Court File No. CV-16-11567-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

THE SUPERINTENDENT OF FINANCIAL SERVICES

Applicant

- and -

TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION and HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION

Respondents

Court File No. CV-17-11689-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO INC., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC. AND TEXTBOOK (555 PRINCESS STREET) INC.

AND IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-17-589078-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

KINGSETT MORTGAGE CORPORATION

Applicant

- and -

TEXTBOOK (445 PRINCESS STREET) INC.

Respondent

IN THE MATTER OF THE RECEIVERSHIP OF TEXTBOOK (445 PRINCESS STREET) INC.

AND IN THE MATTER OF AN APPLICATION UNDER SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-18-598788-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION AND 7743718 CANADA INC.

Applicant

- and -

TEXTBOOK (774 BRONSON AVENUE) INC., TEXTBOOK ROSS PARK INC. and MCMURRAY STREET INVESTMENTS INC.

Respondents

IN THE MATTER OF A MOTION PURSUANT TO SUBSECTION 243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

Court File No. CV-18-606314-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (555 PRINCESS STREET) TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (ROSS PARK) TRUSTEE CORPORATION, 2223947 ONTARIO LIMITED, MC TRUSTEE (KITCHENER) LTD., SCOLLARD TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, 7743718 CANADA INC., KEELE MEDICAL TRUSTEE CORPORATION, TEXTBOOK STUDENT SUITES (445 PRINCESS STREET) TRUSTEE CORPORATION AND HAZELTON 4070 DIXIE ROAD TRUSTEE CORPORATION, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, MEMORY CARE INVESTMENTS (KITCHENER) LTD., MEMORY CARE INVESTMENTS (OAKVILLE) LTD., 1703858 ONTARIO LTD., LEGACY LANE INVESTMENTS LTD., TEXTBOOK (525 PRINCESS STREET) INC., TEXTBOOK (555 PRINCESS STREET) INC., TEXTBOOK (445 PRINCESS STREET) INC., MCMURRAY STREET INVESTMENTS INC., TEXTBOOK (774 BRONSON AVENUE) INC. AND TEXTBOOK ROSS PARK INC.

Plaintiffs

- and -

AEOLIAN INVESTMENTS LTD., JOHN DAVIES IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF BOTH THE DAVIES ARIZONA TRUST AND THE DAVIES FAMILY TRUST, JUDITH DAVIES IN HER PERSONAL CAPACITY AND IN HER CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, GREGORY HARRIS IN HIS PERSONAL CAPACITY AND IN HIS CAPACITY AS TRUSTEE OF THE DAVIES FAMILY TRUST, HARRIS + HARRIS LLP, NANCY ELLIOT, ELLIOT LAW PROFESSIONAL CORPORATION, WALTER THOMPSON, 1321805 ONTARIO INC., BRUCE STEWART, THE TRADITIONS DEVELOPMENT COMPANY LTD., DAVID ARSENAULT, JAMES GRACE, BHAKTRAJ SINGH A.K.A. RAJ SINGH, RS CONSULTING GROUP INC., TIER 1 TRANSACTION ADVISORY SERVICES INC., JUDE CASSIMY, FIRST COMMONWEALTH MORTGAGE CORPORATION, MEMORY CARE INVESTMENTS LTD., TEXTBOOK SUITES INC., TEXTBOOK STUDENT SUITES INC. AND MICHAEL CANE

Defendants

JOINT BOOK OF AUTHORITIES

(returnable November 18, 2019)

Date: November 5, 2019

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TAB 1

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CITATION: Allianz v. Canada (Attorney General) 2017 ONSC 4484
COURT FILE NO.: 12-54674
DATE: 2017/07/21

COURT OF ONTARIO,
SUPERIOR COURT OF JUSTICE

RE: ALLIANZ GLOBAL RISKS US INSURANCE COMPANY, TRANS STATES HOLDING, INC., TRANS STATES AIRLINES, LLC, XL SPECIALITY INSURANCE COMPANY, GENERAL SECURITY INDEMNITY COMPANY OF AZ, AXA CORPORATE SOLUTIONS ASSURANCE, NATIONAL FIRE & MARINE INSURANCE COMPANY, IRONSHORE SPECIALITY INSURANCE COMPANY, STARNET INSURANCE COMPANY, LLOYD'S SYNDICATE 2488, LLOYD'S SYNDICATE 5000, LLOYD'S SYNDICATE 1400, LLOYD'S SYNDICATE 5555, LLOYD'S SYNDICATE 1183, GREAT LAKES REINSURANCE (UK) PLC, ARCH INSURANCE COMPANY, ISOSCELES INSURANCE LTD,. AND CHARTIS INSURANCE UK LIMITED, Plaintiffs

AND:

THE ATTORNEY GENERAL OF CANADA, OTTAWA INTERNATIONAL AIRPORT AUTHORITY AND NAV CANADA, Defendants

AND:

PHILIP NASSER EFTEKHARI AND ALLAN WAYNE BURCH, Third Parties

BEFORE: MR. JUSTICE CALUM MACLEOD

COUNSEL: T. Tremblay, for the Plaintiffs and the Third Parties

S. Johnston, for The Attorney General Of Canada

D. Pankratz, for The Ottawa International Airport Authority

R. Fenn, for NAV Canada

HEARD: July 13, 2017

REASONS

Introduction

[1] This decision also applies in action 13-58703 which is a parallel action raising the same issues. The motion before the court seeks certain orders necessary to implement a *Pierringer*

agreement.[1] The issue is whether or not the court may impose a litigation bar on the non settling defendant and on what terms.

[2] As set out below, I have concluded there is jurisdiction to dismiss the crossclaims and third party claims in order to implement the *Pierrenger* agreement but it is appropriate to do so on terms which minimize prejudice to the non-settling defendant. This does not require all of the terms sought by NAV Canada. The terms imposed should be sufficient to protect the party who is a stranger to the settlement agreement but the court should attempt to craft terms that do not undo the benefit of settling. It is in the public interest and in the interest of justice to support settlement and streamlining of litigation generally and multi-party litigation in particular.

Background

[3] These actions arise out of separate incidents involving Embrauer 145 aircraft owned by Trans States Airlines LLC flying into the Ottawa International Airport for United Express / United Airlines. The incidents took place between 2004 and 2011 and involved damage to the aircraft sustained when the aircraft could not be kept on the paved portion of the runway while landing in the rain.[2]

[4] The plaintiffs are the owners of the aircraft and a consortium of insurers. The defendants are properly named in the title of the proceedings but in essence they are Transport Canada (the regulator and one time owner and operator of the airport), the airport authority (the current operator of the airport) and NAV Canada (now responsible for air traffic control). Although the federal government no longer directly operates the airport or the air traffic control system, the history and timing of divestment creates potentially complex liability issues to the extent that the plaintiffs allege liability for design of the runways (as but one example).

[5] This litigation has been underway for a considerable period of time and the actions have been in case management since 2014. Over the course of the last year it appears a settlement was reached between the plaintiffs and two of the defendants. The plaintiffs now seek to amend their claim to remove Transport Canada and the airport as defendants. They propose to continue with a much more focused claim against NAV Canada (the non-settling defendant) limited to its proportionate share of fault, if any. That is to say they would abandon any claim for joint liability and seek to hold NAV Canada liable only for the share of damages actually caused by its negligence (assuming any such fault is proven).

[6] The agreement also requires the plaintiff to ensure that none of the settling defendants are exposed to claims for contribution by a non-settling defendant. To implement this aspect of the settlement, the plaintiff seeks to have the court dismiss all of the crossclaims and the third party claims "with prejudice". In other words NAV Canada would not be permitted to seek contribution and indemnity from any of its co-defendants or from the pilots. Finally, the settling

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[1] Named after the American case of *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), the utility of such agreements was expressly accepted by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron*, 2013 SCC 37, [2013] 2 SCR 623

[2] The factual background is set out in more detail at 2014 ONSC 4198 (Master) and 2016 ONSC 29 (Master)

defendants wish to be let out of the litigation. Part of the incentive for settling includes bringing the litigation to a halt and ending the necessity of incurring further costs.

The Issue

[7] NAV Canada has no objection to facing a narrower claim for its proportionate share of damages and in fact it has no objection to dismissal of the crossclaims providing the court grants the dismissal on terms. Specifically it wishes to retain rights of discovery against settling defendants. Even though they would no longer be parties, NAV Canada wants their evidence to be available in the same manner as it would be if they remained parties and it also wants its right to cross-claim preserved in the case of non-compliance.

[8] The issue then is whether the court can force the non-settling defendant to abandon claims against the settling defendants without its consent. Assuming the court has that authority is it reasonable to impose the order on terms other than those agreed to by the remaining defendant? And is it appropriate to impose terms over the objection of the settling parties at the risk of imperilling the settlement?

Analysis

Public Policy Supports *Pierringer* Agreements in Multi-party Litigation

[9] There is no doubt that there is an overriding public interest in favour of settlement. It is sound judicial policy which contributes to the administration of justice.[3] *Pierringer* agreements have been recognized as an important tool in settling multi-party litigation. As described by the Supreme Court it is an important tool without which it is very difficult to conclude a settlement with only some of the defendants and with which it is possible to substantially streamline the litigation.

> In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial. [4]

[10] This is a motion to implement a Pierenger agreement. This is not a case in which the agreement itself requires court approval but approval is required to amend the statement of claim, to allow the settling defendants out of the action and to stay or dismiss the crossclaims. The controversial aspect of this is the request for a "bar order" which would prevent the non-settling defendant from making any claim against any other party if it is found liable.

[11] There is a public policy in favour of supporting settlements. *Pierringer* agreements should be approved and supported if possible because there are benefits to the parties involved in

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[3] See *Sable Offshore, supra* @ para. 11
[4] *Ibid,* @ para. 23

the litigation but also systemic benefits to the justice system as a whole. Of course the implementation of the agreement must also be fair to the non-settling defendant which is left to face the litigation alone. I will return to this shortly.

The jurisdiction to bar or stay claims for indemnity

[12] I must first consider the question of jurisdiction to compel the non-settling defendant to accept dismissal of its claim for indemnity and contribution. In this case the question is really whether I can grant the order on terms other than the terms on which NAV Canada is prepared to consent to the order. It is only if the court has the jurisdiction to impose the order in the first place that it also has the jurisdiction to determine what terms to impose (if any).

[13] In our jurisprudence there are numerous examples of the court approving *Pierringer* agreements and imposing a bar order. This is a common feature in the resolution of class proceedings. The seminal case is *Ontario New Home Warranty Program v. Chevron Chemical Co.*[5] (*"ONHWP"*) in which Justice Winkler (as he then was) conducted an extensive analysis of the reasons for a bar order and concluded that the court could impose it when approving a settlement. Importantly however, Justice Winkler found jurisdiction to grant the order in s. 12 and 13 of the *Class Proceedings Act* [6]. Section 13 in particular arms the court in a class proceeding with authority to stay any related actions. In addition, the class proceedings regime requires certification and court approval of any settlement. It is inherent in the class proceedings process that the court has the right to control, prune and shape complex litigation and of course there are numerous requirements for notice and opting out. Bar orders are also found in insolvency proceedings.[7] In the latter case termination of litigation rights is a fundamental insolvency tool. It is another matter to foreclose litigation in the absence of statutory authority.

[14] Jurisdiction in *ONHWP* was anchored by specific statutory provisions that are not present here and Justice Winkler emphasised the principle that jurisdiction cannot be conferred by agreement or convenience. Still the court went on to consider whether the proposed bar interfered with the substantive rights of the non-settling defendant and concluded it did not. This analysis is instructive in relation to the liability, rights and protections afforded by the *Negligence Act.*[8] It was the conclusion of the court that the provisions of s. 1, 2 and 5 of the Act could not be invoked if the plaintiff did not assert joint liability and the settling defendants surrendered their rights to claim indemnity from the non-settling defendant.

[15] In those circumstances the non-settling defendant could never be found liable for more than its share of the damages and could never face a claim for contribution or indemnity by other tort-feasors. The non-settling defendant could never have a claim for contribution against the other tort-feasors because it would be impossible for it to have to pay any share of the damages caused by another tort-feasor's negligence. In effect the court ruled that the *Pierrenger*

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[5] (1999) 46 O.R. (3d) 130 (SCJ)
[6] *Class Proceedings Act, 1992*, S.O. 1992, c. 6
[7] *Re Hollinger Inc.*, 2012 ONSC 5107
[8] RSO 1990, c. N.1

agreement took the case out of the *Negligence Act* by providing the non-settling defendant with the very same protections the Act provided.[9]

[16] If I permit the pleading amendments proposed by the plaintiff and dismiss the action against the settling defendants as well as the cross-claims asserted by them, it becomes self-evident that cross claims against the co-defendants based on the *Negligence Act* or common law principles of indemnity cannot succeed. The court could then dismiss the cross-claims of the non-settling defendant as being untenable pleas. This is precisely what occurred in *Taylor v. Canada* in which the Court of Appeal upheld the motion judge's decision to dismiss the third party claims because the right of indemnity does not exist "unless the defendant is called upon to pay more than its fair share of the loss".[10]

[17] Dismissing cross claims for indemnity based on the *Negligence Act* or general common law principles which are no longer tenable is not precisely the same thing as imposing a wide ranging or complete "bar-order". A right of indemnity arising if a tort-feasor is called upon to pay more than its fair share of a judgment would be foreclosed by the proposed pleading amendment but that argument would not apply to any contractual or statutory rights of indemnity that are not based on apportionment of fault. In the case at bar, however, no other form of indemnity right is pleaded or asserted. In fact, the non-settling defendant does not oppose dismissal of the crossclaims provided the terms are fair.

[18] Several rules would permit dismissal of a crossclaim that is no longer tenable and while no particular rule is relied upon by the moving parties, all parties are aware that is the relief being sought. In addition, it is within the power of the court in the exercise of its case management function to permit an informal motion if it is just to do so and in my view a case management judge also has the authority to stay portions of a proceeding that serve no purpose.[11] As decided by the court in *ONWHP* the pruning of a claim that cannot succeed because it has no basis in law can be regarded as procedural and does not affect the substantive rights of the party. There is no substantive right to advance a claim that no longer has a legal basis.

[19] I conclude that given the public policy grounds for encouraging settlement and the clear authority from the Court of Appeal that indemnity cannot be claimed by the defendant if the plaintiffs limit their claim in the manner proposed, the court would have the jurisdiction to dismiss the crossclaims for contribution and indemnity. As pleaded they will become untenable when the plaintiffs' claim is narrowed and it would be unjust to permit them to continue only to claim costs.[12] In any event at this point it is highly unlikely given the manner in which this action has proceeded that there are any costs attributable solely to the crossclaims.

Justification for terms to protect the remaining defendant

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[9] *NHWP v. Chevron, supra* @ para.s 51 -
[10] *Taylor v. Canada,* 2009 ONCA 487, (2009) 95 OR (3d) 561 (CA)
[11] See for example Rule 77.07 (4) and Rule 50.13 (6)
[12] See *Packard v. Fitzgibbon,* 2017 ONSC 566, a recent decision of Justice Mew

[20] Having satisfied myself that I can make the orders, I can of course do so on terms.[13] I recognize that the settling parties have not agreed to any terms and if I grant the relief only on terms that are unacceptable to them, it may imperil the settlement. That concern does not justify granting the orders unconditionally if doing so prejudices the rights of the non-settling defendant.

[21] If I conclude that justice requires the orders only be granted on terms then it will be up to the settling defendants to determine if they are prepared to live with the terms. Having regard to the public policy identified above, the court should not impose terms unnecessarily and should attempt not to undermine the settlement by imposing terms which eliminate the benefit of settling.

[22] What the settling parties achieve through the *Pierringer* agreement is a limit on their exposure to liability and certainty regarding their contribution to the damages but they also hope to end the need to incur further costs as a party to the litigation. Of course they cannot extract themselves entirely from the litigation because they are in possession and control of relevant documents and they have personnel who will be necessary witnesses at the trial but it would undermine one of the benefits of settling if they continue to have the same obligations as a party.

[23] I was referred to a 1994 article written by Peter Knapp, an American law professor.[14] Extracts from this article were referred to by the Supreme Court of Canada in *Sable Offshore, supra.* It is an interesting read because it deals with the development, rationale and difficulties encountered with such agreements in several American states. Amongst other things the article underscores for the reader that tort litigation in the United States takes place in a myriad of jurisdictions in which negligence law may be both procedurally and substantively different from our own. In particular at least when the article was written, not all states had an equivalent to the *Negligence Act* and some states had legislation which responded in some manner to the existence of *Pierringer* agreements. So caution is needed before automatically importing features of tort litigation found in other jurisdictions. Proportionate share settlements have been found useful in Canada and the term "*Pierringer*" has become widespread and useful shorthand. That does not mean that all features of the original prototype should automatically apply. Each agreement must be evaluated in context.

[24] With that caveat, and also recognizing that the article is now 20 years old, Professor Knapp's analysis remains instructive. For example he raises interesting questions about the effect of *Pierringer* agreements and releases in cases of vicarious liability, agency and intentional tortfeasors. To date Canadian courts have had little experience wrestling with these issues. For purpose of this motion, pages 43 – 56 of the article are particularly useful because they discuss the impact of these agreements on the trial, on discovery and on preservation of evidence. He makes the important point that even though the plaintiff has the burden of proving fault against the non-settling defendant who remains in the litigation, the "plaintiff no longer has any incentive to prove the settling defendant's fault" and that at least at a practical level, the

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[13] Rule 37.13 (1)

[14] *Keeping the Pierringer Promise: Fair Settlements and Fair Trials,* (1994) 20 William Mitchell Law Review 1, (1994) *Faculty Scholarship,* Paper 25 Available at: http://open.mitchellhamline.edu/wmlr/vol20/iss1/1

"*Pierringer* settlement transfers to the remaining defendant the burden to prove the settling defendant's fault."

[25] Here Nav Canada was originally one of three co-defendants all interested in proving that there was no negligence on the part of the defendants and all interested in showing that all blame lay with the plaintiff airline or the third party pilots. Now NAV Canada stands alone and while it may still hope to convince the court there was no fault on its part, it may also have to demonstrate that if there was fault, the largest component of that fault lies with one of its former co-defendants. This is a significant change to the litigation landscape.

[26] The non-settling defendant faces procedural prejudice when it is the sole remaining defendant. Although its liability for damages will be limited to its proportionate share, it will now be faced with defending the allegation it is 100% at fault and in asserting its defence it may well be faced with proving the fault of the other former defendants even though they are non-parties. In fact it will be in the interests of NAV Canada to assert that all fault (if any) lies with one or both of its former co-defendants if it does not lie with the pilots or the airline.

[27] The evidence shows that at a time when the three co-defendants appeared to have common cause, they pleaded relatively broadly and they agreed amongst themselves that they would not conduct discoveries of each other at least at that time. It was not in the interest of any of them to help the plaintiff by pointing fingers at each other. As of December of 2016 when the *Pierrenger* agreement was revealed to NAV Canada this situation changed. It is now very much in NAV Canada's interest to point the finger elsewhere. Conversely it may be faced with witnesses who would previously have been witnesses called by one of the other defendants who will now be witnesses for the plaintiff. That is unknown at this point.

[28] NAV Canada is not a party to the agreement. In implementing the agreement, it is unfair not to recognize that there were originally three defendants and it is important to recognize the evidentiary difficulties that may potentially arise when the court is asked to assign fault to a party that will no longer be present. Some of this must be left to the trial judge. The question is whether any other terms are necessary at this stage in the proceeding.

What terms are required?

[29] I agree that all of the documents produced in the litigation and all of the discovery transcripts should continue to be available to NAV Canada. It will be for the trial judge to determine precisely how these may be used by whom considering that they were produced or examined at a time when there were other parties in the litigation. I do not see how I can rule in advance on the manner in which the trial will be conducted. At this point it is unclear who if anyone may seek to call the witness so it would not be appropriate to rule in advance on whether or not transcripts may be read in. The transcripts will remain useful because they stand as a summary of what the witness will likely say if called and can be used to refresh memory or to impeach the witness in appropriate cases.

[30] I also acknowledge the very real possibility that NAV Canada may have to seek discovery of the former co-defendants if they have information that has not already been elicited during their discovery by the plaintiff or cannot be obtained voluntarily. I do not agree it is

appropriate to give leave in advance of the need being identified. It is not necessary to provide NAV Canada with open ended authority.

[31] *Noonan v. Alpha-Vico* [15] was a case decided by me when I was a master and it was cited by both parties. Although that case was decided in 2010 it contains a useful analysis of proportionate share settlements and their impact on the litigation. I will note in passing that the case was partly concerned with disclosure of the terms of the *Pierringer* agreement and at the time there were two schools of thought about whether the executed agreement was privileged and the amount of the settlement had to be disclosed to the non-settling party. The Supreme Court has since resolved both of those questions in *Sable Offshore* and the answer now is that the agreement is covered by settlement privilege. The fact of the agreement and certain features of the agreement must be disclosed to the court and to the non-settling defendant but the amount of the settlement need not be.[16] That is a different conclusion than the one I reached in *Noonan* and to that extent the case has been overruled by later jurisprudence. In the case at bar, the settling parties have disclosed all of the terms of their agreement except for the amount. This is the correct approach.

[32] They have also prepared a proposed amended pleading. Since it is an amended pleading and not a fresh pleading, it is readily apparent that there were originally co-defendants and what the allegations were against those defendants. I also think that is appropriate as it will show the trier of fact that the litigation has changed since it was begun.

[33] The other aspect of *Noonan* was the request by the defendant to conduct discovery of the former defendants. In deciding not to grant that request, I analyzed much of the same jurisprudence cited to me by the parties today.[17] I concluded that "Ontario courts have generally not imposed a term requiring the settling party to produce documents or submit for discovery but have left it open for the non-settling defendants to obtain that relief under the ordinary rules of civil procedure."[18] Those mechanisms are motions under Rule 30.10 and 31.10 and if such motions are brought, the court will have to consider the unique circumstances in which NAV Canada finds itself as the result of the *Pierringer* agreement.

[34] In *Noonan* the defendants had actually been sued in separate actions and there were no crossclaims. In fact the first action had been quietly settled and there had been no discoveries. Nevertheless it appeared consistent with the weight of authority and with the Ontario discovery regime to require the defendant to bring a motion if and when it required access to evidence or documents and could not obtain that information through non coercive processes. In the case at bar NAV Canada is in a much better position than was Alpha-Vico. It has affidavits of documents from its former co-defendants. It attended all of the discoveries. There do not appear to be outstanding undertakings.

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[15] 2010 ONSC 2720 (Master)
[16] See *Sable Offshore* at paras 18 – 25. The amount must be disclosed to the court after judgment in order to ensure the plaintiff is not over compensated. See *Laudon v. Roberts* 2009 ONCA 383
[17] See *Noonan, supra,* paras 33 - 43
[18] *Supra,* para. 42

[35] This does not mean that terms are inappropriate. Certain orders are appropriate with respect to the preservation of evidence and the use that can be made of it prior to trial. It is reasonable to require the settling-defendants to take steps to make their evidence available should it be necessary. It will not do for those defendants to be treated as if they are complete strangers to the litigation and were never involved. By reason of their involvement in the litigation to date they may well have relevant information in useful and accessible form. That information may be necessary and useful to the remaining parties and to the court. In keeping with the principle I enunciated earlier, the terms I am imposing will be only those necessary to ensure the protection of NAV Canada's rights and will not undermine the benefits of settlement.

[36] The plaintiffs as well as NAV Canada are now in possession of copies of all documents produced by the settling defendants. There should be a mechanism to avoid the need for each party to include those documents in new affidavits of documents. More importantly there should be a mechanism for identifying which party intends to make use of those documents and to avoid a chaotic situation and effective trial planning there should be a mechanism to determine which witnesses from the settling defendants will be called at trial and by which party. This mechanism however is likely to be found in discovery planning, case management and trial management rather than trying to anticipate all possible scenarios in an order.

Terms of the Order

[37] Having regard to the issues identified above and having reviewed the various orders proposed by the parties I am prepared to make the following orders.

> a. An order permitting amendment of the amended statement of claim in the form proposed to remove all allegations against the settling defendants and to confine the claim against the remaining defendant NAV Canada to its proportionate share of the damages if any. As set out in the proposed pleading, the plaintiffs will waive any right to recover from NAV Canada any portion of the loss or damages attributable to any fault attributed to the settling defendants.
>
> b. An order that NAV Canada is entitled to prove at trial the proportion of liability attributable to Transport Canada, the airport authority or the airlines and pilots.
>
> c. An order that the plaintiffs are only entitled to recover from NAV Canada the several apportionment of fault and liability of NAV Canada, if any, and not for any portion of damages attributable to the fault of any other person or entity.
>
> d. An order as proposed by the plaintiff dismissing the action and all crossclaims against and between the settling defendants with prejudice and without costs.
>
> e. An order dismissing crossclaims by the settling defendants against the non-settling defendant with prejudice and without costs and barring any subsequent claim for indemnity against NAV Canada arising out of the claims made in this litigation.
>
> f. An order as proposed by the plaintiffs dismissing the third party claims against the pilots with prejudice and without costs.

g. An order that the former defendants The Attorney General of Canada and the Ottawa International Airport Authority preserve all documents listed in their affidavits of documents and any other documents subsequently produced for use in this litigation.

h. An order that the former defendants The Attorney General of Canada and the Ottawa International Airport Authority advise the plaintiffs and the remaining defendant of the contact information for the witnesses who were deposed at the discovery, whether they continue to be employed by the former defendant, and whether they may be contacted directly or only through counsel. They shall update that information on request.

i. An order that The Attorney General of Canada and the Ottawa International Airport Authority co-operate with the plaintiffs and the defendants by providing contact information for any other employees or former employees who may be required as witnesses upon request.

j. An order permitting the remaining parties to use the affidavits of documents, documentary production and discovery transcripts relating to the former parties for purposes of this litigation subject to direction by the trial judge.

k. An order confirming that the defendant NAV Canada may if necessary bring motions seeking production and discovery orders against the settling defendants having regard to the fact that they were defendants but are now non-parties.

l. An order requiring the plaintiffs to amend and serve the amended amended statement of claim on NAV Canada within 21 days and permitting NAV Canada 30 days following receipt to deliver an amended Statement of Defence.

m. An order that NAV Canada may not add any other party (including any of the parties released from the action) by way of third party claim or other form of claim for indemnity without leave of the court.

n. An order providing that immediately after the exchange of amended pleadings, counsel are to meet and confer with a view to updating a discovery and production plan including agreement if possible concerning the admissibility and use of discoveries previously conducted and documents previously produced.

o. An order that the action will continue under case management. I will be seized of the matter as the case management judge pursuant to Rule 77.06 (1) and will hear any further motions subject to Rule 77.07 (3).

[38] If counsel cannot agree on the form of the order or orders or if the parties to the *Pierringer* agreement no longer wish to proceed with the agreement upon reviewing these terms, I may be spoken to for further direction.

[39] I may also be spoken to regarding costs if counsel are not able to agree on costs.

Mr. Justice Calum MacLeod

Date: July 21, 2017

TAB 2

paras. 23-27

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation and ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project *Appellants*

v.

Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. *Respondents*

INDEXED AS: SABLE OFFSHORE ENERGY INC. *v.* AMERON INTERNATIONAL CORP.

2013 SCC 37

File No.: 34678.

2013: March 25; 2013: June 21.

Present: McLachlin C.J. and LeBel, Abella, Cromwell, Moldaver, Karakatsanis and Wagner JJ.

ON APPEAL FROM THE COURT OF APPEAL FOR NOVA SCOTIA

Civil Procedure — Access to justice — Disclosure — Privilege — Promoting Settlement — Settlement privilege — Scope of protection offered by settlement privilege — Appellants entering into Pierringer Agreements with some defendants to multi-party litigation — Non-settling defendants seeking disclosure of amount of settlements prior to trial — Whether amounts of negotiated settlements protected by settlement privilege.

Sable Offshore Energy Inc. sued a number of defendants who had supplied it with paint intended to prevent corrosion of Sable's offshore structures and onshore facilities. Sable also sued several contractors and applicators who had prepared surfaces and

Sable Offshore Energy Inc., mandataire des détenteurs d'une participation de concessionnaire dans le Projet énergétique extracôtier Sable, ExxonMobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., Pengrowth Corporation et ExxonMobil Canada Properties, exploitante du Projet énergétique extracôtier Sable *Appelantes*

c.

Ameron International Corporation, Ameron B.V., Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. et Serious Business Inc. *Intimées*

RÉPERTORIÉ : SABLE OFFSHORE ENERGY INC. *c.* AMERON INTERNATIONAL CORP.

2013 CSC 37

N° du greffe : 34678.

2013 : 25 mars; 2013 : 21 juin.

Présents : La juge en chef McLachlin et les juges LeBel, Abella, Cromwell, Moldaver, Karakatsanis et Wagner.

EN APPEL DE LA COUR D'APPEL DE LA NOUVELLE-ÉCOSSE

Procédure civile — Accès à la justice — Divulgation — Privilège — Incitation au règlement — Privilège relatif aux règlements — Portée de la protection offerte par le privilège relatif aux règlements — Ententes de type Pierringer conclues entre les appelantes et quelques défenderesses dans un litige faisant intervenir plusieurs parties — Défenderesses non parties aux règlements cherchant à connaître avant le procès les sommes convenues aux règlements — Les sommes négociées aux ententes sont-elles protégées par le privilège relatif aux règlements?

Sable Offshore Energy Inc. a poursuivi plusieurs défenderesses qui lui avaient fourni de la peinture qui devait prévenir la corrosion des installations extracôtières et installations terrestres de traitement du gaz de Sable. Sable a également poursuivi plusieurs entrepreneurs et

applied the paint. The paint allegedly failed to prevent corrosion. Sable entered into Pierringer Agreements with some of the defendants, allowing those defendants to withdraw from the litigation while permitting Sable's claims against the non-settling defendants to continue. Pierringer Agreements allow one or more defendants in a multi-party proceeding to settle with the plaintiff, leaving the remaining defendants responsible only for the loss they actually caused. All of the terms of those agreements were disclosed to the remaining defendants with the exception of the amounts the parties settled for. The remaining defendants sought disclosure of the settlement amounts.

The trial judge dismissed the application seeking disclosure of the settlement amounts, concluding they were covered by settlement privilege. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Held: The appeal should be allowed.

The purpose of settlement privilege is to promote settlement. Settlements allow parties to reach a mutually acceptable resolution to their dispute without prolonging the personal and public expense and time involved in litigation. Settlement privilege protects the efforts parties make to settle their disputes by ensuring that communications made in the course of those negotiations are inadmissible. The protection is for settlement *negotiations*, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. Since the negotiated amount is a key component of the content of successful negotiations, reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege.

As with other class privileges, there are exceptions. To come within those exceptions, a defendant must show that, on balance, a competing public interest outweighs the public interest in encouraging settlement.

The non-settling defendants have received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. As for any concern that the non-settling defendants will be required to pay more

poseurs qui avaient préparé les surfaces et appliqué la peinture. La peinture n'aurait pas prévenu la corrosion. Sable a conclu avec certaines des défenderesses des ententes de type Pierringer qui permettent à ces défenderesses de se retirer du litige alors que les actions intentées par Sable contre les autres défenderesses peuvent suivre leur cours. Les ententes de type Pierringer permettent à un ou plusieurs défendeurs dans une instance multipartite de régler à l'amiable avec le demandeur, ce qui laisse les autres défendeurs responsables uniquement des pertes qu'ils ont effectivement causées. Toutes les modalités de ces ententes, à l'exception des sommes convenues, ont été divulguées aux défenderesses qui restent. Ces dernières ont demandé la divulgation de ces sommes.

La juge de première instance a conclu que les sommes convenues aux règlements étaient protégées par le privilège relatif aux règlements et elle a rejeté la demande de divulgation. La Cour d'appel a infirmé cette décision et ordonné la divulgation des sommes.

Arrêt : Le pourvoi est accueilli.

Le privilège relatif aux règlements vise à favoriser les règlements amiables. Le règlement amiable permet aux parties de résoudre leur différend de façon mutuellement satisfaisante sans faire augmenter le coût et la durée d'une poursuite judiciaire pour les personnes concernées et le public. Le privilège protège les démarches prises par les parties pour résoudre leurs différends en assurant l'irrecevabilité des communications échangées lors de ces négociations. La protection couvre les *négociations* en vue d'un règlement, qu'un règlement intervienne ou non. Par conséquent, les négociations fructueuses doivent bénéficier d'une protection au moins égale à celle des négociations qui n'aboutissent pas à un règlement. Puisque la somme négociée constitue un élément clef du contenu de négociations fructueuses et reflète les admissions, offres et compromis faits au cours des négociations, elle aussi est protégée par le privilège relatif aux règlements.

Comme les autres privilèges génériques, ce privilège souffre d'exceptions. Pour en bénéficier, le défendeur doit établir que, tout compte fait, un intérêt public opposé l'emporte sur l'intérêt public à favoriser le règlement.

Toutes les modalités non financières des ententes de type Pierringer ont été communiquées aux défenderesses non parties aux règlements. Ces dernières peuvent consulter tous les documents pertinents et autres éléments de preuve qui étaient en la possession des défenderesses parties aux règlements. Elles ont également reçu l'assurance qu'elles ne seront tenues responsables que de

than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable is seeking. There is therefore no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

leur part des dommages. Quant à la crainte que les défenderesses non parties aux règlements soient tenues de payer davantage que leur part des dommages, il est de la nature même des ententes de type Pierringer que les défendeurs non parties à ce genre de règlement ne peuvent être tenus responsables que de leur part des dommages et qu'ils sont responsables individuellement, et non solidairement, avec les défendeurs parties au règlement. Ces défenderesses demeurent pleinement conscientes des poursuites contre lesquelles elles doivent se défendre ainsi que de la somme globale que réclame Sable. Par conséquent, on ne peut affirmer qu'un préjudice tangible créé par le fait de ne pas dévoiler les sommes convenues aux ententes l'emporte sur l'intérêt du public à ce que les règlements amiables soient favorisés.

Cases Cited

Referred to: *Pierringer v. Hoger*, 124 N.W.2d 106 (1963); *Sparling v. Southam Inc.* (1988), 66 O.R. (2d) 225; *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235; *Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737; *Cutts v. Head*, [1984] 1 All E.R. 597; *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276; *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84; *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185; *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214; *Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54; *Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783; *Underwood v. Cox* (1912), 26 O.L.R. 303; *Bioriginal Food & Science Corp. v. Sascopack Inc.*, 2012 SKQB 469 (CanLII).

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APPEAL from a judgment of the Nova Scotia Court of Appeal (MacDonald C.J.N.S. and Oland and Farrar JJ.A.), 2011 NSCA 121, 310 N.S.R. (2d) 382, 983 A.P.R. 382, 26 C.P.C. (7th) 1, 346 D.L.R. (4th) 68, 12 C.L.R. (4th) 129, [2011] N.S.J. No. 687 (QL), 2011 CarswellNS 893, reversing a decision of Hood J., 2010 NSSC 473, 299 N.S.R. (2d) 216, 947 A.P.R. 216, [2010] N.S.J. No. 713 (QL), 2010 CarswellNS 907. Appeal allowed.

Robert G. Belliveau, Q.C., and *Kevin Gibson*, for the appellants.

John P. Merrick, Q.C., and *Darlene Jamieson, Q.C.*, for the respondents Ameron International Corporation and Ameron B.V.

Terrence L. S. Teed, Q.C., and *Ronald J. Savoy*, for the respondents Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.

The judgment of the Court was delivered by

[1] ABELLA J. — The justice system is on a constant quest for ameliorative strategies that reduce litigation's stubbornly endemic delays, expense and stress. In this evolving mission to confront barriers to access to justice, some strategies for resolving disputes have proven to be more enduringly successful than others. Of these, few can claim the tradition of success rightfully attributed to settlements.

[2] The purpose of settlement privilege is to promote settlement. The privilege wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible.

[3] Sable Offshore Energy Inc. sued a number of defendants. It settled with some of them. The

POURVOI contre un arrêt de la Cour d'appel de la Nouvelle-Écosse (le juge en chef MacDonald et les juges Oland et Farrar), 2011 NSCA 121, 310 N.S.R. (2d) 382, 983 A.P.R. 382, 26 C.P.C. (7th) 1, 346 D.L.R. (4th) 68, 12 C.L.R. (4th) 129, [2011] N.S.J. No. 687 (QL), 2011 CarswellNS 893, qui a infirmé une décision de la juge Hood, 2010 NSSC 473, 299 N.S.R. (2d) 216, 947 A.P.R. 216, [2010] N.S.J. No. 713 (QL), 2010 CarswellNS 907. Pourvoi accueilli.

Robert G. Belliveau, c.r., et *Kevin Gibson*, pour les appelantes.

John P. Merrick, c.r., et *Darlene Jamieson, c.r.*, pour les intimées Ameron International Corporation et Ameron B.V.

Terrence L. S. Teed, c.r., et *Ronald J. Savoy*, pour les intimées Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. et Serious Business Inc.

Version française du jugement de la Cour rendu par

[1] LA JUGE ABELLA — Le système de justice est toujours en quête de stratégies d'amélioration propres à réduire les délais, les coûts et le stress obstinément endémiques dans la conduite des litiges. Dans cette mission en évolution en vue d'affronter les obstacles à l'accès à la justice, certaines stratégies de règlement des différends se sont avérées plus durablement efficaces que d'autres. Peu d'entre elles peuvent toutefois prétendre à la tradition de succès que l'on attribue avec raison aux règlements amiables.

[2] Le privilège relatif aux règlements vise à favoriser les règlements amiables. Ce privilège entoure d'un voile protecteur les démarches prises par les parties pour résoudre leurs différends en assurant l'irrecevabilité des communications échangées lors de ces négociations.

[3] Sable Offshore Energy Inc. a poursuivi plusieurs défenderesses et réglé à l'amiable avec

remaining defendants want to know what amounts the parties settled for. The question before us is whether those negotiated amounts should be disclosed or whether they are protected by settlement privilege.

Background

[4] Sable undertook the Sable Offshore Energy Project, whose purpose was the building of several offshore structures and onshore gas processing facilities in Nova Scotia. Ameron International Corporation and Ameron B.V. (Ameron) and Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively Amercoat) supplied Sable with paint for parts of the Sable structures. Sable brought three lawsuits alleging that the paint failed to prevent corrosion.

[5] In the lawsuit that is the subject of this appeal, Sable sued Ameron, Amercoat, and 12 other contractors and applicators who were responsible for preparing surfaces and applying the paint coatings. The claims against Ameron and Amercoat were for negligence, negligent misrepresentation and breach of a collateral warranty. The claims against the other defendants were similar.

[6] Sable entered into three Pierringer Agreements with some of the defendants. Named for the 1963 Wisconsin case of *Pierringer v. Hoger*, 124 N.W.2d 106 (Wis. 1963), a Pierringer Agreement 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.

certaines d'entre elles. Les autres défenderesses veulent connaître les sommes sur lesquelles les parties se sont entendues. Nous avons à décider si ces sommes négociées doivent être divulguées ou si elles sont protégées par le privilège relatif aux règlements.

Contexte

[4] Sable a entrepris le Projet énergétique extracôtier Sable en vue de la construction de plusieurs installations extracôtières et installations terrestres de traitement du gaz en Nouvelle-Écosse. Ameron International Corporation et Ameron B.V. (Ameron) de même que Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. et Serious Business Inc. (collectivement appelées Amercoat) ont fourni à Sable de la peinture pour peindre des sections de ses installations. Sable a engagé trois poursuites dans lesquelles elle prétend que la peinture n'a pas prévenu la corrosion.

[5] Sable a intenté la poursuite faisant l'objet du présent pourvoi contre Ameron, Amercoat et 12 autres entrepreneurs et poseurs chargés de préparer les surfaces et d'appliquer les couches de peinture. Sable a poursuivi Ameron et Amercoat pour négligence, déclaration inexacte faite par négligence et violation d'une garantie accessoire. Les actions visant les autres défenderesses étaient similaires.

[6] Sable a conclu trois ententes de type Pierringer avec certaines des défenderesses. Nommée ainsi en raison de la décision rendue au Wisconsin en 1963 dans l'affaire *Pierringer c. Hoger*, 124 N.W.2d 106 (Wis. 1963), l'entente de type Pierringer permet à un ou à plusieurs défendeurs dans une instance multipartite de régler à l'amiable avec le demandeur et de se retirer du litige, et les autres défendeurs sont responsables uniquement des pertes qu'ils ont effectivement causées. Les défendeurs qui restent ne partagent pas la responsabilité avec ceux qui sont parties à un règlement amiable, mais ils peuvent être tenus conjointement responsables les uns avec les autres.

[7] As part of the terms of the Agreements, Sable agreed to amend its statement of claim against the non-settling defendants to pursue them only for their share of liability. In addition, all the relevant evidence in the possession of the settling defendants, would, in accordance with the Agreements, be given to the Plaintiffs and be discoverable by the non-settling defendants.

[8] Ameron and Amercoat did not settle. All the terms of the Pierringer Agreements were disclosed to Ameron and Amercoat except the amounts agreed to.

[9] These settlement agreements were approved by court order on April 27, 2010. On December 3, 2010, Ameron filed an application pursuant to Rules 20.02 and 20.06 of Nova Scotia's 1972 *Civil Procedure Rules* (which the parties previously agreed would govern the litigation) for disclosure of the settlement amounts paid under the Pierringer Agreements. Sable's position was that the amounts were subject to settlement privilege.

[10] Hood J. dismissed the defendants' application for disclosure of the settlement amounts. She concluded that the public interest was best served by preserving settlement privilege and keeping the settlement amounts confidential. The Court of Appeal overturned that decision and ordered the amounts disclosed.

Analysis

[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), 66 O.R. (2d) 225 (H.C.J.):

[7] Aux termes des ententes, Sable a convenu de modifier sa déclaration à l'encontre des défenderesses non parties aux règlements afin de les poursuivre uniquement pour leur part de la responsabilité. En outre, conformément aux ententes, tous les éléments de preuve pertinents que possèdent les défenderesses parties aux règlements amiables doivent être remis aux demanderesses et peuvent faire l'objet d'une enquête préalable par les autres défenderesses.

[8] Ameron et Amercoat n'ont pas réglé à l'amiable. Toutes les modalités des ententes de type Pierringer leur ont été divulguées à l'exception des sommes convenues.

[9] Ces ententes portant règlement ont été approuvées par ordonnance judiciaire le 27 avril 2010. Le 3 décembre 2010, Ameron a demandé, en application des art. 20.02 et 20.06 des *Civil Procedure Rules* de 1972 de la Nouvelle-Écosse (qui régissent le litige tel que convenu auparavant par les parties), la communication des sommes convenues aux ententes de type Pierringer. Sable a soutenu que les sommes devaient rester assujetties au privilège relatif aux règlements.

[10] La juge Hood a rejeté la demande des défenderesses visant à obtenir communication des sommes convenues aux ententes. Selon elle, l'intérêt public est mieux servi si l'on préserve le privilège relatif aux règlements et l'on assure la confidentialité de ces sommes. La Cour d'appel a infirmé cette décision et ordonné la communication des sommes.

Analyse

[11] Le règlement amiable permet aux parties de résoudre leur différend de façon mutuellement satisfaisante sans faire augmenter le coût et la durée d'une poursuite judiciaire pour les personnes concernées et le public. Le juge en chef adjoint Callaghan a résumé ainsi les avantages du règlement amiable dans *Sparling c. Southam Inc.* (1988), 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]

This observation was cited with approval in *Kelvin Energy Ltd. v. Lee*, [1992] 3 S.C.R. 235, at p. 259, where L'Heureux-Dubé J. acknowledged that promoting settlement was "sound judicial policy" that "contributes to the effective administration of justice".

[12] Settlement privilege promotes settlements. As the weight of the jurisprudence confirms, it is a class privilege. As with other class privileges, while there is a *prima facie* presumption of inadmissibility, exceptions will be found "when the justice of the case requires it" (*Rush & Tompkins Ltd. v. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), at p. 740).

[13] Settlement negotiations have long been protected by the common law rule that "without prejudice" communications made in the course of such negotiations are inadmissible (see David Vaver, "'Without Prejudice' Communications — Their Admissibility and Effect" (1974), 9 *U.B.C. L. Rev.* 85, at p. 88). The settlement privilege created by the "without prejudice" rule was based on the understanding that parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed. As Oliver L.J. of the English Court of Appeal explained in *Cutts v. Head*, [1984] 1 All E.R. 597, at p. 605:

. . . parties should be encouraged so far as possible to settle their disputes without resort to litigation and should not be discouraged by the knowledge that anything that is said in the course of such negotiations . . . may be used

[TRADUCTION] . . . en général, les tribunaux préfèrent sans exception les règlements amiables. En d'autres termes, il existe un intérêt public prépondérant à ce que les parties en viennent à un règlement. Il s'agit là d'un principe qui sert généralement les intérêts des parties en ce qu'il leur épargne les frais de l'instruction des questions en litige, tout en réduisant la pression exercée sur un système de tribunaux provinciaux déjà surchargé. [p. 230]

Cette observation a été citée avec approbation dans *Kelvin Energy Ltd. c. Lee*, [1992] 3 R.C.S. 235, p. 259, où la juge L'Heureux-Dubé a reconnu que le fait de favoriser le règlement constituait une « saine politique judiciaire » qui « contribue à l'efficacité de l'administration de la justice ».

[12] Le privilège relatif aux règlements favorise la conclusion de règlements. Comme le confirme l'abondance de la jurisprudence à ce sujet, il s'agit d'un privilège générique. Comme pour les autres privilèges génériques, il bénéficie d'une présomption *prima facie* d'inadmissibilité, mais cette présomption souffre d'exceptions [TRADUCTION] « quand les considérations de justice que pose l'espèce le requièrent » (*Rush & Tompkins Ltd. c. Greater London Council*, [1988] 3 All E.R. 737 (H.L.), p. 740).

[13] Les négociations en vue d'un règlement sont protégées depuis longtemps par la règle de la common law suivant laquelle sont inadmissibles les communications faites [TRADUCTION] « sous toutes réserves » au cours de ces négociations (voir David Vaver, « "Without Prejudice" Communications — Their Admissibility and Effect » (1974), 9 *U.B.C. L. Rev.* 85, p. 88). Le privilège relatif aux règlements qui découle de la règle des communications faites « sous toutes réserves » reposait sur l'idée que les parties seront davantage susceptibles de parvenir à un règlement si elles sont confiantes dès le départ que le contenu de leurs négociations ne sera pas divulgué. Comme l'a expliqué le lord juge Oliver, de la Cour d'appel d'Angleterre, dans *Cutts c. Head*, [1984] 1 All E.R. 597, p. 605 :

[TRADUCTION] . . . il faut encourager dans toute la mesure du possible les parties à résoudre leurs différends sans recourir aux tribunaux, et elles ne doivent pas être dissuadées de le faire parce qu'elles savent que tout ce

to their prejudice in the course of the proceedings. They should, as it was expressed by Clauson J in *Scott Paper Co v. Drayton Paper Works Ltd* (1927) 44 RPC 151 at 157, be encouraged freely and frankly to put their cards on the table.

What is said during negotiations, in other words, will be more open, and therefore more fruitful, if the parties know that it cannot be subsequently disclosed.

[14] *Rush & Tompkins* confirmed that settlement privilege extends beyond documents and communications expressly designated to be "without prejudice". In that case, a contractor settled its action against one defendant, the Greater London Council (the GLC), while maintaining it against the other defendant, the Carey contractors. The House of Lords considered whether communications made in the process of negotiating the settlement with the GLC should be admissible in the ongoing litigation with the Carey contractors. Lord Griffiths reached two conclusions of significance for this case. First, although the privilege is often referred to as the rule about "without prejudice" communications, those precise words are not required to invoke the privilege. What matters instead is the intent of the parties to settle the action (p. 739). Any negotiations undertaken with this purpose are inadmissible.

[15] Lord Griffiths' second relevant conclusion was that although most cases considering the "without prejudice" rule have dealt with the admissibility of communications once negotiations have failed, the rationale of promoting settlement is no less applicable if an agreement is actually reached. Lord Griffiths explained that a plaintiff in Rush & Tompkins' situation would be discouraged from settling with one defendant if any admissions it made during the course of its negotiations were admissible in its claim against the other:

qui se dit au cours des négociations [. . .] peut être utilisé à leur détriment au cours de l'instance. Comme l'a dit le juge Clauson dans *Scott Paper Co c. Drayton Paper Works Ltd* (1927), 44 RPC 151, p. 157, il faut encourager librement et franchement les parties à jouer cartes sur table.

En d'autres termes, les discussions tenues lors des négociations seront plus transparentes et donneront par le fait même de meilleurs résultats si les parties savent que leur contenu ne pourra pas être dévoilé par la suite.

[14] L'arrêt *Rush & Tompkins* confirme que le privilège relatif aux règlements ne vise pas que les documents et communications expressément qualifiés par les mots « sous toutes réserves ». Dans cette affaire, un entrepreneur a réglé à l'amiable l'action qu'il avait intentée contre l'un des défendeurs, le Greater London Council (le GLC), tout en continuant de poursuivre l'autre défendeur, les entrepreneurs Carey. La Chambre des lords s'est demandée si les communications échangées au cours des négociations du règlement intervenu avec le GLC devraient être admissibles en preuve dans la poursuite en cours contre les entrepreneurs Carey. Le lord juge Griffiths a tiré deux conclusions importantes pour la présente affaire. Tout d'abord, bien que le privilège soit souvent appelé la règle des communications faites « sous toutes réserves », point n'est besoin d'employer ces termes exacts pour l'invoquer. Ce qui compte plutôt, c'est l'intention des parties de régler l'action (p. 739). Le contenu de toute négociation entreprise à cette fin est inadmissible en preuve.

[15] Selon la deuxième conclusion pertinente du lord juge Griffiths, même si la plupart des décisions dans lesquelles on a examiné la règle des communications faites « sous toutes réserves » portent sur l'admissibilité en preuve de ces communications après l'échec des négociations, la raison d'être de l'incitation au règlement amiable vaut tout autant si une entente est effectivement intervenue. Le lord juge Griffiths a précisé qu'un demandeur se trouvant dans la situation de Rush & Tompkins serait dissuadé de régler à l'amiable avec un défendeur si toutes les admissions qu'il faisait durant les négociations étaient admissibles en preuve dans sa poursuite visant l'autre défendeur :

In such circumstances it would, I think, place a serious fetter on negotiations . . . if they knew that everything that passed between them would ultimately have to be revealed to the one obdurate litigant. [p. 744]

[16] *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.), subsequently endorsed the view that settlement privilege covers any settlement negotiations. The plaintiff James Middelkamp launched a civil suit against Fraser Valley Real Estate Board claiming that it had engaged in practices that were contrary to the *Competition Act*, R.S.C. 1985, c. C-34, and caused him to suffer damages. He also complained about the Board's conduct to the Director of Investigation and Research under different provisions of the *Act*, resulting in an investigation by the Director and criminal charges against the Board. The Board negotiated a settlement with the Department of Justice, leading to the criminal charges being resolved. Middelkamp sought disclosure of any communications made during the course of negotiations between the Board and the Department of Justice. McEachern C.J.B.C. refused to order disclosure of the communications on the basis of settlement privilege, explaining:

. . . the public interest in the settlement of disputes generally requires "without prejudice" documents or communications created for, or communicated in the course of, settlement negotiations to be privileged. I would classify this as a "'blanket', *prima facie*, common law, or 'class'" privilege because it arises from settlement negotiations and protects the class of communications exchanged in the course of that worthwhile endeavour.

In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, *and whether or not a settlement is reached.* This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such

[TRADUCTION] Dans les circonstances, j'estime que, [. . .] si les parties savaient qu'il leur faudrait en fin de compte divulguer toutes leurs communications à la partie inflexible, cela entraverait sérieusement les négociations. [p. 744]

[16] L'opinion selon laquelle le privilège relatif aux règlements s'applique à toute négociation en vue d'un règlement a été acceptée par la suite dans *Middelkamp c. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.). Le demandeur, James Middelkamp, a exercé un recours au civil contre le Fraser Valley Real Estate Board (la chambre immobilière), prétendant que cette dernière s'était livrée, à son détriment, à des pratiques contraires à la *Loi sur la concurrence*, L.R.C. 1985, ch. C-34. Il s'est également plaint de la conduite de la chambre immobilière au directeur des enquêtes et recherches en vertu de dispositions différentes de cette *Loi*, ce qui a mené à une enquête du directeur et au dépôt d'accusations criminelles contre la chambre immobilière. Cette dernière a négocié avec le ministère de la Justice le règlement des accusations criminelles, et ces négociations ont porté fruit. M. Middelkamp a demandé la divulgation de toutes les communications échangées au cours des négociations entre la chambre immobilière et le ministère de la Justice. Le juge en chef McEachern a expliqué en ces termes son refus d'ordonner la divulgation des communications en raison du privilège relatif aux règlements :

[TRADUCTION] . . . l'intérêt que porte le public au règlement des différends requiert généralement que les documents créés et les communications échangées « sous toutes réserves » au cours de négociations en vue d'un règlement restent assujettis au privilège. Je qualifierais ce privilège de « "général", *prima facie*, de la common law, ou "générique" », parce qu'il découle des négociations en vue d'un règlement et protège la catégorie des communications échangées durant cette initiative valable.

À mon sens, ce privilège empêche que les documents créés et les communications échangées en vue d'un règlement soient divulgués tant aux autres parties aux négociations qu'aux tiers, et il touche également l'admissibilité de la preuve, *qu'un règlement intervienne ou non.* Il en est ainsi parce que, comme je l'ai déjà dit, une partie qui présente une proposition de règlement amiable ou qui répond à une telle proposition n'exerce habituellement

documents. Without such protection, the public interest in encouraging settlements will not be served. [Emphasis added; paras. 19-20.]

[17] As McEachern C.J.B.C. pointed out, the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. The reasoning in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, is instructive. A plaintiff brought separate claims against two defendants for unrelated injuries to the same knee. She settled with one defendant and the Court of Appeal had to consider whether the trial judge was right to order disclosure of the amount of the settlement to the remaining defendant. Bryson J.A. found that disclosure should not have been ordered since a principled approach to settlement privilege did not justify a distinction between settlement *negotiations* and what was ultimately negotiated:

> Some of the cases distinguish between extending privilege from negotiations to the concluded agreement itself. . . . *The distinction . . . is arbitrary.* The reasons for protecting settlement communications from disclosure are not usually spent when a deal is made. *Typically parties no more wish to disclose to the world the terms of their agreement than their negotiations in achieving it.* [Emphasis added; para. 41.]

Notably, this is the view taken in Alan W. Bryant, Sidney N. Lederman and Michelle K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), where the authors conclude:

> . . . the privilege applies not only to failed negotiations, but also to the *content of successful negotiations*, so long as the existence or interpretation of the agreement itself is not in issue in the subsequent proceedings and

aucun contrôle sur l'utilisation que peut faire la partie adverse des documents en question. Écarter cette protection serait contraire à l'intérêt public qui favorise les règlements amiables. [Italiques ajoutés; par. 19-20.]

[17] Comme l'a souligné le juge en chef McEachern, le privilège protège les négociations en vue d'un règlement, qu'un règlement intervienne ou non. Par conséquent, les négociations fructueuses doivent bénéficier d'une protection au moins égale à celle des négociations qui n'aboutissent pas à un règlement. Le raisonnement adopté dans *Brown c. Cape Breton (Regional Municipality)*, 2011 NSCA 32, 302 N.S.R. (2d) 84, est révélateur. La demanderesse a intenté des poursuites distinctes contre un défendeur et une défenderesse pour des blessures différentes subies au même genou. Elle a conclu un règlement amiable avec le défendeur et la Cour d'appel devait décider si le juge du procès avait eu raison d'ordonner que la somme convenue au règlement soit communiquée à la défenderesse dans l'autre poursuite. Le juge Bryson a conclu que la communication n'aurait pas dû être ordonnée puisqu'une analyse du privilège relatif aux règlements fondée sur des principes ne justifiait pas que l'on établisse une distinction entre les *négociations* en vue d'un règlement et l'entente finalement négociée :

> [TRADUCTION] Certaines décisions font une distinction entre l'application du privilège aux négociations et son application à l'entente elle-même. [. . .] *La distinction* [. . .] *est arbitraire.* Les raisons pour lesquelles on met les communications en vue d'un règlement à l'abri de leur divulgation ne deviennent généralement pas caduques à la conclusion d'une entente. *D'habitude, les parties ne sont pas plus disposées à dévoiler publiquement les modalités de leur entente que le contenu des négociations ayant abouti à celle-ci.* [Italiques ajoutés; par. 41.]

Il convient de signaler que c'est le point de vue retenu par Alan W. Bryant, Sidney N. Lederman et Michelle K. Fuerst, *The Law of Evidence in Canada* (3e éd. 2009), où ils concluent :

> [TRADUCTION] . . . le privilège s'applique non seulement aux négociations qui ont échoué, mais également au *contenu des négociations fructueuses*, dès lors que l'existence ou l'interprétation de l'entente elle-même ne

none of the exceptions are applicable. [Emphasis added; §14.341.]

[18] Since the negotiated amount is a key component of the "content of successful negotiations", reflecting the admissions, offers, and compromises made in the course of negotiations, it too is protected by the privilege. I am aware that some earlier jurisprudence did not extend the privilege to the concluded agreement (see *Amoco Canada Petroleum Co. v. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185, at para. 40, citing *Hudson Bay Mining and Smelting Co. v. Wright* (1997), 120 Man. R. (2d) 214 (Q.B.)), but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.

[19] There are, inevitably, exceptions to the privilege. To come within those exceptions, a defendant must show that, on balance, "a competing public interest outweighs the public interest in encouraging settlement" (*Dos Santos Estate v. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, at para. 20). These countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence (*Unilever plc v. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. Civ. Div.), *Underwood v. Cox* (1912), 26 O.L.R. 303 (Div. Ct.)), and preventing a plaintiff from being overcompensated (*Dos Santos*).

[20] The non-settling defendants argue that there should be an exception to the privilege for the amounts of the settlements because they say they need this information to conduct their litigation. I see no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements.

[21] The particular settlements negotiated in this case are known as Pierringer Agreements. Pierringer Agreements were developed in the United States to address the obstacles to settlement that arose in multi-party litigation. Professor Peter B. Knapp

sont pas en jeu dans l'instance subséquente et qu'aucune des exceptions au privilège ne s'applique. [Italiques ajoutés; §14.341.]

[18] Puisque la somme négociée constitue un élément clef du « contenu de négociations fructueuses », et reflète les admissions, offres et compromis faits au cours des négociations, elle est elle aussi protégée par le privilège. Je sais que dans certaines décisions plus anciennes, les tribunaux n'ont pas appliqué le privilège à l'entente (voir *Amoco Canada Petroleum Co. c. Propak Systems Ltd.*, 2001 ABCA 110, 281 A.R. 185, par. 40, citant *Hudson Bay Mining and Smelting Co. c. Wright* (1997), 120 Man. R. (2d) 214 (B.R.)), mais il vaut mieux à mon avis adopter une approche qui favorise avec plus de vigueur le règlement amiable en en protégeant le contenu.

[19] Le privilège souffre inévitablement d'exceptions. Pour en bénéficier, le défendeur doit établir que, tout compte fait, [TRADUCTION] « un intérêt public opposé l'emporte sur l'intérêt public à favoriser le règlement amiable » (*Dos Santos Estate c. Sun Life Assurance Co. of Canada*, 2005 BCCA 4, 207 B.C.A.C. 54, par. 20). On a retenu parmi ces intérêts opposés les allégations de déclaration inexacte, la fraude ou l'abus d'influence (*Unilever plc c. Procter & Gamble Co.*, [2001] 1 All E.R. 783 (C.A. div. civ.), *Underwood c. Cox* (1912), 26 O.L.R. 303 (C. div.)), et la prévention de la surindemnisation du demandeur (*Dos Santos*).

[20] Les défenderesses non parties aux règlements amiables soutiennent que les sommes convenues aux ententes devraient faire l'objet d'une exception au privilège parce qu'elles disent avoir besoin de ces renseignements pour la conduite de leur litige. Je ne vois, dans le fait de ne pas dévoiler les sommes convenues aux ententes, aucun préjudice tangible qui l'emporte sur l'intérêt du public à ce que les règlements amiables soient favorisés.

[21] Les ententes particulières négociées en l'espèce sont dites des ententes de type Pierringer. L'entente de type Pierringer a été conçue aux États-Unis pour surmonter les obstacles au règlement amiable qui se dressent dans les litiges faisant

summarized the value — and complexity — of trying to settle multi-party litigation as follows:

> Settlement of complicated multi-defendant civil litigation is particularly valuable, because complicated civil trials can consume enormous amounts of a judge's time and can be expensive for the parties. However, settling multi-defendant civil litigation can be especially difficult. Different defendants have different tolerances for risk, and some defendants are simply far less willing to settle than others.
>
> ("Keeping the *Pierringer* Promise: Fair Settlements and Fair Trials" (1994), 20 *Wm. Mitchell L. Rev.* 1, at p. 5)

[22] Professor Knapp also explained why, prior to Pierringer Agreements, settlements had been difficult to encourage:

> On one hand, a plaintiff contemplating settlement with one of several defendants faced the possibility that release of the one defendant would also extinguish all claims against the nonsettling defendants. On the other hand, in jurisdictions which permitted contribution among joint tortfeasors, a settling defendant faced the possibility of post-settlement contribution claims made by the nonsettling defendants. [pp. 6-7]

[23] In the United States, Pierringer Agreements were found to significantly attenuate the obstacles in the way of negotiating settlements in multi-party litigation. Under a Pierringer Agreement, the plaintiff's claim was only "extinguished" against those defendants with whom it settled; the claims against the non-settling defendants continued. The settling defendants, meanwhile, were assured that they could not be subject to a contribution claim from the non-settling defendants, who would be accountable only for their own share of liability at trial.

intervenir plusieurs parties. Le professeur Peter B. Knapp a résumé ainsi la valeur — et la complexité — des efforts déployés pour régler à l'amiable un litige de ce genre :

> [TRADUCTION] Le règlement amiable des litiges civils mettant en cause plusieurs défendeurs a une valeur particulièrement grande du fait que le juge peut devoir consacrer énormément de temps à des procès civils qui peuvent s'avérer coûteux pour les parties. Cependant, il est parfois particulièrement difficile de régler à l'amiable un litige de cette nature. La tolérance au risque varie d'un défendeur à l'autre, et certains défendeurs sont tout simplement beaucoup moins disposés que d'autres à régler à l'amiable.
>
> (« Keeping the *Pierringer* Promise : Fair Settlements and Fair Trials » (1994), 20 *Wm. Mitchell L. Rev.* 1, p. 5)

[22] Le professeur Knapp a aussi expliqué les raisons pour lesquelles il était difficile, avant l'avènement des ententes de type Pierringer, d'inciter les parties à en venir à un règlement :

> [TRADUCTION] D'une part, le demandeur qui songeait à régler à l'amiable avec l'un des défendeurs courait le risque que l'abandon de la poursuite contre ce défendeur éteigne toutes les réclamations à l'égard des défendeurs non parties au règlement. D'autre part, dans les ressorts où les coauteurs du délit pouvaient devoir verser une contribution, le défendeur partie au règlement s'exposait au risque que les autres défendeurs lui réclament une contribution après le règlement. [p. 6-7]

[23] Aux États-Unis, on a estimé que les ententes de type Pierringer réduisaient sensiblement les obstacles à la négociation de règlements amiables dans les litiges faisant intervenir plusieurs parties. Aux termes d'une entente de ce genre, l'action du demandeur ne « prend fin » qu'à l'égard des défendeurs avec qui il a réglé à l'amiable; les actions intentées contre les défendeurs non parties au règlement suivent leur cours. Quant aux défendeurs qui sont parties au règlement, ils obtiennent l'assurance qu'ils ne seront pas mis à contribution par les autres défendeurs, et au procès, ces derniers ne devront rendre compte que de leur propre part de la responsabilité.

[24] Pierringer Agreements in Canada built on these American foundations and routinely included additional protections for non-settling defendants, such as requiring that non-settling defendants be given access to the settling defendants' evidence. In this case, for example, the court order approving the settlement required that the plaintiffs get production of all relevant evidence from the settling defendants and make this evidence available to the non-settling defendants on discovery. It also ordered that, with respect to factual matters, there be no restrictions on the non-settling defendants' access to experts retained by the settling defendants. In addition, the Agreements in this case specified that their non-financial terms would be disclosed to the court and non-settling defendants "to the extent required by the laws of the Province of Nova Scotia and the rulings and ethical guidelines promulgated by the Nova Scotia Barristers' Society" (A.R., at pp. 142 and 184).

[25] The non-settling defendants have in fact received all the non-financial terms of the Pierringer Agreements. They have access to all the relevant documents and other evidence that was in the settling defendants' possession. They also have the assurance that they will not be held liable for more than their share of damages. Moreover, Sable agreed that at the end of the trial, once liability had been determined, it would disclose to the trial judge the amounts it settled for. As a result, should the non-settling defendants establish a right to set-off in this case, their liability for damages will be adjusted downwards if necessary to avoid overcompensating the plaintiff.

[26] As for any concern that the non-settling defendants will be required to pay more than their share of damages, it is inherent in Pierringer Agreements that non-settling defendants can only

[24] Au Canada, les ententes de type Pierringer se sont constituées sur ces assises américaines et elles ont prévu couramment d'autres mesures protectrices à l'égard des défendeurs non parties au règlement, comme l'obligation de leur donner accès à la preuve des défendeurs qui sont parties à ce règlement. En l'espèce, par exemple, l'ordonnance par laquelle le tribunal a donné son aval au règlement amiable exigeait que les demanderesses obtiennent communication de toute la preuve pertinente de la part des défenderesses parties aux règlements amiables et qu'elles mettent cette preuve à la disposition des défenderesses non parties au règlement aux fins d'enquête préalable. L'ordonnance accordait aussi à ces défenderesses, en ce qui concerne les questions de fait, la faculté d'avoir recours sans restriction aux experts retenus par les défenderesses parties aux règlements. De plus, les ententes en l'espèce précisaient que leurs modalités non financières seraient communiquées à la cour et aux défenderesses non parties aux règlements [TRADUCTION] « dans la mesure requise par les lois de la Nouvelle-Écosse ainsi que les décisions et le code de déontologie de la Nova Scotia Barristers' Society » (d.a., p. 142 et 184).

[25] Toutes les modalités non financières des ententes de type Pierringer ont effectivement été communiquées aux défenderesses non parties aux règlements. Elles peuvent consulter tous les documents pertinents et autres éléments de preuve qui étaient en la possession des défenderesses parties aux règlements. On leur a également donné l'assurance qu'elles ne seront tenues responsables que de leur part des dommages. De plus, Sable a accepté de divulguer les sommes convenues au juge de première instance au terme du procès, une fois la responsabilité établie. Par conséquent, si les défenderesses non parties aux règlements établissaient leur droit à une compensation en l'espèce, leur responsabilité en dommages-intérêts sera revue à la baisse en cas de besoin pour éviter une surindemnisation des demanderesses.

[26] Quant à la crainte que les défenderesses non parties aux règlements soient tenues de payer davantage que leur part des dommages, il est de la nature même des ententes de type Pierringer que

be held liable for their share of the damages and are severally, and not jointly, liable with the settling defendants.

[27] It is therefore not clear to me how knowledge of the settlement amounts materially affects the ability of the non-settling defendants to know and present their case. The defendants remain fully aware of the claims they must defend themselves against and of the overall amount that Sable 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.

[28] The non-settling defendants also argued that refusing disclosure impedes their own possible settlement initiatives since they are more likely to settle if they know the settlement amounts already negotiated. Perhaps. But they may also, depending on the amounts, arguably come to see them as a disincentive. In any event, theirs is essentially a circular argument that the interest in *subsequent* settlement outweighs the public interest in encouraging the *initial* settlement. But the likelihood of an initial settlement decreases if the amount is disclosable.

[29] Someone has to go first, and encouraging that first settlement in multi-party litigation is palpably worthy of more protection than the speculative assumption that others will only follow if they know the amount. The settling defendants, after all, were able to come to a negotiated amount without the benefit of a guiding settlement precedent. The non-settling defendants' position is no worse. As Smith J. noted in protecting the settlement amount

les défendeurs non parties à ce genre de règlement ne peuvent être tenus responsables que de leur part des dommages et qu'ils sont responsables individuellement, et non solidairement, avec les défendeurs parties au règlement.

[27] Je ne vois donc pas en quoi la connaissance des sommes convenues aux ententes influe matériellement sur l'aptitude des défenderesses non parties au règlement à connaître et à présenter leurs arguments. Ces défenderesses demeurent pleinement conscientes des poursuites contre lesquelles elles doivent se défendre ainsi que de la somme globale que réclame Sable. Certes, le fait de connaître les sommes convenues aux ententes pourrait permettre aux défenderesses de revoir leur estimation de la somme qu'elles veulent investir pour se défendre, mais la connaissance de ces sommes ne me semble pas suffisamment importante pour écarter l'intérêt public à favoriser les règlements amiables.

[28] Les défenderesses non parties aux règlements ont aussi plaidé que le refus de divulgation fait obstacle à leurs propres projets potentiels de règlement amiable, car elles seraient plus enclines à régler à l'amiable si elles connaissaient les sommes déjà négociées. Peut-être. Mais elles pourraient aussi, par contre, selon les sommes en cause, en venir à considérer ces sommes comme un élément dissuasif. De toute façon, leur argument est essentiellement circulaire, car il revient à dire que l'intérêt à favoriser un règlement amiable *subséquent* l'emporte sur l'intérêt public à favoriser le règlement amiable *initial.* Mais la probabilité de parvenir à un règlement amiable au départ diminue si la somme convenue peut être divulguée.

[29] Quelqu'un doit faire le premier pas, et l'incitation au premier règlement d'un litige mettant aux prises plusieurs parties mérite clairement une plus grande protection que l'hypothèse conjecturale voulant que d'autres parties n'emboîteront le pas que si elles connaissent la somme convenue. Après tout, les défenderesses parties aux règlements amiables sont parvenues à négocier une somme en l'absence d'un règlement antérieur comme modèle.

from disclosure in *Bioriginal Food & Science Corp. v. Sascopack Inc.*, 2012 SKQB 469 (CanLII):

> . . . imperfect knowledge is virtually always the case in settlement negotiations. There are always knowns and known unknowns . . . . [para. 33]

And Bryson J.A. compellingly summarized the competing arguments in *Brown* as follows:

> Some courts have argued that it is necessary to go further and disclose the settlement amount itself. They hold either that the agreement (unlike negotiations) is not privileged or that the settling parties have an advantage which should be redressed by disclosure. . . . If indeed settling parties thereby enjoy an advantage over non-settling parties, it is one for which they have bargained. The court should hesitate to expropriate that advantage by ordering disclosure at the instance of non-settling parties, intransigent or otherwise. The argument that disclosure would facilitate settlement amongst the remaining parties ignores that, but for the privilege, the first settlement would often not occur. [Citations omitted; para. 67.]

[30] 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. While protecting disclosure of settlement negotiations and their fruits has the demonstrable benefit of promoting settlement, there is little corresponding harm in denying disclosure of the settlement amounts in this case.

[31] I would therefore allow the appeal with costs throughout.

Les défenderesses non parties aux règlements ne se trouvent pas dans une pire situation qu'elles. Comme l'a fait remarquer le juge Smith quand il a refusé la divulgation de la somme convenue à l'entente dans *Bioriginal Food & Science Corp. c. Sascopack Inc.*, 2012 SKQB 469 (CanLII) :

> [TRADUCTION] . . . dans pratiquement tous les cas de négociation en vue d'un règlement amiable, les parties ne savent pas tout. Il y a toujours des éléments connus et des éléments que l'on sait inconnus . . . [par. 33]

Et le juge Bryson a résumé de manière convaincante en ces termes les arguments contradictoires dans *Brown* :

> [TRADUCTION] Certains tribunaux sont d'avis qu'il faut aller plus loin et divulguer la somme convenue à l'entente. Ils affirment soit que l'entente (contrairement aux négociations) ne fait pas l'objet d'un privilège, soit que les parties au règlement amiable disposent d'un avantage auquel il doit être remédié par la divulgation. [. . .] Si les parties qui en viennent à un règlement bénéficient vraiment de ce fait d'un avantage aux dépens des autres parties, c'est un avantage qu'elles ont négocié. Les tribunaux devraient hésiter à leur enlever cet avantage en leur ordonnant de dévoiler la somme à la demande des parties qui n'ont pas réglé à l'amiable parce qu'elles se sont montrées inflexibles ou pour d'autres raisons. L'argument selon lequel la divulgation favoriserait un règlement entre les autres parties ne tient pas compte du fait que souvent, s'il n'y avait pas de privilège, il n'y aurait pas de premier règlement. [Références omises; par. 67.]

[30] Pour analyser comme il se doit la revendication d'une exception au privilège relatif aux règlements, il ne faut pas se demander simplement si les défendeurs non parties au règlement tirent un quelconque avantage tactique de la divulgation, mais si le motif de la divulgation *l'emporte* sur le principe suivant lequel il faut favoriser les règlements amiables. Bien que le fait d'empêcher la divulgation du contenu et des résultats des négociations en vue d'un règlement ait l'avantage évident de favoriser les règlements amiables, le refus de divulguer les sommes convenues aux ententes en l'espèce ne cause guère de préjudice corrélatif.

[31] Par conséquent, je suis d'avis d'accueillir le pourvoi avec dépens devant toutes les cours.

Appeal allowed with costs throughout.

Solicitors for the appellants: McInnes Cooper, Halifax.

Solicitors for the respondents Ameron International Corporation and Ameron B.V.: Merrick Jamieson Sterns Washington & Mahody, Halifax.

Solicitors for the respondents Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc.: Bingham Law, Moncton.

Pourvoi accueilli avec dépens devant toutes les cours.

Procureurs des appelantes : McInnes Cooper, Halifax.

Procureurs des intimées Ameron International Corporation et Ameron B.V. : Merrick Jamieson Sterns Washington & Mahody, Halifax.

Procureurs des intimées Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. et Serious Business Inc. : Bingham Law, Moncton.

TAB 3

paras. 15-16

CITATION: 1511419 Ontario Inc. v. KPMG LLP, 2017 ONSC 2472
COURT FILE NO.: CV-14-10771-00CL
DATE: 20170421

ONTARIO SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N

1511419 ONTARIO INC. (FORMERLY KNOWN AS THE CASH STORE FINANCIAL SERVICES INC.)

Plaintiff

- and -

KPMG LLP

Defendant

BEFORE: F.L. Myers J.

COUNSEL: *Gerald L.R. Ranking and Dylan Chocla,* counsel for the defendant.

Megan Keenberg, counsel for the plaintiff

John Fabello, counsel for the former independent directors and officers of the plaintiff.

Matthew Lerner, counsel for the former inside directors and officers of the plaintiff Gordon Reykdal and Ed McClelland.

HEARD: April 12, 2017

ENDORSEMENT

The Motion

[1] The defendant KPMG LLP moves for an order relieving former members of the board of directors of the plaintiff (or its predecessor) Cash Store of their contractual obligation to refuse to "cooperate with, meet with or talk to" KPMG concerning this litigation except under compulsion of a court order or summons to witness.

[2] The former directors' contractual obligation to refuse to speak to the defendant is contained in a side letter agreement that was part of a global settlement of litigation that was the centerpiece of the plan of compromise and arrangement of Cash Store under the *Companies' Creditors Arrangement Act*, RSC 1985, c. C-36.

[3] Cash Store (or those who were responsible for its actions at the time) did not disclose the side letter agreement to the defendant, the creditors, or to the Court in the *CCAA* plan approval process.

[4] For the reasons that follow, I find that the prohibition against communicating with KPMG contained in the undisclosed side letter agreement is not binding on the former directors of Cash Store. Cash Store required approval of the Court to enter into the side letter agreement. As it did not disclose the side letter agreement to its creditors, KPMG, or to the Court, Cash Store thereby failed to obtain the required Court approval to agree to the side letter agreement. As such, Cash Store lacked authority to enter into the impugned term in the side letter agreement and cannot rely upon it.

The Facts

The Initial Order under the CCAA

[5] On April 14, 2014, Regional Senior Justice Morawetz granted an initial order in favour of Cash Store under the *CCAA*. The initial order stayed enforcement actions by creditors against Cash Store and, in return, limited the insolvent Cash Store's authority to carry on business and to utilize its property without Court approval. See, for example, paras. 4, 6(a), 7, and 10.

The Litigation

[6] On November 24, 2014, Cash Store commenced litigation against KPMG who was its former auditor; Cassels Brock & Blackwell LLP its former legal counsel; Canaccord Genuity Corp. its former financial advisor; its former directors and officers; and a number of its lenders.

[7] In this action, Cash Store alleges that KPMG committed auditor's negligence concerning the preparation of its financial statements for 2011 through 2013. Cash Store seeks damages of $300 million and disgorgement of KPMG's fees. In its statement of defence, KPMG claims, among other things, that the former directors and officers of Cash Store who retained and instructed the auditors never told them the facts that Cash Store now says ought to have been disclosed in its financial statements. KPMG and the other professional firm defendants assert rights to claim over for contribution and indemnity against former directors and officers of Cash Store.

The Global Settlement

[8] In 2015, Cash Store negotiated a global settlement to resolve 22 pieces of litigation brought by and against it. The global settlement included a resolution of Cash Store's claim against its former directors and officers. Under that settlement, the directors and officers insurer agreed to pay substantial funds towards the resolution of Cash Store's litigation. As a CCAA debtor, Cash Store required approval of the Court to enter into the global settlement.

[9] The global settlement was the centerpiece of Cash Store's plan of compromise and arrangement under the *CCAA*. Cash Store required the approval of its plan of compromise and arrangement by both its creditors and the Court under the statute.

[10] Cash Store's claims against KPMG, Canaccord Genuity, and Cassels Brock were not settled in the global settlement. Under the terms of Cash Store's plan of compromise and arrangement, those claims would continue and would be carried by a Litigation Trustee and Litigation Counsel on behalf of creditors.

[11] The settlement against the former directors and officers is said to require them to cooperate with Cash Store in the prosecution of its ongoing litigation. Cash Store's evidence is that the cooperation covenants were memorialized in a side letter agreement dated September 22, 2015 at the request of the former directors and officers.

[12] On this motion, KPMG sought production of the side letter agreement. Cash Store has declined to produce it. Instead, it has disclosed a redacted version. The terms that are disclosed provide that the side letter agreement is conditional upon the approval of the global settlement and Cash Store's plan of compromise and arrangement. The only substantive term disclosed from the side letter agreement provides:

> The former directors and officers will] not directly or indirectly through their representatives or counsel, cooperate with, meet with or talk to any party to any of the Estate Claims other than Cash Store, for the purpose of, or with the effect of, addressing the Estate Claims or any matter at issue therein, unless compelled to do so by court order or summons to witness from a court of competent jurisdiction and in the event of such compulsion shall notify the Litigation Trustee and Litigation Counsel in writing

[13] Although referred to throughout their materials and before me as "cooperation obligations," Cash Store has not disclosed any terms of the side letter or any agreement that impose obligations on its former directors and officers to cooperate with it or to positively help Cash Store in its ongoing litigation against KPMG or the other professional firm defendants.

Cash Store Agrees to a Pierringer Agreement and to Provide Third Party Releases

[14] Cash Store included a *Pierringer* provision and third party releases in favour of the former directors and officers as terms of the global settlement and its plan of compromise and arrangement. These provisions are designed to protect the former directors and officers by preventing claims over being made against them by KPMG and the other remaining professional firm defendants. The *Pierringer* agreement also required approval of the Court.

[15] *Pierringer* agreements have been recognized as very helpful methods to advance settlements in complex lawsuits. The Supreme Court of Canada has approved of the use of *Pierringer* agreements as long as the terms proposed are fair and avoid possible prejudice associated with these types of agreements. *Sable Offshore Energy Inc. v. Ameron International Corp.*, [2013] 2 SCR 623, 2013 SCC 37 (CanLII), at paras 24 to 27.

[16] Promoting settlement while preserving the fairness of the ongoing litigation process to the remaining parties is at the heart of *Pierringer* agreement approval. In *Sable*, the Supreme Court of Canada was satisfied with the fairness of the process because, in that case, the terms of the *Pierringer* agreement were fully disclosed and protections were provided for disclosed concerns in order to ensure that the defendants in that case would be able to fairly "know and present their case."

[17] In this case, the side letter agreement was not disclosed. Based on what was disclosed, KPMG and the other professional firm defendants objected and negotiated terms referred to as the Non-Party Protocol. The Non-Party Protocol requires the former directors and officers of Cash Store to produce relevant documents for discovery and binds them and Cash Store not to oppose a motion by any of the remaining defendants if any of them wish to examine a former director or officer for discovery. It also binds the former directors and officers to respond to a summons to witness for trial if one is served upon their counsel. Most of the former directors and officers reside outside of Ontario. The latter provision therefore saved significant time and expense that would have been necessary in attempting to summon witnesses for trial under the *Interprovincial Summonses Act*, RSO 1990, c I.12 or to arrange for commission evidence to be taken outside of Ontario.

[18] As Cash Store did not disclose the term of the side letter agreement prohibiting the former directors and officers of Cash Store from communicating with KPMG and the remaining professional firm defendants, no one had an opportunity to object or to make submissions as to whether the inclusion of that term as part of the *Pierringer* agreement was lawful, fair, or caused avoidable prejudice.

Approval of the Plan

[19] Cash Store submits in para. 20 of its factum that with the Non-Party Protocol in place, KPMG, Cassels Brock, and Canaccord withdrew their objections to its plan of compromise and arrangement so that the plan (including the global settlement and the *Pierringer* agreement) was approved by the Court on November 19, 2015.

[20] In para. 29 of its factum in support of the approval of its plan of compromise and arrangement, Cash Store submitted that, "[t]he settlements are central to the resolution of these CCAA proceedings and are highly interconnected." It confirmed in para. 30 of its factum that it was a condition precedent of each settlement that the plan of compromise and arrangement be approved with the third party releases in favour of its former directors and officers among others as sought.

[21] At para. 78 of its factum in support of the approval of its plan of compromise and arrangement, Cash Store described the consideration that it received from its former directors and officers as consisting of: a cash payment, cancellation of a related security, and:

> (c) the cooperation of the D&Os in the prosecution of the Applicants' Remaining Estate Actions for the potential benefit of the Applicants' creditors.

[22] Cash Store led no evidence on the approval motions to support that submission in its factum.

KPMG Asks to Meet Directors with their Counsel

[23] KPMG has moved for summary judgment to dismiss parts of Cash Store's remaining claims against it in this action. KPMG's counsel contacted the lawyer for the former directors to request a meeting with a former director, Mr. Mondor, and possibly others, to discuss the facts concerning Cash Store's receipt in 2012 of certain correspondence referred to by KPMG as the "Whistleblower Letters." Counsel for the former Directors advised counsel for KPMG that the former directors could not meet with them due to obligations that they had undertaken to Cash Store. Counsel for KPMG wrote to Litigation Counsel for Cash Store and asked for production of the agreement that prevented the former directors from meeting him (now known to be the side letter agreement) and to ask for the release of the former directors from its terms. Litigation Counsel refused both requests.

Analysis

[24] As pleaded, 10 of the 13 former directors of Cash Store reside in Alberta. One resides in British Columbia and one in Ontario. KPMG argues that requiring it to execute inter-provincial summonses for all of them just to talk to them to collect evidence and possibly seek affidavits from them adds cost and delay to the litigation that is contrary to the goals of the civil justice system recognized by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7. KPMG argues that Cash Store has no legitimate business rationale for gagging its former directors and officers. Rather, Cash Store just seeks to run up the cost and cause needless delays in the litigation for KPMG and the other professional firm defendants. KPMG is willing to meet with the former directors with their counsel and understands that to the extent that the former directors have confidentiality obligations concerning confidential information, that information is legitimately withheld at the pre-trial stage at least.

[25] KPMG relies upon the decision of Lord Denning in *Harmony Shipping Co. S.A. v. Davis*, [1979] 3 All E.R. 177 (C.A.) at 180

> So far as witnesses of fact are concerned, the law is as plain as it can be. There is no property in a witness. The reason is because the court has a right to every man's evidence. Its primary duty is to ascertain the truth. Neither one side or the other can debar the court from ascertaining the truth either by seeing a witness beforehand or by purchasing his evidence or by making communication to him. In no way can one side prohibit the other from seeing a witness of fact, from getting the facts from him or from calling him to give evidence or from issuing him with a subpoena. [Emphasis added.]

[26] See also *Versloot Dredging BV v HDI Gerling Industrie Versicherung* AG & 6 Others, [2013] EWHC 581 (Comm) at paras 19, 22, and 27.

[27] Cash Store argues that in 2015 it negotiated settlements to 22 different pieces of litigation including the claim against its former directors and officers. In doing so, it settled and exhausted

is former directors' and officers' insurance policy. The settlements were the product of extensive negotiations and multiple mediation efforts. They included releases and *Pierringer* agreements. Ms. Keenberg acknowledged that the settlements required Court approval even if they had not been contained in Cash Store's plan of compromise and arrangement.

[28] Ms. Keenberg submitted that obtaining cooperation obligations from the former directors and officers was part of consideration that made up the global settlement and was part of Cash Store's plan of compromise and arrangement. The cooperation obligations were referred to para. 78 (c) of the factum supporting the motion. When KPMG objected to the terms initially proposed for the *Pierringer* agreement, the Non-Party Protocol was negotiated to resolve KPMG's concerns. The law does not require that a *Pierringer* agreement always include terms like the Non-Party Protocol. It was a concession to KPMG and the other remaining professional firm defendants.

[29] Ms. Keenberg notes that there is no suggestion in the side letter agreement that any former director or officer will not be available to testify. The agreement expressly confirms that the former directors and officers will testify if summoned or otherwise ordered to do so. She argues that there is no question of suppressing testimony or any basis to find the terms of the side letter agreement to be contrary to law or public policy, unfair, or prejudicial.

[30] Ms. Keenberg submits that it would be unprecedented were the Court to deprive a CCAA debtor of part of the consideration that it obtained under its approved plan of compromise and arrangement. In this case, the former directors' and officers' documents are being preserved as agreed. Summonses for trial can be served on Ontario counsel. KPMG does not have these rights against other third parties. They are part of a contractual arrangement which should not be ignored by the Court.

[31] Cash Store relies upon case law in which courts have held that there is no obligation on a potential witness to agree to be interviewed out of court. See, for example, the Alberta Court of Appeal decision in *M. (N.) v. Drew Estate*, 2003 ABCA 231, at para. 12. As a general rule, I have no doubt that is correct. Cash Store argues that this answers KPMG's motion. KPMG has no right to compel any witness to speak to it, so it has no say in the issues between Cash Store and its former directors and officers as embodied in the side letter agreement.

[32] The inside directors, represented by Mr. Lerner, argue that the former directors have the sole rights to determine if they will cooperate with any party in litigation. The question of whether witnesses wish to speak to parties is not covered by the *Rules of Civil Procedure* and it is wholly outside of this Court's jurisdiction. Mr. Lerner distinguishes issues of documentary and oral discovery and evidence at trial, on the one side, from interviews with witnesses on the other. All of the former matters are governed by the *Rules of Civil Procedure* and occur under the general auspices of the Court. But the right to cooperate and be interviewed out of court is a right of each witness and is his or her right to bargain away as he or she sees fit.

[33] Mr. Lerner argues further that the terms as between his clients and Cash Store as to cooperation and non-cooperation were not part of the *Pierringer* agreement and were not before

the Court for approval at all. This is directly contrary to the submission made by Ms. Keenberg, Cash Store's factum on the *Pierringer* agreement, global settlement, and plan approval motion and Mr. Aziz's affidavit before me.

[34] Mr. Lerner argues that approval of the *Pierringer* agreement did not prejudice KPMG or the other remaining professional firm defendants in that they never had the right to interview the formers directors and officers informally out of court. Therefore the prohibition against speaking did not require Court approval as part of the *Pierringer* agreement. Similarly, the Non-Party Protocol did not require Court approval. By contrast, to obtain third party releases, the former directors and officers were required to tell the Court the consideration that they provided to the debtor. That explains why emphasis was placed on the "cooperation obligations" in para. 78 (c) of the factum supporting plan approval. But the agreement to refrain from speaking to KPMG did not form part of the consideration for the third party releases so it stands on a different footing that is outside of the proper scope of the Court's regulation or review.

[35] There were three overlapping Court approval motions at play in November:

a. The *Pierringer* agreement;

b. The global settlement agreement; and

c. Cash Store's plan of compromise and arrangement.

[36] *Pierringer* agreements require Court approval in the context of the ongoing litigation to which they apply. They entail a dismissal of proceedings against some defendants and a reconstitution of the claims to assert several liability rather than joint liability against the remaining defendants. In this case, KPMG had not yet commenced its third party claims against the former directors and officers. The *Pierringer* terms and third party releases were intended to prevent that from happening. The issue on the *Pierringer* agreement approval motion was whether the pro-settlement purpose of the agreement fairly offsets any potential prejudice caused by the agreement to the remaining defendants' ability to "know and present their case."

[37] While ordinarily non-parties have no duty to cooperate with parties to litigation, they are also ordinarily not prohibited from doing so. What was being proposed was to add a layer of legal obligation, a gag order, that made the former directors and officers quite different than ordinary non-parties. The lawfulness of such a provision is not at all clear. But I do not need to rule on that broad point on this motion.

[38] The issue that was before the Court for approval was the fairness of the remaining litigation process as it was affected by the *Pierringer* agreement. In my view, it does not matter that the gag proposed is not addressed specifically by the *Rules of Civil Procedure*. Mr. Lerner tried to create a distinction between processes that fall under the *Rules* and those that are outside. He argued that the Court had no jurisdiction treading on his clients' rights to bargain about matters outside the *Rules of Civil Procedure*. In my view, that is a clever argument but it raises a straw man. The issue was not whether a matter was covered by the *Rules*. As stated above, the issue was the fairness of the remaining litigation process as it was affected by the proposed

Pierringer terms. The ability to interview witnesses to obtain evidence and affidavits for motions or trial is certainly an aspect of the litigation process. It is not one specifically covered by the *Rules*, but that does not prohibit consideration of it under a general assessment of fairness or a balancing of proposed settlement terms against the equitable treatment of the defendants. The *Rules* are not a complete code for the management of lawsuits before this Court. The Court retains the inherent jurisdiction to control its process specifically in relation to matters where a gap exists in applicable legislation. *Stelco Inc. (Bankruptcy), Re*, 2005 CanLII 8671 (ON CA), at para. 35. In assessing the balance of the equities under the *Pierringer* agreement, it was relevant to the remaining defendants and to the Court to know that while the former directors and officers were agreeing to provide "procedural access" recited in the Non-Party Protocol, they had also gagged themselves from talking to the remaining defendants otherwise. That term directly affects the way the remaining defendants will both get to know and present their cases (to borrow the phrase used by the Supreme Court of Canada in *Sable*).

[39] For the purposes of this motion, I agree with Cash Store, that the terms of the side letter agreement were part and parcel of the *Pierringer* agreement, the global settlement, and the plan. The creditors who by then were acting for Cash Store ought therefore to have put the side letter agreement before the Court for approval. They did not do so. Accordingly, the gag term of the side letter agreement relied upon by Cash Store was not approved as part of the *Pierringer* Agreement granted by the Court.

[40] In paras. 82 to 88 of its factum filed for approval of its plan of arrangement and compromise, Cash Store discussed approval of settlements under the applicable case law dealing with settlements between a *CCAA* debtor and third parties. Among the cases upon which it relied was the decision of Farley J. in *Air Canada, Re* (2004), 47 CBR (4^{th}) 169 (Ont. SCJ [Commercial List]. In that case Farley J. adopted the "fair and reasonable" test for the approval of settlements as set out by MacEachern, CJBC in *Northland Properties Ltd. v. Excelsior Life Ins. Co. of Can.*, 1989 CanLII 2672 (BC CA). In that case, the B.C. Court of Appeal was required to comment on a side deal entered into between a creditor and the debtor under which the creditor's claim was settled. The Court wrote:

> [30] There is no doubt that side deals are a dangerous game and any arrangement made with just one creditor endangers the appearance of the bona fides of a plan of this kind and any debtor who undertakes such a burden does so at considerable risk. In this case, however, it is apparent that this agreement was not made for the purpose of ensuring a favourable vote because at the time the deal was struck the companies had not reached an accommodation with the bank. I think the companies were negotiating, as businessmen do, on values for the purpose of putting a plan together.
>
> [31] Further, the arrangement with Relax was fully disclosed in the plan. This does not ensure its full absolution if it was improper, but at least it removes any coloration of an underhanded or secret deal...[Emphasis added.]

[41] Prior to his appointment to the bench, the great jurist Justice Louis Brandeis wrote the following words that remain as vibrant and applicable today as when they were written over 100 years ago:

> If the broad light of day could be let in upon men's actions, it would purify them as the sun disinfects.[1]

[42] Disclosure to interested parties and to the Court of the terms for which approval is sought or mandated is a minimum requirement. *CCAA* debtors are supervised by the Court under the watchful eyes of their creditors and other interested parties. Transparency is a part of the *quid pro quo* that comes with enjoying the protections of the *CCAA*. This is reflected in the Monitor's role as the Court's eyes and ears, its power to access all information and records of the debtor, its obligation to report to the Court periodically, and the Monitor's specific obligation to provide information concerning the debtor and its restructuring efforts upon request. See paras. 32, 33 (f) and 36 of Cash Store's initial order.

[43] Moreover, transparency obligations flow from the public nature of Court proceedings.

[44] At the hearing of the motion before me, counsel for Cash Store submitted that para. 78 (c) of its factum on the global settlement and plan approval motion amounted to disclosure of the side letter agreement to the Court. Nothing in the sentence disclosed in the factum alerted the Court, the creditors, or KPMG to the fact that, as part of the global settlement and *Pierringer* terms proposed, Cash Store had purported to obtain an agreement by its former directors and officers that they would not talk to the remaining defendants without a summons to witness or court order. Euphemistic references to "cooperation obligations" at the oral hearing of the plan approval motion as attested to by Mr. Aziz were equally no disclosure at all of the gag provision of the side letter agreement. Accordingly, I find that Cash Store did not disclose the impugned provision of the side letter to the parties or to the Court in respect of the motions to approve the global settlement or Cash Store's plan of compromise and arrangement.

[45] I do not agree with Mr. Lerner's effort to parse some terms which he says were relevant to the third party releases and were required to be disclosed and others which he says were not. It was not up to the debtor and the former directors and officers to decide if the remaining professional firm defendants should or would object to the proposed terms. Nor were they entitled to withhold disclosure of terms that could be relevant to the balancing of prejudices and the assessment of the overall lawfulness, fairness, and reasonableness of the terms for which the Court's approval was required under the *CCAA*.

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[1] *Brandeis and the History of Transparency*, online: Sunlight Foundation <https://sunlightfoundation.com/2009/05/26/brandeis-and-the-history-of-transparency/ >

[46] Secret side deals are not consistent with the transparency required of a CCAA debtor or with a public, Court-based process.

[47] It follows that I reject Ms. Keenberg's submission that the Court's approval of the the global settlement, the *Pierringer* agreement, and Cash Store's plan of compromise and arrangement included approval of the undisclosed term of the side letter agreement prohibiting the former directors and officers from communicating with KPMG and the remaining professional firm defendants except under summons or Court order. Accordingly, Cash Store had no authority to enter into that term as part of an agreement. Therefore, Cash Store cannot rely upon or enforce the impugned term and it does not bind the former directors and officers.

[48] I make no finding as to if or how this holding affects the approvals that Cash Store has obtained of the *Pierringer* agreement, the global settlement, and its plan of compromise and arrangement. While the Court is cognizant of counsel's submission that this outcome could have an effect on prior approvals purportedly obtained, if approval of the side letter agreement was required for any of those approvals to be effective, then it was incumbent on those in charge of Cash Store to seek the approval of the side letter agreement by proper means at that time.

Costs

[49] The parties agreed that the successful party should be entitled to $5,000 in costs. Cash Store shall therefore pay KPMG LLP $5,000 in costs all-in forthwith. No other costs were sought or are awarded.

Order

[50] Order to go in terms of para. 1 of KPMG's notice of motion dated March 24, 2017. KPMG does not need the Court's permission to seek to interview former directors as sought in the notice of motion. If case management directions are sought concerning processes to obtain evidence from former directors and officers or as to scheduling of the action, the parties are always at liberty to convene a 9:30 appointment under the *Practice Direction* and Rule 50.13.

F.L. Myers J.

Date: April 21, 2017

THE SUPERINTENDENT OF FINANCIAL SERVICES Applicant	- and -	**TEXTBOOK STUDENTS SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION ET AL.** Respondents

Court File No: CV-16-11567-00CL

IN THE MATTER OF THE RECEIVERSHIP OF SCOLLARD DEVELOPMENT CORPORATION, ET AL.

Court File No: CV-17-11689-00CL

KINGSETT MORTGAGE CORPORATION Applicant	- and -	**TEXTBOOK (445 PRINCESS STREET) INC.** Respondent

Court File No. CV-17-589078-00CL

GRANT THORNTON LIMITED IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (774 BRONSON AVENUE) TRUSTEE CORPORATION, ET AL. Applicant	- and -	**TEXTBOOK (774 BRONSON AVENUE) INC., ET AL.** Respondents

Court File No. CV-18-598788-00CL

GRANT THORNTON LIMITED, IN ITS CAPACITY AS THE COURT-APPOINTED TRUSTEE OF TEXTBOOK STUDENT SUITES (525 PRINCESS STREET) TRUSTEE CORPORATION, ET AL, AND KSV KOFMAN INC., IN ITS CAPACITY AS THE COURT-APPOINTED RECEIVER AND MANAGER OF CERTAIN PROPERTY OF SCOLLARD DEVELOPMENT CORPORATION, ET AL. Plaintiffs	- and -	**AEOLIAN INVESTMENTS LTD., ET AL.** Defendants

Court File No. CV-18-606314-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

PROCEEDING COMMENCED AT
TORONTO

JOINT BOOK OF AUTHORITIES
(returnable November 18, 2019)

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