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Never Settle for Uncertainty

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In a pair of recent decisions, Justices MacPherson, Simmons and Nordheimer of the Ontario Court of Appeal remind us that as with other commercial contracts, courts will construe settlement agreements objectively, and will enforce their terms even where one party insists that the terms are not as they appear.

Thoba v Srajeldin

The first of these two decisions is *Thoba v Srajeldin,* 2021 ONCA 789. In this case, Thoba commenced an action against Srajeldin alleging corporate oppression. Not long thereafter, the parties reached a settlement whereby Srajeldin would buy out Thoba's interest in the corporations at issue – or so they thought. The parties finalized minutes of settlement, but before they were exchanged, Srajeldin's financing fell through. Thoba moved to enforce the settlement. Justice Conway enforced the settlement and concluded:

1. that the parties had agreed upon the essential terms of the settlement;
2. that minutes of settlement were not required for the agreement to be binding; and
3. that Srajeldin's position that he did not intend to create a legally binding agreement was an after-the-fact construct.

Srajeldin appealed.

On appeal, the aforementioned panel upheld Justice Conway's decision, concluding that it was open to her to find that the parties' communications reflected an enforceable – and unconditional – settlement agreement. The panel also found no error in her decision not to exercise her discretion and decline to enforce the settlement agreement. In short, the Court enforced Justice Conway's objective construction of the settlement agreement.

DeLuca v Grillone

This same panel came to a similar conclusion in *DeLuca v Grillone,* 2021 ONCA 798. In this case, the parties reached a settlement. Counsel for DeLuca advised the motions judge of the settlement and its terms by e-mail prior to the hearing, writing:

Your Honour in connection with tomorrow's attendance before you … the purchasing and selling parties have agreed to the price to be paid for the shares of 239 in 189. The parties will agree to an order that:1.1.

1. Subject to any contrary direction by His Honour the agreed price … shall be paid by Rhonderoo to 239 within 10 business days of Friday, July 17. [Emphasis added]

The motions judge – Justice Koehnen, ordered that the share purchase monies be paid into Court, rather than to the "239" corporation. Grillone and 239 subsequently took the position that "subject to any contrary direction by His Honour" meant that there

would be no settlement if the Court directed the monies be paid anywhere other than to 239. Justice Koehnen disagreed and held that the words meant that it was open to him to direct the monies be paid into Court rather than to 239.

On appeal, Justices MacPherson, Simmons and Nordheimer upheld Justice Koehnen's interpretation, finding that it was open to him to interpret the email from DeLuca's counsel as he did. The Court also declined to permit Grillone and 239 to adduce fresh evidence related to events after the settlement was reached because such evidence is "irrelevant to the question of whether there was a settlement."

Takeaways

These decisions make it clear that courts will enforce an objective interpretation of settlement agreements reached between parties, and will have little patience for *ex post facto* assertions that the terms of the agreement are not as they appear. The lesson is clear: always ensure that the terms of settlement which are *intended* are accurately reflected in the correspondence between the parties, and never settle for uncertainty.

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