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Adversary to Ally? Disclosure Required When the Litigation Landscape Shifts

Practitioners must remain attentive to their disclosure obligations. Any settlement agreement (or partial settlement agreement) reached between some parties, but not others, that entirely changes the landscape of the litigation in a way that significantly alters the dynamics of the litigation must be disclosed to the non-settling parties.[1] The obligation to disclose is immediate and unequivocal.

The failure to comply with these disclosure obligations amounts to an abuse of process, with the most serious of consequences – a stay of proceedings or stay of the claim asserted by the defaulting, non-disclosing party. This is because without disclosure of such agreements, the court considers its processes to have been rendered a sham which amounts to a failure of justice.

When Do You Need To Disclose?

The legal principles regarding the disclosure of settlement agreements (sometimes called the *Aecon-Handley Estate* principles) are well established. A summary of the governing principles, which were recently considered in the context of two construction cases, are below:

1. **Warning:** Remember, the obligation to disclose settlement agreements extends beyond pure Mary Carter or Pierringer agreements.[2]

2. **Trigger to Disclose:** Parties in a lawsuit have an obligation to disclose immediately upon their completion of any agreement between or amongst parties to the litigation that has the effect of changing entirely the landscape of the litigation *in a way that significantly alters the dynamics of the litigation*. This is a fact-specific inquiry based on the configuration of the litigation and the various parties. Ask yourself, do the terms of the agreement alter the apparent relationships between any parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation? A settlement will entirely change the landscape of litigation when it involves a party switching sides from its pleaded position, changing the adversarial position of the parties set out in the pleadings into a cooperative one.[3]

3. **Content of Disclosure:** Where the obligation to disclose is triggered, the content of such disclosure includes: (1) that there is a settlement and (2) the terms of the settlement that change the adversarial orientation of the proceeding.[4]

4. **Disclosure Must be Voluntary:** The disclosure must not only be immediate but voluntary. Other parties to the litigation are not required to make inquiries to seek out such agreements.[5]

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[1] *Kingdom Construction Limited v. Perma Pipe Inc.,* 2024 ONCA 593
[2] *Southside Construction v. City of Windsor*, 2022 ONSC 2241
[3] *Kingdom Construction Limited v. Perma Pipe Inc.,* 2024 ONCA 593
[4] *Southside Construction v. City of Windsor*, 2022 ONSC 2241
[5] *Southside Construction v. City of Windsor*, 2022 ONSC 2241

5. **Unsure About Whether the Obligation is Triggered:** If a party is unsure about whether the obligation has been triggered, it is open to that party to move before the court for directions. In that way, the Court can enforce and control its own process and ensure that justice is done between and among the parties.[6]

6. **Fairness in the Litigation Process:** The disclosure of settlement agreements is necessary to maintain the fairness of the litigation process. Both the court and opposing parties need to know the reality of the adversity between parties and whether an agreement changes the "dynamics of the litigation" or the "adversarial orientation". [7]

7. **Failure to Comply:** The absence of prejudice does not excuse the late disclosure. The failure to disclose the terms of settlement is fatal. This is because the failure to comply amounts to an abuse of process. There is no discretion. The only possible remedy to redress the wrong of the abuse of process is to stay the claim (pursuant to s. 106 of the *Courts of Justice Act*) asserted by the defaulting, non-disclosing party.[8]

The decision of *Kingdom Construction Limited v Perma Pipe*

In the recent decision of *Kingdom Construction Limited v Perma Pipe Inc.*,[9] the Court of Appeal upheld a motion's judge decision that a settlement agreement did not have the effect of entirely changing the landscape of the litigation.

Background

In that case, Kingdom Construction acted as the general contractor for the construction of a disinfection facility, which included the installation of a water piping system. After installation, the piping system began leaking. The remediation and repairs cost approximately $1.2 million. Kingdom Construction then sued several defendants asserting different theories of liability. The defendants fell into the categories of: (i) the project owners; (ii) owner's insurer; and (iii) subcontractors, suppliers and consultants.

On March 1, 2021, Kingdom entered into a settlement with the project owners and the owner's insurer. The settlement provided for payments by the project owners and the owner's insurer to Kingdom, Kingdom would assign to the insurer its claims against the subcontractors, suppliers and consultants (the "**Non-Settling Defendants**"), a Pierringer Agreement would be entered into, and Kingdom would discontinue its claims against the project owners. The settlement also provided that the insurer would pay Kingdom any amount it recovered from pursuit of the action that exceeded its settlement and Kingdom would make its personnel available to the insurer to assist in pursuing the Non-Settling Defendants.

On March 29, 2021, the insurer's counsel circulated a letter to the Non-Settling Defendants to advise there was a settlement, and that the insurer would be exercising its subrogation rights to continue the action against the Non-Settling Defendants.

Whether the Settlement Agreement Changed the Litigation Landscape

In the court below, the motion judge found this settlement did not entirely change the landscape of the litigation in a way that significantly altered the dynamics of the litigation and therefore the settlement agreement did not require immediate disclosure. In support of this conclusion, the court referred to, among other things:

- The fundamentally different nature of the claims (e.g., the claims against the project owners and insurer were in contract and the claims against the Non-Settling Defendants were in negligence).

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[6] *Southside Construction v. City of Windsor*, 2022 ONSC 2241
[7] *Southside Construction v. City of Windsor*, 2022 ONSC 2241
[8] *Southside Construction v. City of Windsor*, 2022 ONSC 2241
[9] *Kingdom Construction Limited v. Perma Pipe Inc.,* 2024 ONCA 593

- The claim on the insurance policy did not have to be litigated in the same proceeding as those claims against the Non-Settling Defendants.
- There was always a known prospect that the insurer may be found liable to insure Kingdom, after which the insurer would be entitled to exercise subrogation rights. The fact that the insurer was now a plaintiff rather than defendant was a function of the subrogation. The fact that Kingdom would assist the insurer did not change anything about the claims that the Non-Settling Defendants were facing or the evidence that would be marshalled in support of the claims.
- None of the Non-Settling Defendants had advanced claims that they were additional insureds under the insurance policy and nothing in the settlement agreement prevented them from making such claims.
- While Kingdom was no longer adverse to the project owners, the pre-settlement adversity was contractual and quasi contractual in nature and none of those issues concerned the Non-Settling Defendants and their resolution had no impact on their legal position

The Court of Appeal upheld the motion judge's decision. The Court of Appeal noted that in order to determine whether a settlement has entirely changed the landscape of the litigation in a way that significantly alters its dynamics, the pre- and post-settlement configuration of the litigation and the claims must be compared. This is what the motion judge did.

On appeal, the Non-Settling Defendants failed to identify how the settlement could possibly affect their strategy, or the evidence they may lead or will be faced with, in litigation now that the fundamentally distinct claims against others were settled. The settlement with the project owners did not provide for any cooperation by the project owners with Kingdom (or the insurer) or involve switching of sides on any issue of concern to the Non-Settling Defendants.

One aspect of a Pierringer agreement is typically a provision requiring settling defendants to co-operate with the plaintiff to make documents and witnesses available for the action against non-settling defendants. While the settlement agreement in this case referred to a Pierringer agreement, the agreement itself did not provide that the project owners would cooperate with Kingdom (or the insurer) in the pursuit of claims against the Non-Settling Defendants, by providing witnesses or documents or in any other way. Therefore, the use of the word Pierringer was not determinative.

Whether the Settlement Agreement was Immediate

As the Non-Settling Defendants failed on the first issue, the Court of Appeal did not address this issue. However, it is interesting to note that the court below found that even if the settlement agreement required immediate disclosure, the obligation was fulfilled. The court below held that the "immediate" standard should be applied purposively to prevent the abuse of the court's process by parties who conceal a change in adversity from non-settling defendants. This was not the case here. There was no effort to conceal the settlement. The litigation was dormant during the gap. The settlement closed on March 11, 2021 and the terms were disclosed by March 29, 2021. The settlement had been disclosed "immediately" given the particular facts of this case.

The decision of *Southside Construction v City of Windsor*

In the decision of *Southside Construction v City of Windsor*, a partial settlement agreement did entirely change the landscape of the litigation such that the agreement required immediate disclosure.[10]

Background

[10] *Southside Construction v. City of Windsor*, 2022 ONSC 2241

In that case, the City of Windsor entered into a construction contract with Southside Construction as the general contractor. Montgomery Sisam Architects Inc. and J.P. Thomson Associates Ltd. (the "**Architects**") were the architectural consultants for the project.

In 2007, Southside sued the City for unpaid work. The City counterclaimed for deficiencies and delay. Southside commenced third party proceedings against its subtrades. Southside also commenced proceedings against the Architects, seeking contribution and indemnity. The Architects defended and also sought contribution and indemnity from the subtrades.

In the fall of 2013, the City entered into eight settlement agreements with some of the unpaid third party subtrades. One week after the settlement agreements were entered into, four days of examinations for discovery were conducted between the City, Southside and the Architects. At no point during the discoveries did the City disclose that it had settled with eight of the unpaid subtrades.

Following the discoveries, the City brought a motion to continue the proceedings on behalf of the settling third party subtrades. At this time the City disclosed there were settlements and disclosed one-page assignment agreements.

In December 2016, a motion was heard regarding the continuation of Southside's and the Architects' claims against the settling third party subtrades. As part of its findings, the Court held that the documents disclosed by the City in November 2013 did not include the critical terms of the settlement. The settlement agreements comprised more than a standard form assignment of claims and instead were a combination of unique commitments to perform further work and to provide extended warranties, and commitments by the City to indemnify for all claims of any sort that might be made against the subtrade arising in the litigation, and an assumption by the City of the liabilities of the subtrade.

The Non-Settling Defendants Seek a Stay

In 2021, Southside and the Architects brought a motion that the continuation of the City's claim constituted an abuse of process by reason of the failure to immediately and fully disclose the settlement agreements.

The City defended the motion on the basis that, among other things, Southside and the Architects "should have been aware" of the negotiations because the Mayor had held a press conference in 2013 declaring a plan to negotiate with the subtrades.

The Court ultimately found that when the City entered into the eight settlement agreements, the agreements entirely changed both the adversarial relationship between the litigants and the adversarial landscape. Some of the fundamental changes included indemnities from the City to the subcontractor for the City's complaints against Southside based on the subcontractor's own work; certain extended warranties from the subcontractors to the City to address the specific complaints about the subcontractors' own work; and an assumption by the City of all liabilities of the subcontractors which were being pursued by Southside and the Architects against them.

The Court also found that notwithstanding the above changes in the adversarial landscape, it was not until December 2019 at a further cross-examination that Southside and the Architects discovered that the eight settlement agreements were an attempt by the City to substitute itself in place of the settling subtrades (by assuming the liabilities of the settling subtrades and by relieving them of any financial interest to stand behind their work and thus support Southside's defence of the City's counterclaim).

Because the City failed to comply with its disclosure obligations, the Court found that the City's counterclaim against Southside, the City's third party claim against the Architects, and the counterclaims or crossclaims of the

settling third parties which were assigned to the City were all permanently stayed pursuant to s. 106 of the *Courts of Justice Act*.

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