CITATION: Evertz Technologies v. Lawo AG, 2024 ONSC 1478
COURT FILE NO.: CV-18-00597979-0000
DATE: 20240318

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: *Evertz Technologies Inc. et al v. Lawo AG et al*

BEFORE: Associate Justice Rappos

COUNSEL: *Zohar Levy and Jordan Allison*, for the Plaintiffs Evertz Technologies Limited and Evertz Microsystems Limited

Anu Koshal and Rachel Chan, for the Defendants Providius Corp., Tony Zare (a/k/a Antony Zarezadeqan), Ayman Al Khatib and Jackson Wiegman

Laurent Massam and Matthew Karabus, for the Defendants Lawo AG, Lawo Holding AG, Lawo Inc., Lawo Group USA, Inc., Lawo Corp. and Albert Faust

HEARD: November 10, 2023

REASONS FOR DECISION

Overview

[1] The Plaintiffs commenced this action against two sets of Defendants, referred to below as the "Lawo Defendants" and the "Providius Defendants". Litigation was also commenced in Delaware by one of the Plaintiffs against three of the Lawo Defendants.

[2] The Plaintiffs and the Lawo Defendants have settled this action and the Delaware litigation.

[3] The Plaintiffs wish to discontinue this action against the Lawo Defendants and amend their statement of claim to remove claims against the Lawo Defendants.

[4] The Plaintiffs have disclosed redacted Settlement Agreements (as defined below) to the Providius Defendants. The agreements are currently subject to court orders regarding their use.

[5] The issue on this motion concerns the treatment or use of the Settlement Agreements following the discontinuance of the action as against the Lawo Defendants.

[6] The Plaintiffs argue that the Settlement Agreements should be protected from use or disclosure outside of this litigation. The Providius Defendants argue that they should not be prevented from referring to the terms of the Settlement Agreements in a claim they intend to bring against the Plaintiffs and Lawo (as defined below) arising as a result of the terms of the settlement between Evertz and Lawo.

[7] For the reasons that follow, I dismiss the Plaintiffs' request for an order continuing the confidentiality provisions concerning the Settlement Agreements set out in prior court orders.

Factual Background

[8] Evertz Technologies Limited and Evertz Microsystems Limited (collectively, "**Evertz**" or the "**Plaintiffs**") design, manufacture, and market video and audio infrastructure solutions for the television, telecommunications, and new-media industries.

[9] The Defendant Providius Corp. ("**Providius**") develops products that help broadcast networks and cable companies monitor and analyze digital video services.

[10] The Defendants Lawo AG, Lawo Holding AG, Lawo Inc., Lawo Group USA, Inc., and Lawo Corp. (collectively, "**Lawo**") are involved with products and services in broadcast live production and infrastructure.

[11] Lawo is a 49% shareholder of Providius and had two nominees on its board of directors. Lawo and Providius entered into a license agreement which provided Lawo with an exclusive license over all of Providius' products. Given that exclusive license, Providius was largely dependent on Lawo for the sale of its products.

[12] The Defendants Albert Faust ("**Faust**"), Tony Zare (a/k/a Antony Zarezadeqan) ("**Zare**"), Ayman Al Khatib ("**Al Khatib**") and Jackson Wiegman ("**Wiegman**") are former employees of Evertz (collectively, the "**Individual Defendants**").

[13] Evertz alleges that, among other things: (a) it developed a market-leading solution for converting traditional broadcast network communication standards to IP; (b) the Individual Defendants stole Evertz's confidential information and used it for the benefit of themselves, Providius and Lawo; and (c) the Defendants conspired to build their own IP-based network product line using information stolen from Evertz.

[14] On May 18, 2018, Evertz commenced this action against Lawo and Faust (collectively, the "**Lawo Defendants**"), and Providius and Zare, Al Khatib and Wiegman (collectively, the "**Providius Defendants**") seeking, among other things, damages against all of the Defendants in the amount of $600 million for breach of confidence, conspiracy to injure, conspiracy by unlawful means and unjust enrichment.

[15] Lawo and Providius entered into a joint defence and common interest privilege agreement regarding their joint strategy for defending this action.

[16] On February 12, 2019, one of the Plaintiffs, Evertz Microsystems Limited ("**EML**"), filed a Complaint for Patent Infringement against Lawo AG, Lawo Inc. and Lawo Corp. (collectively, the "**Lawo Delaware Defendants**") in the United States District Court for the District of Delaware (the "**Delaware Litigation**").

[17] The Providius Defendants are not parties to the Delaware Litigation.

[18] On March 11, 2019, EML filed an amended complaint in the Delaware Litigation that refers to this litigation.

[19] On June 4, 2022, EML and the Lawo Delaware Defendants settled the Delaware Litigation and Evertz settled this action as against the Lawo Defendants.

[20] On that same day, counsel to the Lawo Defendants advised counsel to the Providius Defendants that they were no longer in common interest privilege in this action.

[21] On June 7, 2022, counsel to the Lawo Defendants advised counsel to the Providius Defendants that a settlement had been reached that released the Lawo Defendants from this action. As a result, Evertz would be moving to dismiss the action as against the Lawo Defendants, and would limit any continuation of its claim against the Providius Defendants to only their share of several liability.

[22] Following the announcement of the settlement, Lawo's nominees to the Providius board of directors resigned, and Lawo terminated the license agreement with Providius and ceased providing support to products under the license agreement.

[23] On June 27, 2022, counsel to Evertz sent excerpts from the settlement agreement between Evertz and the Lawo Defendants to counsel to the Providius Defendants. The excerpts indicated that, among other things, Evertz would provide indemnity to the Lawo Defendants.

[24] On July 15, 2022, counsel to Evertz sent draft motion materials for a dismissal of the action as against the Lawo Defendants to counsel to the Providius Defendants. Evertz inquired whether the Providius Defendants would agree to a release of this action as against the Lawo Defendants.

[25] On August 4, 2022, counsel to the Providius Defendants requested disclosure of the full settlement agreement before they could provide their position in connection with Evertz's motion.

[26] The parties exchanged correspondence regarding their respective positions as to whether Evertz had to disclose to the Providius Defendants the entire settlement agreement, given that the Providius Defendants were not parties to the Delaware Litigation.

[27] On August 25, 2022, Evertz served its motion record for an order dismissing the action without costs as against the Lawo Defendants, an order restricting Evertz's claims as against the Providius Defendants to the proportionate share of damages attributable to the several liability of the Providius Defendants and any joint liability among the Providius Defendants, and an order granting Evertz leave to serve and file an Amended Amended Statement of Claim that removes claims as against the Lawo Defendants.

[28] The motion was originally returnable on February 28, 2023.

[29] Leading up to the motion date, the parties exchanged proposals regarding production of the Ontario litigation agreement to the Providius Defendants.

[30] On February 24, 2023, the parties agreed to terms and the Ontario litigation agreement (the "**Ontario Settlement Agreement**") was provided to counsel to the Providius Defendants. The items redacted in the Ontario Settlement Agreement are the settlement payment amount, wire transfer details, and another amount.[1]

[31] On February 25, 2023, the Providius Defendants took the position that Evertz had not provided a complete copy of the settlement agreement between the parties, and as a result, the Providius Defendants were not bound by the production terms.

[32] On February 28, 2023, Associate Justice McAfee granted an order, on consent of the parties, that Evertz's motion was adjourned to a date to be set, and set out how the Ontario Settlement Agreement was to be handled pending the return of the motion.

[33] The order provides that, among other things, the terms of the Ontario Settlement Agreement would be kept confidential as between the parties and the Court. This term would not prevent the Providius Defendants from commencing counterclaims, cross-claims or new actions against the Plaintiffs and the Lawo Defendants, as long as they did not refer to the terms of the Ontario Settlement Agreement in publicly filed materials.

[34] Evertz's motion was scheduled to be heard on October 13, 2023.

[35] In the week prior to the hearing date, Evertz offered to produce to the Providius Defendants a copy of the settlement agreement regarding the Delaware Litigation (the "**Delaware Settlement Agreement**"), provided that the Providius Defendants agreed to disclosure conditions.

[36] The parties were unable to come to terms prior to the return of the motion.

[37] On October 13, 2023, the parties appeared before me with respect to Evertz's motion. The parties informed me that they had come to terms that morning regarding production of the Delaware Settlement Agreement to the Providius Defendants.

[38] The items redacted in the Delaware Settlement Agreement are the settlement payment amount, wire transfer details, contact details for the parties, and another amount.[2]

[39] Following review of the Delaware Settlement Agreement, the Providius Defendants requested an adjournment so that they could have sufficient time to determine whether they intended to oppose Evertz's motion.

[40] As set out in my Endorsement dated October 13, 2023, I agreed to adjourn the hearing and signed an order, on consent of the parties, setting out the terms upon which the Delaware Settlement Agreement was to be held pending the return of the adjourned motion. The terms were

[1] Given the existing confidentiality orders, I have not provided a greater description of the nature of this amount.
[2] *Ibid.*

the same as those contained in the Order of Associate Justice McAfee regarding the Ontario Settlement Agreement.

[41] Copies of the Delaware Settlement Agreement and the Ontario Settlement Agreement (collectively, the "**Settlement Agreements**") were provided to the Court in a sealed envelope marked "Confidential".

[42] I have reviewed the terms of the Settlement Agreements and, without detailing what the terms are, can confirm that they contain terms that directly impact Providius. I note that the Settlement Agreements provide that the parties are to keep the terms confidential.

[43] The Providius Defendants provided to the Court a Supplementary Factum that was not filed with the Justice Services Online portal or uploaded to CaseLines, as it contains references to terms of the Settlement Agreements.

[44] At the hearing of the motion, the parties informed me that, subject to coming to an agreement on the terms of a draft order, the Providius Defendants had consented to the dismissal of the action as against the Lawo Defendants and the amendments to the Amended Statement of Claim, but only on terms which did not include any restrictions on the use of the Settlement Agreements by the Providius Defendants.

Issue

[45] Should the Court extend the confidentiality terms governing the use of the Settlement Agreements?

Positions of the Parties

[46] Evertz argues that the Settlement Agreements are privileged and should be protected from use or disclosure outside of this litigation until a judge makes a determination that the Settlement Agreements are relevant in this action. Evertz points to decisions of this Court where Pierringer Agreements were ordered to be kept confidential.

[47] Evertz argues that maintaining the confidentiality of the Settlement Agreements provides a baseline protection from misuse, which is necessary to facilitate the key policy goal of promoting settlement. Without protections, Providius will have obtained a privileged, irrelevant document that is not subject to the deemed undertaking rule, which would be unfair to Evertz.

[48] In the alternative, Evertz argues that a confidentiality order is necessary and that they have satisfied the test for such an order established in the decisions of the Supreme Court of Canada in *Sierra Club of Canada v. Canada (Minister of Finance)* ("***Sierra Club***") and *Sherman Estate v. Donovan* ("***Sherman Estate***"). Evertz claims that a confidentiality order will protect the commercial and confidential interests of the parties and promote settlement, and Providius would not suffer any prejudice if the Court maintains the confidentiality of the Settlement Agreements.

[49] The Providius Defendants argue that Evertz has not satisfied the procedural requirements for a confidentiality order, and have not met the very high burden required to obtain a confidentiality order as set out in *Sierra Club and Sherman Estate*.

[50] The Providius Defendants claim that the terms of the Settlement Agreement are designed to harm them, and that Evertz should not be permitted to obtain a confidentiality order that prevents the Providius Defendants from seeking redress against Evertz and Lawo by commencing an action that pleads the terms of the Settlement Agreements and permits production of the agreements in that action.

Analysis

Pierringer Agreements, Privilege and Production

[51] The starting point of the analysis is that the Settlement Agreements are a "Pierringer Agreement", which is an agreement that "allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused. There is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other."[3]

[52] In *Sable Offshore Energy Inc. v. Ameron International Corp.* ("***Sable***"), the Supreme Court of Canada stressed the importance of settlement privilege and its applicability to the contents of settlement agreements such as Pierringer Agreements.[4]

[53] However, the settlement privilege is not absolute. Exceptions to settlement privilege may be found "when the justice of the case requires it" and where a defendant can show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement".[5] Exceptions have included allegations of misrepresentation, fraud, or undue influence, and preventing a plaintiff from being overcompensated.[6]

[54] In *Sable*, Justice Abella, writing for the Court, held that "[a] proper analysis of a claim for an exception to settlement privilege does not simply ask whether the non-settling defendants derive some tactical advantage from disclosure, but *whether the reason for disclosure outweighs the policy in favour of promoting settlement* [*emphasis added*]."[7]

[55] There is also an obligation to immediately disclose any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a cooperative one, including Pierringer Agreements.[8]

---

[3] *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, para. 6.
[4] *Ibid*., paras. 11-18.
[5] *Ibid*., paras. 12 and 19.
[6] *Ibid.*, para. 19.
[7] *Ibid.*, para. 30.
[8] *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, para. 24*; Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, para. 39.

[56] The Settlement Agreements, with certain terms redacted, were disclosed by Evertz to the Providius Defendants pursuant to two consent orders. They have not been filed in the public record.

[57] Evertz relies on two decisions of this Court in support of its position that the Settlement Agreements should be kept confidential until the trial in this action or further order of the court.

[58] In *Noonan v. Alpha-Vico* ("***Noonan***"), which precedes *Sable*, non-settling defendants brought a motion for full disclosure of the settlement agreement and all other terms of settlement.[9] The facts of the case were unique, as two separate actions had been commenced, and the non-settling defendants were defendants in an action separate from the settling defendants.[10] The settlement agreement was subject to a sealing order.[11]

[59] Master MacLeod (as he then was) determined that the settlement agreement was to be disclosed to counsel for the non-settling defendants. However, as it remained subject to the sealing order, "the copies provided to counsel for the defendants will be marked confidential by the plaintiffs' and "the defendants may not disclose the minutes or the order to any other person without the consent of the plaintiffs or further order."[12]

[60] In *Singh v. Mann* ("***Singh***"), non-settling defendants brought a motion for an order requiring production of a copy of a Pierringer Agreement between the plaintiff and the settling defendants.[13] Associate Justice Frank granted the motion and ordered that a redacted Pierringer Agreement be produced to the non-settling defendants on a confidential basis, that use of the contents of the agreement were prohibited, and that review, use or disclosure of the agreement would be dealt with at trial by the trial judge.[14]

[61] In my view, neither case is applicable to the facts and issue before me.

[62] In *Noonan*, while the proceeding was at the same stage as this action, being a request to discontinue the action as against the settled defendants, the Pierringer Agreement was subject to a separate sealing order.

[63] For *Singh*, there is nothing in the decision that suggests that the non-settling defendants objected to the confidentiality terms and to leaving the matter of the release and use of the settlement agreement to the discretion of the trial judge. The relief granted in *Singh* is similar to the relief that was granted in the Order of Associate Justice McAfee dated February 28, 2023 and my Order dated October 13, 2023.

---

[9] *Noonan v. Alpha-Vico*, 2010 ONSC 2720 ("***Noonan***"), para. 2.
[10] *Ibid.*
[11] *Ibid*., para. 16.
[12] *Ibid*., paras. 59-60.
[13] *Singh v. Mann*, 2021 ONSC 8249 ("***Singh***"), para. 1.
[14] *Ibid*., para. 45.

[64] That is not the case before me. The Providius Defendants object to the continued confidentiality provisions, as they believe it hampers their ability to commence an action against Evertz and Lawo based on the terms of the Settlement Agreements and get a fair trial.

[65] Based on the record before me, there does not appear to be a case on point where the Court has had to consider whether to extend confidentiality terms for a Pierringer Agreement until a trial or further order of the Court where the non-settling defendants wish to rely on the terms to commence an action as against the settling parties.

[66] As a result, it is necessary, in addition to the principles set out in *Sable*, to consider the Supreme Court's decisions in *Sierra Club* and *Sherman Estate* dealing with confidentiality and sealing orders to determine whether the confidentiality order should be continued in this action.

Sierra Club and Sherman Estate

[67] In *Sierra Club*,[15] the Supreme Court of Canada considered when, and under what circumstances, a confidentiality order should be granted. The Court held that a confidentiality order should only be granted when: (a) such an order is necessary in order to prevent a serious risk to an important interest, including a commercial interest, in the context of litigation because reasonably alternative measures will not prevent the risk; and (b) the salutary effects of the confidentiality order, including the effects on the right of civil litigants to a fair trial, outweigh its deleterious effects, including the effects on the rights to free expression, which includes the public interest in open and accessible court proceedings.[16]

[68] With respect to the phrase "important commercial interest", the Supreme Court held that the interest cannot merely be specific to the party requesting the order; the interest much be one which can be expressed in terms of a public interest in confidentiality.[17] The Supreme Court went on to provide the following example:

> "a private company could not argue simply that the existence of a particular contract should not be made public because to do so would cause the company to lose business, thus harming its commercial interests. However, if, as in this case, exposure of information would cause a breach of a confidentiality agreement, then the commercial interest affected can be characterized more broadly as the general commercial interest of preserving confidential information. Simply put, if there is no general principle at stake, there can be no 'important commercial interest' for the purposes of this test."[18]

[15] *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41.
[16] *Ibid.*, paras. 1 and 53.
[17] *Ibid.*, para. 55.
[18] *Ibid.*

[69] In *Sherman Estate*,[19] the Supreme Court recast the test from *Sierra Club* to focus on the following three core prerequisites that a person seeking a limit on the open court principle must show:

> (a) court openness poses a serious risk to an important public interest;
>
> (b) the order sought is necessary to prevent this serious risk to the identified interest because reasonably alternative measures will not prevent this risk; and,
>
> (c) as a matter of proportionality, the benefits of the order outweigh its negative effects.[20]

[70] The Supreme Court noted that "the breadth of the category of 'important interest' transcends the interests of the parties to the dispute and provides significant flexibility to address harm to fundamental values in our society that unqualified openness could cause."[21]

[71] It is only where all three prerequisites have been met can a discretionary limit on openness properly be ordered. The test applies to all discretionary limits on court openness.[22]

[72] Evertz argues that they have met the test, as the Settlement Agreements are subject to a confidentiality provision and contain confidential commercial information that should be protected. If the confidentiality terms are not extended, then there would be a risk to the overriding public interest of facilitating settlement of disputes and the avoidance of litigation, and the general commercial interest in preserving private confidential financial information. Evertz argues that no party would be prejudiced by a confidentiality order.

[73] In my view, Evertz has failed to meet the test for a continued confidentiality order.

[74] It is not controversial that promoting settlements and preserving commercially sensitive confidential information are important policy goals.

[75] However, based on the record before me, I do not see there being a serious risk to important interests. There is nothing in the record that supports that the settlement would be jeopardized if the Providius Defendants are able to refer to the terms of the Settlement Agreement in a pleading and produce the agreements in that litigation, or that maintaining privilege over the terms of the Settlement Agreements "would have the demonstrable general benefit of promoting settlement".[23]

---

[19] *Sherman Estate v Donovan*, 2021 SCC 25.
[20] *Ibid.*, para. 38.
[21] *Ibid.*, para. 43
[22] *Ibid.*, para. 38.
[23] *Singh*, para. 43.

[76] Every settlement agreement must be considered in context.[24] The terms of the Settlement Agreements are, in my view, unique. They contain terms that specifically impact the Providius Defendants. These terms are in no way "garden variety" terms that would typically be found in a Pierringer Agreement.

[77] The confidential terms that Evertz wishes to remain confidential largely are terms that impact Providius and its business. While the Settlement Agreements contain confidentiality provisions, in my view, the desire of Evertz to keep the Settlement Agreements confidential is to protect their own commercial interests in a way that does not transcend the interests of the parties to the Settlement Agreements and this action.

[78] I echo the statement made by Justice Centa in *Morgan Canada Corporation v. MacDonald,* that "I accept that the commercial interest in preserving confidential information can be an important interest because of its public character. However, it is also true that harm to a particular business interest will not normally be sufficient to rise to the level of an important public interest."[25]

[79] In my view, there would be significant prejudice experienced by the Providius Defendants if the confidentiality orders are continued. The negative effect of maintaining the confidentiality provisions is that it would prevent the Providius Defendants from detailing the terms of the Settlement Agreements in an action that they say they intend to bring against Evertz and Lawo.

[80] The *Rules of Civil Procedure* require that certain allegations made in a pleading must contain full particulars.[26] Claims may be struck if allegations are not sufficiently particularized.[27]

[81] Based on my review of the Settlement Agreements, I believe that continuing the confidentiality order would negatively impact the ability to the Providius Defendants to seek redress and get a fair trial against Evertz and Lawo regarding the impact of the Settlement Agreements on Providius. Ensuring fair trials is always within the public interest, as is ensuring parties have a meaningful right to make their case.

[82] In weighing the competing interests of the parties, I am of the view that the justice of this case requires that Providius be entitled to plead the terms of the Settlement Agreement in its to-be-brought action against Evertz and Lawo. The ability of Providius to properly plead and obtain a fair trial in its action outweighs the policy in favour of promoting settlement and protecting confidential commercial interest.

---

[24] *Singh*, para. 42; *Allianz v Canada (Attorney General)*, 2017 ONSC 4484, para. 23.
[25] *Morgan Canada Corporation v. MacDonald*, 2023 ONSC 5217, para. 130.
[26] Subrule 25.06(8).
[27] See *Sun Life Assurance Co. of Canada v. 401700 Ontario Ltd.* (Gen. Div.), 1991 CanLII 7050 (ON SC), where a claim was struck due to the failure of the plaintiff to plead the minimum level of material fact disclosure to establish potential claims.

[83] As a result, the confidentiality terms should not be continued and maintained concerning the Settlement Agreements.

[84] As I have held that Evertz has not met the test for a continuation of the confidentiality orders, it was not necessary for me to consider whether Evertz was required to provide notice to the media of its motion under the *Consolidated Provincial Practice Direction*.

Disposition

[85] For the reasons set out above, the request by Evertz for a continuation of the confidentiality orders concerning the Settlement Agreements is hereby dismissed.

[86] The parties shall contact my Assistant Trial Coordinator to schedule a case conference to settle the form of order. Additionally, if the parties are unable to come to an agreement on costs, a timetable for the exchange of costs submissions will be dealt with at the case conference.

_____

Associate Justice Rappos

DATE: March 18, 2024