

Court of Queen's Bench of Alberta

Citation: IBM Canada Limited v. Kossovan, 2011 ABQB 621

Date: 20111024
Docket: 0901 15599
Registry: Calgary

Between:

IBM Canada Limited

Plaintiff

- and -

Michael Kossovan, Alfred Schmidtke and 1256145 Alberta Inc.

Defendants

**Reasons for Judgment
of the
Honourable Mr. Justice Bryan E. Mahoney**

Introduction

[1] The plaintiff, IBM Canada Limited (IBM) brings an application to have the mandatory dispute resolution process waived pursuant to Rule 4.16(2) of the *Alberta Rules of Court*, Alta. Reg. 124/2010 (New Rules). The defendants submit that IBM has not met the test for waiver.

Background

[2] IBM alleges that the individual defendants, Kossovan and Schmidtke (two of its former employees) perpetrated a fraud against it while they were working for the corporation. IBM alleges that Kossovan and Schmidtke conspired to defraud the company by having Schmidtke pose as a qualified contractor using a false resume. Schmidtke then, according to IBM, submitted time records seeking payment for work which he did not perform. Upon payment from IBM, the

defendants split the proceeds. IBM is looking to recover approximately \$278,000 from the defendants for payments to Schmidtke for work it says he never performed.

[3] The defendants submit that Schmidtke did perform the work in issue, and that IBM invoiced and received payments from its clients for Schmidtke's work.

[4] This matter has been progressing through the normal course of litigation and, pursuant to Rule 4.16(1) of the New Rules, is scheduled for judicial dispute resolution (JDR). The plaintiff wishes to have this requirement waived and proceed directly to trial. The requirement for parties to an action to participate in some form of dispute resolution process - whether judicial or otherwise - has recently been introduced pursuant to the New Rules. While the New Rules contemplate circumstances wherein the requirement might be waived, as yet, there is little guidance from our Court as to how this Rule is to be interpreted. Consistent with the November 1, 2010 Notice to the Profession, the Chief Justice designated me to hear this application.

The New Rules of Court

[5] While this application is brought pursuant to Rule 4.16(2)(b), (c) and (d), I have reproduced those Rules addressing the newly enacted dispute resolution process in order to illustrate the interaction between the Rules as a whole, in an attempt to discern the intent behind the exemption provisions:

Responsibility of parties to manage litigation

4.1 The parties are responsible for managing their dispute and for planning its resolution in a timely and cost-effective way.

What the responsibility includes

4.2 The responsibility of the parties to manage their dispute and to plan its resolution requires the parties

(a) to act in a manner that furthers the purpose and intention of these rules described in rule 1.2,

[...]

(e) to consider and engage in one or more dispute resolution processes described in rule 4.16(1) unless the Court waives that requirement.

Dispute resolution processes

4.16(1) The responsibility of the parties to manage their dispute includes good faith participation in one or more of the following dispute resolution processes with respect to all or any part of the action:

- (a) a dispute resolution process in the private or government sectors involving an impartial third person;
- (b) a Court annexed dispute resolution process;
- (c) a judicial dispute resolution process described in rules 4.17 to 4.21;
- (d) any program or process designated by the Court for the purpose of this rule.

(2) On application, the Court may waive the responsibility of the parties under this rule, but only if

- (a) before the action started the parties engaged in a dispute resolution process and the parties and the Court believe that a further dispute resolution process would not be beneficial,
- (b) the nature of the claim is not one, in all the circumstances, that will or is likely to result in an agreement between the parties,
- (c) there is a compelling reason why a dispute resolution process should not be attempted by the parties,
- (d) the Court is satisfied that engaging in a dispute resolution process would be futile, or
- (e) the claim is of such a nature that a decision by the Court is necessary or desirable.

(3) The parties must attend the hearing of an application under subrule (2) unless the Court otherwise orders.

[6] In addition to those rules dealing specifically with the dispute resolution process, Part 1 of the New Rules, being the "foundational rules" provides:

Purpose and intention of these rules

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.

(2) In particular, these rules are intended to be used

- (a) to identify the real issues in dispute,
- (b) to facilitate the quickest means of resolving a claim at the least expense,

(c) to encourage the parties to resolve the claim themselves, by agreement, with or without assistance, as early in the process as practicable,

(d) to oblige the parties to communicate honestly, openly and in a timely way, and

(e) to provide an effective, efficient and credible system of remedies and sanctions to enforce these rules and orders and judgments.

(3) To achieve the purpose and intention of these rules the parties must, jointly and individually during an action,

(a) identify or make an application to identify the real issues in dispute and facilitate the quickest means of resolving the claim at the least expense,

(b) periodically evaluate dispute resolution process alternatives to a full trial, with or without assistance from the Court,

(c) refrain from filing applications or taking proceedings that do not further the purpose and intention of these rules, and

(d) when using publicly funded Court resources, use them effectively.

Argument

[7] IBM submits that this is a proper case to waive the dispute resolution requirement for a number of reasons. First, it submits that it has a very strong case, having obtained a number of admissions during the discovery process, such that it feels confident of a judgment granting full recovery following trial. IBM takes the position that, as a matter of corporate policy, it simply will not settle a case involving fraud for anything less than full or near-full indemnity.

[8] In addition to the above, IBM submits that it is unlikely that the defendants have the resources to satisfy a judgment for \$278,000 plus costs. IBM takes the position that given the nature of the claim, it wishes to be either fully paid or to receive a judgment. It submits that given the resources of the defendants, they will not be in a position to agree to a settlement for near-full indemnity. In essence, IBM argues that there is no realistic chance of the matter settling at JDR. As such, it submits that proceeding to a JDR will be a waste of resources and time - both for the parties and for the court.

[9] Conversely, the defendants submit that this is an appropriate case for a JDR and that the reasons given by IBM in support of its claim for exemption are insufficient for this Court to waive the requirement.

[10] The parties have not yet begun to prepare for the JDR, and as such there will be no prejudice to either party if the requirement is waived.

Findings

[11] Given that Rule 4.16 has been recently introduced, there is no jurisprudence from this court to assist in its interpretation. However, I agree with the comments of Graesser J., in *Donaldson v. Farrell*, 2011 ABQB 11, that the Rule in issue should be "viewed through the lens of the foundational rule": para 10. This is similar to Moen J.'s finding in *Envision Edmonton Opportunities Society v. Edmonton (City)*, 2011 ABQB 29, 20 Admin. L.R. (5th) 342 at para. 44 that:

The introduction in the New Rules of Rule 1.2, which has no comparable in the Old Rules, means that the Court must consider each of the substantive enactments in light of the principles set out in Rule 1.2

[12] The foundational rule highlights the importance of identifying those issues in dispute and of effective communication between parties. The rule stresses resolution of the claim in issue as early in the litigation process as possible and at the least expense. These, too, are the aims of an alternate dispute resolution process. In any case, Rule 4.16 must be read in manner which gives effect to the purpose statement contained in the foundational rule.

[13] The plaintiff submits that in the circumstances, compelled attendance at a JDR would actually offend against the aims of expediency and economy. It takes the position that because the dispute resolution process would likely be futile, participation would result in additional expense and delay in litigating its claim.

[14] As stated, Rule 4.16 has yet to be judicially considered in this court, but guidance can be found from other jurisdictions that have adopted similar mandatory dispute resolution procedures. Both Ontario and Saskatchewan have had mandatory mediation programs in place for a number of years. While the wording of the rules in Saskatchewan and Ontario differ from Alberta, the Courts in each of those provinces have addressed instances when exemptions from mediation might be granted. A number of cases address arguments of futility or inappropriateness in relation to alternate dispute resolution.

[15] In *O.(G.) v. H.(C.D.)* (2000), 50 O.R. (3d) 82 (Ont. S.C.J.) the Court addressed arguments of both appropriateness and futility in ultimately refusing to grant an exemption from mediation where the claims involved damages for sexual assault, indecent assault and other torts. The parties consented to an exemption. The moving party argued that she was afraid of being in the same room as the other party and that the experience would cause her psychological trauma. She deposed that it was unlikely that she would be able to participate in the mediation in any meaningful way. In refusing to grant an exemption the Court noted that the discretion to exempt the parties from a mandatory program should be exercised sparingly. It concluded that it would be possible to find a mediator who was trained to effectively address the needs of parties where violence was an issue.

[16] The Court reviewed jurisprudence on the issue, noting those instances where an exemption was successfully sought, and holding, at para. 13 that:

At the risk of generalizing from the few reasons for decision and from the somewhat cryptic explanation made by the Local Mediation Co-ordinators in the list tracking exemptions, it would appear that the following criteria are relevant to whether an exemption order should be granted:

- whether the parties have already engaged in a form of dispute resolution, and, in the interests of reducing cost and delay, they ought not to be required to repeat the effort;
- whether the issue involves a matter of public interest or importance which requires adjudication in order to establish an authority which will be persuasive if not binding on other cases;
- whether the issue involves a claim of a modest amount with little complexity which is amenable to a settlement conference presided over by a judicial officer without examination for discovery;
- whether one of the litigants is out of the province and not readily available;
- whether the exemption for any other reason would be consistent with the stated objectives of reducing cost and delay in litigation and facilitating early and fair resolution.

[17] I note that certain of these factors are also found in Rule 4.16, such as prior engagement in a dispute resolution process, or whether a decision by the court is necessary. Rule 4.16 must also be read in light of the objectives of accessibility, affordability and timeliness.

[18] The courts also been disinclined to grant an exemption based upon a strong or persuasive claim. In *Pelham Properties Ltd. v. Hessdorfer*, 2005 SKQB 234, 264 Sask. R. 148 the plaintiff brought an application for a number of orders including an order that the parties were exempt from the requirement to attend mediation. The plaintiff's action was for rent and occupancy costs owing under a commercial lease. The Court held that it was not appropriate to grant an exemption from mediation even though it might be disposed to grant summary judgment. Of note, it held, at paras. 7-8:

That then raises the question of whether an exemption should be granted when an application is brought for a summary judgment and there is merit to the application. Put otherwise, if the Court is disposed to order a summary judgment, should it then grant an exemption from mandatory mediation? I think not.

The mediation requirement is universal. It does not in any way speak to the merits of a claim. The absence or presence of a defence plays no part in whether there should be mediation. The purpose of the process is to afford the parties an

opportunity to resolve their dispute through agreement rather than through the adversarial process of litigation. The process affords a person, even one devoid of a valid defence, to seek and perhaps obtain a resolution through compromise. Even a confident plaintiff may make an accommodation to achieve early closure, eliminate risk and avoid expense. That possibility should not be removed simply because a summary judgment would be granted.

[19] In *Welldone Plumbing, Heating & Air Conditioning (1990) Ltd. v. Total Comfort Systems Inc.*, 2002 SKQB 475, 228 Sask. R. 298, the parties had participated in settlement negotiations prior to commencing the action. Although not all of the defendants participated, they were kept informed of the progress through the co-defendant. Given the fact that prior mediation attempts had been undertaken privately, the Court was satisfied that requiring compliance with mandatory mediation "would not achieve the Act's overarching objectives" and would consume time that could be more effectively used elsewhere. In discussing in the objectives of mediation the Court held, at para. 9:

Based on these decisions and my reading of the Act and the Regulation, I conclude that the following factors apply to exemption applications:

(1) The Act has four objectives in mind: (a) to educate the parties about alternative dispute resolution approaches that they could employ to resolve the issues between them in a cost effective and less confrontational manner; (b) to assist the parties in identifying the material legal issues between them under the guidance of a trained mediator; (c) to facilitate a settlement during a mediation session; (d) where a settlement is not achievable during a mediation session, to assist the parties and their counsel in identifying their respective positions thereon in order to encourage post mandatory mediation settlement negotiations and reducing the time and financial costs should a trial be necessary.

(2) The Act and the Regulations vest this Court with broad discretionary powers to exempt the party or parties from participating in a mandatory mediation session but that such discretion should only be exercised where the material in support of the application outlines a sound basis for an exemption order. Such orders may be appropriate where:

(a) the cost for a non-resident party with no direct or indirect business operations in the Province to attend an early mediation session would substantially outweigh any foreseeable advantage thereof;

(b) where the applicant is ill and unable to travel;

(c) where all parties to the action are familiar with the mandatory mediation process by virtue of having participated in the same on

prior occasions and their issues are of a nature that cannot be fairly explored during a one-day mediation session;

(d) the emotional interplay between the parties is of a nature that it would be detrimental to the health of either of them to participate in mediation at the close of pleadings;

(e) the action is or is likely to become a class action;

(f) the parties have unsuccessfully participated in voluntary mediation and no material change in the position of either party has occurred since;

(g) the action is one of many against one or several defendants based on similar facts and causes of action.

These examples are not an exhaustive list of when an exemption order may be granted or intended to suggest that an order will be granted in every enumerated circumstance. In each case, the Court will exercise its discretion having regard to the circumstances before it.

(3) The party seeking an exemption order should provide material evidence supporting the reason advanced for an exemption order and be prepared during argument to explain why an exemption would not undermine the provisions of s. 42(1) of the Act.

[20] *Maldonado v. Toronto (Metropolitan) Police Services Board*, [2000] O.J. No. 5401 (Ont. S.C.J.) (Master) also addressed arguments of futility and appropriateness. The plaintiff was a homeless man who alleged that he had been assaulted by police officers. He argued that it was inappropriate to proceed to mediation in an assault case when it was unlikely that the police would admit to any assault. The Court held that the plaintiff's counsel should have requested an exemption as opposed to attending the mediation without his client, however, the Court declined to order a second mediation. In discussing the appropriateness of mediation in the circumstances, the Court noted as follows:

2. This is an action against the police for assault. [Counsel] argued that it would be inappropriate to have the accuser in the same room as the police officer and questioned the propriety or usefulness of mediating a case such as this where in his view it was unlikely the police could be persuaded to admit there had been an assault.

[...]

5. There are public policy arguments to be made in favour of a public trial in a case of alleged police wrongdoing. There are also legitimate concerns about the

appropriateness of a face to face mediation in cases of assault and power imbalance. These are factors which could be taken into account by the Court if a request for exemption had been made or a request to modify the conditions under which mediation would be conducted.

[21] I also note that pursuant to Rule 37A of Newfoundland's Rules of the Supreme Court, 1986, SNL 1986, c. 42, Sch D, an application for mediation may be made by either party following the filing of the statement of defence, but may also be ordered by the Court on its own motion. In so ordering, the Court must take into account a number of factors, including: the number of parties, the state of the pleadings and the complexity of the issues; the nature of the legal issues; the stage of the proceedings when the application is made; if the parties have counsel; the financial resources of the parties; and, if mediation has been tried before in the matter.

[22] While the legislation differs from ours, I found the Court's comments in *Drodge v. Martin*, 2005 NLTD 73, 247 Nfld. & P.E.I.R. 223 respecting the "unwilling participant" to mediation particularly instructive, at para. 27:

The First Third Party's comments are symptomatic of the entrenchment that occurs as the proceedings develop. They also reflect his view that he has a "... full or complete defence to the other party's claim of liability" and "... mediation should not be imposed." But reluctance to participate in mediation, or even outright opposition to it, should not always trump the use of mediation. Rule 37A allows the court to "order" mediation thereby overriding objections voiced by responding parties. It is important to be sensitive to the attitudes of the parties because mediation is less likely to be successful if it also has to overcome recalcitrance. But, as Green, C.J. of this court has said, "... a skilled mediator can do a lot to encourage participation by reluctant litigants and to bring them around to a positive way of thinking ..."

[23] M. Keet in "The Evolution of Lawyers' Roles in Mandatory Mediation: A Condition of Systemic Transformation" (2005) 68 Sask. L. Rev. 313, describes and assesses the impact of the mandatory program in Saskatchewan. In discussing the issues raised by the bar concerning grants of exemption she notes:

To be released from the statutory requirement to attend mediation, a litigant needs the approval of the Director of the Dispute Resolution Office or an order from the court: The Queen's Bench Act, 1998, S.S. 1998, c. Q-1.01, s. 42. Lawyers' examples of cases where exemptions might be expanded included medical malpractice, cases involving out-of-province litigants, frivolous claims and defences, cases involving institutional clients who never settle as a matter of policy, and cases involving vulnerable plaintiffs where the defendant is not likely to consider settling. (at footnote 42)

[24] Given the similar objective between the provinces in instituting mandatory dispute resolution, it is not surprising that related concerns were raised during consultation involving the New Rules. In setting out its proposals, the Alberta Law Reform Institute, in *Promoting Early Resolution of Disputes by Settlement: Consultation Memorandum No. 12.6* (Edmonton: Alberta Law Reform Institute, 2003) highlighted the issue of exemptions:

[95] If participation in a non-binding settlement process becomes mandatory, the question of screening for appropriateness arises. We have seen that cases that raise a point of principle having precedential value may be unsuitable for settlement. Other grounds for screening cases away from mandatory settlement processes may be the unequal bargaining positions of the parties, or a history of violence between them. What method of screening should be used? Should screening take place automatically, for example, as part of a non-binding settlement process provided by the civil justice system? Alternatively, should a party who sees settlement as inappropriate be required to apply to the court for an exemption? These are questions that need to be addressed if the use of any settlement measure is rendered mandatory.

[25] Before the New Rules, the traditional view was that although alternative dispute resolution was a useful process, the court would not ordinarily order it over the objections of a party. The thinking was that a mandatory dispute resolution process is an oxymoron because a party who believes that it is a waste of time and money will not engage in good faith negotiations. This, however, is not the new millennium view nor the view of the legislature when enacting the New Rules.

[26] The experience in this Court plus ample informed commentary suggests that requiring participation in an alternative dispute resolution process leads to many settlements that would otherwise not occur. Often disputants, when choosing between a settlement process or proceeding to trial, lack information, make distorted assessments, misjudge the cost, have an overly optimistic or constricted view of potential trial risks and outcomes and fail to understand the hidden benefits of entering structured settlement negotiations, like a JDR.

[27] Even if a final agreement is not reached on all issues, the parties, by engaging in the process, can address their dispute sooner, learn valuable information to help sharpen their understanding of the real issues, reduce the costs of final resolution, and in some cases, improve their relationship. This Court has seen that even in major commercial litigation that was dealt with by way of a JDR, the process has led to quite unexpected positive results. Even in the field of healthcare disputes including medical malpractice, where negotiated settlements are the exception, breakthroughs in conflict resolution have been made as an alternative to litigation. See: Hon. Judge Heather A. Lamoureux & Elaine Seifert; medical editing by Dr. Tanis Blench & Dr. Brian D. Stewart, *Resolving Conflict Improving Communication: a Guide for Healthcare Professionals* (Calgary: Kingsley Pub., 2009).

[28] Making the alternate dispute resolution process mandatory is an attempt to ensure that parties to litigation are exposed to its proven benefits. For sure in certain instances, this process is simply not a correct 'fit' for the claim. The dispute resolution process is not without cost in

time, money, labour and resources or without risk. Sometimes, as provided for in Rule 4.16(2), it can be entirely rational to refuse this alternative and pursue an adjudication route instead. Absent compelling reasons however, the court should not use its discretion to bypass the legislated objectives of the Rule.

[29] The party seeking an exemption has the onus of establishing that the exemption should be granted: *Chase v. Great Lakes Altus Motor Yacht Sales*, 2010 ONSC 6365 (Master) at para. 15; *Welldone Plumbing*, para. 13.

[30] New Rule 4.16(2) addresses those instances where the Court may waive the responsibility of the parties to engage in the dispute resolution process. In attempting to determine which types of matters may fall under the exemptions established under Rule 4.16(a)-(e), a summary of the findings of those provinces with mandatory alternate dispute resolution may serve as a helpful resource. A review of these cases, as well as academic commentary, reveals the following:

- The fact that the parties consent to an exemption from mediation is not a compelling reason to grant an exemption: *Ross v. Seib* (1996), 145 Sask. R. 62 (QB) paras. 7-8;
- maintaining a position that one party is simply unwilling to settle the action is an insufficient reason to grant an exemption: *Cassidy v. Westwood Holdings*, [2000] O.J. No. 5396 (Ont. S.C.J.) (Master) at para. 2; *Dumoulin v. Ontario*, [2004] O.J. No. 2778 (Ont S.C.J.) at para. 6;
- an exemption should not be granted on the anticipated strength of one party's claim: *Pelham*, at para. 8;
- a party's belief that he or she may not be able to meaningfully participate is not necessarily a reason to exempt the party, unless that party is incapable or disabled from participating: *O.(G.)*;
- application for summary judgment does not, of itself, entitle an exemption: *Pelham*, at para. 10;
- a complex case that involves such things as a catastrophic claim, a large exposure, multiple defendants, cross-claims, and third-party complaints for indemnity, coverage issues, and other complex obstacles to settlement may qualify for waiver;
- an exemption may be granted where one party lives in a foreign jurisdiction and the expense of attending the mediation outweighs the probable advantages of the session: *Ross* para. 9; but see *Wheataliba Farms Ltd. v. Alhauser*, 2010 SKQB 391, 363 Sask. R. 287, and *Chase* where the courts refused to exempt a party from attendance at mediation, even though the party resided outside of Canada;

- forcing mediation of an individual action before it is known whether a class action would be certified would be unreasonable and unproductive and is reason to grant an exemption: *Dumoulin*, at para. 6;

- issues of abuse or violence where it would be detrimental to the emotional, mental or physical health of either party to participate and a mediator trained to address the parties' concerns is not an option, may qualify for waiver: *O.(G.)*;

[31] More circumstances outside this list will likely arise in which an exemption may or may not be granted. Though exemptions will be addressed on a case by case basis, the threshold for obtaining them is high and parties can assume that they are used sparingly.

[32] On the facts before me, IBM has failed discharge its onus of showing that this is a proper case for waiver.

[33] Rule 4.16 speaks of a party's "responsibility" to attend a dispute resolution process. This is a serious obligation placed upon litigating parties. During the consultation process leading up to the adoption of the New Rules, it was debated as to whether attendance at mediation should be mandatory. In the end, it was decided that mandatory attendance was the best way in which to achieve the goals espoused in the foundational rules. Thus, I fully agree with the comments in *Ross* and *O.(G.)* that the court should not exercise its discretion to bypass the legislated objectives of the dispute resolution process lightly.

[34] The arguments put forth by IBM do not persuade me that this is an instance where the Court should exercise its discretion and allow the parties to opt out of the mandatory dispute resolution process. First, IBM has failed to demonstrate a compelling reason as to why a JDR is inappropriate. There was no real argument mounted that the cost of having IBM's corporate officer in Toronto attend in Calgary for the JDR would be prohibitive (nor, given the amount of the claim and IBM's resources would I have so found). Nor is this an instance of a power imbalance, or one where a history of violence or other emotional history exists between the parties.

[35] Nor does the nature of the claim in issue preclude attendance at a JDR. In its Statement of Claim IBM alleges fraud as well as conversion, unjust enrichment and conspiracy. The allegations of fraud raised in this claim stem from a relatively simple set of facts. It is my understanding that certain admissions have already come out of the discovery process. There is one plaintiff and two similarly situated defendants. The nature of this claim is fairly straightforward and the parties should be more than able to adequately overcome the obstacles to a final resolution.

[36] While a corporation may have valid concerns about precedent and reputation and want to maintain an institutional position that it takes all matters of employee fraud seriously, this does not of itself prohibit an attempt to settle the matter through JDR. A consent judgment reached as a result of the JDR process is the legal equivalent to a judgment rendered following a trial, and is

equally enforceable. While IBM feels that it has gained the requisite concessions to be successful at trial, belief as to the strength of one's case is not conclusive in an exemption application.

[37] The defendants submit, and I accept, that this application really turns on whether or not proceeding with a JDR would be futile. IBM has stated that because this is an instance of fraud, it will not settle for anything other than near-full indemnity. It states that because the defendants do not have the financial resources to agree to such a figure at the JDR, there is no point in proceeding.

[38] The defendants submit that there is no real evidence as to their financial position and corresponding ability to pay a judgment for the full amount. This, of course, is an example of one of the issues that can be addressed at the JDR. Implicit in IBM's statement that it will not settle for anything less than full or near-full indemnity tells me that it perceives at least some "wiggle room" in the negotiation process. It has already acceded that the results of a trial are never certain.

[39] It is a fallacy to think that the outcome of a JDR will always result in a substantial compromise to one's initial position. While one of the objects of dispute resolution is to get both parties to "move" from their initial positions to one upon which they can mutually accept, the ultimate objective is achievement of a judicious outcome that all parties can live with, put behind them and move on.

[40] If following the JDR the defendants are told that they stand a slim chance of success at trial, they may wish to enter into a consent judgment representing near-full indemnity. The parties can then be creative about repayment options if finances are indeed in issue. If IBM is worried about collecting on its consent judgment, it would no doubt have the same concerns over collecting on its judgment following trial, which would include the additional burden of recovering any award of costs.

[41] A number of plaintiffs enter into the litigation process believing that they are entitled to recover the full amount of their claim. Positions may be based on what they have been told by counsel, personal principles, or as in this case, corporate direction. Yet despite this belief successful settlements are often reached. Parties may be persuaded to resolve the dispute once the weaknesses in their own case is revealed to them, given the uncertainties of litigation. Having a Justice of this Court outline the strengths and weaknesses of each party's case may cause one or both of the parties to modify their settlement positions. Alternatively, if a strong case is put forward where ability to recover is in issue, creative repayment solution might be successfully canvassed.

[42] A belief that there is little room for flexibility and no major concessions as to amount will be made does not act to render the alternate dispute resolution process futile. I note that the IBM's corporate officer, to his credit, has sworn that if IBM must attend the JDR it will do so in good faith. This is not a situation where one party plans to sabotage the process thus resulting in a futile engagement.

[43] Even if the parties are unable to reach a settlement, this does not mean that attendance at the JDR has been "futile." Multiple other benefits may be obtained. For example, the issue of who (if anyone) actually performed the work billed for appears to be in dispute. The parties may be able to narrow down or agree to this issue during the JDR process. At the very least, getting together to refine the legal issues and plan the next court steps can also result in time and cost savings. A good faith commitment to a process that may ultimately resolve the dispute, or shorten trial time and reduce heavy trial costs is never a futile endeavor.

Conclusion

[44] The plaintiff's application for an Order dispensing with the mandatory dispute resolution process is denied. As discussed during argument, this Court will use its best effort in scheduling an early JDR for the parties.

[45] Costs for a contested special application are awarded to the defendants and payable or set off as agreed at the JDR or in a judgment.

Heard on the 2nd day of September, 2011.

Dated at the City of Calgary, Alberta this 24th day of October, 2011.

Bryan E. Mahoney
J.C.Q.B.A.

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