In the Court of Appeal of Alberta

Citation: Custom Metal Installations Ltd v Winspia Windows (Canada) Inc, 2020 ABCA 333

Date: 20200921
Docket: 1901-0318-AC
Registry: Calgary

Between:

Custom Metal Installations Ltd.

Appellant
(Plaintiff by Counterclaim)

- and -

Winspia Windows (Canada) Inc. and Winspia Co. Ltd.

Respondents
(Defendants by Counterclaim)

The Court:

The Honourable Madam Justice Michelle Crighton
The Honourable Madam Justice Elizabeth Hughes
The Honourable Mr. Justice Kevin Feehan

Memorandum of Judgment

Appeal from the Judgment by
The Honourable Mr. Justice BE Mahoney
Dated the 20th day of September, 2019

(2019 ABQB 732, Docket: 1601 06606)

Memorandum of Judgment

The Court:

I. Overview

[1] Custom Metal appeals a decision of a chambers judge allowing an appeal from a Master. The Master had, by consent order, originally set questioning dates for the corporate officer of Winspia failing which Winspia's Statement of Defence to Counterclaim was to be struck. When the corporate officer failed to attend for questioning, the Statement of Defence to Counterclaim was struck. Winspia applied to vary the Master's earlier order and reinstate the Statement of Defence to Counterclaim. The Master dismissed the application with the consequence that Winspia's Statement of Defence to Counterclaim remained struck: 2019 ABQB 345, 34 CPC (8th) 103. The chambers judge allowed the appeal, varied the Master's original consent order, and restored Winspia's Statement of Defence to Counterclaim: 2019 ABQB 732.

[2] The issue on this appeal is whether the Master's analysis that a consent order is a type of contract that can only be set aside for the same reasons as a contract can be set aside, is applicable to an interlocutory procedural order. We find it is not.

[3] For the following reasons we dismiss the appeal from the decision of the chambers judge.

II. Facts

[4] Neither of the counsel before the Court were counsel during the currency of the events which follow.

[5] Winspia is a window manufacturing company and Custom Metal is a supply and installation company. They entered into a supply agreement whereby Winspia would provide a curtain wall system to Custom Metal for installation in a condominium project in Calgary. Winspia filed builder's liens against the project on March 21, 2016, and on May 18, 2016 filed a Statement of Claim to enforce the liens. The Statement of Claim asserted a contract price of $2,374,498 plus or minus additions or deletions, and claimed an unpaid amount of $950,000.

[6] On July 5, 2016, Custom Metal filed a Statement of Defence and Counterclaim against Winspia seeking damages of $3,000,000. On August 19, 2016, Winspia filed a Statement of Defence to Counterclaim. On December 23, 2016, Custom Metal filed an application to have the Winspia liens declared invalid and for it to post security for costs as plaintiff. On July 5, 2017, the Master declared Winspia's builder's liens invalid, directed that Winspia post security for costs and required that Winspia, a British Columbia corporation, register extra-provincially in Alberta.

Although Winspia posted the security for costs, it failed to register extra-provincially in Alberta and its Statement of Claim was struck on September 23, 2017.

[7] As a result of the application of December 23, 2016 and a later application of November 1, 2017 requiring Winspia to provide a supplementary affidavit of records, Winspia was ordered to pay costs of $10,892.50, which costs have not been paid.

[8] On April 19, 2018, an order was granted directing Winspia to pay further security for costs in the sum of $100,000 as defendant by counterclaim, and costs of $500. Although Winspia posted the security for costs, it has again not paid the ordered costs.

[9] On August 20, 2018, Custom Metal filed an application to require Winspia to provide electronic copies of records, advise the name of its corporate representative, set questioning for that corporate representative from October 22 to 25, 2018, and other procedural remedies. That application was resolved by consent order dated September 20, 2018, which order is the root of the current appeal. It provided in relevant part:

> ...
>
> 2. …[t]he corporate representative of Winspia… shall attend for Questioning at the offices of the solicitor for Custom Metal... December 17. ..[through] 20, 2018....
>
> …
>
> 3. In the event...the Order... set out in paragraph...2 [is] not complied with, Winspia's Statement of Defence to Counterclaim shall be struck without further Order.

[10] The corporate representative for Winspia did not attend for questioning on December 17, 2018. Counsel for Custom Metal obtained a Certificate of Non-Attendance and served it immediately on counsel for Winspia. Counsel for Winspia said he had been led to understand that while there were fixed dates stipulated in the consent order, counsel were to work collaboratively to finalize agreeable dates most likely in January or February 2019. He responded, setting out his understanding of counsel's agreement and indicated his client's willingness to attend questioning in early January 2019. Counsel for Custom Metal rejected that proposal.

[11] Counsel for Winspia then proposed to commence questioning on December 20, 2018. Counsel for Custom Metal again rejected that proposal.

[12] As a result of the failure to attend questioning, the Statement of Defence to Counterclaim of Winspia was struck on December 18, 2018.

[13] By January 7, 2019, Winspia had retained new counsel, who on February 14, 2019 filed the application before the Master to vary the terms of the September 20, 2018 consent order and restore Winspia's Statement of Defence to Counterclaim.

[14] The application was heard April 25, 2019, and on May 8, 2019 the Master issued his reasons for decision dismissing the application, determining that the Statement of Defence to Counterclaim remain struck. That left Winspia exposed to assessment of the $3,000,000 Counterclaim.

[15] Winspia appealed the Master's order to the chambers judge, which appeal was heard August 28, 2019, and on September 20, 2019 the chambers judge issued reasons for decision allowing Winspia's appeal and restoring its Statement of Defence to Counterclaim. Notice of appeal to this Court was filed October 16, 2019, and amended October 23, 2019. The appeal was heard June 12, 2020.

III. The Master's decision

[16] The Master reviewed the negotiations leading to the September 20, 2018 consent order. When counsel for Custom Metal sent a draft of the proposed consent order to counsel for Winspia, the latter only requested one change to allow another corporate representative to appear for Winspia such that "Winspia shouldn't lose its defence if for some reason totally out of Winspia's control, Ms. Kwak is not available to be discovered." Custom Metal's counsel agreed to make that change and it was signed and returned by counsel for Winspia. The Master said that exchange made it clear counsel for Winspia was fully aware of the consequence of non-compliance with the consent order.

[17] The Master acknowledged the position of Winspia's counsel that it was his understanding the dates in the consent order were merely "placeholders," but that final dates would be determined collaboratively. He said Winspia's counsel had not advised his clients that unless there was a new court order, Winspia's failure to show up on December 17 would be fatal. He acknowledged that Winspia's counsel had sent advice to his client referring to the upcoming questioning as only tentatively scheduled for mid-December "but likely to be scheduled to some later time," most likely in January or February 2019. However, the Master found there was "no evidence of any communication between Winspia's counsel and Winspia about any other dates that might be up for discussion" and found that the only written evidence made it "very clear that questioning was to take place in December, and if Winspia failed to attend then its defence would be struck."

[18] The Master found that Winspia had a "casual attitude towards the particular order" and there had been a history of Winspia refusing to move the matter forward without court orders, ignoring those orders, and failing to pay costs of those applications.

[19] The Master reviewed rule 9.15(4)(c) of the *Alberta Rules of Court*, AR 124/2010, which allows the court to vary an interlocutory order when it considers it just to do so. He also reviewed the law with respect to variation of contracts of which a consent order is some evidence as set out in ***Foley-Cornish v Nabors Drilling Limited***, 2013 ABQB 186, para 15, adopting ***Simonelli v Ayron Developments Inc***, 2010 ABQB 565, paras 66-67, [2011] 3 WWR 140:

> … a consent order is evidence of a contract between the parties and as such the rules for variation of a contract apply and that generally, will only be varied on grounds of common or unilateral mistake, misrepresentation, fraud, or unilateral mistake where the opposing party was aware of the mistaken understanding on a crucial point.

[20] ***Simonelli*** in turn follows ***155569 Canada Ltd v 248524 Alberta Ltd*** (1992), 126 AR 396, 5 CPC (3d) 200 (Alta QB), which in turn cites ***Chitel v Rothbart*** (1984), 42 CPC 217, 232 (Ont Supreme Court Master), aff'd (1985), 2 CPC (2d) xlix (Ont Div Ct) for this proposition. Since the Master's decision, a similar statement of the law has been made in ***Gustafson v Future Four Agro Inc***, 2019 SKCA 68, paras 9, 22, 29-31, 438 DLR (4th) 647.

[21] The Master found there was "no mistake, certainly not mutual, but apparently not unilateral either." Counsel for Winspia knew the date he was to bring his client for questioning, thought it might be changed, but knew that it was not. Winspia itself knew the questioning had been scheduled for mid-December 2018. The Master also found that Winspia's request for equitable relief was inappropriate because it did not have "clean hands" given its history of failing to move the lawsuit along, not responding other than by court order, not obeying court orders, and being generally non-compliant with litigation progress. He found the offer to begin questioning on December 20, 2018, was "too little, too late" and dismissed the application to amend the terms of the September 20, 2018 consent order such that Winspia's Statement of Defence to Counterclaim was struck.

IV. The chambers judge's decision

[22] On appeal, the chambers judge said this consent order was a procedural interlocutory order governed by rule 9.15, read in the context of foundational rule 1.2. He said the objectives to those rules were to ensure that matters proceed on their merits, in a timely, efficient, cost-effective and fair manner. He said the general law with respect to variation of contracts of which a consent order is some evidence was correctly stated in ***Foley-Cornish***, but that on the matter before him there was no proven contract to be varied. What he had before him was directly contradictory affidavit evidence as to the exchange between counsel on the explicit dates for questioning. He said it was not possible to assess credibility of the two lawyers and determine which version of events was true.

[23] The chambers judge acknowledged that counsel for Winspia said there was more to the agreement than evidenced in the consent order. According to counsel for Winspia, he and counsel for Custom Metal had, prior to execution of the consent order, discussed the possibility of questioning occurring "as early as December 2018 but more likely early in 2019." Counsel for Winspia said he had expressed concerns "regarding the draconian results described in paragraph 3" of the proposed consent order and was advised by counsel for Custom Metal that "he was flexible as to the actual dates for the Questioning and advised that he thought it unlikely he would be able to prepare for Questioning by December 17th." He advised that counsel for Custom Metal preferred to conduct the questioning by January or February 2019 and although he required fixed December dates in the consent order, he would work collaboratively in finalizing dates.

[24] After finalization of the draft consent order, counsel for Winspia says there were further discussions with counsel for Custom Metal about the schedule for questioning, and he sent correspondence to his client, Winspia, on September 28, 2018, advising that although questioning was tentatively scheduled for mid-December, it would likely be rescheduled to some later time. Because he had understood there would be further contact from counsel for Custom Metal about questioning, counsel for Winspia says he "did not advise the corporate representative to attend for Questioning" on December 17, 2018.

[25] On December 17, 2018 after Winspia's failure to appear for questioning, Winspia's counsel offered to reschedule questioning "in the near future," which was rejected, and then to December 20, 2018, which was also rejected. In other correspondence, he protested that he had been misled. For example, in his email of December 18, 2018 to counsel for Custom Windows he said:

> You told me that you would not hold the date against my client. You told me that your client was insisting on a fixed date in the Order and that your client was insisting on unrealistically early discovery dates. You had to include such an early date to placate your client. You [advised]...that you would not have enough time to prepare to conduct the discovery by December 2018. You also advised me that your preference was to conduct the discovery in January or February 2019.

[26] Counsel for Custom Metal disagreed with that version of events. He said:

> There was no discussion between [counsel] that the December dates might not or would not proceed. [Counsel for Winspia] readily agreed to the dates without any qualification.
>
> ... I did not advise [counsel for Winspia] that it was unlikely that I would be able to prepare for Questioning by December 2018, that I wanted to set different dates in the future, or that I would contact him to set different dates. There was absolutely no discussion to that effect or along those lines.

> ... Between the finalization of the Consent Order and December 17, 2018, I had no further communications with [counsel for Winspia] about Questioning dates …
>
> ... Between the finalization of the Consent Order and December 17, 2018, I received no written or oral advice from [counsel for Winspia] that he expected the December Questioning dates to be changed, or that the Consent Order did not reflect the agreement reached.

[27] The chambers judge said the credibility of counsel for Winspia was bolstered by the fact that Winspia had paid the ordered security for costs of $100,000 and produced voluminous electronic records; he said that "to then completely ignore the third deadline, to attend Questioning on December 17, 2018 seems incongruous." Additionally, Winspia's counsel's explanation was bolstered by correspondence to his client, indicating his understanding was that while the questioning was scheduled for mid-December, it would likely be rescheduled to some later time.

[28] The chambers judge said it is the duty of the courts to do everything in their power to enforce "fast, efficient, inexpensive and fair resolution of cases on their merits," but that in the current case it was not the fault of Winspia "nor a deliberate act of contempt or indifferent non-compliance" that resulted in its failure to appear for questioning on December 17, 2018. The chambers judge said it was contrary to a sense of fairness to impose a severe punishment on Winspia for its lawyer's failure to protect it and this case was a "good example of the unfairness that can come from the mechanical application of [the] rule" that a client is responsible for the acts or omissions of its lawyer. The chambers judge found that the prejudice which would be suffered by Winspia if its appeal was dismissed would be extreme as it would lose its ability to defend the $3,000,000 counterclaim. On the other hand, the prejudice suffered by Custom Metal if the appeal were restored would be compensable in costs. As a result, he allowed the appeal and restored Winspia's Statement of Defence to Counterclaim.

V. Grounds of appeal

[29] Custom Metal says the chambers judge erred in:

a) failing to give sufficient reasons;

b) making his decision without sufficient evidentiary support;

c) misapprehending the preponderance of the evidence;

d) considering irrelevant evidence or failing to consider relevant evidence;

e) making erroneous inferences from the facts and drawing erroneous conclusions from the evidence;

f) misstating or misapplying the law regarding consent orders, contracts and/or a lawyer's authority to bind a client; and

g) failing to exercise his discretion reasonably.

VI. Standard of review

[30] The standard of review on questions of law is correctness, on questions of fact is palpable and overriding error, and on questions of mixed law and fact is palpable and overriding error unless there is an extricable error of law: ***Housen v Nikolaisen***, 2002 SCC 33, paras 7-37, [2002] 2 SCR 235.

[31] The standard of review with respect to the proper interpretation of r 9.15 is correctness. With respect to the application of that rule to findings of fact where the chambers judge has exercised discretion, the standard of review is reasonableness: ***McGowan v Lang,*** 2015 ABCA 217, para 21, 602 AR 168; ***O'Connor Associates Environmental Inc v MEC OP LLC***, 2014 ABCA 140, para 12, [2014] 6 WWR 231; ***Al-Ghamdi v College and Association of Registered Nurses of Alberta***, 2020 ABCA 81, para 9.

[32] Failing to provide reasons that are sufficiently intelligible to permit appellate review is an error of law. Assessing adequacy of reasons is a contextual inquiry having regard to the particular circumstances of the case: whether the basis of the trial judge's conclusions is apparent from the balance of the record even without articulation, whether the trial judge was called on to address troublesome principles of law, unsettled, confused or contradictory evidence on a key issue, and the time constraints and general press of business in the courts: ***R v Sheppard***, 2002 SCC 26, paras 28-29, 50, 55, [2002] 1 SCR 869; ***R v Walker***, 2008 SCC 34, paras 19-20, [2008] 2 SCR 245; ***R v Lim***, 2019 ABCA 473, para 22.

VII. Analysis

a) Alberta decisions

[33] Rules 1.2(1) and 9.15(4) read:

> 1.2(1) The purpose of these rules is to provide a means by which claims can be fairly and justly resolved in or by a court process in a timely and cost-effective way.
>
> ...
>
> 9.15(4) The Court may set aside, vary or discharge an interlocutory order
>
> (a) because information arose or was discovered after the order was made,

(b) with the agreement of every party, or

(c) on other grounds that the Court considers just.

[34] Rule 9.15(4) has not yet been interpreted by this Court. No appellate authority since the *Alberta Rules of Court* were amended in 2010 explicitly discusses the setting aside or variance of interlocutory consent orders. Citing lower court decisions, Darren Reed and Glen Poelman: *Civil Procedure and Practice in Alberta, 2020 Ed* (Toronto: LexisNexis Canada, 2019), Alberta Rules of Court, Part 9: Judgments and Orders, 303, state that r 9.15(4) "gives the court broad discretion in determining whether to set aside interlocutory orders". They also state that r 9.15(4) is triggered only where the conditions of r 9.15 are met, "which includes the condition that the order is interlocutory": citing ***First Calgary Financial Credit Union Ltd v Inspired Luxury Homes Inc***, 2014 ABQB 787, para 26.

[35] The predecessors to r 9.15(4), former rr 389 and 390, were applied by this Court on three occasions, although none of those cases are directly on point. Rule 389 stated:

> A party who has failed to appear on an application through accident or mistake or insufficient notice thereof, may move to rescind or vary the order before any judge within seven days from the time the order has come to his notice or within such further time as the court may allow and whether the order has been acted upon by the party issuing it or not.

[36] In ***Hunt v Pederson***, 1989 ABCA 4, this Court heard an appeal from an order dismissing an action for want of prosecution. This Court opined, paras 2 & 5, that "the plaintiffs should have applied under rule 389. The object of the rule is to permit a matter to be properly heard on the merits where there is an excuse for failing to appear.... Had that been done, the matter could have been reheard on the merits." In the result, the appeal was allowed, and the matter returned to the Court of Queen's Bench to decide whether the action should be dismissed for want of prosecution or leave to take the next step should be granted.

[37] Former r 390 reads:

> (1) Any order may be set aside, varied or discharged on notice by the judge who granted it;
>
> (2) On consent of all parties interested the Court may set aside, vary or discharge any order.

[38] Rule 390 was interpreted in the context of an interlocutory consent order that no further evidence would be filed nor cross-examinations held prior to an appeal from a Master in ***Young West Oil and Gas Ltd v Erehwon Inc***, 2001 ABCA 115, 281 AR 152. The majority of the Court

upheld the Queen's Bench judge, paras 2 & 3, in varying the consent order on a discretionary basis. The decision of the majority suggested that under r 390, the court had broad discretion to set aside interlocutory procedural consent orders for reasons related to fairness or hearing a matter on its merits.

[39] In dissent, Justice Fruman preferred the approach taken in the present matter by the Master. Quoting from ***Chitel***, she said, para 11, that while consent orders addressing procedural matters may be more easily set aside, the consent order in question dealt with a more substantive evidentiary issue despite its interlocutory nature.

[40] More recently, in ***1048497 Alberta Corporation v Lessoway***, 2008 ABCA 234, this Court reviewed the decision of a chambers judge varying a consent order which prevented the sale of property while a dispute between the company and its shareholders was being resolved. In ruling that the chambers judge's decision should stand, this Court asked, para 10, whether the chambers judge erred in law in varying and vacating an interim consent order. To answer this question, the Court reviewed the terms of the consent order, which it determined, para 11, were expressly interim in nature and the order contemplated, on its face, future variation by agreement of the parties or "further order of the court".

[41] Under former rr 389 and 390, while none of the above three decisions are directly on point, this Court has favoured a broad discretion in allowing variation of consent orders, but without a rigorous examination of the law in that regard.

b) Context of consent orders

[42] Consent orders arise in at least two distinct contexts: final consent orders which dispose of the dispute by settling the ultimate issues between parties; and interlocutory consent orders that move litigation forward and are thus procedural in nature. The matter before us involves an interlocutory procedural consent order meant to move the litigation forward.

[43] This distinction between different types of consent orders was recognized by Lord Denning, MR, in ***Siebe Gorman & Co Ltd v Pneupac Ltd***, [1982] 1 All ER 377 (CA), where the Court addressed its jurisdiction to extend time provided in an order for further discovery of documents within 10 days, in default of which the plaintiff's claim would be struck. The Court said, 380:

> We have had a discussion about 'consent orders'. It should be clearly understood by the profession that, when an order is expressed to be made 'by consent', it is ambiguous. There are two meanings to the words 'by consent'. That was observed by Lord Greene MR in *Chandless-Chandless v Nicholson*, [1942] 2 All ER 315 at 317, [1942] KB 321 at 324. One meaning is this: the words 'by consent' may evidence a real contract between the parties. In such a case the court will only

> interfere with such an order on the same grounds as it would with any other contract. The other meaning is this: the words 'by consent' may mean 'the parties hereto not objecting'. In such a case there is no real contract between the parties. The order can be altered or varied by the court in the same circumstances as any other order that is made by the court without the consent of the parties. In every case it is necessary to discover which meaning is used. Does the order evidence a real contract between the parties? Or does it only evidence an order made without obligation?
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> …
>
> It often happens in the Bear Garden that one solicitor or legal executive says to the other: 'Give me ten days.' The other agrees. They go in before the master. They say: 'We have agreed to the order'. The master initials it. It is said to be 'by consent'. But there is no real contract. All that happens is that the master makes an order without any objection being made to it. It seems to me that is exactly what happened here. The solicitors for the plaintiffs were saying: 'We do not object to the order. Give us the extra ten days from the time of inspection, and that is good enough.' It seems to me quite impossible in this case to infer any contract from the fact that the order was drawn up as 'by consent'.

[44] Appellate authorities have taken three different approaches to varying or setting aside these interlocutory procedural consent orders; the contractual approach utilized by the Master in the present matter, a discretionary approach which assesses whether prejudice would befall the parties by upholding the consent order, much like the approach of the chambers judge in the present matter, and an alternate discretionary approach which assesses whether it is in the interests of justice to hear the dispute on the merits.

[45] An example of the contractual approach to varying interlocutory consent orders includes ***Gustafson***, in which the consent order provided that if a party failed to serve an affidavit of documents on the other side by a date certain their statement of defence and counterclaim would be struck, and of course the present decision of the Master (see also ***Elmtree Environmental Ltd v Fredericton Region Solid Waste Commission***, 2011 NBQB 108, paras 15-17, 377 NBR (2d) 71, ***Wall Estate v GlaxoSmithKline Inc***, 2017 SKQB 149, and ***Arslan v Sekerbank TAS***, 2016 SKCA 77, 400 DLR (4th) 193, which addressed final consent orders by adopting a test consistent with grounds for variation of a contract).

[46] An example of the discretionary approach which assesses what prejudice may befall the parties if the consent order was upheld is ***Devlin v Boon***, [1930] 1 DLR 910, 24 Sask LR 149 (CA), a case where a consent order set time for examinations for discovery under an order for the issue of a commission, variation of which was allowed by the Court of Appeal, para 5. In ***Gates Estate v Pirate's Lure Beverage Room***, 2004 NSCA 36, 237 DLR (4th) 74, the consent order in question

required production of specified documents within 30 days or "the action…shall be dismissed without costs." The chambers judge decided he did not have authority to vary the consent order, a decision reversed by the Court of Appeal.

[47] An example of the discretionary approach which assesses whether it is in the interests of justice to hear the dispute on the merits is ***BeeTown Honey Products Inc (Bankruptcy)*** (2003), 67 OR (3d) 511, 46 CBR (4th) 195 (Ont SC), aff'd (2004) 3 CBR (5th) 204 (Ont CA), a bankruptcy case where it was alleged that the respondents were in contempt for failure to comply with a consent order to attend for cross-examination on affidavits.

[48] The difficulty in interpreting the cases arises from a failure in some instances to determine whether the consent order is a final consent order or an interlocutory consent order. This appeal addresses only the latter category of consent order and requires a determination as to whether for that category alone this Court should follow the contractual approach, the discretionary approach assessing whether prejudice would befall the parties by upholding the consent order, the discretionary approach assessing whether it is in the interests of justice to hear the dispute on the merits, or perhaps a combination of the latter two approaches.

[49] Those cases which adopt a discretionary approach for interlocutory procedural consent orders on the basis of what prejudice may befall the parties in upholding the consent order begin with ***Devlin***, where the Court said, para 9:

> While there has been delay on the part of the plaintiffs in making the application for an extension of time, there is no suggestion that the defendant has been prejudiced in any way, and there is no material showing any change in the circumstances; as a fact, the parties are in exactly the position they were in when the order for commission was originally consented to. I can see no reason why an extension should not be granted.

[50] In ***Gates Estate*** the consent order in question required one party to produce documents within 30 days of the date of the order, failing which that party's action would be dismissed without costs. In overturning the chambers judge's decision not to vary this consent order the Court of Appeal, said, para 37, that "[t]he object of the Chambers Judge's discretion is to do justice between the parties," concluding, para 38, that the plaintiff would suffer great prejudice were the order allowed to stand, whereas there would be no prejudice to the defendants except for the passage of four months. The Court of Appeal began its analysis by distinguishing between consent orders that resolve substantive issues and those that do not, paras 28-29:

> I am conscious of the importance of consent orders in resolving substantive issues in litigation and the reliance rightfully placed upon such orders by litigants and their counsel. However, the rationale for courts not varying this type of consent order is that these orders give effect to agreements reached by the parties after

> negotiations which may include the litigants compromising their strict legal rights and obligations in order to finally dissolve the dispute between themselves. Once the court exercises its discretion and accepts their agreement by granting a consent order, the negotiated terms and the finality the parties sought by their agreement should be respected. For a court to vary the terms of a consent order giving effect to such a negotiated contract may alter the parties' agreement in a way they would never have agreed to settle for. This is not to say that there will never be a situation where it would be just and equitable to set aside a consent order giving effect to a negotiated settlement.
>
> The order in this appeal is of a different nature. This type of order is used to ensure the carriage of an action proceeds as it should. In this case, the order was an attempt to ensure timely documentary disclosure. The involvement of the Court in varying this type of order does not carry the same risk of undoing a negotiated agreement of the parties. With interlocutory orders such as this dealing with the litigation process, there is residual discretion to grant relief against dismissal of the action or striking of the defences, in other words to relieve against the sanction provided for failure to comply.

[51] The Court relied upon the differentiation in types of consent orders as described in ***Atkins v Holubeshen*** (1984), 43 CPC 166 (Ont HC), where a plaintiff's counsel gave undertakings at an examination for discovery, failing which his client's action would be dismissed. The undertakings were not fulfilled and the action was dismissed, but the Court, para 32, concluded, in overturning the consent order that "[t]he agreement can in no sense be regarded as a compromise of the action as it did not purport to dispose of the issues in the action on the basis of any substantive resolution."

[52] The third method of addressing interlocutory procedural consent orders is to determine whether it is in the interests of justice to hear the dispute on the merits. This statement of law in ***BeeTown Honey*** was adopted by the Ontario Court of Appeal in ***Stoughton Trailers Canada Corp v James Expedite Transport Inc***, 2008 ONCA 817, para 1; ***Cookish v Paul Lee Associates Professional Corporation***, 2013 ONCA 278, 39 CPC (7th) 227, paras 56-57; and ***Clatney v Quinn Thiele Mineault Grodzki LLP***, 2016 ONCA 377, 399 DLR (4th) 343, para 60.

[53] In ***BeeTown Honey***, the Court adjudicated a bankruptcy dispute in which there had been a consent order requiring creditors to attend, with their retained expert, for cross-examination on affidavits, and failure to do so resulting in their appeal being struck. The creditors failed to attend after they learned that the trustee had obtained an audit report containing new information, until they had an opportunity to review the report. On a contempt of consent order motion the trustee relied on ***Chitel*** to argue, para 11, that a consent order can only be varied or set aside on the reasons

for variation of a contract. In reviewing the applicability of ***Chitel*** for discretionary procedural consent orders the Court said, para 12:

> In the case before me, there is uncontradicted evidence that the circumstances changed subsequent to the consent. As soon as these circumstances came to the attention of counsel who entered into the consent, he advised counsel for the other side and indicated that he would be taking steps to get the matter back before the Court. In fact, while these steps were not taken before the examinations that were scheduled to be held took place, they were taken very shortly thereafter. In these circumstances, is it appropriate to dismiss the Creditors' appeal, thereby, in effect, refusing them the right to be heard?

[54] The Court said, para 13, that the particular context of the consent was critical: ***Apple Computer, Inc v Mackintosh Computers Ltd***, [1988] 1 FC 191 (FCA), para 34. In setting aside the consent order the Court concluded, para 14: "the negative impact on the administration of justice would be greater if the Creditors were denied their right to have their appeal heard than if I exercised my discretion to grant another opportunity for cross-examinations to take place."

[55] In ***Stoughton Trailers***, the Ontario Court of Appeal held that a motions judge had erred in reliance on ***Chitel*** saying, para 1: "the discretion is broader and should be exercised where necessary to achieve the justice of the case". It varied a consent order to provide a new date for a motion to set aside a default judgment.

[56] In ***Clatney***, there was a consent order that provided for release of monies. A party brought an application for an order referring the other parties' accounts to assessment and the application was dismissed on the basis there was no jurisdiction to hear the matter in light of the consent order. On appeal, the Ontario Court of Appeal said that jurisdiction existed and the consent order should be set aside. It said, para 57, "Courts are, with good reason, cautious about setting aside orders, particularly those made on consent. Finality is important in litigation. And, when dealing with a consent order, the objective that parties be held to their agreements is also an important consideration." However, it continued, para 60: "a court is not limited to setting aside an order in instances of fraud or facts arising or discovered after the order has been made. This is reflected in a review of this court's decisions, which demonstrates a willingness to depart from finality and set aside court orders where it is necessary in the interests of justice to do so".

[57] The Master's analysis that a consent order is a type of contract that can only be set aside for the same reasons as a contract can be set aside is misleading when applied to interlocutory procedural orders and we expressly refuse to endorse his conclusion in that regard or the analysis upon which it is based. A similar problem arises with ***Foley-Cornish*** and the line of cases including ***Gustafson*** and ***155569 Canada*** that have followed ***Foley-Cornish***. There is a marked distinction between a consent judgment that implements a settlement on the merits and creates *res*

judicata and an interlocutory consent order that purports to engage the powers of the court and governs the conduct of the litigation. The contract analogy is more applicable to the former.

[58] In our view, ***Gates Estate*** and ***BeeTown Honey*** were correct to distinguish consent orders on that basis. ***Gates Estate*** and ***BeeTown Honey*** represent a more principled way to address the true nature of an interlocutory procedural order than to apply the law that might be relevant, for example, to a final order such as a consent judgment: ***Monarch Construction Ltd v Buildevco Ltd*** (1988), 26 CPC (2d) 164 (Ont CA), para 3; or family law cases settling final obligations between the parties, including division of property: ***Rick v Brandsema***, 2009 SCC 10, paras 49-50, [2009] 1 SCR 295. A discretionary approach is also more consistent with the interpretation of r 9.15(4)(c) which specifically recognizes "grounds that the Court considers just."

[59] Rule 9.15(4) is clearly discretionary. Once it has been determined that a consent order is interlocutory and procedural in effect and not in the nature of a final determination on a matter of substance, the Court may determine what is just in the circumstances.

c) Other rules

[60] We observe that other rules are available that might well have been more appropriate to the circumstances on this record.

[61] Rule 13.5(2) allows the court to "stay, extend or shorten a time period that is…(b) specified in an order…or (c) agreed on by the parties." The essence of the order was that the officer would show up for questioning on December 17, a date that was agreed upon by the parties. The officer missed the deadline for a rather weak but plausible reason, and sought to have the deadline extended. The issue for the court is whether the date should be extended, including consideration of the fact that it was agreed to. In those circumstances, the general rule is found in r 1.5(4) to the effect that a contravention, non-compliance or irregularity will only be overlooked if terms can be imposed that will eliminate any prejudice to the other party. The fact that there is a presumptive remedy for contempt in the order does not, in our view, deprive the court of its discretion in r 13.5(2) and 1.5(4). Any prejudice to the other party can be remedied by generous thrown-away costs and possibly accompanied by an order that all previously imposed but unpaid costs are to be paid forthwith. We note that all of ***Gates Estate***, ***Devlin v Boon***, ***BeeTown Honey*** and ***Stoughton Trailers*** could have been dealt with in Alberta under r 13.5(2). See ***Piikani Nation v Kostic***, 2018 ABCA 234 at para 25; ***Cornelson v Alliance Pipeline Ltd***, 2013 ABCA 378 at paras 2, 9-10.

[62] Custom Metal could also have proceeded under r 10.52 asking that the court cite Winspia in civil contempt. This rule provides for a wide variety of prospective sanctions, including ability to purge the contempt.

[63] Not surprisingly, the remedies set out for each of the above additional rules are, like r 9.15(4) with respect to an interlocutory procedural consent order, discretionary and focused on what the court considers just in the circumstances.

VIII. Conclusion

[64] We agree that the result reached by the chambers judge was appropriate and reasonable in the circumstances for the reasons set out above.

[65] The appeal is dismissed.

Appeal heard on June 12, 2020

Memorandum filed at Calgary, Alberta
this 21st day of September, 2020

Crighton J.A.

Authorized to sign for: Hughes J.A.

Feehan J.A.

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