

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Gregory v. KPMG LLP*,
2012 BCSC 1387

Date: 20120920
Docket: S-108528
Registry: Vancouver

Between:

Rick Gregory

Plaintiff

And

**KPMG LLP, Gary Webster and the
Transportation Investment Corporation**

Defendants

Before: The Honourable Mr. Justice Blair
in Chambers

Reasons for Judgment

Counsel for the Plaintiff:

G. Phillips

Counsel for the Defendants, KPMG LLP and
Gary Webster:

S.K. Gudmundseth, Q.C.

Counsel for the Defendant, Transportation
Investment Corporation:

R. Warburton

Place and Date of Trial:

Vancouver, B.C.
August 17, 2012

Place and Date of Judgment:

Vancouver, B.C.
September 20, 2012

[1] On Sunday, June 24, 2012, the eve of a four-day summary trial scheduled in this action, the parties reached what appeared to be a settlement leading to a resolution of their differences. The settlement required the defendants, KPMG LLP (“KPMG”), Gary Webster, and Transportation Investment Corporation (“TI Corp.”) to pay the plaintiff, Rick Gregory, the sum of \$35,000, the filing of a consent dismissal order, and the execution of a release by Mr. Gregory.

[2] Unfortunately, the settlement between the parties did not detail the terms to be included in the release, although the defendants assert that the release which they produced includes the terms which would ordinarily follow the settlement of a dispute such as that in which the parties were involved.

[3] The plaintiff takes a contrary position to that of the defendants, submitting that the terms in the defendants’ proposed release bind the plaintiff in a manner much greater than was or could have been anticipated when the parties agreed that their settlement should include a release executed by Mr. Gregory.

[4] The parties’ dispute with respect to the wording of the terms of the release resulted in a chambers hearing during which the parties addressed their differing positions with what they contend is the appropriate wording of the release, supported as might be anticipated by three volumes of their joint application record, a variety of applicable authorities, as well as thorough outlines of the parties’ respective positions. The latter have been of considerable assistance in understanding the parties’ positions and in preparing these reasons.

Background

[5] I do not propose to canvass at length the background behind this action, but will outline some of the details to give a factual matrix which led to the plaintiff commencing his action. KPMG, an accounting firm, on March 27, 2009, entered into an agreement for services with Mr. Gregory, a professional engineer involved in the construction industry. Under the agreement, Mr. Gregory, as an independent contractor was to provide consulting services for KPMG’s major projects advisory

group which KPMG created to meet the needs of owners undertaking major construction programs.

[6] The defendant, TI Corp., retained KPMG in September 2009 to review a contractor's invoicing process on a major British Columbia highway project. KPMG assigned Mr. Gregory, with his construction background, to become involved in the highway project with TI Corp. The defendant, Gary Webster, a KPMG partner, had oversight over the project and Mr. Gregory's involvement in that project. Mr. Gregory's contract with KPMG provided that KPMG could terminate Mr. Gregory's services on 30 days notice, a term in the contract which KPMG exercised on October 13, 2009, for various reasons.

[7] After the termination of his contract, Mr. Gregory wrote to KPMG seeking the payment of \$250,000 to settle his claim against KPMG arising from the termination of his contract. The sum was not paid and Mr. Gregory brought this claim against KPMG for the termination of his contract in spite of the provision that permitted KPMG to terminate Mr. Gregory's contract on 30 days notice. Mr. Gregory further included claims against Mr. Webster and TI Corp., and, during the course of the litigation made allegations of questionable conduct by individuals involved in the project undertaken by KPMG with TI Corp.

The Settlement

[8] The pertinent email correspondence which confirmed the settlement commenced when counsel for KPMG and Gary Webster sent an email to counsel for Mr. Gregory at 3:47 p.m. on June 24, 2012, stating:

And now I just got the instructions pursuant to my recommendation of \$35,000 from KPMG against a consent dismissal order of the action against all defendants without costs; return of all documents and copies; confidentiality order; release of all defendants. What gives?

[9] Counsel for Mr. Gregory responded at 4:18 p.m. on June 24, 2012 stating succinctly:

Deal.

[10] Counsel for the defendants filed a requisition the following day, June 25, 2012, advising that the defendants were adjourning by consent the hearing of their summary trial applications set to commence that day.

[11] Counsel for KPMG and Gary Webster on June 26, 2012 forwarded a release by email to Mr. Gregory's counsel who responded by email on July 5, 2012, advising of the plaintiff's concerns with the terms of the release, triggering a further response from counsel for KPMG and Gary Webster. The parties could not resolve their differences with respect to the terms of the release, hence the present application brought on behalf of the defendants, KPMG, Gary Webster and TI Corp., who seek orders in accord with the terms of the settlement which they submit was reached between the parties on June 24, 2012, including the release. In their requisition the defendants stated the relief they sought in the following terms:

- (a) An order dismissing the action against all defendants without costs to any party as if pronounced at the trial of the action on its merits and without costs to any party, provided that payment is made as contemplated in paragraph (b);
- (b) An order approving the form of release as follows and declaring that the plaintiff, Rick Gregory, is bound by its terms as if he had signed it, upon payment to Mr. Gregory's counsel, Gordon Phillips, in trust for Mr. Gregory of \$35,000 less any set off as permitted pursuant to paragraph (d);
- (c) An order prohibiting the plaintiff from disclosing to any person other than legal counsel, his tax accountant, or as required by law, the contents of the release, the terms of the settlement of the Action, or the affairs of KPMG LLP, Gary Webster, or TI Corp; and
- (d) An award of costs of this application in the lump sum of \$1,705.20 payable by the plaintiff to KPMG LLP, which KPMG LLP may deduct from the payment pursuant to paragraph (b).

[12] The plaintiff agrees to the provisions found in item (a) of the defendants' requisition, but opposes the relief as described in items (b), (c) and (d).

[13] The release, as drafted by the defendants, commences with an opening recital which is then followed by paragraphs numbered 1 to 13 which read as follows:

1. Gregory, on his own behalf and on behalf of his heirs, executors, administrators and assigns does hereby remise, release and forever discharge KPMG, Webster, TI Corp and, as the case may be, their respective heirs, executors, officers, partners, agents, employees, administrators, successors, assigns, subsidiaries and affiliated companies, and each of them, (hereinafter called the "Releasees") of and from any and all claims, demands, proceedings, actions or causes of action, for damages, costs, debts, expenses and compensation whatsoever and wheresoever, whether at law or in equity and whether known or unknown, suspected or unsuspected which Gregory now has or hereafter can, shall or may have, as of the date of this Release and without limiting the generality of the foregoing, with respect to any matter relating to, arising out of, or in any way connected with:
 - a. The Agreement for Services between KPMG and Gregory executed on or about March 27, 2009; and
 - b. All claims made by Gregory in the Action, including all claims made in the Notice of Civil Claim filed December 30, 2010, the Amended Notice of Civil Claim filed August 19, 2011, and the proposed (but not filed) Further Amended Notices of Civil Claim circulated January 11, 2012 and June 11, 2012 or any proposed amended claim of conspiracy against Webster and others.
2. The consideration provided by the Releasees is not an admission of any liability by the Releasees or any of them but is a compromise of disputed claims and nothing herein contained shall be construed as an admission of liability on the part of the Releasees or any of them.
3. Gregory agrees not to disclose to any person other than legal counsel, his tax accountant, or as required by law the contents of this Release or the terms of the settlement of the Action.
4. Gregory agrees not to make any claim or to take any proceedings against any other person or corporation in respect of any matter relating to, arising out of, or in any way connected with the Agreement for Services or the claims in the Action, as described in paragraph 1(a) and paragraph 1(b) of this Release.
5. Gregory warrants that there are no actions, other than the Action, which he has commenced against the Releasees or any of them and that Gregory has not assigned to any person, firm or corporation any rights he may have or has had with respect to any possible claim, action, cause of action, suit or proceeding for debt, damages, loss, injury, costs or expenses whatsoever and howsoever arising, at law or in equity, as against the Releasees, or any of them.
6. Gregory will, or will cause his legal counsel to, execute and deliver a consent dismissal order in the Action dismissing his claims against the Releasees, such dismissal being of the same force and effect as if pronounced at the trial of the Action on its merits.

7. Gregory will, at the request of the Releasees or any of them, execute and deliver such further agreements, deeds, instruments and documents and do such further acts and things as the Releasees, or any of them, may reasonably request in order to evidence, carry out, and give full force and effect to the terms, conditions, intent and meaning of this Release.
8. Gregory represents that he has obtained legal advice with respect to the terms of the settlement prior to the execution of this Release, and has read this Release and understands the terms, and his rights and obligations thereunder and he warrants that he has not been influenced to any extent whatsoever in making this Release by any representations or statements regarding any matter made by the Releasees or any of them except as contained herein, or by any person or persons representing the Releasees or any of them.
9. Gregory acknowledges that the facts in respect of which this Release is made may prove to be other than or different from the facts in that connection now known by Gregory or believed by him to be true. Gregory assumes the risk that the facts may be different than the facts now known to him. Gregory covenants that the terms of this Release shall be, in all respects, effective and not subject to termination or rescission by the discovery of any facts which are as yet unknown to Gregory.
10. Gregory directs that the Settlement Funds be paid to the trust account of his counsel in the Action, Gordon Phillips, and that payment of the Settlement Funds to Mr. Phillips is effective as payment of such sum to Gregory.
11. Gregory covenants that within 14 days of the delivery of the Settlement Funds to Mr. Phillips in trust, he shall deliver to counsel for KPMG, and instruct his lawyer Gordon Phillips and his former lawyer Simon Kent to deliver to counsel for KPMG, all versions of all documents, work papers, audio recordings, transcripts of recordings, software, reports, data record forms and other materials in Gregory's possession or control developed by Gregory for KPMG or its clients or obtained by Gregory in the course of performing, or relating to his performing, services for KPMG whether pursuant to the Agreement or otherwise (including, but not limited to any information obtained by Gregory from KPMG, such as client records or personal data or any other personal information of any client or KPMG personnel), whether in paper or electronic form, and including all copies thereof, and howsoever obtained by Gregory, (the "Confidential Records"), except that in the case of electronic copies and audio recordings, Gregory shall, and shall instruct Gordon Phillips and Simon Kent to, irreversibly delete and expunge all electronic copies, whether in e-mail format or otherwise, and wheresoever located.
12. Gregory shall not disclose any of the Confidential Records to any person for any reason except as may be required by law.
13. The terms of this Release are contractual and not a mere recital, and this Release is executed for the purpose of making a full, final and

irrevocable settlement of the Action. This Release shall be governed by and be construed in accordance with the laws of British Columbia.

[14] While the plaintiff concurs that the action between the parties has been settled and that he is to sign a release, he takes exception to some of the terms as drafted by the defendants. The plaintiff agrees with the terms of the release numbered 2, 3, 6, 8, 9, 10 and 13. He submits that terms numbered 1 and 11 require modification before he will acquiesce to their forming part of the release. The plaintiff submits that the terms numbered 4, 5, 7, and 12 must be deleted from the release.

Release Term Number 1:

[15] The agreement of June 24, 2012 provided that the settlement would include a “release of all defendants”. That language is interesting, providing as it does for a settlement including the release of a generally described “all defendants”, not just a specific “the defendants”. The use of the descriptor “all defendants” implies that the release was to include an expanded list of releasees, rather than just “the defendants” named by Mr. Gregory in his style of cause.

[16] In term number 1, the plaintiff submits that the list of “Releasees” included in this term goes well beyond those who might generally or normally be included in a form of release, citing various cases and authorities which describe those who might usually be expected to be included as releasees. The plaintiff cites *Fieguth v. Acklands Ltd.*, [1989] B.C.J. No. 857, 37 B.C.L.R. (2d) 62 which involved a dispute about the terms of a release in a wrongful dismissal action. The court held that the settlement provided that the employer was entitled to a “simple release” of a claim.

[17] While *Fieguth* involved a “wrongful dismissal” action, that is not the situation in the instant case. Although the plaintiff initially couched his claim in the language of a “wrongful dismissal” it became a claim for a breach of contract and then through further amendments his claim included allegations against the named defendants and others of conspiracy, inducing a breach of contract, a cover up, misfeasance, breaches of loyalty and misuse of funds. These latter allegations involved certain of

the defendants' employees as well as others further involved in the project with which the defendants and Mr. Gregory were involved.

[18] The plaintiff, in modifying term number 1, seeks to restrict the list of releasees. However, to comply with his submission would effectively ignore the plaintiff's expansion of his claims against the defendants and others. In those expanded claims, which the defendants assert are unfounded allegations, the plaintiff includes allegations against individuals not named in the action but involved in the project which was instrumental in bringing together both these individuals not named as parties and the named defendants.

[19] The goal of a release such as has been prepared by the defendants is to put the parties' dispute to rest with finality, specifically to liberate a party once and for all from any liability or obligation to another party arising out of specific circumstances: Cass, Fred, *The Law of Releases in Canada* (Aurora: Canada Law Book, 2006) at page 1. To ensure that the release achieves the goal expressed in the parties' settlement, that is that the release will effectively terminate the parties' action and provide a finality to their dispute, I conclude that it is necessary that the list of releasees include those found in term number 1 as drafted by the defendants.

Release Term Numbers 4 and 5:

[20] The plaintiff submits that term number 4, referred to as the contribution and indemnity provision, and term number 5 of the defendants' release also ought to be deleted. Both of these terms appear specifically directed towards ensuring that the plaintiff not commence a claim against any other person or corporation connected with the plaintiff's agreement for service with KPMG or the other claims he advanced in the action in respect of any proceedings against any other person or corporation relating to either the agreement for services between Mr. Gregory and KPMG. Further, the defendants seek the plaintiff's assurance that he has neither commenced any actions against the releasees, nor has he assigned to any third party any rights he has had with respect to any claim or action as against the releasees or any of them.

[21] To ensure that the release achieves the goal expressed in the parties' settlement, that is that the release will effectively terminate the parties' action and provide a finality to their dispute, I conclude that it is necessary that the list of releasees include those found in term number 1 as drafted by the defendants.

[22] As noted previously, the purpose of a release is to ensure that the terms of the release achieves the goal expressed in the parties' settlement which is that the release effectively terminates the parties' action and provides a finality to their dispute and the potential for matters arising out of their dispute.

[23] The plaintiff submits that the defendants are attempting to include in the release a provision that the release include an "other persons clause" which he asserts must be specifically negotiated, relying on the decision in *Norwich Union Life Insurance Co. (Canada) v. MGM Insurance Group Inc.*, 2003 MBQB 282.

[24] The defendants' submission is that term number 4 contains standard commercial litigation custom and usage as found in *The Law of Releases in Canada* (Aurora: Canada Law Book, 2006) to include the releasees generally, and such a provision is consistent with the decision in *Misko v. John Doe*, 2007 ONCA 660 and the language.

[25] The plaintiff contends that term number 5, involving as it does a restriction on his activities, required the defendants to specifically negotiate those terms requiring that the plaintiff warrant that he has not commenced an action against any of the releasees or that he has assigned such a claim to a third party.

[26] The defendants' position with respect to term numbers 4 and 5 is that both are necessary to finalize the dispute giving rise to the action, the resolution of which is the aim of the terms of settlement reached and giving rise to the provisions of the release. Without such finalization, the defendants submit that the potential exists for a renewed or further dispute arising in some fashion from the ashes of what constituted the original basis of the action between the parties.

[27] I concur with the defendants' position that the release they drafted addresses and finalizes all aspects of the parties' dispute, including any claims relating to the action settled in the June 24, 2012 agreement which the plaintiff subsequently might attempt to pursue against some or all of the releasees. Terms 4 and 5 will be included in the release.

Release Term Number 7:

[28] The plaintiff further seeks the deletion from the release of term number 7 which requires Mr. Gregory to execute and deliver such further documentation and do further acts as a releasee or releasees may reasonably request in order to give effect to the terms of the release.

[29] The defendants assert that such a term is not to expand the release, but are required to give effect and purpose to the release as a whole. The defendants submit that the plaintiff can have no legitimate purpose in opposing term number 7 other than to keep his options open to attack or embarrass the defendants or their clients in the future in respect of the same underlying allegations which the plaintiff agreed to settle on June 24, 2012.

[30] I have considered the defendants' submission with respect to term number 7, and I am left in a quandary as to whether its inclusion in the release is appropriate in these circumstances. The onus lies on the defendants to establish as a fact that the term belongs in the release and I am not satisfied that the defendants have established that term number 7 belongs in the release, it being neither included specifically in the agreement reached June 24, 2012, nor that it is a term necessarily included to give the release some purpose.

Release Term Number 11:

[31] The plaintiff submits that term number 11 goes beyond that which might properly be included in the release, asserting that the documents, referred to as the confidential records, which the defendants seek from the plaintiff ought to be limited

to the documents which were the subject matter referred to in the plaintiff's contract with KPMG.

[32] However, the June 24, 2012 email from the defendants to the plaintiff specifies that a provision of the agreement required the plaintiff to "return of all documents and copies". I conclude that this language is broad enough to include the delivery to the defendants pursuant to the release of all the material (the "confidential records") described in the release in whatever form obtained by the plaintiff, including documents, work papers, audio recordings, transcripts of recordings, software, reports, data record forms and other material in the plaintiff's possession or control.

[33] The limited amount of material possessed by the plaintiff which his counsel asserts can properly be claimed by the defendants would exclude much of the material in the defendant's possession and control, including documents, work papers, audio recordings, transcripts of recording, software, reports, data record forms, and other materials in the plaintiff's possession and obtained during his involvement with the defendants.

[34] I gather from the submissions that some of the material the plaintiff obtained during his time with KPMG included recordings obtained surreptitiously in conversations with KPMG's staff who were working on the project in which Mr. Gregory was also involved under his agreement of service. Transcripts were also made from those recordings and constitute materials which are to be delivered to the defendants. Term number 11 is properly included in the release.

Release Term Number 12:

[35] The plaintiff also submits that term number 12 of the release ought to be deleted asserting that its provision that he not disclose any of the confidential records which he possesses except as may be required by law is unnecessary as the term duplicates the provision contained in the form of the order sought by the defendants in this application.

[36] In the June 24, 2012 email which forms the basis of the agreement between the parties, the defendants state that one of the terms would include a “confidentiality order” which would direct that the plaintiff keep confidential information concerning the affairs of KPMG and TI Corp. except as required by law.

[37] Term number 12 of the release appears to duplicate a provision of the order sought and granted by the court. I am not convinced that there should be duplication between the order and the release. I find that term number 12 of the release drafted by the defendants ought to be deleted as an unnecessary duplication of the terms of the order.

[38] The release will, therefore, include terms numbered 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 13. The terms numbered 7 and 12 will be deleted.

Costs:

[39] The defendants seek lump sum costs of \$1,705.20 which KPMG may deduct from the settlement funds. The defendants have been largely successful in their requisition, and I conclude that they are entitled to lump sum costs of \$1,500 which KPMG is entitled to deduct from the settlement funds payable to the plaintiff’s counsel.

Signing of Order and Release:

[40] The defendants have obtained an order to enforce a settlement agreement which is associated with a release provision. In *Bolton v. Surrey (City)*, [1999] B.C.J. No. 529, aff’d 2000 BCCA 15, the respondent sought and obtained an order to enforce a settlement agreement which included a release provision. To avoid the necessity of returning to court in the event that the applicant failed to sign the release as required, Paris J. ordered that the applicant was bound by its terms. I have some concern that Mr. Gregory might not sign the release in this case and will order, as did Paris J., that Mr. Gregory is bound by the terms of the release in the form approved in these reasons. I find the jurisdiction to make the order is found in s. 10 of the *Law and Equity Act and Rule 13-1(19)*, the latter providing that I may

impose terms and conditions which I consider will further the object of the *Supreme Court Civil Rules*.

Order:

[41] Pursuant to the requisition filed by the defendants, KPMG, Gary Webster, and TI Corp., the terms my order will be as follows:

- a) Upon the making of the payment contemplated in paragraph (b) the action is dismissed against all defendants without costs to any party as if pronounced at the trial of the action on its merits;
- b) The form of release appended as Schedule A hereto, including terms numbered 1, 2, 3, 4, 5, 6, 8, 9, 10, 11 and 13 with terms numbered 7 and 12 deleted is approved and the plaintiff is bound by its terms as if he had signed it upon the payment to Gordon Phillips in trust for Rick Gregory of the sum of \$35,000, less any set off as permitted pursuant to paragraph (d);
- c) The plaintiff is prohibited from disclosing to any person other than legal counsel, his tax accountant, or as required by law, the contents of the release, the terms of the settlement of the action, or the affairs of KPMG, Gary Webster, or TI Corp.; and
- d) The plaintiff shall pay to KPMG its costs of this application in the lump sum of \$1,500 which KPMG may deduct from the payment pursuant to paragraph (b).

“R.M. Blair J.”

BLAIR J.