

Federal Court



Cour fédérale

**Date: 20220211**

**Docket: T-1432-20**

**Citation: 2022 FC 187**

**Ottawa, Ontario, February 11, 2022**

**PRESENT: Mr. Justice Pentney**

**Docket: T-1432-20**

**BETWEEN:**

**THE MINISTER OF NATIONAL REVENUE**

**Applicant**

**and**

**JOHN DOMINELLI**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] John Dominelli seeks to enforce an agreement reached between the parties to resolve ongoing litigation. He says that he has lived up to his side of the bargain, and that the case against him should therefore be brought to an end. The Minister of National Revenue (Minister) opposes this request, and seeks a ruling on the compliance application it brought pursuant to section 231.7 of the *Income Tax Act*, RSC 1985, c. 1 (5<sup>th</sup> Supp) [*ITA*].

[2] The usual roles of the parties are reversed in the matter at hand, and in order to avoid confusion I will refer to them by their names: Dominelli (the moving party in the matter before me, but the Respondent in the underlying application), and the Minister (the responding party in this matter, but the Applicant in the underlying application).

[3] As stated above, the agreement that is the focus of this motion arose in the context of a compliance application brought by the Minister against Dominelli. The matter was strongly contested. During the course of the three days of argument on the application before the Honourable Justice Alan Diner of this Court, the parties were urged to seek a resolution of their dispute.

[4] The parties eventually reached an agreement, the specific terms of which are set out in more detail below. The crux of it is that Dominelli was to undertake a search for documents and to ask his advisors to do the same, and then provide an affidavit setting out the details of the search that was conducted, and appending the documents he found. If there were documents he was unable to locate, Dominelli was to provide details on the search he undertook. If this was satisfactory to the Minister, the compliance application would be discontinued, on a without costs basis. If not, the Minister would advise the Court that the matter was not resolved and ask that the judgment be issued in the compliance application.

[5] The parties advised the Court that they had entered into a settlement process, asking that Justice Diner not issue his decision while they pursued a resolution. After receiving Dominelli's affidavit setting out the results of his search, the Minister indicated she was not satisfied and

advised the Court that the parties had not settled the matter. The Minister asked the Court to render judgment on the compliance application. Dominelli objected, and brought this motion to enforce the settlement agreement. Justice Diner issued a Direction on February 9, 2020, indicating he would not render judgment on the compliance motion pending the outcome of the motion.

[6] Dominelli asserts that the Minister cannot have an untrammelled right to decide whether he has fulfilled his obligations under the agreement. He claims that he has done everything that he was required to do, and argues that the case against him should therefore be dismissed. The Minister submits that Dominelli is asking the Court to enforce an agreement that he has not complied with and argues that his motion should be rejected so that the decision on the underlying compliance action can be issued.

[7] For the reasons below, I am dismissing Dominelli's motion. I find that the evidence he produced does not indicate that he complied with the specific terms of the agreement, in particular the requirement that he provide details as to the nature of the search for documents he performed, and the request(s) he made to his advisor(s). These terms were central to the agreement between the parties, given the context within which it arose, and Dominelli's failure to provide evidence of these matters is thus fatal to his claim. Therefore, Dominelli's motion to enforce the agreement cannot succeed.

I. Background

[8] The underlying facts are largely uncontroverted. Because the compliance application is still before the Court, the following summary is intended simply to provide the necessary background for the analysis of the settlement agreement. Nothing in what follows should be taken as a comment or finding on the merits of the respective parties' claims in relation to the compliance application.

[9] Dominelli founded and operates NRT Technology Corp. (NRT), a large corporation that operates in several countries. As part of his personal financial planning, he entered into two Leveraged Insurance Annuity (LIA) arrangements (the LIA Arrangements), which are described in the following way in the written submissions of the Minister in the compliance application (para 4):

Generally, an LIA is a circular series of transactions involving, but not limited to:

- a. purchasing an annuity policy with a short term loan;
- b. purchasing an insurance policy and using the annuity policy to pay the insurance premiums; and
- c. providing the annuity and insurance as collateral to obtain a long term loan and using the long term loan proceeds to repay the short term loan.

[10] The Minister states that the LIA Arrangements provided Dominelli with over \$139,000,000 in carrying charges that he deducted against his employment income from NRT. The Minister initially audited Dominelli for his participation in the LIA Arrangements for his

2013 taxation year, and this was subsequently expanded to cover the prior year, 2012, as well as the 2014, 2015 and 2016 taxation years.

[11] After commencing the audit for the 2012-2015 taxation years, the Minister reassessed the amount of taxes Dominelli owed, because those taxation years were about to become statute-barred. Dominelli is challenging those reassessments in the Tax Court of Canada. That left the audit of the 2016 taxation years.

[12] The parties agree that the Minister had issued several requests for documents relating to the audit of the 2016 taxation year, and that Dominelli had provided some documents. They do not agree whether Dominelli has met his obligations under s 231.1(1) of the *ITA*.

[13] In November 2020, the Minister commenced a summary application under s 237.1 of the *ITA*, alleging that Dominelli was not compliant in responding to requests pertaining to the audit of his 2016 taxation year. Dominelli opposed the application. At this stage, it is not necessary to review the respective positions of the parties in any detail, in particular because the matter is still before the Court.

[14] The compliance application was heard on December 15, 17 and 21, 2020, before Justice Diner. He encouraged the parties to attempt to settle the matter. Following some discussion between the parties at a virtual meeting facilitated by the Court, counsel exchanged correspondence, negotiating the terms of the agreement and the specifics of Dominelli's undertaking. The terms of the agreement were finalized on December 31, 2020. That same day,

the parties advised the Court that they had entered into a settlement process, and indicated that they would advise the Court on or before February 5, 2020, whether this process had resulted in a settlement of the compliance application.

[15] The key terms of the agreement provided that:

- a. Dominelli would sign an undertaking that he would conduct a “detailed and exhaustive search” for the Outstanding Documents relating to his 2016 taxation year, and that he would ask his advisors to do the same (“Outstanding Documents” is a term defined by the agreement);
- b. Dominelli would provide the results of his search efforts in a personal affidavit. The affidavit would particularize his search efforts, as well as his requests to his advisor(s), and would include as an exhibit any documents he located. For documents he was unable to find, he would particularize his search efforts;
- c. If Dominelli satisfied his commitments, the Minister would discontinue the compliance application on a no costs basis;
- d. If Dominelli failed to satisfy his commitments, the Minister would advise the Court that the parties were not able to resolve the matter, and ask the Court to render judgment.

[16] Dominelli provided an affidavit and some documentation, the details of which are described below. On February 5, 2020, the Minister informed Dominelli that she was not

satisfied with his materials. On the same day, the Minister indicated to the Court that the parties had not resolved the matter and asked that Justice Diner issue his decision. Dominelli wrote immediately to advise that he intended to bring this motion, asking the Court to refrain from issuing judgment.

[17] On February 9, 2020, Justice Diner issued a Direction, indicating that he would not proceed with issuing his judgment, in light of the motion to enforce the settlement agreement that Dominelli had indicated he intended to file.

## II. Issues

[18] The only issue in dispute is whether the agreement between the parties has been fulfilled, and whether the Minister's compliance application should therefore be dismissed.

[19] At the hearing the Minister raised two objections regarding Dominelli's evidence. First, the Minister objected to the Supplementary Motion Record that Dominelli filed on the day of the hearing. That record included an affidavit that Dominelli had sworn on December 8, 2020 in the context of the underlying compliance application as well as the transcript of cross-examination on that affidavit. The Minister objected that there had been no notice that this material would form part of the record in this proceeding, that it was contrary to the *Federal Courts Rules*, SOR/98-106 [*Rules*], and amounted to litigation by ambush. Dominelli argued that he was entitled to rely on material that was already part of the Court record, and that there was no unfairness because the Minister was already aware of the contents of the Supplementary Motion Record.

[20] At the hearing, I ruled that I would accept the Supplementary Motion Record but give it less weight, because by not including any reference to this material in his Motion Record and then filing it so late, Dominelli had not respected the *Rules* regarding the contents of his Motion Record and he effectively deprived the Minister of an opportunity to reply, or to test the evidence in the context of this proceeding. The earlier cross-examination had been for a different purpose, and so did not diminish the unfairness of the late filing.

[21] The Minister's second objection arose from the fact that Dominelli's main Motion Record included an affidavit from Anish Kamboj, a law clerk employed with the law firm that represents him in this matter, to which he appended the affidavit that Dominelli had submitted in fulfilment of the agreement between the parties. The Minister argued that the Kamboj affidavit should be given no weight, because the affiant has no personal knowledge of the matters that he attests to, and there is no explanation as to why better evidence was not available. The Minister also argues that it is improper to rely on an affidavit appended to another affidavit, noting that this tactic shielded Dominelli from cross-examination on his efforts to implement the agreement. I will deal with this below.

### III. Analysis

#### A. *What principles guide the interpretation of the agreement?*

[22] There is no dispute that the parties reached a binding agreement. They agree that the criteria of a binding settlement offer set out in *Apotex Inc. v Allergan Inc.*, 2016 FCA 155 are all present. Before moving to the heart of the dispute, which concerns the interpretation of the



specific terms of the agreement, it will be useful to set out the guiding principles for the interpretation of written agreements.

[23] The current approach to interpreting contracts was set out by the Supreme Court of Canada in *Sattva Capital Corp. v Creston Moly Corp.*, 2014 SCC 53 [*Sattva*]. This has been confirmed in several more recent Supreme Court of Canada decisions: *Ledcor Construction Ltd. v Northbridge Indemnity Insurance Co.*, 2016 SCC 37; *Corner Brook (City) v Bailey*, 2021 SCC 29; *Wastech Services Ltd. v Greater Vancouver Sewerage and Drainage District*, 2021 SCC 7 [*Wastech*].

[24] Two touchstones of this approach are that the contract must be interpreted as a whole and it must be understood in the context in which it was negotiated. In *Sattva* the following guidance was provided:

[ 47] ...[T]he interpretation of contracts has evolved towards a practical, common-sense approach not dominated by technical rules of construction. The overriding concern is to determine “the intent of the parties and the scope of their understanding”. To do so, a decision-maker must read the contract as a whole, giving the words used their ordinary and grammatical meaning, consistent with the surrounding circumstances known to the parties at the time of formation of the contract. Consideration of the surrounding circumstances recognizes that ascertaining contractual intention can be difficult when looking at words on their own, because words alone do not have an immutable or absolute meaning:

No contracts are made in a vacuum: there is always a setting in which they have to be placed. . . . In a commercial contract it is certainly right that the court should know the commercial purpose of the contract and this in turn presupposes knowledge of the genesis of the transaction, the background, the context, the market in which the parties are operating.

[48] The meaning of words is often derived from a number of contextual factors, the purpose of the agreement and the nature of the relationship created by the agreement.

(citations omitted)

[25] While *Sattva* acknowledges that a contract must be understood in the context within which it was negotiated, the case also places important limits on this:

While the surrounding circumstances will be considered in interpreting the terms of a contract, they must never be allowed to overwhelm the words of that agreement. The goal of examining such evidence is to deepen a decision-maker's understanding of the mutual and objective intentions of the parties as expressed in the words of the contract. The interpretation of a written contractual provision must always be grounded in the text and read in light of the entire contract. While the surrounding circumstances are relied upon in the interpretive process, courts cannot use them to deviate from the text such that the court effectively creates a new agreement.

(citations omitted)

[26] I now turn to the heart of the dispute, which involves the scope of the Minister's discretion and whether Dominelli has met his obligations.

B. *What is the proper interpretation of the agreement?*

[27] The differences between the parties in the matter before the Court boil down to two fundamental questions. Dominelli says that he has fulfilled his part of the bargain, and that the Minister cannot change the terms of their agreement just because she does not like the results. He questions the scope of the Minister's discretion to find that she is not satisfied with his efforts to

locate and produce the requested documents, and argues that the Minister has not exercised her discretion in a manner that reflects their agreement.

[28] The Minister argues that Dominelli has not met the terms of his undertaking, in particular he has not shown that he has conducted a “detailed and exhaustive search” for the documents and has not provided sufficient details of his efforts to locate documents that he was unable to produce.

[29] Before addressing these questions, it will be useful to review the terms and context of the agreement.

(1) *The terms of the agreement*

[30] At the outset, it is important to recall that the parties were agreeing to enter into a resolution process; the agreement was not intended by either party to be a “full and final” settlement of the litigation, although both likely hoped that the process might lead to a final resolution of the compliance application. Instead, the agreement sets out the steps that Dominelli and the Minister were required to take in order to try to resolve the compliance application.

[31] The agreement in many ways is quite simple. By the time the parties were negotiating it, the Minister had indicated that the focus was on specific areas of interest:

The following information, books and records remain outstanding (the “Outstanding Material”):

- a. According to Annuity Policy #M091201 the January 2016 annuity benefit was \$750,000, and according to Insurance Policy #20000001, the 2016 annual premium due was

\$4,750,000. Please provide proof that the portion of the annual insurance premium payable, not covered by the annuity benefit, i.e. \$4,000,000, was paid in 2016 by providing a copy of the cheque (both sides) or bank draft or wire transfer or any other form of payment;

- b. According to Annuity Policy #ADVA 1009-6057 the September 30, 2016 annuity benefit was \$2,000,000, and according to Insurance Policy #20000003, the 2016 annual premium due was \$7,500,000. Please provide proof that the portion of the annual insurance premium payable, not covered by the annuity benefit, i.e. \$5,500,000, was paid in 2016 by providing a copy of the cheque (both sides) or bank draft or wire transfer or any other form of payment; and
- c. Were there any documentation [sic] to support the unwinding of the arrangements? If so, please provide.

[32] The agreement set out the following obligations on the part of Dominelli:

- a. Mr. Dominelli will personally sign an undertaking, by December 31, 2020, pursuant to which he agrees to undertake a detailed and exhaustive search for the Outstanding Material,
- b. By February 1, 2021 at 12:00 p.m. EST, Mr. Dominelli will provide the results of his search efforts in a personal affidavit. The affidavit will include as an exhibit, any documents he may have located, and for the documents he is unable to locate, a detailed description of the search steps taken as set out in his undertaking.

[33] The agreement also set out the terms of Dominelli's Undertaking, the key elements of which are set out below:

I, John Dominelli, undertake to perform a detailed and exhaustive search of the books and records in my possession and to request and direct my professional advisors to conduct an exhaustive search of their files pertaining to my tax matters for the years 2010-2016 in their possession. Books and records includes, but is not limited to, all banking and financial records of any individual

or entity, held in Canada or internationally, over which I have legal control and/or legal access.

I undertake to particularize my efforts in conducting this search in the form of an affidavit. My affidavit will include as an exhibit any of the Outstanding Documents I that I have located.

For the Outstanding Documents that I am unable to locate. I undertake to recite the search steps taken, including where I and/or other persons, who will be identified, have searched, or collectively searched. I will provide my affidavit by February 3, 2021 at 12:00 p.m. EST.

I undertake to make inquiries of the individuals and entities listed below, and to particularize my efforts in making these inquiries in the form of an affidavit. My affidavit will include as an exhibit, any responses received by the individuals and entities and I will recite the date and method of the inquiries made. My affidavit regarding my inquiries of the individuals and entities (collectively, the "Entities") listed below will be provided by February 3, 2021 at 12:00 p.m. EST whether or not those answers are full answers to the Outstanding Material:

[there follows a list of 24 individuals and entities, including companies controlled by Dominelli, as well as advisors he had relied on in relation to the LIA arrangements].

If I am able to obtain the Outstanding Documents from any one source, I will cease my search and will not be obligated to contact the entire list of Entities.

(2) *The context for the agreement*

[34] As noted earlier, the agreement between the parties arose in the context of a strongly contested compliance motion. The Minister alleged that Dominelli had failed to comply with his obligations under s 231.1(1) of the *ITA*, which provides:

**Inspections**

231.1 (1) An authorized person may, at all reasonable times, for any purpose related

**Enquêtes**

231.1 (1) Une personne autorisée peut, à tout moment raisonnable, pour l'application

to the administration or enforcement of this Act,

(a) inspect, audit or examine the books and records of a taxpayer and any document of the taxpayer or of any other person that relates or may relate to the information that is or should be in the books or records of the taxpayer or to any amount payable by the taxpayer under this Act, and

(b) examine property in an inventory of a taxpayer and any property or process of, or matter relating to, the taxpayer or any other person, an examination of which may assist the authorized person in determining the accuracy of the inventory of the taxpayer or in ascertaining the information that is or should be in the books or records of the taxpayer or any amount payable by the taxpayer under this Act,

and for those purposes the authorized person may

(c) subject to subsection 231.1(2), enter into any premises or place where any business is carried on, any property is kept, anything is done in connection with any business or any books or records are or should be kept, and

(d) require the owner or manager of the property or business and any other person on the premises or place to

et l'exécution de la présente loi, à la fois :

a) inspecter, vérifier ou examiner les livres et registres d'un contribuable ainsi que tous documents du contribuable ou d'une autre personne qui se rapportent ou peuvent se rapporter soit aux renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit à tout montant payable par le contribuable en vertu de la présente loi;

b) examiner les biens à porter à l'inventaire d'un contribuable, ainsi que tout bien ou tout procédé du contribuable ou d'une autre personne ou toute matière concernant l'un ou l'autre dont l'examen peut aider la personne autorisée à établir l'exactitude de l'inventaire du contribuable ou à contrôler soit les renseignements qui figurent dans les livres ou registres du contribuable ou qui devraient y figurer, soit tout montant payable par le contribuable en vertu de la présente loi;

à ces fins, la personne autorisée peut :

c) sous réserve du paragraphe (2), pénétrer dans un lieu où est exploitée une entreprise, est gardé un bien, est faite une chose en rapport avec une entreprise ou sont tenus ou

give the authorized person all reasonable assistance and to answer all proper questions relating to the administration or enforcement of this Act and, for that purpose, require the owner or manager to attend at the premises or place with the authorized person.

devraient l'être des livres ou registres;

d) requérir le propriétaire, ou la personne ayant la gestion, du bien ou de l'entreprise ainsi que toute autre personne présente sur les lieux de lui fournir toute l'aide raisonnable et de répondre à toutes les questions pertinentes à l'application et l'exécution de la présente loi et, à cette fin, requérir le propriétaire, ou la personne ayant la gestion, de l'accompagner sur les lieux.

[35] The Minister therefore brought a compliance application pursuant to s 231.7(1) of the *ITA*:

#### **Compliance order**

231.7 (1) On summary application by the Minister, a judge may, notwithstanding subsection 238(2), order a person to provide any access, assistance, information or document sought by the Minister under section 231.1 or 231.2 if the judge is satisfied that

(a) the person was required under section 231.1 or 231.2 to provide the access, assistance, information or document and did not do so; and

(b) in the case of information or a document, the information or document is

#### **Ordonnance**

231.7 (1) Sur demande sommaire du ministre, un juge peut, malgré le paragraphe 238(2), ordonner à une personne de fournir l'accès, l'aide, les renseignements ou les documents que le ministre cherche à obtenir en vertu des articles 231.1 ou 231.2 s'il est convaincu de ce qui suit :

a) la personne n'a pas fourni l'accès, l'aide, les renseignements ou les documents bien qu'elle en soit tenue par les articles 231.1 ou 231.2;

b) s'agissant de renseignements ou de documents, le privilège des

<p>not protected from disclosure by solicitor-client privilege (within the meaning of subsection 232(1)).</p>	<p>communications entre client et avocat, au sens du paragraphe 232(1), ne peut être invoqué à leur égard.</p>
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[36] As noted previously, it is neither necessary nor appropriate to describe in any detail the substance of the parties' positions before the Court on the compliance application. It is sufficient to note that both parties would have been aware of the law regarding such applications, and in particular that:

- i. "The purpose of section 231.1 is to facilitate the Minister's unencumbered and immediate access to all books, records and information of the taxpayer and, in section 231.7, to provide recourse to the authority of the Court in the face of a refusal" (*Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 [*Cameco*] at para 27);
- ii. "The Minister is entitled to determine the scope and manner of an audit, its course and direction... 'auditors must engage in extensive poke-and-check exercises, and are essentially left to their own initiative in verifying the amounts responded by the taxpayer'" (*Cameco* at para 43, citing *BP Canada Energy Co. v Minister of National Revenue*, 2017 FCA 61 at para 82);
- iii. "The ITA only requires reasonable efforts to acquire requested documentation. If a document has been destroyed or is not available because it is not in a taxpayer's possession, then an order for disclosure should not be made..." (*Canada (National Revenue) v Lin*, 2019 FC 646 at para 26, citing *Canada (Minister of National Revenue) v Amdocs Canadian Managed Services Inc.*, 2015 FC 1234 at paras 75 and 76).

(3) *What was done pursuant to the agreement?*

[37] Dominelli signed the undertaking on December 31, 2020, so his compliance with that term of the agreement is not in question. On February 2, 2021, Dominelli provided the affidavit setting out the results of his search, so he also complied with that term.



[38] After an exchange of messages between counsel for the parties, counsel for the Minister indicated on February 5, 2021 that “[o]ur client is not satisfied with the materials produced. We will thus be writing to Justice Diner to advise the parties have not reached an agreement and request that he issue his judgment.”

[39] This crystallizes the dispute between the parties: Dominelli says that he complied with the terms of the agreement, terms that were negotiated in some detail between the parties. He asks the Court to find that he did what he promised to do, and that the Minister’s discretion to determine that she is not “satisfied” with the disclosure is limited by the terms of the agreement. The Minister argues that Dominelli did not do what he promised and asks the Court to find that he failed to live up to his part of the bargain.

[40] Having set out the specifics of the parties’ agreement above, it is necessary to examine Dominelli’s affidavit and the documents he provided in order to determine whether he fulfilled his obligations, and to assess whether the Minister’s determination that she was not satisfied that he had lived up to his side of the bargain is sustainable. As required by *Sattva*, the agreement must be considered as a whole and interpreted in light of the objective context within which it was negotiated. I will address below the Minister’s contention that the Court should give no weight to the Dominelli affidavit, because it was not filed separately but was merely appended to the Kamboj affidavit.

[41] There is no dispute between the parties that by the time the agreement was reached, the Minister was focused on three particular categories of documents in the context of her audit of

Dominelli's 2016 taxation year. The agreement and the Undertaking defined these as the "Outstanding Material", and the categories of documents the Minister sought can be summarized as follows:

- a. According to Annuity Policy #M091201 the January 2016 annuity benefit was \$750,000, and under the #20000001 Insurance Policy [hereafter referred to as the '01 Policy], the annual premium was \$4,750,000. Dominelli was to provide proof that the \$4 million insurance premium was paid in 2016 by providing a copy of a cheque or bank draft or wire transfer or other form of payment;
- b. According to Annuity Policy #ADVA 1009-6057, the September 2016 annuity benefit was \$2 million, and under the #20000003 Insurance Policy [hereafter referred to as the '03 Policy], the annual premium was \$7,500,000. Dominelli was to provide proof that the \$5.5 million insurance premium was paid in 2016, by providing a copy of a cheque, bank draft, wire transfer or other form of payment;
- c. Dominelli claimed that the arrangements had been wound up. He was to confirm whether there was any documentation confirming that, and to provide any such documents.

[42] It is important to underline at the outset that the question of whether the documents Dominelli provided are satisfactory for the purposes of assessing Dominelli's tax liability is not before me.

[43] Instead, the question before the Court is whether Dominelli's affidavit demonstrates that he met his obligation to search and to document his efforts. This is captured in his Undertaking, by which he promised to:

- i. "perform a detailed and exhaustive search of the books in records in [his] possession and to request and direct [his] professional advisors" to do the same;

- ii. “particularize [his] efforts in conducting this search, including his requests to his advisor(s), and to provide the Outstanding Material that resulted from the search”; and
- ii. for Outstanding Documents he was unable to locate, to “particularize [his] efforts in making these inquiries”.

[44] The Undertaking also included a term that Dominelli added and the Minister accepted, which stated that if he was “able to obtain the Outstanding Documents from any one source, [he would] cease [his] search and will not be obligated to contact the entire list of Entities.”

[45] Turning next to Dominelli’s affidavit and the attached documents, the following summary captures the essential elements, and it is not necessary for the purposes of this matter to review each document in detail. As to the scope of his search for the Outstanding Material, Dominelli states:

On January 13, 2021, Robert Young (“Young”), the insurance consultant with knowledge of the life insurance policy bearing number 2000-0002 (the “03 Policy”) sent to my lawyers at Miller Thompson LLP documents that Young advises contains the answers to certain requests made by the applicant in this summary application. I append those documents to this affidavit as set out below.

[46] Dominelli’s affidavit then lists a series of transactions that are reflected in the exhibits to his affidavit; although there are some differences between the two, the exhibits set out a similar series of transactions relating to both the ‘01 and the ‘03 Policies. It is not necessary to detail each step; the following summary is sufficient for the purposes of this matter:

- In 2010, Dominelli executed a direction to TriCap Assurance SPC (the life insurance company that issued the policies) to pay his creditor, Relius Group Consulting Inc.

(Relius), any proceeds that would be payable upon the death of any of the lives insured by the policies;

- In December 2019, TriCap issued a receipt to Dominelli, confirming payment of the amount due to Relius;
  
- Young advised Dominelli that:
  - Relius executed an assignment for the benefit of Surefine Fund, Ltd. (Surefine);
  
  - Surefine issued a demand promissory note to the creditor, Advantage Life & Annuity Company Limited. (Advantage) for the death benefit amounts;
  
  - Advantage assigned Relius a note; it also assigned a note to TriCap, and TriCap further assigned it to Relius;
  
  - Advantage issued to Surefine a demand for payment of a settlement amount equal to the death benefit amounts which it would receive in full and final satisfaction of any amounts under an Investment Agreement, and on account for premiums outstanding on the '01 and '03 Policies;
  
  - Advantage paid to Surefine the amounts owed under its obligations on the Policies, and issued a confirmation to evidence the payment;
  
  - Surefine issued a receipt to Relius as confirmation that it has received the payment of the death benefit amount in satisfaction of the loan agreement;
  
  - Relius issued a receipt to Dominelli as confirmation that it had received payment of the death benefit amount in satisfaction of his loan agreement.

[47] In addition, Dominelli stated that his mother, who was insured under the '01 and '03 policies, died on February 21, 2017, but the death benefit amount was not settled until December 2019. His affidavit continues: “Young advised me and I believe that as part of the wind up of the policies, the amount I owed to TriCap on account of 2016 premiums was satisfied in full.” He appended letters from Advantage pertaining to the outstanding 2016 premiums for both the '01

and '03 Policies, which stated that Advantage is the issuer of the Annuity Policy and reinsurer of the life insurance policy issued by Tricap Assurance SPC. The letter then confirmed that:

As part of the winding up of the Annuity Policy and Life Policy, Advantage paid the full amount of death benefit in satisfaction of its obligations... Upon distribution of the death benefit and in accordance with the provisions of the Reinsurance Agreement, Advantage was therefore able to account for premium obligations due under the Life Policy to the satisfaction of Tricap.

(4) *The parties' submissions*

[48] Dominelli argues that his affidavit and these documents show that he has met his obligations under the agreement. He describes the search, namely that he contacted Robert Young, the advisor that he had consistently indicated was the person who had all of the relevant documents. He then describes the documents and what they show, and provides copies as he was required to do. He says these documents confirm that the outstanding premiums were paid, and the arrangements have been wound up. His affidavit indicates that “Young advised me and I believe that as part of the wind up of the policies, the amount I owed to TriCap on account of 2016 premiums was satisfied in full.” He submits that the affidavit and materials is a full and complete response to the Minister’s concerns as set out in the definition of “Outstanding Materials.” Based on this, Dominelli contends that he did precisely what he was required to do.

[49] In response to the Minister’s objection that he did not undertake the searches as he promised, Dominelli points to the clause that he added during the negotiations, which states that he was not obliged to contact all of the listed individuals and entities if he obtained all of the documents from one source. He says that this is consistent with the position he had advanced

throughout the audit and the compliance proceeding – namely, that he relied on his advisors, and Mr. Young would have all of the relevant documentation. He claims that under *Sattva*, this is part of the context for the agreement that must be considered in the interpretation of his obligations.

[50] Dominelli also notes that the Minister did not seek to specify the details of the search that he was required to undertake, beyond stating that he was to conduct a detailed and exhaustive search, listing the material that was of concern, and listing potential sources of such material. If the Minister wanted to be more specific, she had the opportunity to do so. Similarly, if the Minister wanted a particular type of document relating to the winding up of the LIA arrangement, she could have included that in the agreement, but failed to do so. Dominelli asserts that just because the Minister is not happy with the outcome does not mean she has the right to unilaterally change the terms of their agreement.

[51] Dominelli notes that if the Minister is not satisfied with the results of his search, she has other statutory powers to seek further information from third parties. He argues that the Minister's objections that he has not provided original copies or that certain documents are not signed cannot support a finding that he has failed to discharge his obligations, because there is nothing in the agreement that requires originals or signed versions of documents to be provided. All that he was obliged to do was to search for documents and to turn over what he obtained, and that is precisely what he did.

[52] Finally, in response to the Minister's objection to the Kamboj affidavit, Dominelli asserts that the Minister's written representations indicate that she accepts that limited use may be made of the documents appended to that affidavit, and that they are not being tendered for the truth of their contents, but rather as proof that he met his obligations under the agreement. Dominelli argues that the Court can simply read the documents to decide whether they show that he lived up to the bargain.

[53] The Minister argues that Dominelli has failed to meet his onus of demonstrating through admissible evidence that he discharged his obligations under the agreement. She points to defects in both the substance of the evidence Dominelli submitted as well as to its form. The Minister submits that the Kamboj affidavit is replete with hearsay, and the Dominelli affidavit should be discounted because it was not filed independently but rather was appended to the Kamboj affidavit. The Minister submits that in the absence of evidence, Dominelli seeks to elevate information about the context into evidence of compliance, and this is impermissible.

[54] Starting with the evidence of what Dominelli says he did to fulfil his obligations under the agreement, the Minister notes the following:

- a. Dominelli's affidavit does not state that he searched any of his own records, or any holdings of the companies he controls;
- b. The affidavit does not state that Dominelli believed that only Mr. Young has all of the relevant documents, nor does he explain why he never contacted any of the other listed individuals or entities;
- c. The affidavit never says that Dominelli believes that he has received all of the relevant documentation, only that Mr. Young sent him "documents that Mr. Young advises contains the answers to certain requests made by [the Minister]". The Minister submits this is hearsay;

- d. The affidavit does not explain why Dominelli believed that no further search was needed in order to obtain all of the relevant documents;
- e. The affidavit does not say that there were no documents relating to the wind up of the arrangements, or that Dominelli believed there were no further documents, nor does it provide any basis for such a belief.

[55] The Minister submits that on the face of the Dominelli affidavit, it is evident that he has not discharged his obligations. Dominelli has acted at his peril in placing his total reliance on what Mr. Young said and the documents Young provided. Although Dominelli asserts that the context shows that the Minister was aware that he believed that Mr. Young had all of the relevant documents, there is no evidence that the Minister ever accepted that statement.

[56] The Minister asserts that the background information indicates that in the course of the audits of his 2012-2016 taxation years, Dominelli had said that he relied on a number of other advisors, and they are all referenced in the Undertaking – in a list that was prepared by the Minister. The Minister says that this demonstrates that she never accepted that only Young could provide the relevant documents.

[57] Regarding the form of the evidence, the Minister submits that the Kamboj affidavit should be given no weight, because the affiant had no personal involvement in any of the matters that he addresses in his affidavit. In addition, he appends the Dominelli affidavit as an exhibit, and there is no explanation about why it was not filed as a separate document. The Respondent points to the jurisprudence of this Court that has consistently found that an affidavit appended to another affidavit will be given little or no weight, because that tactic has the effect of shielding the affiant from cross-examination and is unfair to the other party: *Zaman v Canada (Minister of*



*Citizenship & Immigration*), [1997] FCJ No 646 (QL), 131 FTR 54 at paras 6-8; *Krah v Canada (Citizenship and Immigration)*, 2019 FC 361 [*Krah*] at paras 5 and 17; *Almeddine v Canada (Citizenship and Immigration)*, 2019 FC 1285 at paras 20-22.

[58] In summary, the Minister argues that the onus is on Dominelli to establish that he has met each of his obligations under the agreement. A common theme that runs throughout the agreement and the Undertaking is that he is to conduct a detailed and thorough search, and to explain the steps that he took. A bare reading of his affidavit, according to the Minister, shows that he has failed to do that. He has also failed to provide any documents that address in any meaningful way how the arrangement was wound up, and so he has not discharged that requirement of the agreement. The Minister argues that Dominelli's evidence falls short, and asks that his motion be dismissed.

(5) *Discussion*

[59] I agree with Dominelli that the scope of the Minister's discretion to determine that she is not satisfied that he has discharged his obligations under the agreement must be limited by the terms of their agreement(see *Bhasin v Hrynew*, 2014 SCC 71; and *Wastech Services*). Therefore, objections that he only provided copies or that some of the documents were not signed would not sustain the Minister's position.

[60] However, I am unable to find that Dominelli has met his onus to demonstrate that he has, in fact, delivered on his promises as set out in the agreement.

[61] In regard to the form of Dominelli's evidence, I agree with the Respondent that the statements made in the Kamboj affidavit should be given little weight, to the extent they go beyond recounting the procedural history and explaining the source or nature of the exhibits. Nothing turns on that finding, however, because the heart of the evidence in this matter lies in the Dominelli affidavit and the documents appended to it, and so I have had regard to these. Dominelli's case rests on the content of his own affidavit and the appended documents, and for the reasons explained below I find that evidence to fall short.

[62] In this context, it is not necessary to discuss at any length the question of the weight to be given to an affidavit appended to another affidavit, other than to confirm that the jurisprudence of this Court has consistently found that this is problematic and should be avoided, because it may result in the contents of the appended affidavit being given little weight (see the discussion in *Krah*, and *Canada (National Revenue) v Edward Enterprise International Group Inc.*, 2020 FC 1044 at paras 20-22). However, in the circumstances of this case, nothing turns on this point, because in the discussion below I do not discount the weight to be attributed to Dominelli's affidavit and exhibits. Indeed, even taking them at face value, I still find the evidence falls short of demonstrating that he has met his obligations under the Agreement.

[63] Turning back to the question of whether Dominelli has met his onus to establish that he has fulfilled the terms of the agreement, I agree with Dominelli's position that it is not necessary to pronounce on the substance of the documents attached as exhibits to his affidavit. In order to assess whether Dominelli has complied with the agreement, there is no need to determine whether the documents actually establish that Dominelli paid the insurance premiums owing

under the LIA arrangement in 2016. That is for the Minister to assess in the context of the audit. Instead, I am required to consider whether Dominelli's evidence demonstrates that he complied with the specific terms set out in the agreement and Undertaking, interpreted in the context within which they were negotiated.

[64] For the purposes of this analysis, it will be helpful to group the specific obligations undertaken by Dominelli, as well as his evidence relating to each, under several headings.

(a) *To search for documents and to document his efforts:*

[65] Dominelli promised "to perform a detailed and exhaustive search of... records in my possession" and to "particularize my efforts" and "to request and direct my professional advisors to conduct an exhaustive search", "to make inquiries of individuals and entities listed below" and to "particularize my efforts in making these inquiries".

[66] Dominelli agreed to undertake a search of books and records under his control, and to request his professional advisors to conduct a similar search of their files pertaining to his 2010-2016 taxation years. His affidavit contains no information regarding any search of his own records, and no indication that he requested his professional advisors to search for anything. Instead, it simply states that on January 13, 2021, Robert Young sent documents pertaining to the Outstanding Material to his lawyers "that Young advises contains the answers to certain requests made by the applicant in this summary application." Implicit in this statement is that Dominelli must have asked Mr. Young to conduct some sort of search, but no details are provided. This does not, on its face, comply with the terms of the agreement or the Undertaking.

[67] Interpreting these documents with reference to the context does not assist Dominelli. One aspect of the relevant context is what the Minister could objectively have expected Dominelli to produce from his own records, and the related question of how much would likely have come from his advisors. I accept that he had stated that he relied on his advisors in making these arrangements and that he was not knowledgeable about the details of the LIA scheme; indeed the Minister has acknowledged this.

[68] The fact that he was not an expert in LIA schemes and that he relied on advisors does not, however, mute the force of the specific terms he agreed to. These terms required Dominelli to undertake a search of his own records and those of companies he controlled; they also required him to particularize his efforts. Dominelli's affidavit does not say that he undertook any search of his own records, nor does it indicate that he asked any of his related companies to do so, nor that he asked any of the listed companies or individuals to do so. Nor does the affidavit set out any justification for his failure to document what he had asked any or all of his advisors to do. His

(b) *To ask his advisors to search for documents and to document this effort:*

[69] Turning to Dominelli's promise to ask his advisors to conduct a similar search and to particularize his efforts, Dominelli clearly believed that he could meet the terms of his obligations by asking Mr. Young for the relevant documents, and that once he obtained them he did not have to continue with his search. He points to the clause he added to the Undertaking as proof that he could meet his obligations in this manner.

[70] However, the clear terms of the agreement required him to “request and direct [his] professional advisors to conduct an exhaustive search of their files” for the relevant taxation years. In addition, he was required to “particularize [his] efforts in conducting this search in the form of an affidavit.” By the specific terms of the agreement, this obligation to “particularize” the search efforts applied both to his own search, and to the requests he made of his advisors: “I undertake to make inquiries of the individuals and entities listed below, and to particularize my efforts in making these inquiries in the form of an affidavit.”

[71] Dominelli did not describe what he asked Young to search for, but rather he simply states that Young provided documents and made certain statements. He provides no communication directly from Mr. Young that indicates what he had been asked or instructed to do, nor to explain why he believed that the documents he provided were all that was available of the Outstanding Material.

[72] Furthermore, even taking Dominelli’s evidence at its highest, he does not state that he believed he had been able to obtain all of the Outstanding Material from one source, nor to explain why he thought that. Rather, he simply recounts what Mr. Young stated, namely that he advised Dominelli that the documents contain “the answers to certain requests made” by the Minister.

[73] The evidence provided by Dominelli falls well short of establishing that he has met his obligations to conduct a thorough and exhaustive search, to make inquiries of his advisors to conduct a similarly thorough search, and to particularize his efforts and those of his advisor(s). If

he truly believed that only Mr. Young had any relevant documents, he needed to say that and to offer an explanation as to why – that is the only reasonable interpretation of his promise to “particularize” his efforts. It is notable that this expression was inserted by the Minister in several places in the agreement. This is a clear sign that she was not willing to take Dominelli’s word that he had searched or asked his advisors to do so. The Minister wanted documentation of the details about this, Dominelli agreed to provide such details, and yet he failed to provide any information at all about the nature of his request or his search efforts.

(c) *To provide documentation supporting the unwinding of the LIA arrangements*

[74] In a similar vein, the agreement and Undertaking asked whether there was “any documentation to support the unwinding of the arrangement” and if so, Dominelli was to provide such material. His affidavit simply states that “Young advised me and I believe that as part of the wind up of the policies, the amount I owed to TriCap on account of 2016 premiums was satisfied in full.” Once again, he says nothing about whether any documents relating to the winding up of the arrangement exist, nor does he state that he asked for such information.

[75] The only reference to winding up in the documents Dominelli provided is found in the letters from Advantage Insurance, which state: “As part of the winding up of the Annuity Policy and Life Policy, Advantage paid the full amount of death benefit...” This does not indicate whether there are any documents that relate to the winding up, although it appears to confirm that the LIA arrangements have, in fact, been wound up. Once again, this does not comply with the specific terms of the agreement.

[76] To summarize the analysis above, in the context of the ongoing audits, the Minister's demand for documentation to back up Dominelli's assertions is understandable. This demand is incorporated in the clear terms of the agreement and Undertaking, and these must govern the interpretation of Dominelli's obligations, as required by *Sattva*. For the reasons set out above, I find that the evidence falls short of demonstrating that Dominelli has fulfilled his obligations. At best, it demonstrates the basis for Dominelli's belief that the arrangements have, in fact, been wound up, but it does not indicate that he asked for any documents to support this nor does it state that he was advised that no such documents exist.

[77] Even setting aside any concerns about the weight to be given to Dominelli's affidavit because it was filed as an exhibit to another affidavit, I must conclude that he has failed to demonstrate that he has discharged his obligations under the agreement.

[78] It must be recalled that the agreement between the parties arose in the context of a compliance application brought by the Minister. Although that matter was strongly contested, the parties were clearly focused on specific information (defined as the Outstanding Material) relating to a specific transaction (the LIA arrangement) for the 2016 taxation year. Both parties knew that the Minister was not satisfied with the documentation that Dominelli had produced during the course of the audit, and that explained the emphasis placed on the search obligations as well as the requirement that Dominelli "particularize" his efforts. That is the only reasonable way to understand the specific terms of the agreement in the context of the situation within which it was negotiated. These terms were not mere procedural fluff, added to improve the flow of the agreement. Rather, they were the heart of what Dominelli promised to do, as demonstrated

by their notable repetition in the agreement and Undertaking. There can be no doubt that both parties were aware of this when they finalized the agreement.

[79] Understood in that context, the gap between what Dominelli promised to do and what his affidavit states is striking. It is not necessary to review the deficiencies in his evidence, described in detail above. Instead, I simply repeat here that his evidence does not establish that he has met the specific and detailed terms of the agreement and the Undertaking that he negotiated, and thus his motion cannot succeed.

#### IV. Conclusion

[80] For the reasons set out above, I must dismiss Dominelli's motion to enforce the settlement.

[81] Following the hearing, the parties jointly submitted that an amount of \$5,000, all-inclusive, would be the appropriate quantum of costs to be awarded to the successful party. In the circumstances of this case, and in exercise of my discretion under Rule 400, I find this to be a reasonable proposal. Dominelli shall therefore pay to the Minister the lump sum amount of \$5,000, including costs and disbursements.



**JUDGMENT in T-1432-20**

**THIS COURT'S JUDGMENT is that:**

1. The motion brought by the Respondent, John Dominelli, to enforce the terms of the agreement between the parties is dismissed.
2. The Respondent, John Dominelli, shall pay costs in the lump sum, all-inclusive, amount of \$5,000 to the Applicant, The Minister of National Revenue.

"William F. Pentney"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** T-1432-20

**STYLE OF CAUSE:** THE MINISTER OF NATIONAL REVENUE v JOHN DOMINELLI

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** APRIL 8, 2021

**REASONS FOR JUDGMENT AND JUDGMENT:** PENTNEY J.

**DATED:** FEBRUARY 11, 2022

**APPEARANCES:**

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