Code). The CSA says that the Code is an original work in which copyright subsists and which it owns.

[2] The CSA's underlying application was filed on March 23, 2018. It seeks declaratory and injunctive relief and damages against the Respondents for alleged infringement of its copyright in the Code. On a variety of grounds, the Respondents assert that they are lawfully entitled to reproduce and sell their version of the 2018 Code (the *Knight Code*).

[3] In an earlier proceeding between the parties, Justice Michael Manson found Knights' conduct in relation to the CSA's 2015 Code constituted an infringement of copyright: see *Canadian Standards Association v PS Knight Co Ltd and Gordon Knight*, 2016 FC 294 at para 61, 264 ACWS (3d) 750 . Justice Manson granted declaratory and injunctive relief, ordered the surrender of all copies of the 2015 *Knight Code* and awarded statutory damages. In a subsequent decision, costs of $96,336 were awarded to the CSA: see *Canadian Standards Association v PS Knight Co Ltd and Gordon Knight*, 2016 FC 387 at para 17., 265 ACWS (3d) 39.

[4] Justice Manson's decision was appealed to the Federal Court of Appeal. That Court granted a stay of the monetary awards pending the disposition of the appeal because Knight would otherwise be unable to pursue the appeal. The appeal decision on the merits remains on reserve.

[5] The CSA initially sought interim injunctive relief in this proceeding. A motion for an interim injunction was adjourned on consent by order of Justice Sean Harrington dated April 19, 2018 pending the hearing of a motion before me on May 15, 2018 seeking an interlocutory

injunction. That motion was similarly adjourned on consent due to an agreement (the Minutes of Settlement) between the parties. The Minutes of Settlement included the following:

a) Knight would be permitted to sell the 2018 *Knight Code* with all revenue from sales to be held in trust by their legal counsel and monthly accountings of the sales revenue would be provided to the CSA or their counsel;

b) Within two (2) days of the release of the appeal decision from the Federal Court of Appeal concerning the 2015 *Knight Code,* the parties would provide their positions on the underlying merits of this litigation;

c) The CSA would advise Knight if further changes to their published *errata* list were required. Such changes were to be effected online within seven (7) days;

d) The Minutes of Settlement were to be confidential and both parties agreed that they would not publicly comment on its existence or terms. They also agreed to refrain from any conduct that would harm the other's publication business beyond stating their previously held positions to public authorities and electrical safety stakeholders; and

e) The Minutes of Settlement's terms were made "without prejudice" to all matters in issue in the underlying proceeding.

[6] On July 4, 2018, the CSA's counsel wrote to Knights' counsel enclosing a list of 180 differences between the CSA's 2018 Code and the 2018 *Knight Code* to be added to Knights' published *errata* list. Knights' counsel responded on July 12, 2018 acknowledging eight (8)

differences that would be treated as mistakes and added to the *errata* list. Knight refused to accept the remaining differences as mistakes and declined to add them to the *errata* list. Indeed, Knights' response attributed 96% of the differences to the CSA's "own publishing errors, most notably in missing Delta identifiers and duplicate use of rule numbers". The CSA objected to Knights' characterizations of the disputed differences and its counsel advised that, unless the *errata* list was updated as demanded within four (4) days, the Minutes of Settlement would be treated as repudiated and its motion for injunctive relief would be resumed. Knight objected and the parties exchanged messages outlining their differing views about what was required by the Minutes of Settlement. Knights' last proposal was to publish an enhanced *errata* list containing all 180 differences but also containing numerous disclaimers attributing the errors to the CSA. That proposal was not acceptable to the CSA and its motion for injunctive relief was set down again for argument.

[7] Neither party expressed any particular concern about the Court's ability to determine <u>on a motion</u> whether a breach of their settlement had taken place. Each accused the other of breaching the agreement but the only evidence they presented was in affidavit form consisting largely of counsels' correspondence and email exchanges. Knight asserts that the CSA failed to respect the mutual commitment to confidentiality. The CSA contends that Knights' refusal to post a complete an unqualified *errata* list posed a serious safety risk to the public and supports a finding of contractual breach.

[8] Both parties acknowledge that the Minutes of Settlement represents a potential barrier to the CSA's resurrected motion. By the Minutes of Settlement, the CSA's claim to injunctive

relief was put aside pending the disposition of the outstanding appeal from Justice Manson's Judgment. As the Minutes of Settlement suggest, that decision will likely render the underlying issues in this case moot.

[9] It is common ground that, to entertain the CSA's motion, the Court must make a finding that Knight fundamentally breached the terms of settlement such that the CSA was entitled to treat the settlement agreement as repudiated. A breach of this type must be of sufficient significance that its effect is to deprive the innocent party of substantially the whole benefit of the contract: see *Spirent Communications of Ottawa Limited v Quake Technologies (Canada) Inc.*, 2008 ONCA 92 at para 35, 88 OR (3d) 721. The focus of this inquiry is on the relative importance of term in question to the performance of the contract as a whole. The issue is not what the breaching party subjectively intended or believed but, rather, how the notional reasonable person would view the impugned conduct: see *Potter v New Brunswick Legal Aid Services Commission*, 2015 SCC 10 at para 171, 381 DLR (4th) 1.

[10] Agreements that settle litigation are subject to the above principles but, as in this case, such agreements are frequently susceptible to interpretive disagreements. Because of the value of promoting and enforcing litigation settlements, the courts have generally been reluctant to treat *ex post facto* posturing as a repudiation. According to the British Columbia Court of Appeal in *Kuo v Kuo*, 2016 BCSC 767, 2016 CarswellBC 1154, a party's later insistence on a condition of performance that is excessive and contrary to the original contractual intent will only rarely amount to a repudiation: see para 41. To the same effect is the decision in *Remedy*

Drug Store Co Inc v Farnham, 2015 ONCA 576, 256 ACWS (3d) 305, where Epstein, J.A. said the following:

> [53] I agree with the opinion of the British Columbia Court of Appeal in *Fieguth v. Acklands Limited* (1989), 1989 CanLII 2744 (BC CA), 59 D.L.R. (4th) 114 (B.C.C.A.), at pp. 122-123, that anticipatory repudiation should be considered a particularly exceptional remedy in the context of settlement agreements. The Court explained the rationale for this approach as follows:
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>> It should not be thought that every disagreement over documentation consequent upon a settlement, even if insisted upon, amounts to a repudiation of a settlement. Many such settlements are very complicated, such as structured settlements, and the deal is usually struck before the documentation can be completed. In such cases the settlement will be binding if there is agreement on the essential terms. When disputes arise in this connection the question will seldom be one of repudiation as the test cited above is a strict one, but rather whether a final agreement has been reached which the parties intend to record in formal documentation, or whether the parties have only reached a tentative agreement which will not be binding upon them until the documentation is complete. Generally speaking, litigation is settled on the former rather than on the latter basis and parties who reach a settlement should usually be held to their bargains. Subsequent disputes should be resolved by application to the court or by common sense within the framework of the settlement to which the parties have agreed and in accordance with the common practices which prevail amongst members of the bar. It will be rare for conduct subsequent to a settlement agreement to amount to repudiation.
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>> [Emphasis added.]
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> This passage from *Fieguth* has been cited with approval by at least three Ontario courts, including this one: see *Bogue v. Bogue* (1999), 1999 CanLII 3284 (ON CA), 46 O.R. (3d) 1 (C.A.); *Cellular Rental Systems Inc. v. Bell Mobility Cellular Inc.*, [1995]

> O.J. No. 721 (S.C.), aff'd [1995] O.J. No. 3773 (C.A.); and *Whitehall Homes & Construction Ltd. v. Hanson*, 2012 ONSC 3307 (CanLII), 23 C.L.R. (4th) 272, at para. 31.
>
> [54] Courts are motivated to enforce settlements for good reason. As Swan puts it at p. 52 of her treatise, "There are strong policy reasons for the court's attitude to settlements: it is in everyone's interest that litigation be concluded by the parties' agreement".
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> …
>
> [71] In my view, the surrounding circumstances paint the following picture. A dispute arose that brought an end to a relatively brief employment relationship. A settlement was negotiated and the parties then disagreed on the nature of the technological sweep that would be required to ensure that Ms. Farnham no longer had possession of Remedy's confidential documents. In my view, even without the release, the forensic sweep did not go to the root of the contract. However, in the light of the release, the forensic sweep was next to meaningless in terms of its impact on Ms. Farnham.
>
> [72] Although insistence on a new contractual term can amount to repudiation, this will not always be the case, "especially when it can be demonstrated that the other party is seizing upon small points to get out from under its contractual obligation": *AIC Ltd. v. Infinity Investment Counsel Ltd.* (1998), 1998 CanLII 7783 (FC), 147 F.T.R. 233 (F.C.), at para. 42.

[11] The dispute here was primarily a disagreement about what textual differences between the 2018 Code and the 2018 *Knight Code* were caught by the term "*errata*" and subject to publication on Knights' website.[1] Knight agreed to address eight (8) items and the CSA insisted on 180. It is perhaps unfortunate that the parties did not reach the end of their discussions before the CSA brought its motion for an injunction back to the Court. The question that remains, is

[1] Knight was also briefly non-compliant with respect to the obligation to provide a monthly accounting to the CSA. This breach appears to have been caused by an oversight by Knights' counsel and it was quickly remedied.

whether Knights' refusal to accept the CSA's *errata* list amounted to a fundamental breach of the settlement. On the evidence before me, I am unable to make such a finding.

[12] Even if Knights' interpretation of the term "*errata*" was unreasonable and not in compliance with what was intended by the parties, I do not find that Knight's actions constitute a fundamental breach of the Minutes of Settlement. The core aspect of the Minutes of Settlement was a temporary stand-down arrangement that paused these proceedings, and allowed Knight to continue to sell the *Knight Code* with the proceeds held in trust pending the disposition of the appeal. This provided comfort to both parties and removed the litigation risk each faced in connection with the CSA's injunction motion. It also reduced the exposure of each party to additional legal costs. That essential part of the Minutes of Settlement has been honoured. Furthermore, the settlement was only an interim arrangement that did not bind either party beyond the disposition of the pending appeal.

[13] Although the CSA maintains that Knights' refusal to publish the CSA's *errata* list raised serious public safety risks, the evidence it provided to that effect is not compelling. The vast majority of the differences the CSA characterized as material appear to be small grammatical edits or minor changes the CSA did not highlight in its 2018 Code. The fact that Mr. Pope's affidavit offers only four (4) examples giving rise to practical safety concerns supports an inference that the remainder were of no particular concern to the CSA. Furthermore, Knight accepted that those four (4) examples should be added to the *errata* list and, in two (2) cases, had done so. For its part, the CSA dealt with its remaining concerns by way of issuing a public "safety alert".

[14] In my view, this dispute over the *errata* list did not go to the essence of the settlement agreement. Further good faith efforts to resolve the *errata* issue would probably have been successful; and if not, the Court could have done so on a better record.

[15] In the result, CSA's motion for an interlocutory injunction is dismissed with costs payable to the Respondents.

[16] I have reviewed the parties' submissions on costs. The Respondents have presented a reasonable Bill of Costs calculated under Column III of the Tariff. I am satisfied that an award of costs in the total amount of $6500.00 is justified.

ORDER

THIS COURT ORDERS that this motion is dismissed with costs payable to the Respondents in the amount of $6500.00.

"R.L. Barnes"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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