IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Fibreco Export Inc. v. AG Growth International Inc.,* 2023 BCSC 1970

Date: 20231109
Docket: S215438
Registry: Vancouver

Between:

Fibreco Export Inc.

Plaintiff

And:

AG Growth International Inc., also doing business as Westeel Canada, also doing business as AGI Westeel, also doing business as AGI Union Iron Inc., Westeel Canada, also doing business as AGI Westeel, Union Iron Inc., also doing business as Union Iron, also doing business as AGI Union Iron, and Donald W. Deal

Defendants

And:

Herman 123 Ltd., Corr Grain Systems Inc., Pederson Management Ltd., CWA Engineers Inc., Core Engineering Services Ltd., ABC Co., XYZ Co, Marsh Canada Limited/Marsh Canada Limitee and Thomas Liu

Third Parties

These Reasons for Judgment have been redacted for publication purposes

Before: The Honourable Mr. Justice D.M. Masuhara

Reasons for Judgment

Counsel for Fibreco Export Inc.: M. Milne
R. Moore

Counsel for AG Growth International Inc.:	J. Luu D. de Groot F. Hogg
Counsel for Marsh Limited/Marsh Limitee and Thomas Liu:	M. Parrish N. Surkan
Counsel for AGT Food and Ingredients Inc.	W. Stransky
Place and Date of Trial/Hearing:	Vancouver, B.C. October 11–12, 2023
Place and Date of Judgment:	Vancouver, B.C. November 9, 2023

Introduction

[1] On July 27, 2023, Fibreco Export Inc. (“Fibreco”) and AG Growth International Inc. (“AGI”) executed a settlement agreement resolving the claims between them in this action (the “Settlement Agreement”). The settlement did not include AGI’s third party notice against Marsh Canada Limited and Thomas Liu (together, “Marsh”), which AGI advised it intended to continue.

[2] Fibreco and AGI applied to this Court for a sealing order over the Settlement Agreement, seeking to maintain the confidentiality of both the financial and non-financial terms of the settlement. Marsh opposed the sealing order, along with AGT Food and Ingredients Inc. (“AGT”), the plaintiff in a related action.

[3] On October 4, 2023, I handed down my ruling denying the sealing order over the non-financial terms of the Settlement Agreement, imposing instead less restrictive alternative measures to maintain some degree of confidentiality over those terms. That ruling is indexed as *Fibreco Export Inc. v. AG Growth International Inc.*, 2023 BCSC 1719 [*Fibreco*].

[4] The issue of whether the financial terms of the Settlement Agreement should be disclosed was left for the application presently before me. The application, made by Marsh, seeks an order that AGI:

a) provide particulars of AGI’s third party notice against Marsh—namely, the amount paid by AGI to Fibreco in settlement, the amount or portion of the settlement monies allocated to the fault of Marsh, and the amount claimed from Marsh in indemnity; and

b) produce an unredacted copy of the Settlement Agreement, which discloses the financial terms of the settlement.

[5] Marsh argues that the nature of AGI's third party notice, which includes a claim for indemnity for the amount that AGI agreed to pay Fibreco under the

Settlement Agreement, entitles them to know the financial terms of the settlement. Marsh argues that the pleadings alone entitle it to such disclosure. Marsh also argues that AGI's pleadings are deficient and signals an application to strike in the near future.

[6] AGT, while involved as a party in a separate action against Fibreco that arises from the same silo collapse which is to be heard in a joint trial, supports the application.

[7] AGI opposes the application on the basis that settlement privilege applies to the financial terms of the Settlement Agreement, that the information sought does not fall within an exception to settlement privilege, and that this privilege has not been waived.

[8] Fibreco supports the position of AGI.

[9] I understand from the parties that after an extensive review, no Canadian court has considered whether settlement privilege protects against the disclosure of the financial terms of a settlement agreement between two parties, where one of those parties claims the settlement amount in indemnity from a third party.

[10] The burden lies upon the applicant, Marsh, to establish that the case fits within an exception to settlement privilege.

[11] For the reasons that follow, I have concluded that the application should be allowed subject to a requirement which I have identified at the end of these reasons.

Background

[12] In brief, several actions have arisen from the collapse of an agriproducts silo located at a marine terminal owned by Fibreco on September 11, 2020.

[13] I have been case-managing several of the actions arising from the September 11, 2020 silo collapse. The litigation is complex. Additional actions are to be added

to the collection of cases to be heard in the joint trial. The trial, which was to have started this past October, has been adjourned and will be re-scheduled with a duration of approximately 115 days.

[14] One of the actions is Fibreco's claim against AGI—a party involved in the design and construction of the silos—alleging negligence and breach of contract regarding the silos (the "Fibreco Action"). Another of these actions is Fibreco's claim against Marsh—Fibreco's then-insurance broker—alleging that Marsh acted negligently, made misrepresentations, and breached their broker agreement, resulting in a lack of insurance coverage for Fibreco's costs arising from the silo collapse (the "Marsh Action").

[15] Marsh filed a third party notice against AGI in the Marsh Action, claiming Fibreco's damage and loss against Marsh was caused or contributed to by AGI and seeks contribution and indemnity from AGI.

[16] AGI filed a third party notice against Marsh in the Fibreco Action, claiming that but for Marsh's negligence, AGI would not be exposed to a claim of damages by Fibreco. AGI has since amended this third party notice (the "Amended Third Party Notice").

[17] On July 27, 2023, Fibreco and AGI entered into a settlement to resolve the issues between them in the Fibreco and Marsh Actions, as well as the other ongoing litigation between them. In relation to Marsh, the key terms of the Settlement Agreement are as follows:

[redacted]

[18] As I understand AGI's claim, the Settlement Agreement includes payments by AGI to Fibreco intended to compensate for both the remediation costs to the silos (the "Silo Damage") and the towers (the "Tower Defects"). It is only the amount of the settlement allocated to the Silo Damage that AGI claims from Marsh, not the amount allocated to the Tower Defects.

[19] Also, the Settlement Agreement does not contain an admission of fault or responsibility by AGI, nor does the Amended Third Party Notice.

AGI's Amended Third Party Notice

[20] In its Amended Third Party Notice against Marsh, AGI pleads:

> **Part 1: STATEMENT OF FACTS**
>
> …
>
> 28. On July 27, 2023, the AGI Parties and Fibreco entered into a confidential Settlement Agreement (the Settlement Agreement) that settled Fibreco's claimed damages (the Fibreco Damages) as alleged against the AGI Parties in the Notice of Civil Claim in this Action.
>
> 29. The Fibreco Damages include amounts for which Fibreco ought to have received financial coverage under the Policy (the Fibreco Insured Amounts), and to which the AGI Parties should not have been required to contribute, regardless of whether they caused the Collapse or the Silo Damage by reason of any cause, as a result of the AGI Parties being an "Insured" under the Policy and/or a waiver of subrogation in the Policy against "Insureds". But for Marsh's and Liu's negligence, neither the AGI Parties nor Fibreco ought to have paid the Fibreco Insured Amounts; rather they should have been fully covered under and paid by the Policy.
>
> 30. The AGI Parties have now paid a portion of the Fibreco Insured Amounts, and the balance of the Fibreco Insured Amounts are unpaid and remain a claim by Fibreco against Marsh in B.C. Supreme Court Action No. 218900 (Vancouver Registry), being tried concurrently with this Action (the Fibreco-Marsh Action).
>
> 31. The AGI Parties seek contribution and/or indemnity from Marsh and Liu for a proportion of the value of the Fibreco Insured Amount, as proven in the Fibreco-Marsh Action, equivalent to the proportion of the Fibreco Insured Amounts that the AGI parties paid Fibreco.

> **Part 2: RELIEF SOUGHT**
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> 32. The AGI Parties claim against Marsh and Liu for:
>
> (b) Any part of the Fibreco Insured Amount, as proven in the Fibreco Marsh Action, to which AGI paid Fibreco pursuant to the Settlement Agreement;
>
> (c) General damages for Marsh and/or Liu's negligence and/or breach of the Broker Agreement, under which the AGI Parties were a third party beneficiary;
>
> …

[21] AGI in its Amended Third Party Notice has deleted its reliance upon s. 4 of the *Negligence Act*, R.S.B.C. 1996, c. 333 [*Negligence Act*], which provides a statutory basis for a claim for contribution and indemnity. The "Legal Basis" section of the Amended Third Party Notice states:

> 35. Marsh and Liu are liable to indemnify the AGI Parties for any part of the Fibreco Insured Amount, as proven in the Fibreco Marsh Action, to which AGI paid Fibreco pursuant to the Settlement Agreement up to the amount of $85.3 million for the following reasons:
>
> (a) The negligence of Marsh and Liu caused damages . . .
>
> (b) Further, Marsh and Liu breached the Broker Agreement, under which the AGI Parties were a third party beneficiary.

Legal Principles

Demand for Particulars

[22] Marsh seeks an order for further and better particulars pursuant to R. 3-7(22) of the *Supreme Court Civil Rules* [*Rules*]. Specifically, Marsh seeks particulars of the amounts paid by AGI to Fibreco in settlement, the amount or portion of the settlement monies allocated to the fault of Marsh, and the amount claimed from Marsh in indemnity.

[23] An order for particulars pursuant to R. 3-7(22) is primarily one of judicial discretion. The guiding principle is whether an order for particulars is "necessary" to inform a party of the case it has to meet and to allow it to prepare for trial: *Sidhu v. Hiebert*, 2018 BCSC 401 [*Sidhu*] at paras. 34–35, 38, citing *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada Ltd.*, 79 B.C.L.R. (2d) 126, 1993 CanLII 187 (S.C.).

[24] The purpose of particulars is to ensure the fair and open conduct of proceedings by requiring a party to clarify the issues raised in the pleadings, such that the opposing party can prepare for discovery and trial without surprise: *Sidhu* at para. 33. Counsel advise that the date for the examination of discovery of the representative for Marsh has been set.

[25] The Court of Appeal identified six functions of particulars in *Cansulex Ltd. v. Perry*, [1982] B.C.J. No. 369, 1982 CarswellBC 836 (C.A.) at para. 15:

> (1) to inform the other side of the nature of the case they have to meet as distinguished from the made in which that case is to be proved;
>
> (2) to prevent the other side from being taken by surprise at the trial;
>
> (3) to enable the other side to know what evidence they ought to be prepared with and to prepare for trial;
>
> (4) to limit the generality of the pleadings;
>
> (5) to limit and decide the issues to be tried, and as to which discovery is required, and
>
> (6) to tie the hands of the party so that he cannot without leave go into any matters not included.

Nature of Third Party Proceedings

[26] A party, other than the plaintiff in the main action, may file a third party notice against a person pursuant to R. 3-5(1)(a) alleging that it is entitled to contribution or indemnity from that person.

[27] The purpose of third party proceedings is to avoid multiple actions and inconsistent findings: *McNaughton v. Baker* (1988), 25 B.C.L.R. (2d) 17, 1988 CanLII 3036 (C.A.); *Tyson Creek Hydro Corporation v. Kerr Wood Leidal Associates Limited*, 2014 BCCA 17 at paras. 16–17, 20.

[28] Third party proceedings are not mere incidents of the main action. They are "independent actions which stand upon their own feet": *Wire Rope Industries of Canada (1966) Ltd. v. B.C. Marine Shipbuilders Ltd.*, [1981] 1 S.C.R. 363 at 379, 1981 CanLII 182 (SCC).

[29] A third party notice, like a notice of civil claim, must set out the material facts giving rise to the claim, the relief sought, and a concise summary of the legal basis for the relief sought: R. 3-5(1), (3), and (11), 3-1(1).

[30] Justice Voith noted in *Mercantile Office Systems Private Limited v. Worldwide Warranty Life Services Inc.*, 2021 BCCA 362 [*Mercantile*] that a counterclaim—a different type of pleading—must independently set out all material facts that underlie the claim and may not simply incorporate portions of other pleadings by reference:

> [32] A counterclaim is an independent claim raised by the defendant, which is in the nature of a cross claim. Rule 3-4(1) requires that a counterclaim be pleaded separately from a response to civil claim. Furthermore R. 3-4(6) indicates that, except to the extent that R. 3-4 provides otherwise, Rules 3-1, 3-7 (pleadings generally) and 3-8 (default judgment) apply to a counterclaim as if it were a notice of civil claim. Form 3, under Part 1: Statement of Facts, requires that the claimant "set out a concise statement of the material facts giving rise to the counterclaim."
>
> [33] Thus, though there may be instances where the material facts underlying a response and the material facts that underlie a counterclaim overlap or mirror each other, a counterclaim remains a distinct claim and the material facts that pertain to that claim must be concisely identified. There is no broad ability on the part of a defendant to include material facts in its response to civil claim that are simply irrelevant to that response. Similarly, there is no broad ability on the part of that same party to rely on material facts in its counterclaim that are adopted from a response to civil claim and that have nothing to do with the counterclaim itself. Otherwise both the response and counterclaim would contain material facts that have nothing to do with the defences and claims being advanced in the respective pleadings.

[31] While Justice Voith's decision in *Mercantile* specifically concerned counterclaims, I find that his observations apply equally to third party notices. R. 3-5(11) provides that R. 3-1 (Notice of Civil Claim) applies to a third party notice as if it were a notice of civil claim, which is what R. 3-4(6) provides in the case of counterclaims. Further, R. 3-5(3) provides that a party must file a third party notice in Form 5 that accords with the requirements for all pleadings set forth in R. 3-7 (Pleadings Generally).

[32] A third party claim for contribution and indemnity may continue even after the plaintiff has reached a settlement with a defendant in the main action, provided the

third party notice was issued prior to settlement: *0932053 B.C. Ltd. v. TBM Holdco Ltd.*, 2018 BCSC 368 at para. 88; *Kim v 1048656 B.C. Ltd.*, 2023 BCSC 192 at para. 72.

Settlement Privilege

[33] My review of the legal principles relating to settlement privilege in my recent decision in *Fibreco* are equally relevant to the present application:

> [35] The leading case on settlement privilege is *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 [*Sable*]. In that case, Justice Abella confirmed that all communications made in an attempt to effect a settlement—including the contents of a concluded settlement agreement—are protected by a presumption of privilege: at paras. 12–18. The purpose of settlement privilege is to promote the resolution of disputes in a manner that avoids the personal and public expense and time involved in litigation: *Sable* at para. 11. The idea is that parties will have more "open" and "fruitful" negotiations, and therefore will be more likely to settle, if they have confidence that their communications will not be disclosed or used against them in court proceedings: *Sable* at para. 13.
>
> [36] Justice Abella affirmed in *Sable* that exceptions to settlement privilege exist "when the justice of the case requires it": at para. 12. The party seeking an exception to settlement privilege must show, on a balance of probabilities, that "a competing public interest outweighs the public interest in encouraging settlement": *Sable* at para. 19, citing *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 at para. 20.

[34] The Court of Appeal confirmed in *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4 [*Dos* Santos] that in order to fall within an exception to settlement privilege, the documents or information sought must be both relevant and necessary "to achieve either the agreement of the parties to the settlement, or another compelling or overriding interest of justice": at para. 20. Disclosure of privileged information or documents may be required to satisfy the public interest in the proper disposition of the litigation if it outweighs the public interest in encouraging settlement in the circumstances: *Dos Santos* at paras. 17–20, citing *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276, 1992 CanLII 4039 (C.A.) at para. 20 [*Middelkamp*]. The Supreme Court of Canada affirmed and applied these principles from *Dos Santos* in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 at para. 19 [*Sable*].

Position of Marsh

[35] Marsh started its argument quoting Justice Dunphy: “Settlement privilege cannot be invoked to mask the true nature of a settlement from the party being asked to pay for it” in *TD Bank, N.A. v. Lloyd’s Underwriters*, 2016 ONSC 5993 at para. 51 [*TD Bank*].

[36] Marsh argues that particulars of the amount paid by AGI to Fibreco under the Settlement Agreement are necessary for it to know the case that it must meet and to prepare for trial. The fact that the Amended Third Party Notice exists in a constellation of other claims arising from the same event and being heard together does not, in Marsh’s view, alter the fact that the Amended Third Party Notice must be able to stand alone.

[37] Marsh argues that the Amended Third Party Notice is impossibly vague. Marsh notes in particular the wording of para. 32(b) under the “Relief Sought” section and says it is impossible for either Marsh or the Court to understand what indemnity is being claimed, as there are at least three secret and unpleaded amounts referenced:

> (a) the amount “which AGI paid to Fibreco pursuant to the Settlement Agreement”;
>
> (b) the “Fibreco Insured Amount”, which amount the Amended Third Party Notice states will be “proven in the Marsh Fibreco Action” even though the notice of civil claim in the Marsh Action makes no reference to such a term or amount. Rather, Part 3, paragraph 72 of the Marsh Action notice of civil claim expressly pleads a series of particularized “Damages”; and
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> (c) the amount or portion of the “Fibreco Insured Amount … which AGI paid Fibreco pursuant to the Settlement Agreement”.

[38] It is argued the deficiencies are not just technical but go to the core of the substance of the indemnity claim.

[39] Marsh argues that the Supreme Court of Canada's decision on settlement privilege in *Sable* does not protect from disclosure the amounts that AGI paid to Fibreco under the Settlement Agreement, a portion of which it now seeks from Marsh in indemnity. It claims that this case falls within the exception to settlement privilege that applies when the public interest in the "proper disposition of litigation" outweighs the public interest in encouraging settlement, as discussed in *Middelkamp* and *Dos Santos*. Marsh argues that the financial terms of the Settlement Agreement are both relevant and necessary for the proper adjudication of AGI's Amended Third Party Notice.

[40] Alternatively, if the information sought does not fall within an exception to settlement privilege, Marsh argues that AGI waived privilege over the settlement amount by relying on the facts and circumstances as material facts in its Amended Third Party Notice, citing *Soprema Inc. v. Wolridge Mahon LLP*, 2016 BCCA 471.

[41] In terms of similarity, Marsh relies upon this Court's decision in *Hayes Heli-Log Services Ltd. et al. v. Acro Aerospace Inc. et al.*, 2006 BCSC 1580 and the Ontario Superior Court of Justice's decisions in *TD Bank* and *IPEX Inc. v. AT Plastic Inc.*, 2011 ONSC 4734. Courts found in each of these cases that the balance of public interests favoured production of the settlement agreements, including settlement amounts, over the maintenance of settlement privilege.

[42] Marsh notes that AGI has deleted the reference to s. 4 of the *Negligence Act* from the legal basis section of the Amended Third Party Notice, and it argues that AGI has therefore abandoned its claim for contribution, leaving only indemnity as relief. It cites *The Owners, Strata Plan LMS 1751 v. Scott Management Ltd.*, 2010 BCCA 192 at para. 20 [*Strata Plan LMS 1751*] as support for the proposition that there is no right to contribution at common law between concurrent tortfeasors in British Columbia. Marsh argues that the relief available in indemnity does not sound

in damages but in restitution. According to Marsh, this distinction strengthens their argument that the disclosure of the settlement amount is required now as opposed to waiting until the determination of the actions that fix liability, quantum, and allocation of fault.

Position of AGI

[43] AGI argues that class settlement privilege is a full answer to the application. It claims that settlement privilege applies to the settlement amount, that the information sought does not fall within an exception to settlement privilege, and that it did not waive this privilege. It further claims that the disclosure of the settlement amount is not necessary for Marsh to know the case against it.

[44] AGI argues s. 8 of the *Negligence Act* provides a legal basis for its claim against Marsh for contribution and indemnity, despite the fact that AGI removed all references to the *Negligence Act* in its Amended Third Party Notice and that it would not seek to amend its pleadings further. Section 8 provides:

> 8 This Act applies to all cases where damage is caused or contributed to by the act of a person even if another person had the opportunity of avoiding the consequences of that act and negligently or carelessly failed to do so.

[45] AGI argues that the terms "contribution" and "indemnity" are often used synonymously in third party pleadings. It submits that contribution refers to recovery of part of the defendant's liability, whereas indemnity refers to recovery of the whole of its liability. The concept to apply in this case, AGI argues, will not be known until the end of the trial, since it is for the Court to determine the proper share of liability—either the entirety or only a portion—to attribute to Marsh. In support of these propositions, AGI cites Frederick M. Irvine, ed., *McLachlin and Taylor, British Columbia Practice*, 3rd ed., vol. 1 (Markham, Ont.: LexisNexis Canada Inc., 2006) at Rule 3-5(1) for definitions [*McLachlin and Taylor*].

[46] AGI argues that disclosure of the settlement amount in this case should only be made for the purpose of avoiding double recovery. Such disclosure, according to

AGI, must occur after trial, once the Court has made its findings concerning the attribution of fault in the multiple trials being heard together and turns to the assessment of damages.

Discussion

[47] The tension that exists here is between class settlement privilege and the right of a party who is being sued for indemnity of monies paid by a settling party under a settlement agreement to know the settlement amount.

[48] I readily accept, and all parties agree, that settlement privilege applies to the particulars sought by Marsh and the unredacted version of the Settlement Agreement. What I am to determine is whether Marsh has discharged the high burden of establishing that this case falls within an exception to settlement privilege, and further, whether it is appropriate to order the particulars sought pursuant to R. 3-7(22).

[49] In my view, these determinations involve similar considerations. The first involves asking whether the particulars are both relevant and necessary to the proper disposition of the Amended Third Party Notice, such that the public interest in their disclosure for the proper disposition of the litigation outweighs the public interest in encouraging settlement: *Dos Santos*. The second involves asking whether the particulars are necessary to inform Marsh of the case it has to meet in the Amended Third Party Notice and to allow it to prepare for trial: *Sidhu*. As a result of this overlap, I have combined my analysis of these questions.

[50] I will first address the legal nature of AGI's Amended Third Party Notice. I will then address whether AGI's Amended Third Party Notice requires further particularization.

The Legal Nature of AGI's Amended Third Party Notice

[51] I reject AGI's position that its deliberate removal of all references to the *Negligence Act* in its Amended Third Party Notice was not legally significant. As

Justice Voith noted in *Sahyoun v. Ho*, 2013 BCSC 1143 [*Sahyoun*] at paras. 32—33, the *Rules* require plaintiffs to expressly plead a statute that they rely on to advance their cause of action. Following its amendments, AGI has not done so here, perhaps to avoid an admission of fault as required in the application of s. 4 of the *Negligence Act*. AGI affirmed at the hearing of this application that it was not seeking to further amend it pleadings.

[52] In its submissions, AGI relied on s. 8 of the *Negligence Act*, which states that the "Act applies to all cases where damage is caused or contributed to by the act of a person". I do not think s. 8 alone imports the application of s. 4, such that the Amended Third Party Notice may be properly characterized as a claim for contribution and indemnity under the *Negligence Act* without expressly pleading the statute or fulfilling its related requirements.

[53] AGI's argument that contribution and indemnity are "often used synonymously" does not alter the fact that they are distinct legal concepts, despite their "statutory fusion" under the *Negligence Act*: *McLachlin and Taylor* at 3-52. The two cases that AGI points to in support of this argument are *0932053 B.C. Ltd. v. TBM Holdco Ltd.*, 2018 BCSC 368 and *Tucker (Guardian at Litem) v. Asleson*, 86 D.L.R. (4th) 73, 1991 CanLII 8258 (B.C.S.C.). However, unlike the present case, both of these cases involved causes of action that were expressly pleaded under s. 4 of the *Negligence Act*, and the distinction between contribution and indemnity was therefore merely less practically relevant.

[54] As conceded by AGI, there is no claim available for contribution under the common law for a case like the present: *Strata Plan LMS 1751* at para. 20. Section 4 of the *Negligence Act* was put in place to correct this: *McLachlin and Taylor* at 3-51–3-52. In the absence of pleadings that relate to the *Negligence Act*, what remains of AGI's Amended Third Party Notice is a claim for relief in indemnity based on the common law.

[55] Claims in indemnity for amounts paid in settlement are claims for restitution, not damages: *Family Trust Corp. v. Harrison*, [1986] O.J. No. 2555, 1986 CarswellOnt 536 (Ont. Dist. Ct.), citing *McGregor on Damages*, 14th ed. (London: Sweet & Maxwell Ltd., 1980). To assess a plaintiff's loss in such cases, either the plaintiff must strictly prove its losses, or, where strict proof would be too difficult to establish, the Court must assess the reasonableness of the settlement: *Parkhill Excavating Limited v. Robert Young Construction*, 2017 ONSC 6903 at paras. 188-193.

[56] AGI submits that it will be possible for it to strictly prove its losses in this case once the Court allocates fault between Marsh and AGI and assesses Fibreco's damages in the Marsh Action. Therefore, according to AGI, there is no need for either the Court or Marsh to assess the reasonableness of the settlement or know the amount of the settlement before trial.

[57] I disagree. AGI's proposed model for the assessment of damages in its Amended Third Party Notice depends on the determination of fault and the assessment of damages in another action. This model would offend the proposition from *Mercantile* that all material facts necessary to advance a claim or a defence in an action must be set out in a party's pleadings in that action. Further, it would practically permit AGI to proceed with a claim for contribution despite no such claim existing at common law and AGI having deliberately removed the statutory basis for such a claim—that is, s. 4 of the *Negligence Act*—from its Amended Third Party Notice.

[58] The legal nature of the Amended Third Party Notice, which is a common law claim in indemnity for amounts paid in settlement, underscores the relevance and necessity of the disclosure of the settlement amount in this case.

Ambiguity in AGI's Amended Third Party Notice

[59] I agree with Marsh's submission that the wording of the Amended Third Party Notice, particularly para. 32(b), is vague and ambiguous, and as such, is not in

accordance with the object and function of pleadings as helpfully summarized by Voith J. in *Sahyoun* at paras. 16—20. The disclosure of the settlement amount paid by AGI and the other financial terms sought is necessary to the proper disposition of AGI's indemnity claim against Marsh. Marsh is entitled to know the true nature of the claim in order to be able to properly defend against it. Efficiency and fairness require it.

[60] It is currently impossible for Marsh, or the Court, to know what amounts AGI claims in indemnity without reference to other pleadings, and even then, such amounts remain unclear. For example, at paragraph 32(b) of the Amended Third Party Notice, AGI seeks a proportion of the total amount which AGI paid Fibreco pursuant to the Settlement Agreement that Fibreco would have received under an insurance policy but for Marsh's negligence. AGI claims that this amount will be proven in the Marsh Action. However, as Marsh notes, the notice of civil claim in the Marsh Action itself makes no reference to such an amount. Moreover, there may be other settlements that could eliminate the Court's need to make the determinations AGI foresees.

[61] Further, the allocation of remedial costs paid by AGI to Fibreco between the Tower Defects and the Silo Damage in the Settlement Agreement requires investigation. This allocation is clearly relevant and necessary for Marsh to be able to understand the case it has to meet, given that it is only the amount of the settlement allocated to the Silo Damage that AGI claims from Marsh in indemnity.

[62] In *Sable*, the Supreme Court of Canada found that the public interest in promoting settlement outweighed the public interest in the disclosure of the settlement amounts. However, in that case, the plaintiff entered into settlement agreements with some of the multiple defendants, and then continued to pursue its claim against the non-settling defendants for only the loss they actually caused. Critically, *Sable* did not involve a claim in indemnity against the non-settling defendants for the amounts it paid to the settling defendants, as is the case here.

Further, the Court found that the non-settling defendants were "fully aware" of the claims they needed to defend themselves against and of "the overall amount" that the plaintiff was seeking. I therefore do not find that *Sable* provides a full answer to this application.

[63] In my view, a party cannot claim indemnification against a third party for an amount paid under a settlement agreement, which they say was made necessary by the fault of that third party, without disclosing the essential fact of how much they say they were obliged to pay in settlement or how much of the amount paid they now claim in indemnity.

[64] I also note that while the specific amount of the Settlement Agreement has not been disclosed, AGI has made considerable financial disclosure in public statements: see *Fibreco* at paras. 17–20. In my view, this voluntary disclosure weakens the public interest in maintaining settlement privilege argument over the settlement amounts in this case: *Fibreco* at para. 67.

Conclusion

[65] For these reasons, I find that this case falls within the exception to settlement privilege that exists where the public interest in the proper disposition of the litigation outweighs the public interest in promoting settlement. Without the demanded particulars, Marsh cannot know the true nature of AGI's indemnity claim or be able to properly defend against it.

[66] Based on the result, I do not intend to address the issue of waiver of privilege.

[67] I order that:

a) AGI shall provide particulars of the Settlement Agreement sought by Marsh in its notice of application; and

b) AGI shall list and produce in Part 1 of an amended list of documents an unredacted copy of the Settlement Agreement.

[68] While I have granted Marsh's application, I am not persuaded that the proper disposition of the litigation also requires disclosure of the settlement amounts to the other parties involved in this multi-party litigation or to the public. Therefore, prior to the above orders taking effect, the parties are to propose a process for protecting the information from disclosure to the other parties involved in the actions which are being heard together with this action, in addition to the public. This method will be necessary, for example, to protect against disclosure in the context of the collection of evidence during examinations for discovery and the discovery of documents.

[69] The parties are to schedule an appearance before me to finalize this process.

"The Honourable Mr. Justice Masuhara"