Federal Court  Cour fédérale

Date: 20211110

Dockets: T-900-17
T-901-17
T-902-17
T-903-17

Citation: 2021 FC 1223

Ottawa, Ontario, November 10, 2021

PRESENT: The Honourable Mr. Justice Favel

Docket: T-900-17

BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff
(Defendants on the Motion)

and

STEPHEN MOFFETT LTD. AND
STEPHEN D. MOFFETT

Defendants
(Moving Parties)

Docket: T-901-17

AND BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff
(Defendants on the Motion)

and

FERME NORD-EST LTÉE

Defendant
(Moving Parties)

Docket: T-902-17

AND BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff
(Defendants on Motion)

and

SOWCOW FARMS INC., STEPHEN D. MOFFETT AND MARLENE L. MOFFETT

Defendants
(Moving Parties)

Docket: T-903-17

AND BETWEEN:

HER MAJESTY THE QUEEN

Plaintiff
(Defendants on the Motion)

and

MARLENE MOFFETT LTD. AND MARLENE L. MOFFETT

Defendants
(Moving Parties)

ORDER AND REASONS

I. Nature of the Matter

[1] This a motion brought by the Defendants in four ongoing actions, files T-900-17, T-901-17, T-902-17, and T-903-17 [Actions]. In short, the motion seeks a declaration confirming that the parties reached a settlement in the Actions, the terms of which are outlined further in these reasons. The Plaintiff also submitted a draft order setting out the relief it is seeking.

[2] Stephen Moffett Ltd. [SM Ltd.] and Stephen D. Moffett [Stephen] are the Defendants in T-900-17. Ferme Nord-Est Ltée [FNE Ltée.] is the Defendant in T-901-17. Sowcow Farms Inc. [SF Inc.], Stephen, and Marlene L. Moffett [Marlene] are the Defendants in T-902-17. Marlene Moffett Ltd. [MM Ltd.] and Marlene are the Defendants in T-903-17. The Department of Agriculture and Agri-Food Canada is the Plaintiff in all the Actions.

[3] Defendants SM Ltd., FNE Ltée., SF Inc., MM Ltd., and Stephen [collectively the Moving Parties] are represented by the same counsel and have therefore made common submissions. Marlene, a guarantor for amounts advanced by SF Inc. in T-902-17 and MM Ltd. in T-903-17, is represented by different counsel and has provided submissions of her own, which add to what is being put forward by the Moving Parties.

[4] This matter revolves around the Plaintiff's written Formal Offer to Settle the litigation and an explanatory letter [Settlement Offer] (attached in Appendix "A") and a dispute over the timing of settlement payments. The Plaintiff submits that the Settlement Offer and its acceptance constitute a binding settlement agreement between the parties. Further, the payment of the

settlement amount was due upon acceptance of the offer or within a reasonable period thereafter. Finally, a lump sum payment did not need to be specified in the Settlement Offer – it should be presumed.

[5] The Defendants submit that the Settlement Offer was accepted on all of its essential terms upon issuance. Therefore, if the Plaintiff intended that settlement payments occur at a particular time, it ought to have been clear that this was an essential term and should have included it within the Settlement Offer.

[6] I find that there is a binding settlement agreement between the parties. Absent any explicit stipulation as to the timing of the payment, it can be presumed that it is payable as a lump sum and within a reasonable amount of time from the acceptance of the offer.

II. Background and Context

[7] The Defendants all operate a farrow to finish hog farming operation in Penobsquis, New Brunswick. In order to finance their operations, SM Ltd., FNE Ltée., SF Inc., and MM Ltd. [Moffett Group] have participated in programs administered by the Plaintiff, including but not limited to the Advanced Payment Program [APP] and the AgriStability Program. These programs have allowed the Moffett Group to maintain financing through Farm Credit Canada [FCC] and the National Bank of Canada [National].

[8] On May 3, 2017, the Defendants received demand letters from the Plaintiff seeking immediate payment of the amount owed by the Moffett Group under the APP.

[9] On or about June 21, 2017, the Plaintiff commenced the Actions to recover the amounts owed. The Defendants defended the Actions and filed counterclaims.

[10] From June 2017 to November 2020, the Plaintiff and the Defendants engaged in discussions regarding settlement of the Actions [Settlement Discussions]. During the Settlement Discussions, the Defendants disclosed financial information to the Plaintiff (Exhibit "C" to Supplementary Affidavit of Stephen).

[11] Between July 2017 and August 2018, the Settlement Discussions focused on the quantum of payment. On August 7, 2018, the Plaintiff wrote to counsel for the Defendants and advised that it was not willing to accept payment terms stretching over twenty years. Plaintiff's counsel did advise that a more typical payment schedule would span over a five-year period (Exhibit "H" to Supplementary Affidavit of Stephen).

[12] In November 2018, during an in-person meeting, the Plaintiff advised the Defendants that a lump sum payment of settlement funds would be required if a portion of the debt was to be "written-off" (Affidavit of Mark De Luca at paras 7-11). The Defendants disclosed the solvency issues they were facing as well as their ability to pay the Plaintiff (Supplementary Affidavit of Stephen at para 20).

[13] On or about April 18, 2019, counsel for the Plaintiff wrote to the Defendants and offered to settle all claims for $1.1 million in the form of a lump sum payment (Affidavit of Mark De Luca at para 15).

[14] Following this, the Defendants attempted to obtain financing. The Defendants' lending institution advised that in order to qualify, the Defendants would need to access certain programs through the Plaintiff. However, in October 2019, the Plaintiff advised the Defendants that the Moffett Group would not be eligible for these programs. Therefore, the Defendants were unable to procure financing for a lump sum payment and advised the Plaintiffs accordingly (Exhibit "I" to Supplementary Affidavit of Stephen).

[15] The Settlement Discussions remained dormant until on or about November 19, 2020, when the Defendants were served with the Settlement Offer. The Settlement Offer was made pursuant to Rules 419 and 420 of the *Federal Court Rules*, SOR/98-106 [*Rules*] and included cost consequences for Defendants if the Settlement Offer was not accepted.

[16] On or about November 23, 2020, the Defendants served the Plaintiff with a Formal Acceptance of Offer to Settle [Acceptance] (attached as Appendix "B"). The Acceptance was provided on the exact terms of the Settlement Offer with no changes, revisions, or alterations. On or about November 24, 2020, the Plaintiff confirmed receipt of the Acceptance.

[17] The parties agreed to settle the Actions on the following terms:

1. The corporate defendants will pay the Plaintiff a total of $1,000,000, more specifically the corporate defendants will pay the following amounts:
    - Femme Nord-Est Limitee (AAFC #152399) - $338,225.37
    - SowCow Farms Inc. (AAFC #153547) - $291,844.45
    - Marlene Moffett Ltd. (AAFC #152854) - $245,474.89
    - Stephen Moffett Ltd. (AAFC #153540) - $124,455.29
2. The corporate defendants will each sign a "Consent to Judgment" in the following amounts:

- Femme Nord-Est Limitee (AAFC #152399) - $379,000
- SowCow Farms Inc. (AAFC #153547) - $379,000
- Marlene Moffett Ltd. (AAFC #152854) - $200,000
- Stephen Moffett Ltd. (AAFC #153540) - $200,000

3. The individual defendants will sign a "Consent to Judgment" as follows:

    - Marlene Moffett - $50,000
    - Stephen Moffett - $50,000

[18] The Settlement Offer did not include any requirement that the payments be made by lump sum or by any particular date. Similarly, it did not indicate that the Defendants could make payments in instalments. After the Acceptance, Plaintiff's counsel requested that counsel for the Defendants advise her of the date which the Defendants proposed payment of the sums due.

[19] In response, counsel for the Defendants detailed a payment arrangement [the Payment Arrangement] as follows (Exhibit "D" to Affidavit of Christopher D. J. Isnor):

a. 50 payments to the Plaintiff in the amount of $5,000 per month beginning on January 1, 2021, and ending on February 1, 2025;

b. From January 1, 2021, until February 28, 2025, the Defendants will continue paying to FCC the amount of $23,620.00 per month to ensure that the HILLRP loan is fully paid off by February 28, 2025;

c. 31 payments to the Plaintiff in the amount of $23,620.00 per month beginning March 1, 2025, and ending on September l, 2027; and

d. 1 payment to the Plaintiff in the amount of $17,780.00 made on October 1, 2027.

[20] The Plaintiff found the Payment Arrangement to be unacceptable.

III. Issues

[21] Based on the parties submissions, the issues are:

1. Is there a binding settlement agreement between the parties that resolves the Actions?
2. Is payment via lump sum within a reasonable amount of time an implied term of the Settlement Offer?
3. Is there a binding and enforceable settlement of the claim against Marlene Moffett if the first issue is answered in the negative?

IV. Parties' Positions

A. *Is there a binding settlement agreement between the parties that resolves the Actions?*

(1) Defendants' Position

[22] The Defendants submit that the Settlement Offer and the Acceptance constitute a binding settlement agreement. They rely on the Federal Court of Appeal's decision in *Apotex Inc v Allergan Inc*, 2016 FCA 155 [*Apotex*] at paragraphs 21-43, which establishes a five-part test to determine whether a binding settlement has been reached in a given set of negotiations:

a. The parties must have had the mutual intention to create legal relations;

b. The agreement must contain consideration;

c. The terms of the agreement must be sufficiently certain;

d. There must be matching offer and acceptance on all terms of the agreement; and

e. Other requirements may apply in special circumstances.

[23] The Defendants submit that the first four criteria are met in the case at bar and that no other requirements apply which would render the Settlement Offer and Acceptance unenforceable at law.

[24] The Settlement Offer was prepared and issued by counsel for the Plaintiff upon instructions from her client, the Federal Government, which is a particularly sophisticated party. Thus, there is no question that the terms presented to the Defendants were clear and unambiguous.

[25] Upon reception of the Settlement Offer, the Defendants considered it in good faith and understood all of its terms. They then issued the Acceptance. Therefore, the parties were certainly of a common mind.

[26] Finally, the Defendants argue that the Settlement Offer was certainly an offer for the purposes of reaching an agreement (*Richter v McKeachie*, 2009 BCSC 288 at para 30 [*Richter*]). After receiving the Settlement Offer, the Defendants reviewed it and came to the reasonable conclusion that it contained all terms that the Plaintiff considered essential. The Defendants then issued a formal Acceptance, on the exact same terms presented in the Settlement Offer.

(2) Plaintiff's Position

[27] The Plaintiff agrees that there was a binding agreement reached between the parties on the essential terms of the Settlement Offer.

[28] The Plaintiff also submits that disagreement regarding the timeline for payment ought not be construed as evidence that an agreement was not reached, as it was not an essential term (*Betser-Zilevitch v Nexen Inc*, 2019 FCA 230 at para 5).

B. *Is payment via lump sum within a reasonable amount of time an implied term of the Settlement Offer?*

(1) Defendants' Position

[29] The Defendants submit that the Plaintiff had the opportunity and obligation to put forth all essential terms when issuing its Settlement Offer. If the date of payment was an essential term to the Plaintiff, it should have mentioned it in its Settlement Offer (*Apotex* at para 32; *Fontaine v Canada (Attorney General)*, 2015 SKQB 220 at paras 38-39 [*Fontaine*]). In this case, the Plaintiff failed to do so. However, the fact that a due date for payment was not included is not fatal to a contract between parties and the Settlement Offer must stand (*Richter* at para 40).

[30] The Defendants argue that even if this Court finds there is a subsequent agreement regarding the timing of payments, that would not in of itself invalidate the Settlement Agreement. In fact, the Plaintiff is not entitled to attempt to repudiate the Settlement Offer upon receipt of a payment timetable it does not like. Nor does a proposed timetable "amount to a repudiation of the agreement unless the other side demonstrates an unwillingness to be bound any further" (*McCabe v Verge*, 1999 CanLII 18936 at para 26 [*McCabe*]).

[31] Additionally, formal offers to settle "must be intended to be capable of maturing into a binding settlement upon acceptance. Otherwise, the purpose of the rule promoting such settlements would be frustrated" (*McCabe* at para 12). They also submit that Courts will be reluctant to hold agreements void on the ground of uncertainty and will rather strive to give effect to the reasonable expectations of the parties, objectively determined (*Apotex* at para 28).

[32] The Defendants further submit that the Plaintiff had the opportunity, as drafter of the Settlement Offer, to add words such as "subject to reaching a formal agreement" but counsel failed to do so (*Apotex* at paras 36). If the Plaintiff wished not to be bound by the Settlement Offer until it had agreed to all terms it subjectively considered to be essential, it had the onus of making that point clearly in the Settlement Offer (*Apotex* at para 53; *Richter* at para 30).

[33] Although the Settlement Offer was executed and issued by the Plaintiff's counsel and not directly from the Plaintiff itself, there is a presumption that counsel has authority to bind his or her client when settlements are negotiated between counsel (*Fontaine* at para 35).

[34] The principle of *contra proferentum* holds that any ambiguity or flaw in the wording of the Plaintiff's Settlement Offer should be interpreted fairly and liberally, in favour of the Defendants. In fact, the Defendants argue that there is a significant power imbalance between the parties and that any deficiencies in the terms presented are at the sole fault of the Plaintiff.

[35] It is important to consider both the context in which the Settlement Offer was made and its format. In the case at bar, the Settlement Offer was drafted by the Plaintiff after it knew the

Defendants were unable to achieve financing to make a lump sum payment. The term "lump sum payment" as previously used by the Plaintiff was not inserted anywhere in the Settlement Offer.

[36] Finally, the Defendants argue that if the Plaintiff was successful in the underlying Actions, it would obtain monetary judgments against some or all of the Defendants, but would not obtain an order that payment be made by any certain time period. The parties would then be free to negotiate an agreement on the terms of such payment, failing which the Plaintiff could choose to enforce the agreement through available legal remedies. The alleged implied term is not within the power of the Court to award in the context of the filed pleadings. Therefore, it is not reasonable to construe the Settlement Offer to incorporate terms which go beyond the relief this Court can grant (*Beam Suntory Inc v Domaines Pinnacle Inc*, 2016 FCA 212 at para 39 [*Beam*]).

[37] For all of these reasons, the Defendants submit that there is no implied term that the Settlement Offer is payable as a lump sum and within a reasonable amount of time from Acceptance.

(2) Plaintiff's Position

[38] The Plaintiff is not seeking to retract its own Settlement Offer. However, contrary to the Defendants' position, the Settlement Offer was not required to include reference to a lump sum payment. It is clear from the case law that certain terms can be implicit in an offer (*Hutton v Hutton*, 2020 BCSC 2046 at para 33, citing *Apotex* at paras 32, 33). Where there is no mention of a payment arrangement, payment via lump sum is the only reasonable inference.

[39] Hence, the Plaintiff argues that payment within a reasonable amount of time was an implied term of the Settlement Offer and that the Payment Arrangement detailed by the Defendants is not reasonable (*Hall v Smith*, 2007 CanLII 1865 at para 28 [*Hall*], citing *Fieguth v Acklands Ltd*, [1989], 59 DLR (4th) 114 (BCCA) at para 21 [*Fieguth*]). The Payment Arrangement would deprive the Plaintiff from substantial settlement benefits of finality in the claim and financial certainty. Without receipt of the settlement funds, the litigation would not conclude and discontinuances could not be filed. Furthermore, the Plaintiff argues that the period for the Defendants' Payment Arrangement exceeds the period that would be expected in obtaining judgment through litigation.

[40] Therefore, absent a deadline for payment, the amount indicated in the Settlement Offer was due upon Acceptance or within a reasonable amount of time, unless otherwise agreed to by the parties. In fact, it is reasonable to assume that payment would be due at the time of Acceptance, given that the debts of the Defendants have crystallized and are owing to the Plaintiff at this time. Furthermore, a lump sum payment did not need to be specified in the Offer but should rather be presumed. In any event, the Defendants cannot now insert a payment plan into the terms of the Settlement Offer.

[41] The Plaintiff further submits that there was no ambiguity in the wording of the Settlement Offer, nor should any alleged ambiguity be interpreted in favour of the Defendants.

[42] The Plaintiff argues that it cannot be assumed, as the Defendants submit, that it had knowledge of the Defendants' inability to achieve financing to make a lump sum payment. The

Plaintiff communicated the Settlement Offer, but was not privy to any financing discussions the Defendants might have had. Moreover, the Defendants were not forced to accept the Settlement Offer.

[43] The Defendants have been informed throughout all prior settlement negotiations that a lump sum payment would be required if a settlement was reached. The Defendants point to correspondence dated August 7, 2018, between counsel as evidence that payment arrangements would be acceptable to the Plaintiff. However, this correspondence predated settlement negotiations and referred to repayment in a different context, where other creditors were being offered full repayment (Exhibit "H" to Supplementary Affidavit of Stephen).

C. *Is there a binding and enforceable settlement of the claim against Marlene if the first issue is answered in the negative?*

(1) Defendants' Position

[44] The Settlement Offer, as it pertains to Marlene, stipulates that the claims against her in T-902-17 and T-903-17 will be settled if she provides a consent to judgment in the amount of $50,000.00. This amount would act as a security for the payments by FNE Ltée., SF Inc., MM Ltd., and SM Ltd. pursuant to outstanding Hog Industry Loan Loss Reserve Program loans.

[45] Marlene argues that the Plaintiff is attempting to resile from the Settlement Agreement on the basis that the proposed Payment Arrangement is unacceptable. Marlene argues that the proposed Payment Arrangement has no effect on the Settlement Offer made and accepted by her.

[46] She further submits that the Plaintiff's offer was presumably made after consideration of the financial documentation provided by her and an assessment of the strengths and weaknesses of the Plaintiff's case against her. The offer made to her was not conditional upon a settlement being reached with the other Defendants.

[47] Therefore, Marlene argues that the Plaintiff cannot renege on an accepted offer to settle, made to her pursuant to Rules 419 and 420, because a dispute has arisen with respect to the proposed Payment Arrangement by the other Defendants. She further submits that in applying the *Apotex* test, it is clear that there is a binding and enforceable settlement of the claim against her.

(2) Plaintiff's Position

[48] The Plaintiff has not made specific submissions on this issue.

V. Analysis

[49] To begin, I confirm that this Court has jurisdiction to determine whether a settlement exists. The existence or non-existence of a settlement agreement affects the status of the proceedings before this Court. If the former, the action subsists; if the latter, it does not. As part of its plenary powers, this Court has jurisdiction to rule on whether a proceeding subsists (*Apotex* at para 14).

[50] In *Beam*, the Federal Court of Appeal set out the nature of a Rule 420 application:

> [38] The object of Rule 420 is to create an incentive to settlement by imposing cost penalties on parties who do not accept a reasonable settlement proposal: *Leuthold v. Canadian Broadcasting Corp.*, 2014 FCA 174, [2014] F.C.J. No. 669 at paragraph 11. But in order to benefit from the Rule, the party making the offer must meet certain conditions. The first is that the offer must be made no later than 14 days before the beginning of the trial and the offer must remain open until the commencement of the hearing (Rules 420(3)(*a*) and (*b*)).
>
> [39] The second is that the offering party must obtain a judgment at least as favourable as the terms of the offer (Rules 420(1) and (2)). This has implications for the subject matter of the offer. The offer must be one whose terms are within the power of the Court to award. An offer containing terms which exceed the Court's jurisdiction cannot give rise to a judgment which [is] at least as favourable as the terms of the offer since the extra-jurisdictional term can never be matched or exceeded.

[51] Based on the record, I find that the Plaintiff's Settlement Officer satisfies the first object. For the reasons that follow, I also find that the Plaintiff's Settlement Offer satisfies the second object. Accordingly, the Court has jurisdiction to make the Order requested by the Plaintiff.

[52] I will now continue with a consideration of the issues.

A. *Is there a binding settlement agreement between the parties that resolves the Actions?*

[53] There is no issue with the formation of the Settlement Offer as all parties agree that it is in effect.

[54] Issues relating to the formation of a contract are different from those arising from its completion (*Fieguth* at paras 35, 36). Issues relating to the formation of a contract determine whether the parties have reached a binding agreement on all essential terms, as per the test laid

out in *Apotex*. Issues arising from the completion of the contract relate to the implementation of the agreement.

[55] The case at bar is somewhat unusual, as both parties agree that the Settlement Offer, which was accepted by the Defendant, constitutes a binding settlement agreement. The current situation does not involve a series of impromptu, informal communications in relaxed non-business settings (*Apotex* at para 24). There are objective indicators that a settlement was reached. There is clearly consideration flowing both ways. The terms are clear and certain. The essential terms are clear but, as already canvassed, the issue as to whether the timing of payments is an implied term remains.

[56] I agree with the parties that they have reached a binding settlement. Therefore, I will focus my analysis on the other issues.

B. *Is payment via lump sum within a reasonable amount of time an implied term of the Settlement Offer?*

[57] In *Apotex,* the Federal Court of Appeal noted that where there is an agreement on essential terms, non-essential terms can be implied into that agreement. Non-essential terms may include the granting of a release, the manner of payment, and the timing of payment (*Apotex* at para 33*; McCabe* at para 20; *Fieguth* at para 21).

[58] In the case at bar, both parties argue that all the essential terms were expressly laid out within the Settlement Offer, which is binding. The remaining question is whether a lump sum payment within a reasonable time can be implied.

[59] The Defendants also submit that the Plaintiff was aware of the financial position of the Defendants. Further, between July 2017 and August 2018 the Plaintiff indicated that a 20-year payment plan was not acceptable but also indicated that a five-year payment plan may be reasonable. The Defendants submit that this position is indicative of a possibility of a payment plan being an option for payment pursuant to the Settlement Offer.

[60] I do not agree with the Defendants. The record indicates that subsequent to the Plaintiff's communication in November 2018 it altered its position. From that date forward, the Plaintiff maintained that if any of the debt was reduced, it would require a lump sum payment. This resulted in an April 2019 offer to settle in a lump sum but, by approximately October 2019, the Defendants were unable to secure the funds for the payment in a lump sum. The next communication was the Settlement Offer of November 19, 2021. Overall, the facts indicate that the Plaintiff was at one point open to considering a payment plan but thereafter the communications focused on a lump sum payment. There is no indication that the Plaintiff was considering a payment by instalments leading to the Settlement Offer.

[61] I find that it is reasonable to imply that the settlement payment was due by way of a lump sum within a reasonable time after its acceptance. I further find that these were non-essential terms that were not expressly stipulated within the Settlement Offer but were implied terms of

the settlement nevertheless (*Gutter Filter Company, LLC v Gutter Filter Canada Inc*, 2011 FC 234 at para 14; *Fieguth* at para 21). In other words, given the fact that nothing has been specified with regard to the payment, the Court can presume that the payment is expected within a "reasonable period of time and in one instalment" (*Hall* para 13). The pattern of communication between the parties, as referred to above, supports this finding.

[62] If the Defendants wished to attach terms to the payment of the settlement amount, they ought to have expressed those terms in a manner that is "objectively clear" (*Apotex* at para 53). They cannot, after accepting the Settlement Offer, argue that the Plaintiff failed to specify that the payment was payable as a lump sum and within a reasonable amount of time. As these are implied terms, the Defendants ought to have expressed its intentions to the contrary through a counter offer and before issuing the Acceptance. Accordingly, the Defendants' arguments fail.

[63] The jurisprudence provided by the parties does not definitively establish what meaning courts have ascribed to the phrase "within a reasonable period of time." If any principles arise from the jurisprudence it is that the phrase will be informed by the parties' expectations, by the facts of the particular case, and past practices. For instance, in *Harco Enterprises Ltd v Knelson Sand and Gravel Ltd*, 2021 ABQB 263 [*Harco*] the circumstances involved a number of business contracts (together constituting one contract) that left many terms uncertain (at paras 5, 200). Harco asserted that Knelson breached the contract by failing to pay amounts owed to Harco. Harco further argued that an implied term of the contract was that invoices were to be paid within "a reasonable time frame." Like the present matter, Knelson claimed that the parties had not agreed on a particular timeframe for payments (at paras 8-9). The Court of Queen's Bench of

Alberta held that the parties had agreed to payment within a reasonable time and that based on past practices, it was reasonable to pay *$391,164.74 in 30 days*. Drawing on authorities from British Columbia, the Court articulated a test for assessing what constitutes a "reasonable time":

> [176] The requirement to "pay within a reasonable time" is a commonly implied term, but it is not often considered a fundamental or essential term, breach of which justifies termination of the contract: see *Hughes v Moncton (City)*, 2006 NBCA 83 at para 6 [Hughes], and *Muller v O'Flynn*, 2019 BCSC 1674 at para 46 [*Muller*].
>
> [177] What constitutes a "reasonable time" is based on the expectations of the parties at the time they made their agreement, and the circumstances of the case: *Muller* at para 58. It can also depend on a number of other factors, such as: (1) "the course of dealing between the parties leading up to the formation of the contract"; (2) the nature of the obligations under the contract; (3) the financial position of the relevant party; (4) the value of what is at issue; and (5) the state of the market: *Muller* at paras 46,58; *Illidge v Sona Resources Corporation*, 2017 BCSC 1326 at para 171 [*Illidge*].
>
> [178] Without an express contractual term to the contrary, time is not presumed to be "of the essence": *Illidge* at para 172…

[64] The Court went ahead and found that in the circumstances, a "reasonable time" was 30 days given that payments normally occurred within this timeframe (see *Harco* at paras 71-72). As the parties' submissions in the present matter have indicated, there is no similar expectation as to what a reasonable period of time would be in the circumstances of this case. Likewise, there is no evidence of the parties' past practices with one another. *Harco* provides the Court with some guidance given that the outstanding amount in that case (*$391,164.74*) was ordered to be paid within *30 days*.

[65] Bearing in mind *Harco* and the fact that the Plaintiff wrote off a significant amount of the outstanding debt in presenting its Settlement Offer, in the present circumstances I find that a "reasonable period of time" would be three months from the Acceptance of the Settlement Offer.

C. *Is there a binding and enforceable settlement of the claim against Marlene if the first issue is answered in the negative?*

[66] Given my analysis above, there is an enforceable settlement of the claim against Marlene in her own right as guarantor.

VI. Conclusion

[67] I find that there is a binding settlement agreement between the parties that, implicitly, requires the Defendants to make a payment via lump sum within a reasonable amount of time. I further find that a reasonable period of time in the present circumstances is three months from the Acceptance, which has long since passed. Accordingly, I find that the settlement amount is now due and payable forthwith.

VII. Costs

[68] The Defendant seeks costs on this Motion, but has not made any further submissions on this issue.

[69] The Plaintiff also seeks costs in relation to this Motion. It argues that the Defendants were not acting in good faith when they accepted the Settlement Offer, as they did not have an

ability to pay the Settlement funds via lump sum payment at the time they accepted the Settlement Offer. While they may have intended to enter into a payment plan, this was not included in a counter offer and therefore there was no certainty the Defendants would be in a position to comply with the terms, express and implied, of the Settlement Offer. Therefore, the Plaintiff argues that it should be entitled to costs.

[70] Pursuant to Rule 400(1), the Court has full discretionary power to allocate costs and determine their amount and to whom they are to be paid. In doing so, the Court may consider multiple factors, including but not limited to "any written offer to settle" (Rule 400(3)(e)).

[71] The Court is also permitted to fix costs of a motion pursuant to Rule 401(1). Under Rule 401(2) the Court may order costs payable forthwith, where the motion ought not to have been brought or contested before the Court.

[72] The Settlement Offer presented by the Plaintiff, being accepted by the Defendants, renders Rule 420(1) inapplicable. The Rule states:

> 420(1) **Consequences of failure to accept plaintiff's offer** – Unless otherwise ordered by the Court and subject to subsection (3), where a plaintiff makes a written offer to settle and obtains a judgment as favourable or more favourable than the terms of the offer to settle, the plaintiff is entitled to party-and-party costs to the date of service of the offer and costs calculated at double that rate, but not double disbursements, after that date.

[73] Both parties agree, and the Court has determined, that there is a binding settlement agreement that has been accepted by the Defendants.

[74] Given the nature of this matter, I decline to exercise my discretion to award costs on this motion. In my view, this motion raised serious and substantive issues and it was not unreasonably brought forward (*Lifescan Inc v Novapharm Ltd*, 2001 FCT 809 (CanLII)). Where parties are bound by an agreement, it is not unusual that issues might arise with regard to its terms or its interpretation. The parties' conduct was also not abusive of the Court process nor can it be found that the Defendants have delayed the proceedings and increased litigation (*Abercrombie & Fitch Co v Giant Tiger Stores Ltd*, 2009 FC 492 at paras 18-19). Both parties will obtain essentially what they ask for – that the Settlement Offer be found enforceable.

ORDER in T-900-17 and T-901-17 and T-902-17 and T-903-17

THIS COURT ORDERS that:

1. The Defendants' motion is granted. The Settlement Offer, consisting of the November 19, 2020 correspondence and the Formal Offer to Settle, attached as Appendix "A", is declared to be binding on the parties.
2. The payment under the Settlement Offer is to be paid in a lump sum and within a reasonable time, being three months from the Acceptance of the Settlement Offer. That settlement amount is now payable forthwith.
3. No costs are awarded.

"Paul Favel"

Judge

APPENDIX A

Department of Justice Canada | **Ministère de la Justice Canada**

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Our File Number:
LEX-8953458/ 8952796 /
8952346 / 8953558

November 19, 2020

"A"
THIS IS EXHIBIT REFERRED TO IN
THE AFFIDAVIT OF Christopher D. Simser
SWORN BEFORE ME THIS 15 DAY OF
December A.D., 2020.

Robert M. Creamer, Q.C.
Lawson Creamer
801 – 133 Prince William Street
Saint John, New Brunswick
E2L 2B5

Dear Mr. Creamer:

Re: HMQ v. Stephen Moffett Ltd & Stephen D. Moffett – Court File No.: T-900-17
HMQ v. Ferme Nord-Est Ltee – Court File No.: T-901-17
HMQ v. Sowcow Farms Inc., *et al* – Court File No.: T-902-17
HMQ v. Marlene Moffett Ltd & Marlene L. Moffett – Court File No.: T-903-17

I write further to the above noted matters.

Costs Associated with Discoveries

I confirm Canada will be paying for 50% of the costs incurred in renting the boardroom and hiring the court reporter (at this time we will not be ordering transcripts) for the discoveries scheduled for November 30-December 4, 2020, in Saint John. We are required to make payment directly to the "vendors" (hotel and court reporter).

420 Offer

Payment

The total outstanding balance owed by the Moffett Group of Companies involved in the litigation noted above is $3,439,541.71. More specifically that debt is broken down as follows:

- Ferme Nord-Est Limitee (AAFC #152399) - $1,164,110.86
- SowCow Farms Inc. (AAFC #153547) - $1,004,176.64
- Marlene Moffett Ltd. (AAFC #152854) - $844,281.62
- Stephen Moffett Ltd. (AAFC #153540) - $426,972.59

Per the attached offer, AAFC is seeking the payment of $1,000,000, 29% of the outstanding balance, as well as consents to judgment. The following information provides a more detailed explanation of the consents referenced in the offer.

Consents to Judgment

You will recall earlier discussions in which AAFC communicated their concern about the outstanding HILLRP loan. In fact, as a term of the previously discussed settlement, it was a requirement that your clients immediately pay out that loan. The requested consents provide security for the outstanding HILLRP loan, which currently has a balance of $1.158 million and is guaranteed by the AAFC should the Moffett Group of Companies default on that loan.

AAFC understands that your clients have been continuing to make payments on the HILLRP loan. I confirm the amount specified in each corporate consent will be reduced by payments made towards the HILLRP loan on a prorated basis, in the event your clients default on the HILLRP and AAFC registers the judgments. For further clarity, if the HILLRP loan is reduced by $300,000 and your clients subsequently default, the following reductions would be applied to reduce the amount of each consent at the time of registration:

- Ferme Nord-Est Limitee (AAFC #152399) - $99,000
- SowCow Farms Inc. (AAFC #153547) - $99,000
- Marlene Moffett Ltd. (AAFC #152854) - $51,000
- Stephen Moffett Ltd. (AAFC #153540) - $51,000

I confirm these consents will be held in trust and will be discharged upon proof that the Moffett Group of Companies has paid off its outstanding HILLRP loan balance, which is currently $1.158 million. As noted above, in the event the Moffett Group of Companies defaults on that loan, my client would register all of the consents, including the consents of Stephen and Marlene Moffett.

Additional Term

As explained in our earlier settlement discussions, should the above-noted litigation settle, AAFC prohibits producers with whom they settle litigation from applying or accepting any further funding through AAFC programs. This includes but is not limited to, funding through the Farm Guaranteed Program Directorate or the Farm Income Program Directorate, including, but not limited to, the Advance Payment Program, the Business Risk Management programs under the Canadian Agricultural Partnership, or any similar program succeeding these programs and guaranteed by the AAFC, for a period of six (6) years.

Reimbursement for Expenses

In addition to the offer, you will note below the costs estimates for my client's travel and accommodations in relation to the upcoming discoveries. Pursuant to Rule 89(1), your client is responsible for paying these costs. I confirm I will provide you with a copy of all receipts at the Discoveries or as soon as practicable. Payment is made to the "Receiver General of Canada".

- $300.00 - Transportation to and from airport (Ottawa & Halifax)
- $900.00 - Return Airfare
- $2,800.00 Hotel
- $360.00 [$20/day for 19 days]

We reserve the right to refer to the attached Offer to Settle when addressing the issue of costs before the court.

Sincerely,

Kelly Peck
Counsel

KP/lw

cc **Frederick Welsford, Q.C. (via email)**
Counsel for the Respondent, Marlene L. Moffett and Marlene Moffett Ltd.

Court File No.: T-900-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

STEPHEN MOFFETT LTD., STEPHEN D. MOFFETT, and DAWN MARIE MCLEAN

Defendants

Court File No.: T-901-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

FERME NORD-EST LTEE and PAUL D. MOFFETT

Defendants

Court File No.: T-902-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

SOWCOW FARMS INC., STEPHEN D. MOFFETT and MARLENE L. MOFFETT

Defendants

Court File No.: T-903-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

MARLENE MOFFETT LTD., MARLENE L. MOFFETT, and KRISTA TONER

Defendants

FORMAL OFFER TO SETTLE

PURSUANT to Rules 419 and 420 of the *Federal Court Rules*, Her Majesty the Queen, the Plaintiff in these claims, hereby offers to fully and finally settle these claims on the following terms:

1. The corporate defendants will pay the Plaintiff a total of $1,000,000, more specifically the corporate defendants will pay the following amounts:
    - Ferme Nord-Est Limitee (AAFC #152399) - $338,225.37
    - SowCow Farms Inc. (AAFC #153547) - $291,844.45
    - Marlene Moffett Ltd. (AAFC #152854) - $245,474.89
    - Stephen Moffett Ltd. (AAFC #153540) - $124,455.29

2. The corporate defendants will each sign a "Consent to Judgment" in the following amounts:
    - Ferme Nord-Est Limitee (AAFC #152399) - $379,000
    - SowCow Farms Inc. (AAFC #153547) - $379,000
    - Marlene Moffett Ltd. (AAFC #152854) - $200,000
    - Stephen Moffett Ltd. (AAFC #153540) - $200,000

3. The individual defendants will sign a "Consent to Judgment" as follows:
    - Marlene Moffett - $50,000
    - Stephen Moffett - $50,000

4. This Offer will not be withdrawn and will not expire before the commencement of the trial of this matter, unless expressly withdrawn or superseded in writing.

PURSUANT to Rules 419 and 420, if the defendants reject this offer and the Plaintiff obtains judgment in an amount equal to or greater than the amount of this offer, the Plaintiff is entitled to party-and-party costs to the date of service of this offer and shall be entitled to costs calculated at double that rate, but not double disbursements, from the date of service of this offer to the date of judgment.

DATED at the City of Halifax, in the Province of Nova Scotia, this 19th day of November, 2020.

ATTORNEY GENERAL OF CANADA
Department of Justice Canada
Suite 1400, Duke Tower
5251 Duke Street
Halifax, NS B3J 1P3
Fax: (902) 426-2329

Per: Kelly A. Peck
Tel: (902) 426-7038
Email: kelly.peck@justice.gc.ca

Counsel for the Plaintiff

APPENDIX B

Chris Isnor

From:	Robert Creamer
Sent:	Monday, November 23, 2020 7:04 PM
To:	Peck, Kelly
Cc:	Warner, Lorri; Frederick A. Welsford (faw@gormannason.com); Chris Isnor; Angie Parlee
Subject:	Emailing: Correspondence dated November 23 and Formal Acceptance OF Offer to Settle (L0663500xD5DDF).PDF
Attachments:	Correspondence dated November 23 and Formal Acceptance OF Offer to Settle (L0663500xD5DDF).pdf

Good Evening Kelly,

Please see the attached correspondence and Formal Acceptance OF Offer To Settle with respect to the above-noted matter.

Thank you,

Bob

THIS IS EXHIBIT "B" REFERRED TO IN THE AFFIDAVIT OF Christopher D.J. Isnor SWORN BEFORE ME THIS 15th DAY OF December A.D., 2020.

A. Flemington

Robert M. Creamer, Q.C.
LAWSON CREAMER
801-133 Prince William Street, Saint John, NB E2L 2B5
Direct 506.633.3545 Fax 506.633.0465
Email rcreamer@lawsoncreamer.com
Assistant: Angie Parlee Direct: 506.633.3500
Email: aparlee@lawsoncreamer.com

Court File No.: T-900-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

STEPHEN MOFFETT LTD., STEPHEN D. MOFFETT, and DAWN MARIE MCLEAN

Defendants

Court File No.: T-901-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

FERME NORD-EST LTEE and PAUL D. MOFFETT

Defendants

Court File No.: T-902-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

SOWCOW FARMS INC., STEPHEN D. MOFFETT and MARLENE L. MOFFETT

Defendants

Court File No.: T-903-17

FEDERAL COURT

HER MAJESTY THE QUEEN

Plaintiff

and

MARLENE MOFFETT LTD., MARLENE L. MOFFETT, and KRISTA TONER

Defendants

FORMAL ACCEPTANCE OF OFFER TO SETTLE

The Defendants, namely, STEPHEN MOFFETT LTD., STEPHEN D. MOFFETT, FERME NORD-EST LTEE, SOWCOW FARMS INC., MARLENE L. MOFFETT, and MARLENE MOFFETT LTD., hereby formally accept the offer to settle contained in the correspondence of Kelly Peck dated November 19, 2020.

DATED at the City of Saint John, in the Province of New Brunswick, this 23rd day of November, 2020:

FERME NORD-EST LTEE

Per: Stephen D. Moffett
Position: President

STEPHEN MOFFETT LTD.

Per: Stephen D. Moffett
Position: President

MARLENE MOFFETT LTD.

Per: Marlene L. Moffett
Position: President

SOWCOW FARMS INC.

Per: Stephen D. Moffett
Position: President

Witness

STEPHEN D. MOFFETT

Witness

MARLENE L. MOFFETT

[10653433-4]

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	T-900-17, T-901-17, T-902-17 AND T-903-17
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v STEPHEN MOFFETT LTD. AND, STEPHEN D. MOFFETT
AND DOCKET:	T-901-17
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v FERME NORD-EST LTÉE
AND DOCKET:	T-902-17
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v SOWCOW FARMS INC., STEPHEN D. MOFFETT AND MARLENE L. MOFFETT
AND DOCKET:	T-903-17
STYLE OF CAUSE:	HER MAJESTY THE QUEEN v MARLENE MOFFETT LTD. AND MARLENE L. MOFFETT
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 12, 2021
ORDER AND REASONS:	FAVEL J.
DATED:	NOVEMBER 10, 2021

APPEARANCES:

Kelly A Peck	FOR THE PLAINTIFF (HER MAJESTY THE QUEEN)
Robert Creamer	FOR THE DEFENDANTS (STEPHEN MOFFETT LTD. AND STEPHEN MOFFETT, FERME NORD-EST LTÉE AND SOWCOW FARMS INC.)
Frederick A. Welsford	FOR THE DEFENDANTS (MARLENE MOFFETT LTD. AND MARLENE L. MOFFETT)

SOLICITORS OF RECORD:

Attorney General of Canada Halifax, Nova Scotia	FOR THE PLAINTIFF (HER MAJESTY THE QUEEN)
Lawson Creamer Barrister and Solicitor Saint John, New Brunswick	FOR THE DEFENDANTS (STEPHEN MOFFETT LTD. AND STEPHEN MOFFETT, FERME NORD-EST LTÉE AND SOWCOW FARMS INC.)
Gorman Nason Barristers and Solicitors Saint John, New Brunswick	FOR THE DEFENDANTS (MARLENE MOFFETT LTD. AND MARLENE L. MOFFETT)