COURT OF APPEAL FOR ONTARIO

CITATION: Kingdom Construction Limited v. Perma Pipe Inc., 2024 ONCA 593
DATE: 20240730
DOCKET: COA-23-CV-1055

Zarnett, Coroza and Favreau JJ.A.

BETWEEN

Kingdom Construction Limited

Plaintiff (Respondent)

and

Perma Pipe Inc.*, Delta Piping Products Canada Inc.*, CH2M Hill Canada Limited*, Victaulic Company of Canada ULC*, The Regional Municipality of York, The Regional Municipality of Durham, Emco Corporation*, D.C. Bray, Brian M. Witek* and Catlin Canada Inc.

Defendants (Appellants*)

Ted Evangelidis, for the appellants Perma Pipe Inc. and Brian M. Witek

Syed Abid Hussain, for the appellant Delta Piping Products Canada Inc.

Jeffrey Long, for the appellant CH2M Hill Canada Limited

Jonathan Levy, for the appellant Victaulic Company of Canada ULC

Kammy Digambar, for the appellant Emco Corporation[1]

Brett Rideout, Sean Dewart and Brett Hughes, for the respondent

Heard: April 26, 2024

On appeal from the order of Justice David A. Broad of the Superior Court of Justice, dated August 31, 2023, with reasons reported at 2023 ONSC 4776.

[1] Only Mr. Evangelidis made oral submissions on behalf of the appellants. All other appellant counsel joined in Mr. Evangelidis' written submission and appeared, but they made no oral submissions.

Zarnett J.A.:

OVERVIEW

[1] Settling parties must immediately disclose a partial settlement – a settlement between a plaintiff and some, but not all, defendants – if the settlement changes entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation. The failure to do so is an abuse of process, the remedy for which is a stay of the action against the non-settling defendants: *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488, at paras. 13, 15-16; *Skymark Finance Corporation v. Ontario*, 2023 ONCA 234, 166 O.R. (3d) 131, at paras. 46-47, 53.

[2] The appellants are six of the defendants in an action commenced by the respondent, Kingdom Construction Limited ("Kingdom"). They brought a motion to permanently stay the action against them, alleging that a settlement among Kingdom and three other defendants to the action was required to be, but was not, immediately disclosed by any of the settling parties.

[3] The motion judge dismissed the appellants' request on two bases. First, he held that the settlement did not change the litigation landscape to a significant enough degree to require immediate disclosure. Second, he found that, when considered purposively, disclosure of the general terms of the settlement about 27 days after it was reached qualified as immediate disclosure.

[4] The appellants attack both of these conclusions. As to the motion judge's first basis for rejecting their motion, they argue that he failed to appreciate the depth, nature, and effect of the changes to the litigation brought about by the settlement, emphasizing that an aspect of the settlement was to be documented by a *Pierringer* Agreement. As to his second basis, they argue that the motion judge was wrong to consider the disclosure that occurred 27 days after the settlement to be "immediate" as to its timing and adequate as to its content.

[5] It is common ground that to succeed on their appeal the appellants must show a reversible error in both of the motion judge's bases for dismissing the motion.

[6] For the reasons that follow, I would dismiss the appeal.

[7] On the issue which is determinative of this appeal – the motion judge's conclusion that the settlement did not require immediate disclosure – the standard of review is deferential absent extricable legal error. The appellants have not shown a reversible error in that conclusion. The motion judge properly focussed on the substantive terms and effect of the settlement considering the parties' positions in the litigation. He reasonably found there to be no or little effect on the appellants. The fact that the settling parties used the term "*Pierringer* Agreement" to describe one of the documents they contemplated does not fatally undermine this conclusion in light of the actual terms to which the settling parties agreed.

[8] It is accordingly unnecessary to consider the question of whether the disclosure was immediate and adequate.[2]

PROCEDURAL CONTEXT

(1) Kingdom's Action

[9] Kingdom was hired by the Regional Municipality of York ("York") as general contractor for the construction of a disinfection facility at the Duffin Creek Water Pollution Control Plant. The plant is co-owned by York and the Regional Municipality of Durham ("Durham"). The construction project included the installation of a water piping system.

[10] After installation, the piping system began leaking. Kingdom's action alleges that it had to investigate the cause of the leaking, arrange for certain remediation and repairs, and ultimately arrange to replace portions of the piping system, at a cost that exceeded $1.2 million.

[11] To recover its expenditures, Kingdom sued several defendants, asserting different theories of liability against them. Essentially, the defendants fell into three groups:

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[2] Nothing in these reasons should be taken as endorsing the motion judge's approach to whether the disclosure was immediate or adequate.

a. **The project's owners, York and Durham.** As against them, Kingdom alleged that York was liable for breach of contract and that York and Durham were liable for unjust enrichment because they required Kingdom to perform the investigation, remediation, and repairs but failed to pay for them.

b. **The appellants,** who Kingdom sued for negligence and breach of contract, alleging they were responsible for the deficient way the piping system had been designed and installed. These included:

   i. **CH2M Hill Canada Limited ("CH2M'),** who Kingdom alleged provided consulting engineering and project management services but failed to properly review and inspect the design of the piping system;

   ii. **Perma Pipe Inc. ("Perma") and Delta Piping Products Canada Inc. ("Delta"),** who Kingdom alleged it had hired as subcontractors to provide design, supply and installation services for the piping system;

   iii. **Brian M. Witek ("Witek"),** a consulting engineer[3] who Kingdom alleged approved the design layout of the piping system prepared by Perma and Delta;

[3] Kingdom also sued the defendant D.C. Bray ("Bray") – who joined neither the appellants' motion to stay nor this appeal – in his capacity as a consulting engineer on the project.

iv. **Victaulic Company of Canada ULC ("Victaulic"),** who Kingdom alleged manufactured deficient couplings that were used in the piping system; and

v. **Emco Corporation ("Emco")** who Kingdom alleged supplied deficient materials for the piping system.

c. **Catlin Canada Inc. ("Catlin"),** who issued an insurance policy to York (the "Policy"). Kingdom alleged that it was an additional insured under the Policy and that its expenditures for investigating, remediating, and replacing the piping system were losses for which it was entitled to be indemnified by Catlin as an additional insured.

(2) Defences and Crossclaims

[12] Each of the defendants delivered a statement of defence. Some asserted crossclaims.

[13] Perma and Witek (together in one pleading), and Delta, Bray, Victaulic, and Emco (each in separate pleadings) crossclaimed against all other defendants. Although their crossclaims included Catlin, they did not specifically assert that they were additional insureds under the Policy. They did, however, incorporate by reference Kingdom's allegations in its statement of claim for the purpose of substantiating their crossclaims – as noted above Kingdom alleged that it was an additional insured.

[14] CH2M crossclaimed against all the other defendants except York, Durham, and Catlin.

[15] York and Durham crossclaimed against all other defendants and asserted that they were entitled to coverage under the Policy.

[16] Catlin asserted no crossclaims.

(3) Motion for Summary Judgment

[17] In May 2019, Kingdom moved for summary judgment against Catlin. Kingdom, in its factum for that motion, submitted as a reason why its claim against Catlin was suitable for summary judgment that success on the motion would dispose of the entire action. It took a position about insurance coverage that was broader than in its statement of claim. It stated:

> Although there are collateral issues concerning the liability of [York, Perma, Delta, and CH2M], they are all insureds for the purpose of [the Policy]. Since there can be no claim of subrogation by the Insurer against another insured, granting judgment against [Catlin] for the full amount of the cost of repair will bring the entire litigation to an end.

[18] Catlin opposed the summary judgment motion and did not accept Kingdom's position that the motion would resolve the entire action.

[19] None of the appellants delivered materials on the summary judgment motion, or took a position on it.

[20] The motion for summary judgment was adjourned several times, and never heard.

(4) The Settlement and Its Disclosure

[21] On March 1, 2021, Kingdom's counsel notified counsel for one of the appellants that he expected the motion for summary judgment, but not the entire action, to settle. A settlement was reached shortly thereafter.

[22] The settlement was initially reflected in Minutes of Settlement executed on March 4, 2021 (the "Minutes"), made among Kingdom, Catlin, Durham, and York. The Minutes provided for settlement payments by Catlin and York to Kingdom. They required Kingdom to assign to Catlin its claims against all defendants other than York and Durham, in a form to be agreed. They also provided that after receipt of the assignment, Catlin, on behalf of Kingdom, would "enter into a *Pierringer* agreement with York and Durham, in a form to be agreed to by counsel". As part of the *Pierringer* Agreement, Kingdom would "amend its claim to pursue only the Non-Settling Defendants [i.e., the appellants and Bray] for their several liability and [would] discontinue or dismiss its claim against York and Durham."

[23] The Minutes further provided that Catlin would pay Kingdom any amount it recovered from pursuit of the action that exceeded its settlement payment, and that Kingdom would make its directors, officers, staff, and documents available to Catlin to assist in prosecuting the action against the appellants and Bray.

[24] On March 11, 2021, in response to an inquiry from counsel for one of the appellants, Kingdom's counsel stated:

> We settled the motion. [Catlin's counsel] will be reporting to the other parties. I do not think I am at liberty to say more than that.

[25] There were no further communications until March 29, 2021, when Catlin's counsel circulated a letter to the appellants advising the following:

- The summary judgment motion had been resolved;
- Kingdom had agreed to settle with Catlin, Durham, and York;
- Catlin intended to exercise its subrogation rights to continue the action against the appellants and Bray;
- Catlin would be bringing a motion to discontinue the action against Catlin, York, and Durham; and
- Kingdom would be filing a notice of change of lawyer, after which Catlin would invite a conference call to answer any questions that the respondents may have about the terms of the settlement.

[26] On September 22, 2021, a notice of change of lawyers was served – the firm who had previously represented Catlin in the action now went on the record as lawyers for Kingdom. On the same date, those lawyers provided the appellants with versions of documents that implemented the settlement: (i) an Assignment and Subrogation Agreement between Catlin and Kingdom dated April 22, 2021;

and (ii) an undated Settlement Agreement among Kingdom, York, and Durham. The financial terms of both documents were redacted.

[27] The Assignment and Subrogation Agreement provided that Kingdom assigned to Catlin its rights against the appellants and Bray, and that Kingdom agreed to provide Catlin with "reasonable assistance" in the pursuit of recovery on those claims. The Settlement Agreement provided that the action would be dismissed against York and Durham. It further stated that, if Kingdom continued the action against the appellants and Bray, it would limit its claim against them so that they would have no basis to seek contribution or indemnity from York or Durham.

[28] On March 30, 2022, in response to a request from one of the appellants, counsel for Kingdom and Catlin provided the appellants with a copy of the Minutes, with financial terms redacted.

(5) The Decision Below

[29] In August 2022 the appellants moved to stay the claims against them, alleging that Kingdom had engaged in an abuse of process by failing to immediately disclose the terms of the settlement.

[30] The motion judge reviewed the principles set out in this court's jurisprudence for determining whether an action should be stayed because of a failure to disclose a partial settlement. He identified the two questions he needed to decide as: (i)

whether the settlement among Kingdom, Catlin, York, and Durham was one that required immediate disclosure; and (ii) if so, whether the settling parties failed to "immediately" disclose the terms of the settlement.

[31] On the first question, the motion judge noted that not all partial settlements require immediate disclosure. Those that do are settlements that have "the effect of changing entirely the landscape of the litigation *in a way that significantly alters the dynamics of the litigation*". This determination is "fact-specific, based on the configuration of the litigation and the various claims among the parties": citing *Skymark*, at paras. 51, 53 (emphasis in original). The court should consider whether "the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation": citing *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, at para. 40.

[32] The motion judge found that the settlement did not require immediate disclosure because it did not change entirely the litigation landscape in a way that significantly altered the dynamics of the litigation. He referred to the following in support of this conclusion:

- Kingdom's claims against Catlin on the Policy, and against York and Durham in contract and quasi contract, were fundamentally distinct from its negligence claims against the appellants.

- There was no requirement for the claims on the Policy to have been litigated in the same proceeding as those against the appellants.
- The appellants did not participate in the summary judgment motion against Catlin, confirming that they viewed the insurance coverage issue as a discrete, preliminary matter to be resolved before further steps in the litigation.
- There was always a known prospect that Catlin might be found liable to insure Kingdom, after which it would be entitled to exercise subrogation rights against the appellants. The fact that Catlin was now acting as plaintiff rather than a defendant was a function of subrogation. The claims against the appellants, post-settlement, were being advanced in the name of Kingdom by the insurer, but the claims against the appellants remained the same. The fact that Kingdom would assist Catlin in the prosecution of the subrogated claim did not change anything about the claims the appellants were facing or the evidence that would be marshalled in support of the claims.
- None of the appellants had advanced a claim that they were additional insureds under the Policy. In any event there was nothing stopping them from asserting such a claim now – nothing in the settlement took that right away from them.

- Although by virtue of the settlement Kingdom was no longer adverse to York and Durham, this did not significantly alter the dynamics of the litigation. The pre-settlement adversity between Kingdom on the one hand, and York and Durham on the other, was contractual and quasi contractual in nature. None of those issues concerned the appellants, and their resolution had no impact on the appellants' legal positions.

[33] The motion judge further found that, even if Kingdom was required to disclose the settlement immediately, that obligation was fulfilled. He rejected the proposition that this court's decision in *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, 466 D.L.R. (4th) 324, which held that a three-week delay in disclosure did not amount to immediate disclosure, precluded a finding of immediate disclosure in this case. He found that he should apply the "immediate" standard "purposively, to prevent the abuse of the court's process by parties who conceal a change in adversity from non-settling defendants". In his view, there had been no such abuse. The settlement was only finalized between March 2 and 4, 2021, by which time Kingdom's counsel advised that the settlement was imminent. Kingdom's counsel advised that the settlement had closed on March 11, 2021, and Catlin's counsel disclosed its general terms by March 29, 2021. There was no effort to conceal the settlement; the litigation was just dormant during the gap between settlement and disclosure. He concluded that the settlement had been disclosed "immediately" given the particular facts of this case.

[34] The motion judge also granted Kingdom's motion for leave to amend the statement of claim to reflect the terms of the settlement and dismissed the action and crossclaims against the settling defendants. The appellants conceded before the motion judge that if their request for a stay of the action was dismissed, the motion to amend should be granted.

ANALYSIS

(1) The Standard of Review

[35] The threshold issue on appeal concerns whether Kingdom's settlement with Catlin, York, and Durham changed the entirety of the litigation landscape in a way that significantly altered the dynamics of the litigation, bringing about an obligation of immediate disclosure, with the mandatory consequence of a permanent stay for non-compliance. As Trotter J.A. explained in *Skymark*, at para. 51, in the absence of an extricable error of law, that issue attracts a deferential standard of review:

> [T]he determination is fact-specific, based on the configuration of the litigation and the various claims among the parties. On appeal, a motion judge's finding with respect to the change to the litigation landscape is a question of mixed fact and law and, barring an extricable error of law, is entitled to deference.

(2) Discussion

[36] The appellants do not take issue with the motion judge's statement of the relevant principles. For the most part, they argue that the motion judge erred in applying the principles. They make essentially two interrelated arguments.

[37] First, they make a number of points that can be encapsulated as an argument that the motion judge simply did not appreciate how significantly the settlement altered the dynamics of the litigation.

[38] Second, they rely on the fact that the Minutes contemplated a *Pierringer* Agreement among Kingdom, York, and Durham. They say that, by definition, this denotes a settlement that changes the entirety of the litigation landscape and requires immediate disclosure.

[39] I do not accept these arguments.

i. The Motion Judge Did not Make a Reversible Error in His Appreciation of the Effect of the Settlement

[40] In order to determine whether a settlement has changed entirely the landscape of the litigation in a way that significantly alters its dynamics, the pre- and post-settlement configuration of the litigation and the claims in it must be compared. This is exactly what the motion judge did. He carefully analysed Kingdom's claims against the appellants on the one hand, and against Catlin, York, and Durham on the other. He concluded that they were fundamentally distinct.

[41] The appellants have not identified an error in this conclusion, which was an important plank supporting the motion judge's view that the settlement of those fundamentally distinct claims did not change the entirety of the litigation landscape in a way that significantly altered its dynamics. The appellants have not identified how the settlement could possibly affect their strategy, or the evidence they may lead or will be faced with, in litigating the claims against them now that fundamentally distinct claims against others have been settled. These kind of potential effects of a settlement can be important markers that the litigation has changed in a significant way and therefore must be disclosed to avoid parties, and the court, "flying blind": see *Laudon v. Roberts*, 2009 ONCA 383, 308 D.L.R. (4th) 422, at para. 39; *Skymark*, at paras. 58, 61, 63. Their absence points the other way.

[42] As the motion judge noted, the appellants had little, if any, pre-settlement interest in the issue of whether Kingdom was entitled to payment by Catlin under the Policy. They did not participate in Kingdom's motion for summary judgment on that issue. Nor did the settlement of that issue have a significant effect on the claims that the appellants would face post-settlement. Kingdom's pre-settlement claims would be pursued post-settlement by Catlin but in the name of Kingdom under the doctrine of subrogation. There was no change in whose claims the appellants were facing. Nor did the settlement terms requiring Kingdom to assist Catlin in the pursuit of those claims change in any way the evidence that would be

marshalled against the appellants in support of those claims, or their amount, compared to what the appellants were facing pre-settlement.[4]

[43] The appellants point to the position that Kingdom took on the summary judgment motion (but not in the statement of claim) that the appellants are also insureds under the Policy. They submit that since they will now be facing a subrogated claim, they have, and must raise, a new defence – namely, that they are additional insureds under the Policy and are immune to a subrogated claim by the insurer. I do not see this as a significant alteration of the dynamics of the litigation. Pre-settlement, the appellants were asserting, or could have asserted, a crossclaim against Catlin for coverage as additional insureds. As the motion judge noted, it remains open to them to raise that issue post-settlement – nothing in the settlement restricts them from doing so. Raising it as a defence rather than as a crossclaim is not, in these circumstances, a significant alteration in the dynamics of the litigation.

[44] The appellants also rely on the term of the settlement that requires Catlin to pay Kingdom any amount it recovers from the appellants in excess of the settlement payment Catlin made to Kingdom. But this term of the settlement does not alter the dynamics of the litigation. How Catlin and Kingdom will share

[4] Kingdom agreeing to assist Catlin in the pursuit of Kingdom's claims is, from the standpoint of whether a change has occurred, different from a situation in which a previously adverse defendant agrees to assist a plaintiff in suing another defendant.

recoveries does not change the quantum of the claims against the appellants – Catlin, standing in the shoes of Kingdom on a subrogated basis, can pursue the appellants only for the amounts for which Kingdom could sue them: *Douglas v. Stan Fergusson Fuels Ltd.*, 2015 ONSC 65, 124 O.R. (3d) 715, at para. 8.

[45] The appellants submit that the settlement took York and Durham out of the category of adverse parties. The motion judge was alive to this. He concluded that since the claims against York and Durham were fundamentally distinct from those against the appellant, no significant alteration in the dynamics of the litigation flowed from the terms of the settlement that required dismissal of the claims against York and Durham. The appellants were not, pre-settlement, involved in or affected by the contractual and quasi-contractual issues on which adversity between Kingdom, York, and Durham had existed. Accordingly, the appellants were not affected by the resolution of those issues, which had no significant effect on how the claims against the appellants would continue post-settlement. Although the settlement required crossclaims against York and Durham to be dismissed, Kingdom's claims against the appellants are, post settlement, only for their several liability, obviating the need for those crossclaims.

[46] A settlement will entirely change the landscape of the litigation when it involves a party switching sides from its pleaded position, changing the adversarial position of parties set out in pleadings into a cooperative one: *Tallman Truck*

Centre Limited v. KSP Holdings Ltd., 2021 ONSC 984, 60 C.P.C. (8th) 258, at para. 46, aff'd 2022 ONCA 66; *Handley Estate*, at paras. 39-41.

[47] The settlement with York and Durham had no such effect. It did not provide for any cooperation by York or Durham with Kingdom (or Catlin) or involve any switching of sides on any issue of concern to the appellants.

[48] The motion judge's appreciation of the effect of the settlement on the dynamics of the litigation was not the product of any reversible error. I would not give effect to this ground of appeal.

ii. The Use of the Term *Pierringer* Agreement Does Not Undermine the Motion Judge's Conclusion

[49] The Minutes contemplated York, Durham, and Kingdom entering into a "*Pierringer* Agreement". The appellants argue that this means immediate disclosure was required in this case. They point to the following statement in *Handley Estate*, at para. 39:

> The obligation of immediate disclosure is not limited to pure *Mary Carter* or *Pierringer* agreements. The disclosure obligation extends to 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.

[50] I do not read *Handley Estate*, which was not a case about a *Pierringer* agreement, as authority for the proposition that the mere use of the words

"*Pierringer* agreement" is determinative on whether a settlement requires immediate disclosure, without considering whether the substance of what the parties agreed to involved changing an adversarial position into a cooperative one.

[51] When *Handley Estate* mentioned *Pierringer* agreements, it referred to their generally understood content, one aspect of which is a provision requiring the settling defendants "to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendants": *Handley Estate*, at para. 39, footnote 2; see also *Endean v. St. Joseph's General Hospital*, 2019 ONCA 181, 54 C.C.L.T. (4th) 183, at para. 52.[5] The importance of that kind of term to the analysis of whether a settlement requires immediate disclosure is underscored by the fact that *Handley Estate*'s reference to a *Pierringer* agreement was immediately followed by: "The disclosure obligation extends to 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": *Handley Estate*, at para. 39.

[52] As described above, the settlement here in issue did not include, either in the Minutes or in the more complete documents that implemented the settlement, any provision whereby York and Durham agreed to cooperate with Kingdom (or

[5] *Mary Carter* agreements also typically provide for substantial shifts in positions between settling parties and the plaintiff, compared to their pleaded positions, and for cooperation with the plaintiff: see e.g., the discussion in *Laudon*, at paras. 35-39 and Schedule A.

Catlin) in the pursuit of claims against the appellants, by providing witnesses or documents, or in any other way. In the absence of such a provision, the use of the word "*Pierringer*", or even the presence in the settlement of other terms commonly found in *Pierringer* agreements was not determinative.

[53] The motion judge's conclusion, based on the substance of what the parties actually agreed to, is not undermined by the presence of the term "*Pierringer* Agreement" in the Minutes.

[54] I would therefore reject this ground of appeal.

CONCLUSION

[55] The appellants must succeed on both issues to succeed on the appeal. They fail on the first issue. I would therefore dismiss the appeal.

[56] The respondent is entitled to costs of the appeal fixed in the agreed sum of $15,000 inclusive of disbursements and applicable taxes.

Released: July 30, 2024 "B.Z."

"B. Zarnett J.A."
"I agree. Coroza J.A."
"I agree. L. Favreau J.A."