NOVA SCOTIA COURT OF APPEAL
Citation: ***Ameron International Corporation v. Sable Offshore Energy Inc.***, 2011 NSCA 121

Date: 20111222
Docket: CA 347078
Registry: Halifax

Between:

Ameron International Corporation and
Ameron B.V.

Appellants

v.

Sable Offshore Energy Inc., as agent for and on behalf of the Working Interest Owners of the Sable Offshore Energy Project, Exxon Mobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., and Pengrowth Corporation; ExxonMobil Canada Properties, as operator of the Sable Offshore Energy Project, Allcolor Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc., and Serious Business Inc.

Respondents

Judges: MacDonald, C.J.N.S.; Oland and Farrar, JJ.A.

Appeal Heard: October 13, 2011, in Halifax, Nova Scotia

Held: Leave to appeal is granted and the appeal is allowed per reasons for judgment Farrar, J.A.; MacDonald, C.J.N.S. and Oland, J.A. concurring.

Counsel: John Merrick, Q.C. and Tammy Manning, for the appellants
Robert G. Belliveau, Q.C. and Kevin Gibson, for the respondents Sable Offshore Energy Inc., as agent for and on

behalf of the working interest owners of the Sable Offshore Energy Project, Exxon Mobil Canada Properties, Shell Canada Limited, Imperial Oil Resources, Mosbacher Operating Ltd., and Pengrowth Corporation; Exxon Mobil Canada Properties as operator of the Sable Offshore Energy Project

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

Reasons for judgment:

[1] This appeal arises out of litigation involving multiple parties where some claims, but not all, have been settled. The issue in this appeal is the timing of the disclosure of the settlement amounts to the non-settling defendants, in the particular circumstances of this case.

[2] The respondent Sable Offshore Energy Inc. is the owner of the Sable gas project which includes three offshore structures and two onshore gas processing facilities located at Goldboro and Point Tupper, Nova Scotia.

[3] The paint system used for corrosion protection on portions of all of the structures was supplied by Ameron International Corporation and Ameron B.V., the appellants ("Ameron").

[4] Some of the paint was also supplied by Allcolour Paint Limited, Amercoat Canada, Rubyco Ltd., Danroh Inc. and Serious Business Inc. (collectively "Amercoat Canada"). Amercoat Canada carries on business as an independent franchisee of Ameron products. It is a respondent in this appeal but supports the position of Ameron.

[5] Sable alleges the paint was not suitable for use on the Project, was not as represented and, as a result, failed prematurely.

[6] There was no contractual relationship between Sable and Ameron and Amercoat Canada.

[7] Sable commenced three actions: the action which is the subject of this appeal and two actions in relation to insurance policies under which Sable claimed coverage for the failures.

[8] Sable's claims against Ameron and Amercoat Canada are based on negligence, negligent misrepresentation and breach of a collateral warranty.

[9] In addition to Ameron and Amercoat Canada, Sable claimed against 12 other contractors and applicators who had responsibility for supplying, fabricating and preparing the steel and for applying the paint coatings. It alleged contracts with

some of those defendants. Sable alleged those defendants performed their responsibilities negligently and in breach of contract and those failures also caused the premature failure of the coating protection.

[10] Sable entered into three Pierringer Agreements. A Pierringer agreement takes its name from a 1963 Wisconsin case; it is an agreement which allows parties to a proceeding to settle claims and the settling defendants to withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused with no joint liability with the settling defendants. The non-settling defendants are responsible only for their proportionate share of the loss (**Amoco Canada Petroleum Co. v. Propak Systems Ltd.**, 2001 ABCA 110, ¶ 3). Two of the agreements deal with the onshore and offshore claims in this proceeding. The third agreement deals with a claim under one of the insurance policies.

[11] Ameron and Amercoat Canada are not parties to the settlement agreements.

[12] In the fall of 2009, Sable and the settling parties sought and obtained a court order implementing the Pierringer Agreements. The order approved the agreements and dismissed all claims, cross-claims, counterclaims and third party claims against all of the parties except Ameron and Ameron Canada.

[13] The terms of the Pierringer Agreements have been disclosed to Ameron and Amercoat Canada. However, the amounts paid by the settling defendants have not.

[14] Certain provisions of the approved Pierringer Agreements were appealed to this Court. The agreements were, in part, varied by this Court's decision in **Ameron International Corp. v. Sable Offshore Energy Inc.**, 2010 NSCA 107. However, that decision does not affect the issues on this appeal.

[15] On December 3rd, 2010, Ameron filed an application pursuant to the 1972 **Civil Procedure Rules** 20.02 and 20.06 for production of three categories of documents. The parties have agreed that the 1972 **Civil Procedure Rules**, in effect at the time the action was started, would continue to apply to the proceeding. The significance of the parties' agreement on this issue will become apparent later in these reasons.

[16] For reasons that are not germane to this appeal, the only disclosure sought on the application which proceeded on December 13th, 2010, was the settlement amounts paid pursuant to the Pierringer Agreements. The remainder of the requests were adjourned for another day.

[17] Sable opposed the application on the basis that the amount of any settlements received was subject to "settlement privilege".

[18] By decision dated December 23, 2010, (now reported at 2010 NSSC 473) Nova Scotia Supreme Court Justice Suzanne M. Hood dismissed Ameron's application. Ameron appeals that decision alleging the Chambers judge erred in failing to disclose the settlement amounts.

[19] For the reasons I will develop, I would grant leave to appeal, allow the appeal, order disclosure of the settlement amounts and award costs to Ameron, payable by Sable in the amount of $2,500 plus taxable disbursements. I would not award any costs to Amercoat Canada.

Issue

[20] The issue on this appeal is very narrow:

> Should this Court grant leave to appeal and, if leave is granted, did the Chambers judge err by failing to order the disclosure of the Pierringer settlement amounts prior to trial?

Standard of Review

[21] The test for interfering with the Chambers judge's decision in circumstances such as this is well known. This Court will not interfere with the exercise of discretion by a Chambers judge unless wrong principles of law have been applied where a patent injustice would result. In deciding whether an injustice would result, this Court will consider the importance and gravity of the matter and consequences of the order (**Ameron International Corp.**, **supra**, ¶ 24).

Analysis

Did the Chambers judge err in refusing to order disclosure of the amounts recovered by Sable?

[22] There was no dispute before the Chambers judge that if she found the settlement amounts were relevant they ought to be disclosed. However, Sable submitted the disclosure should take place after trial. Sable said this in its pre-hearing brief:

> If this Court considers a settlement amount to be relevant, it is submitted that the time to disclose the amount is at the conclusion of trial, when any amount received by the Plaintiffs is to be considered when damages attributable to the Ameron Defendants portion of liability are assessed.

[23] Justice Hood found that the settlement amount was relevant and held:

> [17] The semblance of relevancy threshold is also a low one in this instance. I conclude that the settlement is relevant according to that test. Although not relevant now to the issue of over recovery after trial, I conclude that the amount of the settlement is relevant at this stage of the litigation. It is relevant to assist in both pre-trial preparation and the decision with respect to the non-settling defendants' settlement position.
>
> . . .
>
> [42] There is no dispute that the disclosure of the settlement amount is to be made after trial.

[24] The Chambers judge's determination that the settlement amounts are relevant has not been appealed. Accordingly, there is no issue as to the appellants' right to, ultimately, have disclosure of the amounts paid by the settling defendants to the plaintiff. The issue in this appeal is the timing of the disclosure; before or after trial.

[25] All that is being sought by the appellants is the amount of any settlement. They are not seeking any other information leading up to the settlement or the settlement communications.

[26] Counsel for Sable was asked, during the appeal hearing, whether the amounts paid could potentially impact on the amount which would have to be paid by Ameron if it were found liable at trial. He acknowledged that the amounts paid could have the potential of reducing the overall award against Ameron.

[27] I pause here to point out that these reasons are only deciding the issue of whether the amount paid should be disclosed with the acknowledgement by Sable that it is "possible" that it could go to reduce the amounts otherwise payable by Ameron. I am in no way deciding, as the proposition is boldly stated in the appellants' factum, that Ameron has an absolute right to set off any amounts paid by the settling defendants to Sable from any amount that it may have to pay in the lawsuit. That issue remains to be determined on another day. The very narrow scope of this decision is whether the possibility that the settlement amounts may affect the amounts otherwise payable by Ameron is enough to order their disclosure. In my view it is.

[28] Therefore, it is accepted by both parties that: (1) the settlement amount is relevant; and (2) it may go to reduce the amount payable by the non-settling defendants.

[29] The fundamental principle of a fair trial is that the defendant is entitled to know the case it must answer. That is the foundation of our **Civil Procedure Rules** which sets forth the procedural requirements regarding pleadings, pre-trial evidence, and disclosure of documents.

[30] Knowing the potential value of the claim is necessary and forms an important part of pre-trial preparation, settlement positions and trial preparation.

[31] This was recognized by the Chambers judge when she said at ¶ 17 of her decision:

> [17] ... Although not relevant now to the issue of over recovery after trial, I conclude that the amount of the settlement is relevant at this stage of the litigation. It is relevant to assist in both pre-trial preparation and the decision with respect to the non-settling defendants' settlement position.

[32] I would add to the Chambers judge's analysis that it is also necessary for the defendants to know the case which it has to answer.

[33] This Court in **Brown v. Cape Breton (Regional Municipality)**, 2011 NSCA 32 delineated the scope of settlement privilege and explored potential exceptions to the rule. Sable relies heavily on **Brown** for its position that the amounts are privileged. Although I agree that **Brown** is applicable to this case, its application to the facts before us supports disclosure. Let me explain further.

[34] In **Brown**, the plaintiff sustained a knee injury in 2002 when she fell on property owned by the Cape Breton Regional Municipality ("CBRM"). In 2004, her knee was again injured when she collided with a car while riding her bicycle. Although Ms. Brown brought actions for both incidents, the latter claim was resolved through settlement. CBRM, in the former claim, brought a motion to compel the disclosure of the documents from the settlement agreement. The Chambers judge ordered disclosure ruling that the settlement documents were likely relevant and necessary to the claim. This Court overturned that decision holding that the documents were subject to a settlement privilege.

[35] In **Brown**, my colleague Justice Bryson, began his analysis by acknowledging the general public interest in encouraging settlement as recognized by the Supreme Court of Canada in **Kelvin Energy Ltd. v. Lee**, [1992] 3 S.C.R. 235. While other interests are often into play, facilitating an economic resolution of disputes through settlement has consistently taken precedence:

> [27] Whether potentially relevant settlement communications should be disclosed involves a competition between the public policy of full disclosure serving the truth-seeking function of the court, against that which fosters informal resolution of litigious matters. As a general proposition the latter has prevailed. Settlement discussions require candour. That will not be forthcoming without the protection from non-disclosure that settlement privilege confers.

[36] On the scope of settlement privilege, the Court held that settlement documents and communications are subject to "class" status which is *prima facie* privileged. However, some circumstances may justify the departure from the general rule. Bryson, J.A. provided a succinct articulation of the test to establish an exception to settlement privilege:

> [64] The threshold for an exception requiring disclosure obviously cannot be relevance alone. If that were so, a great deal of privileged communication would be disclosable. Accordingly, one must also link relevance to a compelling policy

> reason to show that disclosure is necessary to give effect to that policy (*Dos Santos* at para. 20).
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> (Emphasis added)

[37] **Brown** specifically referred to the decision of the British Columbia Court of Appeal in **Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada**, 2005 BCCA 4 where the Court recognized an exception for double recovery (**Brown**, ¶ 63). Bryson, J.A. concluded:

> [74] The double recovery rule is a widely acknowledged exception permitting disclosure of documents otherwise protected by settlement privilege. It could form the basis of a disclosure order in this case should the trial judge ultimately determine that the communications sought here were relevant and necessary to avoid double recovery in this case.

[38] **Brown** was ultimately determined on the basis that the relevancy of the settlement communications had not yet been established by CBRM and, therefore, disclosure was refused.

[39] Finally, another distinguishing characteristic of **Brown** is that it was decided under the Nova Scotia **Civil Procedure Rules** (2009). By agreement, this case is governed by the **Civil Procedure Rules** (1972). Bryson, J.A. in **Brown** had this to say about that distinction:

> 22 It may be that this evidence would have been disclosed under the "semblance of relevancy" test which previously prevailed. Without extensive medical evidence, it is hard to say whether Ms. Brown's knee injuries were divisible or indivisible. Under the former Rule, a Chambers judge may well have erred on the side of disclosure, e.g. *Hodgson v. Timmons*, 2006 NSSC 284; *McMullin v. East Port Properties Ltd.*, 2006 NSSC 352. One of the advantages of this kind of "error" would be no surprises at trial. In the interest of saving time and money at this stage, the new *Rules* are not so indulgent. Trial judges may rule differently. Surprises may occur. Adjournments may result. It remains to be seen whether these concerns are more chimeric than real. But these are the risks one runs with the new Rule. We shall have to see.

[40] Neither party to this appeal referred to the case of **British Columbia Children's Hospital v. Air Products Canada Ltd.**, 2003 BCCA 177 cited in **Brown** (¶ 41 and 54), a case which extensively reviewed the jurisprudence relating to the disclosure of settlement agreements. That case is instructive to the analysis

of the present case, not because the court ordered disclosure but because of the distinctions it draws and the reasons for non-disclosure.

[41] In **Air Products**, the defendants sought production of a settlement agreement entered into between the plaintiff, a number of hospitals, and certain former defendants in the litigation including Air Liquide Canada Limited.

[42] The Chambers judge concluded that she would not order that the portion of the settlement agreement relating to the settlement amounts be produced finding that the appellants had not demonstrated the relevance of the agreement and refused, on that basis, to order production of the release.

[43] The British Columbia Court of Appeal after an extensive review of the law concluded:

> [34] In the present case, Neilson J. considered that disclosure of that portion of the settlement agreement relating to the amount of the settlement between the plaintiff and the A.L.C. defendants need not be produced because relevance had not been demonstrated. With that conclusion, I agree. ...

[44] Like **Brown, supra**, the determination turned on relevancy. In the course of coming to that conclusion, the British Columbia Court of Appeal made another important distinction, that is, there was no nexus between what was paid by the settling defendants and the amount sought from the defendants remaining in the lawsuit.

[45] The appellants in **Air Products** relied on **Gnitrow Ltd. v. Cape Plc**, [2000] 1 W.L.R. 2327, a case where employees of a shipyard operator were suing the employer for asbestos related personal injury claims. The shipyard settled the claims through its insurers and sought contribution from the defendant, an independent contractor which had operated the shipyards at the material times. The defendant successfully applied for a stay of the claim until the claimant operator disclosed the terms of the settlement agreement reached between the insurers and a second independent contractor as to the latter's contribution to the shipyard asbestos cases. Hall, J.A. distinguished **Gnitrow** as follows:

> [30] ... I consider that the Gnitrow case is distinguishable on its facts from the case at bar because a relevant and distinguishing circumstance there was a

> relationship between what the claimant had paid its employees and the amount it would be permitted to recover from the defendant. ...
>
> (Emphasis added)

[46] The court continued:

> [31] I do not consider the Gnitrow case applicable here where the plaintiffs are suing the remaining defendants, (the appellants and others), only for damages arising from their dealings with those defendants. I perceive no relationship between the sums they are suing the appellants for and the sums they have agreed to settle for with the A.L.C. defendants. That to my mind distinguishes Gnitrow. Because I see the respective claims of the respondents as separate and unrelated as against the various defendants, I doubt the proposition being argued by the appellants that there will be or could occur in this litigation any species of excessive or double recovery on the part of the respondents.
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> (Emphasis added)

[47] As can be seen from a review of **Air Products**, the two factors which I set forth at the start of this analysis: the settlement amount being relevant and the potential relationship between the amounts that are being sued for by Sable and the amounts that it has agreed to settle for with the other defendants may go to reduce the amount otherwise payable by Ameron, are not present.

[48] To summarize, both **Brown** and **Air Products** were decided on the initial determination that the amounts were not relevant. **Air Products** goes further and says that there is no relationship between the amount that is being sought from the defendants and the amount which was paid by the settling defendants. In this appeal, there has been a determination of relevancy and an acknowledgement that there is a possible relationship between the amount Sable is seeking from Ameron and the amounts it received from the settling defendants.

[49] **Brown** instructs us that we must marry relevancy with the policy consideration to show that disclosure is necessary. The policy consideration, as discussed previously, is the fundamental tenet of our legal system that a party has a right to know the case it has to answer. In these circumstances, the disclosure of the settlement amount is necessary to give effect to Ameron's right to know the case against it.

[50] It seems axiomatic that if the settlement amounts are to be disclosed after trial to prevent double recovery, they must be relevant to the amount of the claim and, hence, the case to be met. I am satisfied that this is the type of exception referred to by Bryson, J.A. in **Brown** and the amounts ought to be disclosed.

[51] I am also satisfied that the Chambers judge erred in principle in failing to consider that Ameron would be deprived of its fundamental right to know the potential case which it has to answer in considering whether to grant disclosure.

[52] As a result, I would order that the settlement amounts, only, be disclosed. However, the amount of the settlement is to be disclosed only to the non-settling parties and not to the trial judge. See **Amoco Canada Petroleum Co. v. Propak Systems Ltd.**, **supra**, ¶ 40. Whether the amounts paid are admissible at trial is a matter for the trial judge.

[53] I reiterate that this decision should not be taken as determining that we consider the settlement amounts to be admissible at trial or otherwise go to reduce the amount of the claims of the non-settling defendants. That was not an issue before us on this appeal.

[54] Leave to appeal is granted and the appeal is allowed. Ameron shall have its costs payable by Sable in the amount of $2,500.00 plus taxable disbursements. Amercoat Canada is not entitled to costs from any party.

Farrar, J.A.

Concurred in:

MacDonald, C.J.N.S.

Oland, J.A.