

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Kinsol Timber Systems Ltd. v. Oliphant Properties Inc.*,
2026 BCSC 1229

Date: 20260703
Docket: S195232
Registry: Victoria

Between:

Kinsol Timber Systems Ltd.

Plaintiff

And

Oliphant Properties Inc.

Defendant

Before: The Honourable Justice Armstrong

Reasons for Judgment on *Voir Dire*

Counsel for the Plaintiff:

J.A. Hall
J.A. Bloomenthal

Counsel for the Defendant:

M.N. Peirce
A. Song, Articled Student

Place and Date of *voir dire*:

Victoria, B.C.
May 6, 2025

Place and Date of Judgment:

Victoria, B.C.
July 3, 2026

[1] This case involves a dispute stemming from the construction of a high-end resort facility the defendants wished to build at its resort located in a remote ocean location in British Columbia. The parties began discussing this construction project in October 2017 and continued to explore the possibility of the plaintiff constructing a floating resort up to and including March 28, 2018, when the parties entered into a CCDC 5B contract (the contract) for the construction of the project. There were substantial exchanges and interactions between the plaintiff, the defendant and the plaintiff's designer over the period after October 2017.

[2] The defendant claims the contract contained a binding term that fixed the maximum price it would pay for completion of the contract and the project at \$1.5 million.

[3] The defendants had hoped for completion of their new structure by May 2019 with an expectation of using the new floating building in its resort business for the summer and fall 2019. There were a number of delays in execution of the construction project resulting in the unavailability of the structure by August 2019; the defendants blame this delay on the plaintiff and the plaintiff attributes the delay to the defendant's dilatory failure to provide the necessary plans.

[4] The plaintiff commenced this action on November 20, 2019, and file an amended notice of civil claim on February 12, 2025. The defendant filed its response to civil claim on February 5, 2020, and an amended response to civil Claim on February 14, 2025.

[5] The trial commenced February 4, 2025, and continued with some interruptions until May 8, 2025. After the plaintiff closed its case, Becky Murray one of the principal shareholders of Oliphant properties Inc. testified and provided the bulk of the evidence in the defendant's case. She testified on several days and was to conclude re-examination starting May 6.

[6] On August 8, 2019, the defendant, through its solicitor, informed the plaintiff that the defendant took the position the plaintiff had breached the contract by, *inter alia*:

- a) failing to complete the Lodge within the Guaranteed Maximum Price;
- b) failing to complete the Lodge within the schedule agreed to between the parties; and
- c) failing to complete the Lodge project as agreed upon in the contract, generally.

[7] The defendant informed the plaintiff its conduct was a repudiation of the contract, the defendant accepted the plaintiff's repudiation and intended to take steps to mitigate its damages.

[8] Understandably, the plaintiff denied the defendant's allegations and sued to recover unpaid accounts rendered up to August 2019.

The Application

[9] Between March 28, 2018 and July 2019 the plaintiff had managed the project largely on plans prepared by the defendant's designer, Sarah Davies-Long and deficiencies in her work was a major focus of the plaintiff's frustration with the construction project leading to the dispute between the parties.

[10] This application concerns an about an email chain between Ms. Murray and employees of the plaintiff beginning July 17, 2019, and ending July 31, 2019. The defendant alleges this email chain contains an admission by the plaintiff that it was refusing to continue work on the project thereby repudiating the contract.

[11] The plaintiff contends this email exchange is part of without prejudice settlement negotiations and should not be permitted to go into the evidence.

[12] Defence counsel began re-examination of Ms. Murray on May 6, 2025, and counsel proposed to ask her questions about the email chain. The plaintiff objected to this attempt to use the email communications from July 2019.

[13] Ms. Murrays examination and cross examination had been completed when defence counsel formed the view that various questions put to her in cross examination suggested the plaintiff was intending to argue an unexpected point; the defendant feared the plaintiff would argue that, at all material times it had been ready, willing and able to complete the contract within a maximum cost to the defendant of \$ 1.5 million as provided for in the contract signed in March 2018. The defendant said this line of argument was a surprise and in the nature of a trial ambush.

[14] The defendant argued that the plaintiff had indicated its refusal to complete the contract within the alleged agreed on price in an email dated July 17, 2019 and that any subsequent argument that the plaintiff intended to complete the contract within the \$ 1.5 million was inconsistent with the July 17 email and a surprise to the defendant.

[15] The plaintiff objected to introduction of the documents because the emails involved without prejudice discussions concerning settlement of an aspect of an impending dispute between the parties that would likely involve litigation.

[16] The plaintiff also argued presentation of these documents and communications breached an agreement between counsel made just before the trial commenced that these without prejudice communications and related exchanges would not be introduced by either party at the trial. The defendant's counsel voiced the initial objection to the documents going into evidence.

[17] It is not disputed that plaintiff's counsel prepared a binder of these documents he believed might be objected to by the defence if they were tendered at trial. This binder included the subject emails spanning exchanges beginning July 17 and ending July 31. Defence counsel objected to the introduction of these emails

because they were part of a negotiation between the parties and anything in them (or stemming from them) should not be entered into evidence. Thus, the parties agreed that the subject emails would not be put to any witnesses during the trial.

[18] Toward the end of Ms. Murray's testimony, defendant's counsel proposed to question her about an email that had been sent by Colin Lang (the plaintiff's senior project manager at the time) on July 31, 2019. The plaintiff objected introduction this document because of its connection to the email train even that involved settlement negotiations (beginning July 17, 2019) which were noted to be without prejudice and contained in the agreement made before the trial started.

[19] However, defendant's counsel argued this email (and a prior email from July 17, 2018) should be admitted, in part, because Ms. Murray had been cross-examined on the question of whether the plaintiff was refusing to, or had failed to complete the lodge within a guaranteed maximum price as set out in the contract.

[20] Counsel argued that insofar as the plaintiff had raised this issue in cross-examination, he felt it was essential to include this July 31, 2019, email train. I informed counsel that it was my view that this issue would have to be decided in the context of a *voir dire* on the question of whether this email was to be excluded. I ordered that the documents would not be admitted into evidence and that reasons for this decision would follow. These are those reasons.

[21] The plaintiff opposed its application to admit these documents for three reasons:

- a) The email was a part of a train of emails which discussed settlement of issues that would likely be issues at trial once the breach of the contract was asserted;
- b) Counsel for both parties agreed before the beginning of the trial that the series of emails contained in a binder prepared by plaintiff's counsel would not be referred to in the trial because they related to these settlement discussions; and

- c) It was simply too late in the trial to permit the defendant to rely on documents in re-examination of a defence witness without canvassing the issue or the documents in Ms. Murray's testimony in chief or with the plaintiff's witnesses on this point. After seven weeks of trial this trial permitting use of these documents would have been unduly delayed the trial.

[22] Defence counsel said that he had not attempted to use this document in cross-examination of Mr. Stevenson (the plaintiff's chief operating officer) or examination Ms. Murray because he had not anticipated the plaintiff would argue that the plaintiff was ready, willing and able to complete the construction project and would do so without charging the defendant more than \$1.5 million (after some adjustments).

[23] Similarly, plaintiff's counsel did not examine or cross examine on the documents because the parties had agreed at the outset of the trial these documents could not be used by either party.

[24] However, in submissions, the defendant explained to the court it wished to rely also on the July 17, 2019, email from Mr. Stevenson indicating that the relationship with defendant had broken down and it was abandoning the project. This was mentioned only the next day when argument on the application commenced.

[25] The defendant did not disagree that before the trial started, there was an agreement between counsel that certain documents contained in the plaintiff's proposed book of documents would be excluded because they reflected without prejudice communications concerning events that had happened up to July 17, 2019. He argued that he had been surprised by the plaintiff's mid-trial amendment to its pleadings and had not anticipated a need to rely on these documents.

[26] Plaintiff's counsel asserts that the lawyers agreed that all of these documents from this book with particular reference to tabs 323 and 336 would be excluded due

to defendant's counsel's objection to the presentation of documents (including the July 17, 2019 email) on the basis they contained settlement discussions.

[27] The plaintiff points out that the defendant had never made a demand to the plaintiff to complete the project notwithstanding that costs might exceed \$1.5 million as provided for in the contract. Moreover, the plaintiff never informed Ms. Murray that the plaintiff would not complete the contract if costs exceeded the GMP.

[28] The subject emails reflect that the plaintiff had handed over contract documents to an agent for the defendants and was seeking agreement on terms to facilitate the handover of the project to the defendant. The plaintiff was proposing to do the work necessary to bring the project to a state where it could be safely delivered to perform work to bring the Lodge to a "lock-up" state.

[29] Prior to August 8, 2019, the defendant did not assert that the plaintiff had repudiated the contract and did not intend to complete the project. At that time the defendant was in breach of the contract for failing to pay two outstanding invoices due under the contract.

[30] When these emails were exchanged, the defendant had not terminated the contract but seems to have engaged in discussions about its intention to take over the project. This aspect of the email exchanges seems to have occurred in the context settlement discussions about minimizing the risks to the structure if the plaintiff ceased working.

Analysis

[31] The plaintiff contends that having agreed to the exclusion of these documents and after seven weeks into this trial, the defendant has changed its position with regard to the documents at issue. It had not examined or cross examined any of the relevant witnesses on the substance of these emails or giving notice of its intention to resile from the agreement to exclude same.

[32] In the defendant's initial Response to Civil Claim it pled that the plaintiff had communicated it was "not able to complete the Project within the Gmax Price and that they no longer wished to continue working on the Project". This pleading remained in place throughout the litigation and the issues of the plaintiff's compliance with its obligations under the contract remained live issues. Thus, it is difficult to accept that the defendant was surprised with this position.

[33] The defendant suggests that the documents can simply go into evidence without any testimony from any witnesses to establish that the exchange occurred without accepting anything in the document for the truth of its contents.

[34] The defendant claims the July 17, 2019 email could have been important because it provides evidence that the plaintiff had abandoned any intention to complete the contract at the time. The subject emails might have foreclosed any arguments the plaintiff might make in final submissions that it remained ready willing and able to perform its obligations under the contract. However, the plaintiff took the position it had not repudiated or breached the contract before August 8, 2019

[35] The July 17, 2019 email came from Mr. Stevenson, COO of the plaintiff and was headed by the phrase "Without Prejudice". It reads as follows:

Our team is doing their level best to manage your interest, and ours, through this project. From the outset, Andrew, Mike and I explicitly told you that I you wanted us to control then schedule and the cost, we needed to control the design. We advised you on how to deliver this project successfully and you wilfully went another direction. We have been vocal about our concern around cost and schedule from the very earliest days of the project.

It has become clear that we have our perspective on how things have transpired over the course of this contract, as do you. Unfortunately, we find ourselves at a point where continuing our relationship through completion of this project is no longer viable.

As constructors, we feel a responsibility to bring the Lodge to a modified lockup, assuming adequate funding can be demonstrated, so that you can securely toe it to your location to allow you to self perform the remaining work.

[36] The plaintiff contends that to allow introduction of this document into evidence would require recalling witnesses to give evidence on the details in the emails and to explore its background, context and origins.

[37] The plaintiff amended its notice of civil claim in the midst of this trial on February 12, 2025 and the defendant responded on September 5, 2025 and nothing in that amendment changed the defendant's approach to this issue.

[38] In the absence of an agreement between the parties or authority that would permit this to occur submissions on this voir dire were made, I do not accept that use of these documents without examination or cross examination of the authors or other witnesses can be permitted. The plaintiff would be prejudiced if denied the right to explore the context and background of these exchanges.

[39] In submissions, defendant's counsel broadened his request for the evidence to be considered on this voir dire. Initially the defendant referred only to a July 31 email before argument was made, but in submissions he contended the entire chain from July 17 to July 31 should be included.

[40] The defendant contends the plaintiff's position regarding the GMAX contract price of \$1.5 million changed between filing its 2019 Notice of Civil Claim and this application. The issues concerning whether the plaintiff was "ready willing and able" to complete the contract was the subject of the defendants Noticed to Admit filed August 8, 2025 and the plaintiff's response of the same day.

[41] In any event, the defendant contends that the plaintiff had refused to complete the contract project for \$1.5 million as of August 8, 2019, and this is an issue raised in its defence.

[42] He argued that the primary basis of the defendants claim is that the plaintiff was refusing to complete the Project for a cost to the defendant of \$1.5 million. It contends the termination of the contract was based on the plaintiff's failure "to complete the project for a cost of \$1.5 million".

[43] He argues that the documents and positions taken by the plaintiff are evidence that the plaintiff was not willing to complete the project within the GMAC's price. He contends this is abundantly clear from all submissions and arguments made by the plaintiff.

[44] The defendant argued that if the plaintiff intends to argue that it was going to complete the project for the \$1.5 million GMAX's price, then the July 17, 2019 email correspondence reinforces this Ms. Murray's testimony that the plaintiff had communicated to her as of August 8, 2019 that it was not willing to complete the project for \$1.5. She said that she assumed the plaintiff would not comply with the GMP clause of the contract but that fact was not stated to her.

[45] The defendant wishes to have these documents admitted because they will foreclose any final submissions by plaintiff that the plaintiff was ready, willing and able to finish the contract with a cost to the defendant of \$ 1.5 million. I have observed that this very issue was addressed in the response was raised at para. 31 of the amended notice of civil claim:

On or about July 17, 2019, Plaintiff informed Oliphant that they would not be able to complete the Project within the GMAC's Price, and they no longer wish to continue working on the project.

[46] The defendant also pleaded that by July 2019 defendant had already paid or been invoiced amounts totaling GMAC's Price at which time the project was not close to complete. This was not true.

[47] The plaintiff argues that if the email train is tendered at this time, there will be no context to the creation of the document or any other things that may have been happening at the time were exchanged between the parties.

[48] The plaintiff contends that if the defendant had wanted to allege breaches of the agreement, before terminating the contract it was obliged to notify the plaintiff of the concern and put the plaintiff to the task of rectifying the shortcoming.

[49] Although the plaintiff is incorrect in asserting that the respondent was obliged to give it the opportunity to correct deficiencies in its performance, the defendant was obliged to notify the plaintiff of any failure to comply with the terms of the contract immediately after such failure

[50] The plaintiff also argues that at the beginning of the email exchanges, July 17, 2019, it was trying to work with Mr. Walter towards amending the Contract and resolve their dispute which was potentially heading to litigation.

[51] The thread of the subject communications was centred on changes to the contract and resolving the question of the plaintiff's role in preserving the structure and ensuring a safe handover to the defendants. They were clearly discussing the plaintiff's suggestions to that end but also the defendant's responsibilities to pay outstanding amounts. The email was directed at settling the plaintiff's role in creating a schedule for delivering the building" while recognizing that the contractual relationship. (See email July 31, 2019). It is apparent that the July 31 email was written in the context of a negotiation on proceeding to conclude the plaintiff's involvement.

[52] In that email it was the plaintiff's concern that it be paid for issued invoices and amendments to the contract to reflect the changes discussed between the plaintiff and the defendant's agents. Parties were engaged in discussions about cancelling the current contract forming a new agreement to move forward in the matter as directed by the defendant. This was the context of the discussions that were carried out in the face of an obvious dispute that the parties wanted to resolve at that point.

Conclusion

[53] From the outset of this litigation the defendant contended that the that the plaintiff had informed it that the plaintiff would not be able to complete the project within the GMAX price, and that they no longer wished to proceed with the project.

[54] I have concluded that the defendant's wish to use the July 17, 2019, email comes too late in this trial and because it wishes to avoid the parties' earlier agreement the contrary. This attempt to put this document to the defendant's witness in re-examination is unfair and unexpected by the plaintiff. It was not put to Mr. Stevenson in chief or cross examination and the context of the email can not be ascertained or explored. It was, sent without prejudice and was clearly referring to resolving terms for taking the project to a modified lockup if adequate funding was offered. The defendant objected to this document entering into evidence because it involved without prejudice settlement negotiations.

[55] The principle of excluding settlement negotiation from admission at trial stems from the public interest in settling disputes under a blanket of privilege because this protection serves the public interest in encouraging settlements: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at paras. 11 -16.

[56] There are exceptions to settlement privilege principal wherein the parties make admissions of specific facts in settlement discussions but resile from those clear and unequivocal admissions after settlements have failed. In the context of some litigation issues, admissibility of admissions maybe predicated on establishment of a competing public interest that outweighs the rule against disclosing settlement negotiations.

[57] In *Livingston v. I.M.W. Industries Ltd.*, 2015 BCSC 1627, Kent J. said:

[29] It is certainly arguable that the document and the communications related to it attract settlement privilege, but that privilege is subject to exceptions where "competing public interests" are at play. In particular, it has been held that privilege cannot be used to mislead the court as to the facts of the case and that admissions by a party in settlement correspondence which are inconsistent with other facts or evidence produced by that party to the court can be admitted into evidence as an exception to the privilege: *Brown v. Brown*, 2013 NBQB 438.

[Emphasis added.]

[58] In *Livingston*, the communication contained clear admissions of fact, including proposals as to the plaintiff's resignation from his relationships with the defendant

companies and a formal release. The defendants offer clearly recognized the employment relationship which was at the heart of the defendant's defence. These were so inconsistent with the defendant's position at trial that, notwithstanding the admissions of a proposed settlement offer that recognized the plaintiff was an employee of the company, a resignation of the employee from all relationships, and a formal release in favour of the defendant it was against public policy to allow the defendant to resile from the admission.

[59] This is not the case in this application.

[60] In this case, the defendant contends that the plaintiff simply changed its arguments during the trial and altered its approach to the litigation on the question of its willingness to complete the contract in accordance with the GMAX's Price term. Moreover, there is no clear inconsistency or contradiction on the face of the emails that would engage a public policy argument favouring admissions of these communications.

[61] This issue of the plaintiff's willingness to complete the project within the \$ 1.5 million budget was present from the defendant's first and second Responses to Notice of Civil Claim and would not have come as a surprise to the defendant when Ms. Murray was testifying in chief. At the outset, the defendant pleaded:

(30)45. On or about July 17, 2019, the Plaintiff informed Oliphant that they would not be able to complete the Project within the GMax Price, and that they no longer wished to continue working on the project.

[62] The enforceability of the GMax clause was always an issue raised by the defendants.

[63] Moreover, the suggestion that the plaintiff had repudiated the agreement on July 17, 2019 did not surprise the defendant. I can not accept that the plaintiff's email of July 17, 2019, was an unequivocal repudiation of the contract or the GMax term without testimony of the author and other witnesses that may have been involved.

[64] This will be an issue for trial that will take into account the plaintiff's assertion that the defendant had breached its obligations under the contract concerning its responsibility to provide adequate plans to enable the plaintiff to accurately assess their estimation of the costs to complete in the absence of satisfactory plans and its failure to pay at least two invoices within a reasonable time.

[65] This part of the defendant's defence was in fact raised by the defendant and the issue could (should have) have been pursued in the cross examinations of the plaintiff's witnesses and direct examination of Ms. Murray. This pleading was clearly relied upon by the defendant because it would have been required to prove the allegation asserted in the response. During the trial the defendant chose not to raise this issue with the defendant or the plaintiff's witnesses.

[66] I accept that the emails at issue were sent in the context of both parties blaming the other for the collapse of their relationship and end to the contract. What is clear is that this was a live issue at the time of the July 17, 2019 email and that document was a proposal to engage the plaintiff to facilitate the handover of the project to the defendant's new contractor.

[67] The contents of these emails are substantially different from statements of fact referred to in Livingston. Livingston does not inform an exception to the rule is applicable in this case. In this case the parties began discussions on July 17, 2019 on a without prejudice basis to minimize the risks faced by the defendant arising from the breakdown in the contractual relationship. Undoubtedly, the plaintiff was frustrated by the defendant's ability to provide adequate plans. This is somewhat consistent with the possibility that the absence of adequate plans would have frustrated the plaintiff's ability to complete the project for \$ 1.5 million.

[68] In addition, the defendant's pleadings always put the plaintiff's decision to refuse completion of the contract within the GMAC's Price at the forefront of its submissions. In addition, its assertion that the plaintiff no longer wish to continue working on the project and from July 17, 2019 relied issues.

[69] A second difficulty with defendant's application is the purpose of admitting these communications into evidence and the absence of any witness able to give that evidence this late in a seven-week trial. The defendant does not want the email to be entered as proof of any fact contained but simply as some evidentiary aspect of the narrative that could prevent the plaintiff from arguing that it had never agreed to complete the project for a cost of \$ 1.5 million nor had it refused to complete the project for \$ 1.5.

[70] The defendant recognized that it would have been impractical to call witnesses back to testify about the circumstances surrounding these emails. Thus, I conclude that without testimony, putting the documents into evidence (not for the truth of their contents but for some informational purpose) by simply marking the emails as exhibits in the trial would be unhelpful and ineffective.

[71] It seems to me it cannot be put into evidence without a witness testifying to the same and might very well require the calling of Mr. Stevenson, the apparent author, to testify about the document. Defence counsel did not put this document to Mr. Stevenson nor ask questions on this point, and one wonders if the Rule in *Browne v. Dunn* (1893), 6 R. 67 (H.L.) would limit the court's ability to make much use of the contents.

[72] Next, the defendant's position raised at this stage in the trial is just untenable in the face of the agreement between counsel at the outset of this trial. This alone is an overarching and compelling reason to exclude these documents from trial.

[73] The documents the defendant wants to enter into evidence were contained in the plaintiff's binder provided at the beginning of the trial. The defendant was certain that these documents should not be considered as potential evidence in the trial and objected to the use of those documents because they invaded the region of settlement privilege communications. Counsel could have objected to some of those documents but not all; the parties reached an agreement that all of those documents would be excluded, and the plaintiff conducted its case on that basis. In my view,

there was merit to those objections, and it is too late for the defendant to resile from that agreement.

[74] In the result, I will not accede to defendant's request that these documents, particularly the July 17, 2019 email and the documents that flowed from it be admitted into evidence. Those documents were exchanged in efforts to find an agreeable mechanism for an orderly handover of the project to the defendant. It is chiefly because the defendant's application has come too late in the trial and against the agreement of counsel that I exercise my discretion to preclude the defendant from using them. In addition, I conclude that the parties had accepted that these documents were part of a settlement process and should not be used in the litigation. Clearly both sides had complaints to make about the other at the time of the exchanged emails and litigation was most likely that the defendant decided to exclude them.

[75] The defendant's application is dismissed.

"Armstrong J."