Date: 20240514
Docket: CI 20-01-26133
(Winnipeg Centre)
Indexed as: Irwin Homes Ltd. v. Wollmann et al.
Cited as: 2024 MBKB 71



# COURT OF KING'S BENCH OF MANITOBA

**B E T W E E N:**

| | |
|---|---|
| IRWIN HOMES LTD., | ) Curran P. McNicol |
| | ) for the plaintiff |
| plaintiff, | ) |
| - and - | ) |
| | ) Evann Waschuk |
| PAUL WOLLMANN, PAUL WOLLMANN carrying on business under the firm name and style of PAUL WOLLMANN STUCCO WIRE and the said PAUL WOLLMANN STUCCO WIRE, ZIMARINO HOLDINGS LTD. formerly K & Z MASONRY LTD.,K & Z MASONRY (2011) LTD., CIVIC ROOFING INC., NOUVELLE CONSTRUTION LTD., CIVIL DISOBEDIENCE INC., CIVIL DISOBEDIENCE INC., carrying on business under the firm name and style of DEK-RITE and the said DEK-RITE, RICARDO MARTINS, RICARDO MARTINS carrying on business under the firm name and style of XCEL CONCRETE and the said XCEL CONCRETE, | ) for the defendants, Paul Wollmann, Paul Wollmann carrying on business under the firm name and style of Paul Wollmann Stucco Wire and the said Paul Wollmann Stucco Wire<br>)<br>) Kelly L. Dixon<br>) for the defendant Civic Roofing Inc.<br>)<br>) Zimarino Holdings Ltd., formerly K & Z Masonry Ltd. and K & Z Masonry (2011) Ltd.<br>) Action discontinued |
| defendants. | ) |
| | ) Caitlin Dyck<br>) for the defendant Nouvelle Construction Ltd. on a watching brief |
| | ) |
| | ) Neil C. Searles<br>) for the defendants Civil Disobedience Inc. and Dek-Rite |

)
) Ricardo Martins and
) XCEL Concrete
) No appearances
)
)
) Judgment Delivered:
) May 14, 2024



## REMPEL J.

## INTRODUCTION

[1] In ***Sable Offshore Energy Inc. v. Ameron International Corp.***, 2013 SCC 37 (CanLII), [2013] 2 S.C.R. 623, at para. 6, the term "Pierringer Agreement" is described as a settlement agreement that:

> [6] … 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.

[2] Since non-settling defendants are responsible only for their proportionate share of any loss that they may be found to be responsible for after trial, a Pierringer Agreement can properly be characterized as a "proportionate share settlement agreement". (See Hollinger Inc. (Re) 2012 ONSC 5107 (CanLII), at para. 54.)

## THE LITIGATION PROCESS

The plaintiff in this case is a general contractor which paid damages to clients who retained the plaintiff to build a residential dwelling (the "House") that

suffered significant damage due to the penetration of moisture through the exterior walls of the House. After paying the sum of $315,842.30 to their clients in damages, the plaintiff began this litigation against several sub-trades that it hired to work on the House. The sub-trades defended the claim and filed cross-claims against one another.

[3] Subsequent to the filing of the statement of claim, the plaintiff came to terms on settlement agreements involving the defendants, Civil Disobedience Inc. carrying on business as Dek-Rite ("Dek-Rite"), Ricardo Martins carrying on business as Xcel Concrete ("Xcel Concrete") and Nouvelle Construction Ltd. ("Nouvelle") (collectively, the "Settling Defendants").

[4] The statement of claim was discontinued against the defendants, Zimarino Holdings Ltd., formerly K & Z Masonry Ltd. and K & Z Masonry (2011) Ltd. on a without costs basis in November of 2021, with the consent of all parties.

[5] The defendants, Paul Wollmann carrying on business as Paul Wollmann Stucco Wire ("Wollmann"), filed a statement of defence and crossclaim against the co-defendants in March of 2022 and Civic Roofing Inc. ("Civic Roofing") (collectively, the "non-Settling Defendants") did the same in November of 2022.

[6] The plaintiff and the Settling Defendants entered into a Pierringer Agreement before the end of 2022 and the plaintiff received the consideration described therein. The amounts of those payments have not been disclosed to date by the plaintiff and the Settling Defendants as they claim litigation privilege with respect to any consideration involved. The plaintiff advises that litigation

privilege as to the settlement amounts will be waived after the trial has concluded and the proportionate share of liability, if any, of each of the Non-Settling Defendants has been established.

## THE MOTION

[7] In the motion before me the plaintiff seeks court approval of the terms of settlement for each of the Settling Defendants that are set out in the Pierringer Agreement. If the motion to uphold the Pierringer Agreement as drafted is granted, the plaintiff will continue its action against the Non-Settling Defendants alone and the claims against the Settling Defendants will be dismissed. Under the terms of the Pierringer Agreement the crossclaims of the Settling Defendants against the Non-Settling Defendants and the crossclaims of the Non-Settling Defendants against the Settling Defendants will also be dismissed.

[8] The material terms of the Pierringer Agreement are as follows:

> AND WHEREAS Irwin Homes has agreed that, as part of the settlement, it will only pursue the Non-Settling Defendants for their direct and several liability for loss and damages;
>
> . . .
>
> 2. Irwin Homes agrees to accept the sum of $[REDACTED], inclusive of pre-judgment interest, costs and disbursements (the "Settlement Sum") in settlement of its claim in the Action against the Settling Defendants, with all parties acknowledging this Agreement leaves outstanding the claim against the Non-Settling Defendants in the Action.
>
> 3. Upon completion of the obligations of the parties arising from this Agreement, Irwin Homes does for itself and its respective insurers, officers, directors, employees, agents, successors and assigns, hereby remise, release and forever discharge the Settling Defendants and their insurers, officers, directors, employees, agents, successors and assigns, of and from any and all manner of action and actions, cause and causes of action, suits, debts, sums of money, dues, expenses, damages, costs,

> claims or demands of any and every kind whatsoever, at law or in equity or under any statute, which he had or now has against the Settling Defendants by reason of any matter, cause or thing whatsoever arising directly or indirectly out of the matters referred to in the Action.
>
> 4. Notwithstanding any other terms of this Agreement, it is the intent of the parties hereto that the Settling Defendants shall not be liable to make any payment whatsoever to Irwin Homes or to the Non-Settling Defendants other than the payment of the Settlement Sum.
>
> 5. Upon completion of the obligations of the parties arising from this Agreement, Irwin Homes acknowledges satisfaction of that portion of its total damages in the Action that have been agreed upon, which have been caused by the act, default, negligence and/or breach of duty of the Settling Defendants, if any, as may be hereinafter determined in the trial or other disposition of the Action.
>
> 6. Subject to the qualifications earlier referred to in this Agreement, and upon completion of the obligations of the parties arising from this Agreement, Irwin Homes releases and discharges that fraction or portion or percentage of its total causes of action and claim for damages in the Action against all persons, including all current and future parties to the Action, which shall hereafter, by trial or other disposition of the Action, or any other action respecting the matters raised directly and indirectly in the Action, be determined to be the fraction or portion or percentage of liability for which the Settling Defendants are liable due to their act, default, negligence, breach of duty or any other theory of liability.
>
> 7. The Settling Defendants covenant and agree that they will not seek contribution or indemnity from the Non-Settling Defendants or from any one of them with respect to the Settlement Sum, nor with respect to any matter at issue in the Action.

## DECISION

[9] I am granting the plaintiff's motion to approve the Pierringer Agreement as drafted with the consideration amount redacted and to dismiss the crossclaims filed by and against the Non-Settling Defendants.

## POSITION OF THE NON-SETTLING DEFENDANTS

[10] In the main, the Non-Settling Defendants argue that the prejudice they will suffer if the Pierringer Agreement is approved will outweigh the public policy

benefits that flow from out-of-court settlements. (See ***Murphy Canada Exploration Company v. Novagas Canada Ltd***., 2009 ABQB 455 (CanLII), at paras. 41-43.) In particular the Non-Settling Defendants point to the constraints the Pieringer Agreement would place on their rights to pre-trial discovery of documents relevant to their defence and the elimination of all possibility of the examination of the Settling Defendants for discovery. These legitimate concerns were acknowledged in In ***Amoco Canada Petroleum Co. Ltd. v. Propak Systems Ltd.***, 2001 ABCA 110 (CanLII) (at paras. 21-22).

[11] The Non-Settling Defendants rely on the statements outlined in ***Murphy*** that when faced with the cost benefit analysis with respect to prejudice to non-settling defendants against the inherent benefits to the public of out-of-court settlements "*the Court must consider if there is substantial prejudice to the non-settling defendant, whether the prejudice can or should be mitigated, and whether the settlement agreement should be approved but on terms or conditions. Otherwise, the Court becomes merely the affixer of a rubber stamp*" (***Murphy***, at para. 61).

[12] In this case the Non-Settling Defendants point out that affidavits of documents have not yet been produced and examinations for discovery have not yet proceeded. Given these circumstances they argue that they have no idea what documentary evidence the Settling Defendants might have produced during the pre-trial process and what sworn testimony they might have offered during examinations for discovery. Given this evidentiary vacuum, the Non-Settling

Defendants say I should refuse to approve of the settlement agreements or in the alternative place terms and conditions on the settlement which would force the Non-Settling Defendants to produce relevant documents and submit to some form of examination for discovery. Further, the Non-Settling Defendants request that I order disclosure of the consideration that is redacted from the proposed Pierringer Agreement prior to trial.



## ANALYSIS OF THE LAW AND THE FACTS

[13] In ***Sable Offshore***, the Supreme Court of Canda described the overarching public policy interests that support out-of-court settlements in the following terms:

> [11] Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. The benefits of settlement were summarized by Callaghan A.C.J.H.C. in *Sparling v. Southam Inc.* (1988), 1988 CanLII 4694 (ON SC), 66 O.R. (2d) 225 (H.C.J.):
>
> > . . . the courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. This policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial court system. [p. 230]
>
> . . .

[14] In evaluating the competing values of prejudicial effect to the non-settling defendants against the public policy benefits that strongly support out-of-court settlement, judges should not dismiss Pierringer Agreements simply based on the fact that the non-settling defendants will inevitably face greater obstacles in obtaining the kind of pre-trial disclosure and evidence on examinations for

discovery that they would have otherwise received had all of the defendants remained active in the litigation.

[15] ***Amoco*** summarizes the evaluation process for Pierringer Agreements as follows, at para. 41:

> [41] In summary, in evaluating proportionate share settlement agreements:
>
> 1. A court must keep in mind the strong public policy reason which encourages settlement;
>
> 2. The fact that a non-settling defendant has restricted rights of third party disclosure under the Alberta Rules of Court does not justify refusing to give effect to a proportionate share settlement agreement;
>
> 3. A court need not approve a proportionate share settlement agreement containing contractual provisions that directly limit the procedural rights a non-settling defendant would otherwise have; and
>
> 4. A proportionate share settlement agreement should be disclosed to the non-settling party. To further reduce potential prejudice, the terms of the agreement, although not necessarily the amount of the settlement, should also be disclosed to the court.

[16] In ***Sable Offshore*** the Supreme Court of Canada upheld the validity of a Pierringer Agreement because it would leave the non-settling defendants responsible only for any losses that they may have caused and that all the terms of the Pierringer Agreement were disclosed to all parties save for the actual amount of the final settlement. The Supreme Court of Canada also notes in ***Sable Offshore*** that the non-settling defendants would have access to all relevant evidence applicable to the settling defendants in the possession of the plaintiff. Given the circumstances, it was held in ***Sable Offshore*** that there was no

compelling public interest in overriding the settlement privilege of the plaintiff and the settling defendants.

[17] The plaintiff in the case before me was careful to remain onside with the key conditions laid down in ***Sable Offshore*** that upheld the validity of a Pierringer Agreement. The Non-Settling Defendants have in fact received all the non-financial terms of the Pierringer Agreement and they know the maximum amount of the plaintiff's claim as against all defendants is $315,842.30. They will also have access to all the documents relevant to their defence by virtue of the pre-trial disclosure obligations of the plaintiff and their right to examine the plaintiff for discovery. Moreover, the plaintiff has agreed that at the end of the trial, once liability had been determined, it will disclose to the trial judge the amounts it settled for with the individual Settling Defendants.

[18] In the event the Non-Settling Defendants in this case establish a right to set-off, their liability for damages will be adjusted downwards to avoid overcompensating the plaintiff. In other words, the Non-Settling Defendants have the assurance that they will not be held liable for more than their proportionate share of damages because they are severally, and not jointly, liable with the Settling Defendants.

[19] I am not persuaded that it is fundamentally unfair for the Non-Settling Defendants to be deprived of any knowledge as to the amounts each of the Non-Settling Defendants settled for. This lack of knowledge does not materially affect the ability of the Non-Settling Defendants to know and present their case

fairly. Just like ***Sable Offshore*** the Non-Settling Defendants remain fully aware of the claims they must defend themselves against and of the overall amount that the plaintiff is seeking. "*It is true that knowing the settlement amounts might allow the defendants to revise their estimate of how much they want to invest in the case, but this, it seems to me, does not rise to a sufficient level of importance to displace the public interest in promoting settlements*" (***Sable Offshore***, at para. 27).

[20] I agree with the plaintiff that the concerns of the Non-Settling Defendants as to prejudice are exaggerated on the facts before me. I say that for several reasons:

a) The ***Court of King's Bench Rules***, M.R. 553/88, unlike the Alberta rules of court referred to in ***Amoco***, explicitly allow litigants to bring motions for the production of documents by non-parties with leave (Rule 30.10) and the discovery of non-parties with leave (Rule 31.10);

b) The Non-Settling Defendants in this case will have full production of all relevant docs from the plaintiff and the right to examination for discovery of the plaintiff as to the nature and extent of the damage to the House. The pre-trial disclosure will include all expert reports obtained by the plaintiff; and

c) The King's Bench Rules also allow judges to case manage complex litigation in a manner that earlier iterations of the King's Bench Rules did not. Under King's Bench Rule 50.1 a case management judge can

"*exercise all of the powers of a pre-trial judge under Rule 50*". The powers set out in Rule 50.05 are broad and expansive and explicitly include the power to "*[establish] special procedures for managing potentially difficult or protracted actions that may involve complex issues, multiple parties, difficult legal questions or unusual proof problems*" (Rule 50.05(4)(q)). King's Bench Rule 50.05(5) also provides for pre-trial or case management powers respecting motions:

> **Pre-trial judge powers respecting motions**
>
> **50.05(5)** The pre-trial judge may do one or more of the following with respect to any motion that he or she hears in an action that is subject to pre-trial management:
>
> (a) make an order on the basis of oral submissions only;
>
> (b) order that oral submissions be recorded;
>
> (c) order that written materials be filed and served;
>
> (d) give directions respecting the preparation and filing of an order.

d) These broad and expansive case management powers did not exist in Manitoba at the time the ***Amoco*** and ***Sable Offshore*** cases were decided and they will ensure that the non-settling parties will not necessarily be forced to the expense or risk of bringing a contested motion in its traditional form to seek the disclosure of material and relevant evidence or examine a non-party prior to trial.

## CONCLUSION

[21] I am satisfied that this is not one of the rare cases where the potential prejudice to the Non-Settling Defendants outweighs the overriding public interest

that encourages out-of-court settlements. Any prejudice to the Non-Settling Defendants can be mitigated through the application of the King's Bench Rules and the case management powers provided for in the King's Bench Rules that I have outlined in detail in these reasons. The Non-Settling Defendants know what the maximum damage claim of the plaintiff is in this litigation and all of the non-financial terms of the Pierringer Agreement have been disclosed to them. I have no concern that the Non-Settling Defendants might be required to pay more than their fair share of damages if a finding of liability is made against them after trial.

[22] For all of these reasons I am approving the Minutes of Settlement as drafted. My order will remove the Settling Defendants from the litigation entirely and give them the benefit of their bargain with the plaintiff, which assures them that their exposure to the risks related to findings of liability at trial, costs and ongoing legal fees will be limited to the amounts they settled for. Further, my order will end all claims against the Settling Defendants by the plaintiff and dismiss all crossclaims as between the Settling and Non-Settling Defendants.

[23] The parties can speak to costs if they cannot agree, provided they file briefs in advance.

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Rempel J.