

THE QUEEN'S BENCH
WINNIPEG CENTRE

BETWEEN:) Mr. M. Finlayson
) for the Plaintiff
GINA TAPPER AND)
ALBERTUS HOLDINGS INC.,)
) Mr. T. Bock
Applicant,) for the Defendant
- and -)
))
LAWRENCE TAPPER, RANCH HOLDINGS)
LTD., ALLOWAY INVESTMENTS LTD.)
AND OXBOW HOLDINGS LTD.,)
) Judgment delivered
Respondent.) September 8, 2011

1 OLIPHANT, J. (Orally)
2 There is before me an application by the
3 respondent, Lawrence Tapper, and other related parties, for
4 an order pursuant to Rule 49.09 to order that a settlement
5 agreement reached was, in fact, an agreement and to grant
6 judgment or make an order accordingly.
7 The situation here is that two parties, both of
8 whom are shareholders -- I say two parties, I include the
9 corporate parties that each of them control. One party,
10 the respondent, Mr. Tapper, being a majority shareholder in
11 corporations and Gina Tapper, Ms. Tapper, being a minority
12 shareholder in that same corporation get into a dispute,
13 Ms. Tapper brings an application with respect to what she
14 alleges as is oppressive conduct on the part of the

1 majority shareholder. Following the initiation of that
2 application counsel have a discussion, the end result of
3 that discussion is that Mr. Tapper agrees that he will buy
4 the shares of Ms. Tapper in return for her giving up any
5 right to pursue a claim that his conduct was oppressive in
6 nature. Nothing further occurred in the course of that
7 discussion, which I say was a discussion or series of
8 discussions held without prejudice.

9 Subsequent to that initial discussion, and
10 correspondence and e-mail messages that flowed between
11 counsel for the parties, Ms. Tapper decided not to pursue
12 with any agreement or any proposal to have Mr. Tapper buy
13 her shares. Mr. Tapper then brings the motion before the
14 court in which we are now involved.

15 I have taken care to read the briefs of the
16 parties and the law and I have had occasion to refer to the
17 decision of my former colleague, Justice Nurgitz, in
18 Aleph-Bet Child Life Enrichment Program Inc. -- and others
19 -- v. Michael Kalo. That decision is cited at 2006 MBQB
20 107.

21 In the course of rendering that decision, Justice
22 Nurgitz, in his reasons for judgment, at paragraph nine
23 refers to a decision out of the Ontario Superior Court, as
24 it is now known, in Cellular Rental Systems Inc. v. Bell
25 Mobility Cellular Inc. Justice Chapnik there says that the
26 following have to exist where parties enter into settlement
27 agreement and there is a dispute about the form of release.

28 First of all, there has to be an agreement to
29 settle a claim, an agreement to settle a claim -- first of
30 all the point he makes is that:

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32 "1. an agreement to settle a claim
33 is a contract;

34 2. to establish the existence of a

1 contract, the parties' expression
2 of agreement must demonstrate a
3 mutual intention to create a
4 legally binding relationship and
5 contain agreement on all of its
6 essential terms;
7 3. where the parties agree on all
8 the essential provisions to be
9 incorporated in a formal document
10 with the intention that their
11 agreement shall be binding they
12 will have fulfilled the requisites
13 for the formation of a contract.
14 The fact that a formal written
15 document needs to be prepared and
16 executed does not alter the
17 binding validity of the original
18 contract;"

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20 Number four and I think this is important.

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22 "4. where the essential provisions
23 intended to govern a contractual
24 relationship have not been settled
25 or agreed upon the original or
26 preliminary agreement does not
27 constitute an enforceable
28 contract;

29 5. in considering whether certain
30 terms of the settlement were
31 implied the court will look at the
32 settlement discussions and the
33 documentation and correspondence
34 in the context of normal business

1 practice and common sense;"

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And last.

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"6. no party is bound to execute a document to effect the settlement agreement which contains terms or conditions which have not been agreed upon and are not reasonably implied in the circumstances."

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Having considered the evidence before the court and the submissions that I have heard this morning, I am not satisfied that there was an agreement as to the essential terms of the contract or proposal covering the sale and purchase of the shares held by Ms. Tapper, the purchase of those shares by Mr. Tapper. I am not satisfied that there is, by implication, or included in the discussions, the essential terms of this contract.

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First of all, while Mr. Tapper said he would buy the shares it was not clear as to who the actual purchaser would be, albeit his proposal was that it would be him or some nominee but we do not know who the purchaser would be. It seems to me that the parties to an agreement have to be specified before you can have an agreement.

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Secondly, there was no agreement as to the price to be paid by Mr. Tapper for the shares held by Ms. Tapper. In my view, there was no agreement as to the process that would be followed for determining the value of the shares and the price to be paid for those shares.

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I am far from satisfied that this court has jurisdiction to order the sale of shares which, in fact, would occur when there is no finding of oppressive conduct. That remains, in my mind, a serious question and I am not

1 satisfied that the court has the jurisdiction to do what
2 Mr. Tapper seeks it to do at this stage. But basically, in
3 my view, the motion to enforce the settlement agreement, as
4 alleged, has to fail because of the failure to demonstrate
5 that the essential provisions intended to govern the
6 contractual relationship have not been settled or agreed
7 upon and for that reason the motion by Mr. Tapper, Ranch
8 Holdings Ltd., Alloway Investments Ltd. and Oxbow Holdings
9 Ltd. is dismissed.

10 Counsel, do you want to address the question of
11 costs? There will be costs by the respondent to the
12 applicant.

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14 (SUBMISSION ON COSTS)

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16 THE COURT: The costs will be paid by the
17 applicant on this motion, who is the respondent on the
18 application on the basis of a class four action for a
19 contested motion in any event of the cause. They need not
20 be paid forthwith.

21 Anything further, counsel?

22 MR. BOCK: No, My Lord, thank you.

23 THE COURT: Thank you. Good morning.

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