SUPREME COURT OF NOVA SCOTIA
Citation: *Unisys Canada Inc. v. Pineau-Pandya*, 2022 NSSC 329

Date: 20221114
Docket: Halifax No. 473125
Registry: Halifax

Between:

Unisys Canada Inc.

Plaintiff

and

Andrea Pineau-Pandya, Matthew Watts, Karen Caldwell, Shiliang Lu, Fang Gao, Qiushi Li, Natasha Squires, and Meraki IT Consulting Incorporated

Defendants

DECISION

Judge: The Honourable Justice Glen G. McDougall

Heard: July 6, 2022, in Halifax, Nova Scotia

Written: November 14, 2022

Counsel: Mark Tector and Richard Jordan, for the Plaintiff
Colin D. Bryson, K.C., and Breagh MacDonald, for the Defendants

By the Court:

Introduction

[1] This is a motion by the Plaintiff, Unisys Canada Inc., for an order to establish a claim of settlement privilege over certain materials sought to be filed by the Defendants in support of their motion for summary judgment.

Background

[2] Andrea Pineau-Pandya ("Pineau") and the other six individual Defendants are former employees of Unisys who worked out of its Halifax office. All the individual Defendants reported directly to Ms. Pineau while employed by Unisys. The corporate Defendant, Meraki IT Consulting Incorporated, ("Meraki") is a Nova Scotia corporation incorporated by Ms. Pineau in September 2017. Ms. Pineau and the Defendant Shiliang Lu are shareholders and directors of Meraki, and Ms. Pineau is also its president and secretary. Each of the individual Defendants are independent contractors or employees of Meraki.

[3] Ms. Pineau was employed with Unisys from November 2000 until she was terminated without notice on October 24, 2016. According to an affidavit sworn by Paul Oliver, Senior Director, CIS Global Application Services and Canada Country Manager of Unisys, Ms. Pineau's termination was related, in part, to discussions she had been having about starting a business to compete with Unisys and hiring Unisys employees.

[4] Ms. Pineau retained legal counsel and submitted a demand for damages for wrongful dismissal to Unisys at the end of November 2016. The terms of Ms. Pineau's termination of employment were later finalized in a without prejudice settlement agreement in February 2017.

[5] In September 2017, Ms. Pineau incorporated Meraki for the immediate purpose of fulfilling a subcontract with CDSC, allegedly a customer of Unisys, and more generally for the purpose of competing with Unisys and other players in the industry.

[6] In January 2018, Unisys commenced an action claiming that the Defendants have breached various post-employment duties owed to Unisys. With respect to Ms.

Pineau, Unisys claims, among other things, that she breached her fiduciary duty not to compete with Unisys for a reasonable period of time. In her defence, Ms. Pineau denies that she was a fiduciary employee or owed any fiduciary obligations to Unisys, either during or following the termination of her employment. She pleads in the alternative that if she was a fiduciary employee of Unisys, she no longer owed any fiduciary obligations to Unisys as of September 2017, when she incorporated Meraki.

[7] In August 2020, the defendants filed a motion for summary judgment. The motion was originally meant to be heard in March 2021. Both parties brought production motions in November 2020. A decision on those motions was issued on March 12, 2021, and the summary judgment motion was rescheduled for February 7-8, 2022.

[8] Following a case conference on January 20, 2022, the summary judgment was adjourned and the hearing date of February 7, 2022, was to be used to determine Unisys' claim for privilege.

[9] The motion was subsequently adjourned at the Court's request and heard on July 6, 2022.

The contested evidence

[10] In her affidavit prepared in support of the Defendants' motion for summary judgment, Ms. Pineau refers to the contents of the settlement agreement reached between the parties in February 2017, and includes a copy of the unredacted Minutes of Settlement as an exhibit. In addition, the Defendants' brief on the motion repeats information from the settlement agreement and Ms. Pineau's affidavit.

[11] A copy of the Minutes of Settlement – with paragraphs one to five redacted – was included in both parties' initial affidavits disclosing documents. Both parties have relied on it to support their positions on the Defendants' production requests. Unisys's objection is with respect to Ms. Pineau's disclosure of the information contained in the previously redacted paragraphs. At the hearing, the parties agreed that the second, fourth, and fifth paragraphs are irrelevant to the main issues in this litigation. The defendants said they were willing to refile the Minutes of Settlement with those paragraphs redacted.

[12] The real dispute is about disclosure of the first and third paragraphs. The first paragraph contains the settlement amount paid to Ms. Pineau. The third paragraph

relates to a letter to be provided by Unisys to Pineau confirming her employment, and a commitment to provide positive verbal references as required in relation to her job search.

[13] With respect to Ms. Pineau's affidavit, Unisys objects to paragraphs 22 and 23. Paragraph 22 refers to the amount of the monetary settlement. Paragraph 23 states:

> At no time while I was employed with Unisys and **at no time during the negotiation of my wrongful dismissal claim did Unisys say or suggest that I was a fiduciary employee with ongoing fiduciary responsibilities to Unisys after my termination.** The first time that Unisys said to me that I was a fiduciary employee was in a letter from legal counsel dated October 11, 2017. Had Unisys said to me at any time prior to settling my wrongful dismissal claim that it felt that I was a fiduciary employee, that would have been a significant factor in the amount of my claim, as my job prospects would be significantly limited, and I would not have settled for what I did.
>
> (Emphasis added)

[14] Paragraphs 28 and 29 of the Defendants' summary judgment brief repeat the information in paragraphs 22 and 23 of Ms. Pineau's affidavit. Paragraphs 135, 137, 139 and 140 advance the argument that Unisys's failure to disclose its position that Pineau was a fiduciary before the settlement of her wrongful dismissal claim estops it from raising the issue post-settlement. According to Unisys, Ms. Pineau is not permitted to refer to what she was not told during negotiations. Unisys says settlement privilege covers not only what was said during negotiations, but also what was *not* said. It further submits that the Defendants have not pleaded estoppel.

[15] Unisys says the terms of the settlement and the negotiations leading to it are protected by privilege and the Defendants cannot meet their onus to show that an exception exists. It seeks an order establishing a claim of privilege and requiring the Defendants to refile their materials without the protected information.

[16] The Defendants acknowledge that settlement privilege applies to negotiations and to the terms of a concluded settlement. They accept that the amount of the settlement is *prima facie* privileged, but submit that, in this case, it falls within a recognized exception to settlement privilege. The Defendants say disclosure of the information is necessary to enable Ms. Pineau to defend herself against Unisys's claims. In other words, the public interest in a fair trial and the just disposition of the case outweighs the public interest in encouraging settlement.

[17] The Defendants do not agree that settlement privilege covers the third paragraph of the Minutes of Settlement. They submit that privilege over this term of the settlement has been implicitly waived because, on its own terms, it is a commitment by Unisys to provide information to prospective third party employers.

[18] The Defendants also disagree that privilege covers the evidence that Unisys did not assert that Ms. Pineau was a fiduciary during the settlement negotiations of her wrongful dismissal claim. They say settlement privilege does not protect what was *not* said during negotiations. The privilege attaches to negotiations that occurred, not to those that did not occur. In the alternative, as with the settlement amount, the Defendants say disclosure is necessary for Ms. Pineau to engage fully in her defence.

[19] The Defendants acknowledge that they did not plead estoppel and submit that it does not need to be specifically pleaded. If the Court concludes otherwise, the Defendants say, they will seek an amendment and would agree to additional discovery of Ms. Pineau on the issue, if requested by the Plaintiff.

Settlement privilege

[20] In *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35, Wagner J. described settlement privilege as follows:

> [31] Settlement privilege is a common law rule of evidence that protects communications exchanged by parties as they try to settle a dispute. Sometimes called the "without prejudice" rule, it enables parties to participate in settlement negotiations without fear that information they disclose will be used against them in litigation. This promotes honest and frank discussions between the parties, which can make it easier to reach a settlement: "In the absence of such protection, few parties would initiate settlement negotiations for fear that any concession they would be prepared to offer could be used to their detriment if no settlement agreement was forthcoming" (A. W. Bryant, S. N. Lederman and M. K. Fuerst, *The Law of Evidence in Canada* (3rd ed. 2009), at para. 14.315).

[21] As the Nova Scotia Court of Appeal noted in *Brown v. Cape Breton (Regional Municipality)*, 2011 NSCA 32, at para. 27:

> Settlement discussions require candour. That will not be forthcoming without the protection from non-disclosure that settlement privilege confers.

[22] Settlement privilege protects the content of negotiations, whether or not a settlement is reached. Successful negotiations are entitled to the same protection as

ones that yield no settlement (*Sable Offshore Energy Inc. v. Ameron International Corp*, 2013 SCC 37 at para. 17). In *Sable*, the Supreme Court of Canada held that privilege also protects the terms of a concluded agreement, including the amount of the settlement:

> [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 … but in my respectful view, it is better to adopt an approach that more robustly promotes settlement by including its content.
>
> (*Sable Offshore*, at para. 18)

[23] There are generally three conditions that must be present for settlement privilege to be recognized:

> (1) A litigious dispute must be in existence or in contemplation;
>
> (2) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event that negotiations failed;
>
> (3) The purpose of communication must be to attempt to effect a settlement.
>
> (*Brown*, at para. 30)

[24] Settlement privilege is a class privilege, which applies at large and not on a case-by-case basis. This means there is a *prima facie* presumption of inadmissibility, and the onus lies on the party seeking to admit the communications to establish that they fall within one of the recognized exceptions to privilege.

[25] To come within an exception, "a defendant must show that on balance, a competing public interest outweighs the public interest in encouraging settlement" (*Sable*, para. 19). The court in *Sable* noted that "[t]hese countervailing interests have been found to include allegations of misrepresentation, fraud or undue influence … and preventing a plaintiff from being overcompensated" (para 19).

[26] In *Brown*, Bryson J.A. referred with approval to the principles articulated in *Meyers v. Dunphy*, 2007 NLCA 1:

> [68] In a thorough and well analyzed decision reviewing Canadian and English authorities, Chief Justice Wells suggests a principled approach to settlement privilege exceptions. In *Meyers v. Dunphy*, 2007 NCLA 1 (262 Nfld. & P.E.I.R. 173), the Chief Justice said:

> 27 While the approach of Finch C.J.B.C. [in *Dos Santos*] may not be identical with that of Lord Robert Walker [in *Unilever*], in my view, the difference lies more in expression than in substance. Lord Robert Walker puts forward a list of "the most important instances". Finch C.J.B.C. proposes a general description of the standard; "addressing a compelling or overriding interest of justice". Nevertheless, such an overriding interest of justice will usually, although perhaps not always, arise because of some blameworthy or meritorious conduct on the part of one party or the other. As noted above, apart from usage to prove that the without prejudice negotiations have resulted in an agreement, or a particular exception was stated, blameworthy or meritorious conduct by one party or the other is the common feature of Lord Robert Walker's list of "most important" instances. Thus, a principled basis for analysis of a claimed exception to settlement privilege, that is totally consistent with both approaches can be identified. In my view it is reflected in the following principles:
>
> 1. Protection of admissions against interest, for the purpose of encouraging settlement discussions, is a compelling public policy basis for settlement privilege;
> 2. Express or implied agreement of the parties can also be a basis for the rule, and where the admissions fall within what can clearly be identified as a term of an express or implied agreement between the parties that factor is also to be considered;
> 3. Except where a special reason exists, or on the basis of express or implied agreement, protection should not be withheld from identifiable admissions while extending it to others expressed in the privileged communication;
> 4. Without prejudice communications are admissible to prove those communications have resulted in a compromise agreement; and
> 5. **Where exclusion of the communication would facilitate an abuse of the privilege, or another compelling or overriding interest of justice requires it, without prejudice communications are admissible.**
>
> . . .
>
> I would add, with respect to point 5, that **disclosure should be both relevant and necessary to give effect to the compelling and overriding interest of justice.**
>
> (Emphasis added)

[27] Bryson J.A. went on to review the categories of exception identified in *Berry v. Cypost Corp.*, 2003 BCSC 1827:

[70] In *Myers* [*sic*], Chief Justice Wells neatly summarizes categories of exception noted by the English Court of Appeal in *Unilever*:

> (1) Whether without prejudice communications have resulted in a concluded compromise agreement;
>
> (2) To show that an agreement apparently concluded between the parties during the negotiations should be set aside on the ground of misrepresentation, fraud or undue influence;
>
> **(3) Where a clear statement made by one party to negotiations, and on which the other party is intended to act and does in fact act, may be admissible as giving rise to an estoppel;**
>
> (4) If the exclusion of the evidence would act as a cloak for perjury, blackmail or other unambiguous impropriety, but such an exception should only be applied in the clearest cases of abuse of a privileged occasion;
>
> (5) In order to explain delay or apparent acquiescence in responding to an application to strike out a proceeding for want of prosecution but use of the letters is to be limited to the fact that such letters have been written and the dates at which they were written;
>
> (6) Whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him; and
>
> (7) Where an offer is expressly made "without prejudice except as to costs".

[71] In *Berry*, Burnyeat J. usefully organizes the authorities around seven general categories of exception with corresponding cases illustrative of each:

> (A) Unlawful Communications/Impropriety such as Threats and Fraud
>
> (B) Communications Prejudicial to the Recipient
>
> (C) Concluded Settlement Agreement Itself is in Issue
>
> (D) Where a question of Laches is raised as a Defence
>
> (E) Under Section 5 of the B.C. Limitation Act which extends limitation periods where there has been written confirmation of the existence of the cause of action
>
> (F) **Contents of a Without Prejudice Communication Form Part of a Legal Claim or Defence**
>
> [Citations omitted.]

[72] Without necessarily endorsing all the examples in those cases, **they exemplify circumstances that may attract potential exceptions to the privilege.**

(Emphasis added)

[28] The Defendants submit that courts have recognized an exception to settlement privilege where disclosure of privileged communications is necessary for the just disposition of litigation. They rely on the following statement in Robert W. Hubbard & Katie Doherty, *The Law of Privilege in Canada*, (Toronto: Thomson Reuters Canada, Loose-leaf, updated to 2022) at §12:77:

> Where material related to a settlement or its negotiation is relevant to the litigation apart from establishing one party's liability for the conduct that is the subject of the negotiations and apart from showing the weakness of one party's claim with respect to those matters, settlement privilege does not bar production.

[29] The authors cite several examples, including *Posehn v. CIBC*, 2018 ONSC 1458; *Abenaim v. Canada*, 2015 TCC 242; and *Ministry of Correctional Services v. McKinnon*, 2010 ONSC 3896.

[30] In *Posehn*, a wrongful dismissal claim, the Plaintiff brought a motion to strike two paragraphs of the statement of defence because they referred to a without prejudice settlement offer made by the Defendant to the Plaintiff on the termination of his employment. The Plaintiff argued that the termination offer was subject to settlement privilege and was irrelevant to the matters in issue.

[31] In the statement of claim, the Plaintiff alleged bad faith on the basis that the employer went back on an earlier agreement that if the Plaintiff was terminated, his severance would include his deferred incentive compensation. The Court concluded that the only time the employer could have gone back on its earlier agreement was in the termination offer over which the Plaintiff claimed settlement privilege. The Court agreed with the Defendant that disclosure of the termination offer was necessary to defend against the allegation of bad faith:

> [11] As noted in *Mueller Canada Inc. v. State Contractors Inc* (1989) 71 O.R (2d) 397 (H.C.), where documents referable to settlement negotiations have relevance apart from establishing one party's liability for the conduct which is the subject of the negotiations and apart from showing the weakness of one party's claim in respect of those matters, the privilege does not bar production. **Here, the termination offer is relevant apart from establishing liability — it is responsive to the plaintiff's claim for bad faith.** This was confirmed in *Bechtold v. Wendell Motor Sales* Ltd. [2007] O.J. No. 4886 where the court cited *Ariganello v. Dun & Bradstreet Ltd.* [1993] O.J. No. 411 for the proposition that "where a proposal is pled to answer accusations of bad faith or of conduct deserving punishment, it is appropriate to make reference to the proposal in the pleadings."

> [12] **As noted in *Ariganello*, "when the so-called offer of settlement is introduced, not to show any admission by either party, and not to indicate the strength or weakness of the case of either party but rather, as the only way to answer an accusation of conduct deserving punishment, then it should be possible to plead the offer."** In the case before me, the statement of claim directly comments on the actions the defendant took at the time of the termination of the plaintiff's employment and on the termination offer the defendant made.
>
> (Emphasis added)

[32] In *Abenaim*, the Appellant appealed an assessment under the *Income Tax Act* of a lump sum paid pursuant to a settlement agreement with the Appellant's former employer. The former employer brought a motion for an order that the settlement agreement was privileged and barring witnesses from testifying on the negotiations leading up to the settlement agreement, as well as its existence and terms. The Court dismissed the motion on the basis that the public interest in encouraging settlement was outweighed by the public interest in taxpayers not having to pay more than their fair share of tax, and the public interest in a fair trial. The Court's reasons with respect to the Appellant's right to a fair trial were as follows:

> [105] Second, **the countervailing public interest also takes precedence over the interest in encouraging out-of-court settlements when it can be shown that, without disclosure, the appellant will be denied a fair trial.** In *Dos Santos v Sun Life Assurance Co*, Justice Finch, writing on behalf of the British Columbia Court of Appeal, cited *Ruloff v Rockshore* (1981) Ltd, BCSC 751, in which Justice Chamberlist applied the exception so that the party could defend herself adequately. He stated the following at paragraph 28 of his reasons:
>
> > ... Chamberlist J. found an exception to settlement privilege where the plaintiff would otherwise be "muzzled in her attempts to justify her position taken in the petition or to adequately defend by evidence available to her".
>
> [106] The right to a fair trial also applies to administrative disputes, such as the present case, where the burden of proof falls on the party invoking this right:
>
> > ... Although in the context of a civil proceeding this does not engage a Charter right, the right to a fair trial generally can be viewed as a fundamental principle of justice: *M. (A.) v. Ryan*, [1997] 1 S.C.R. 157, at para. 84, per L'Heureux-Dubé J. (dissenting, but not on that point). Although this fair trial right is directly relevant to the appellant, there is also a general public interest in protecting the right to a fair trial. Indeed, as a general proposition, all disputes in the courts should be decided under a fair trial standard. The legitimacy of the judicial process alone demands as much. Similarly, courts have an interest in having all relevant evidence before them in order to ensure that justice is done.

[Tax Court's emphasis.]

> [107] **The right to fair trial is a fundamental principle of justice in the general public interest. It cannot be said that such an interest is unique to the appellant. Moreover, a fair trial is key in seeking the truth and achieving a just result, which are in the interests of both the public and the judiciary.**
>
> [108] In the case at bar, the testimony of Mr. Manzo and Mr. Fournier is clearly essential to the appellant's case. **Without this testimony, he cannot adequately defend himself against the assessment made by the Minister, and his right to a fair trial would therefore be compromised.**
>
> [109] For these reasons, I conclude that the public interest in the right to a fair trial, too, must outweigh the interest in encouraging out-of-court settlements.
>
> (Emphasis added)

[33] In *McKinnon*, the Ministry of Correctional Services brought an application for judicial review of an order of the Ontario Human Rights Tribunal requiring the Ministry to produce settlement documents. The issue arose in the context of an ongoing dispute between McKinnon and the Ministry over racial discrimination that McKinnon had suffered as an employee of the Ministry, and regarding which a Board of Inquiry had ordered a series of remedies. In the main proceeding, McKinnon alleged that the Ministry had failed to implement or honour the remedies ordered by the Board. McKinnon sought, and the Board ordered, production of settlement documents regarding investigated complaints of discrimination on the basis that such documents might reveal a practice by the Ministry of settling complaints rather than having the existence and nature of those complaints revealed. This evidence might, in turn, assist in establishing that the Ministry had not been complying with the remedies that had earlier been ordered against it. In dismissing the application, the Divisional Court noted that there are exceptions to privilege, including where the settlement documentation is necessary for the proper disposition of a proceeding (para. 4). The Court continued:

> [5] In our view, the adjudicator correctly decided that the settlement documentation in question was relevant and necessary for the proper disposition of the matter that was before him. In particular, **we agree with the adjudicator that the decision in *Dos Santos (Committee of) v. Sun Life Assurance Co. of Canada*, [2005] B.C.J. No. 5 (B.C. C.A.) does not require that the documentation in question be the "only way" in which a fact in question can be established. Rather necessity is established if there is a compelling or overriding interest of justice achieved through production of the material in the circumstances of a given case.**

> [6] **There is a compelling interest in having the documentation produced given the nature of the allegations made against the Ministry.** Central to the issues currently before the adjudicator is whether the Ministry has failed to abide by earlier orders directed at remedying a serious case of discrimination. Indeed the adjudicator refers to the material as touching upon "matters that lie at the heart of this litigation" and "crucial to a proper resolution of the matters before the Tribunal". The adjudicator provided cogent reasons for those characterizations of the material and why they were necessary to the task before him including that **the settlement documentation may provide important evidence suggesting that the Ministry has not been acting in good faith in terms of its implementation of the remedies earlier ordered. …**
>
> (Emphasis added)

[34] The Defendants also rely on *Lowndes v. Halifax City Soccer Club*, 2021 NSSC 193, a constructive dismissal case, where the Court considered whether correspondence between counsel met the test for settlement privilege, and if so, whether the correspondence fell within an exception. Justice Rowe found that the correspondence did not meet the test for settlement privilege, but went on to consider whether any exceptions would have applied. The Court held that if settlement privilege had been established, disclosure would have been necessary to allow the defendant to respond fully in its own defence:

> [36] In regards to the issue of waiver, I agree with the submissions made by Mr. Bureau that the *Bellatrix Exploration Ltd. v. Penn West Petroleum Ltd.*, 2013 ABCA 10, decision, and others cited in the supplemental briefs filed on the issue of a unilateral waiver, do not support the argument advanced by Halifax City Soccer that settlement privilege may be unilaterally waived.
>
> [37] However, as was noted in *The Law of Objections in Canada: A Handbook*, as referenced earlier, the authors note at p. 52 that "Where a party places the conduct of the settlement discussions in issue in litigation…(as is the case in the pleadings here) …it will be taken to have waived its ability to claim that the discussions are cloaked in settlement privilege." The citation in that text is to *Cowichan Tribes v. Canada (Attorney General)*, 2007 BCSC 1855. I have reviewed that decision, and also note that **this concept more neatly overlaps with the exception set out in *R. v. Clarke*, 2015 NSSC 26, at para. 20 where it was written**:
>
> > Settlement privilege is based on a compelling public policy. Exceptions must be based on a more compelling public policy such as one's ability to make full answer in defence and the right to a fair trial.

[38] I note at paragraphs 19-20 of the Plaintiff's Statement of Claim that Mr. Lowndes pleads:

> (19) As a result of the Defendant's position and failure to provide the Plaintiff with necessary feedback and support to allow him to do his job the Plaintiff had no choice bu[t] to resign from his position to the Defendant.
>
> (20) The Plaintiff further notes that despite his continued denial of committing any act of harassment, the Defendant has directly/indirectly caused damage to the Plaintiff's reputation by refusing to properly investigate what happened and allowing misinformation to be leaked to the soccer community.

[39] **These claims do put into issue Halifax City Soccer's conduct in the course of the discussions contained in the documents. Halifax City Soccer would not be able to respond fully in its own defence in the absence of these documents.**

[40] In *Brown v. Cape Breton Municipality*, *supra*, the Court's consideration of privilege led it to cite Chief Justice Wells' decision in *Meyers v. Dunphy*, 2007 NLCA 1, at para. 27:

> (5) Where exclusion of the communication would facilitate an abuse of the privilege or another compelling or overriding interest of justice requires it, without prejudice communications are admissible.

[41] In *Brown*, supra, the Court remarked in regard to point (5):

> "…that disclosure should be both relevant and necessary to give effect to the compelling and overriding interests of justice."

[42] And again citing *Meyers v. Dunphy*, *supra*, the Court referenced the inclusion of categories of exception set out by Chief Justice Wells, including:

> (6) whether the claimant had acted reasonably to mitigate his loss in his conduct and conclusion of negotiations for the compromise of proceedings brought by him….

[43] **Halifax City Soccer has directed me to employment law decisions to demonstrate that the scope of admissible evidence of communications in an employment law dispute can be cast wide. The full circumstances of accommodations or mitigations offered by the employer may be required to be led for the employer to engage fully in its own defence.**

[44] **If settlement privilege had been found, an exception to the privilege would be appropriate on a consideration of the content of the documents and the pleadings advanced by Mr. Lowndes, as the defendant, would require disclosure to put forward its defence.**

(Emphasis added)

[35] Before considering whether any exceptions apply, I must determine whether the contested information is covered by settlement privilege. I will begin with the failure by Unisys to communicate its view that Ms. Pineau was a fiduciary during settlement negotiations.

Unisys's failure to tell Ms. Pineau it considered her a fiduciary

[36] To support its position that settlement privilege covers not only what was said, but also what was *not* said, Unisys relies on *Roberts v. Zoomermedia Ltd.*, 2015 ONSC 1120. In that case, the Plaintiff was a former employee of the Defendant. Prior to commencing employment with the Defendant, the Plaintiff worked for S-Vox Foundation pursuant to a contract of employment dated November 1, 2007, amended June 11, 2009, and which terminated October 31, 2011. In June 2010, the Defendant purchased certain assets of S-Vox Foundation, including Vision TV, where the Plaintiff held the position of chief executive officer. As part of the purchase, the Defendant agreed to an assignment of the Plaintiff's employment agreement, and the Plaintiff commenced employment with the Defendant as president and CEO of the television division. The assignment was confirmed in writing by the Defendant and included three documents – (1) the original employment agreement; (2) the offer letter from the Defendant confirming acceptance of the assignment of the employment agreement and that it would enter into a new employment agreement for a minimum of one year following expiration of the original agreement; and (3) the memorandum of agreement regarding the amendment to the employment agreement dated June 11, 2009.

[37] The amendment provided, *inter alia*, that severance provisions of the employment agreement were to be replaced by a provision entitling the Plaintiff to a lump sum payment equivalent to two years' salary. The employment agreement provided that the Plaintiff was entitled to a paid sabbatical leave provided he remained employment on October 31, 2011, when the original employment agreement terminated.

[38] In July 2011, the Plaintiff contacted the Defendant's CEO to discuss the terms of a new employment agreement. The CEO asked the Plaintiff to have his legal advisor draw up a letter setting out the terms of an extended employment agreement. In September 2011, Plaintiff's counsel forwarded the letter, which included entitlements under the existing contract of employment and a proposal for continuation of his employment.

[39] In response to the extension letter, the Defendant's chief operating officer requested a clarification regarding the lump sum payment and alleged that the Plaintiff had agreed to forego the sabbatical payment. Discussions about the sabbatical payment continued for months. The original employment agreement expired without a new one in place, but the Plaintiff continued to work. In January 2012, the Plaintiff advised the defendant that he would commence an action to enforce the severance payment and the sabbatical entitlement if the parties could not reach agreement by January 20, 2012. The defendant asked him to delay litigation at least until March 2012 when the CEO and the CFO would be back in the office.

[40] On March 1, 2012, the Plaintiff was notified that his employment was being terminated. The notice of termination did not provide for any lump sum severance payment or sabbatical entitlement. It stated that the Plaintiff would be provided with four weeks' salary and benefits continuation at the end of the working notice period, which was until the remainder of the one-year extension. The Plaintiff commenced an action on April 12, 2012, and filed an amended statement of claim on May 25, 2012. The Defendant then brought a motion for an order striking multiple paragraphs of the amended statement of claim on the basis that they referred to settlement negotiations. The court struck several paragraphs with minimal analysis:

> 29 Paragraph 27 states:
>
> > 27. During the period of November 2011 until January 2012, Mr. Roberts, through his legal counsel, attempted to reach some resolution of the sabbatical issue. Mr. Roberts, through his legal counsel confirmed that they were doing so without prejudice to Mr. Roberts' right to pursue payment of the lump sum severance payment which by now, was due and owed to Mr. Roberts.
>
> This paragraph shall be struck. It speaks of the plaintiff's attempt to 'resolve' the sabbatical issue, and notes the plaintiff's "without prejudice" position.
>
> 30 Paragraph 28 states.
>
> > 28. At no time during these discussions did the Defendant ever assert that Mr. Roberts would not be entitled to the lump sum severance payment. The only entitlement that the Defendant indicated it was not prepared to honour was the sabbatical entitlement.
>
> By the time in question (November 2011 to January 2012), the defendant had involved its counsel and litigation was contemplated. **Although the first sentence pleads what was not discussed as part of the settlement discussions, and the plaintiff asserts that what was not discussed cannot be considered to have formed part of settlement communications, and hence, cannot be found to be subject to settlement privilege, in my view, this paragraph should be read**

> **together with paragraph 27, both of which address the settlement discussions.** This paragraph shall be struck.
>
> (Emphasis added)

[41] In my view, this decision is not helpful to Unisys. The Court in *Zoomermedia* did not establish a general rule that what is not said during negotiations is *prima facie* privileged. The Plaintiff's entitlement to the lump sum severance payment was one of the main issues raised in the litigation. The Plaintiff sought to introduce the Defendant's failure to assert that the severance payment was not owed to the Plaintiff as evidence that it *was* owed to him, and that the Defendant knew it. In other words, the Plaintiff sought to raise the Defendant's silence to establish its liability for the conduct that was the subject of the negotiations, or to show the weakness of the Defendant's position with respect to those matters – precisely what settlement privilege is intended to prevent.

[42] In the present case, the settlement negotiations related to Ms. Pineau's claim for wrongful dismissal. The parties reached an agreement, and Ms. Pineau signed a release of any claims against Unisys "in any way relating to or connected with [her] employment with Unisys or the termination of [her] employment." The issue of whether Ms. Pineau was a fiduciary with ongoing duties to Unisys after termination was not raised or negotiated. Unlike in *Zoomermedia*, the Defendants are not seeking to rely on what was not said during negotiations to establish liability for the conduct that was the subject of the negotiations. Ms. Pineau's claim in relation to her dismissal has already been settled. Nor is Unisys's failure to tell Ms. Pineau that it considered her a fiduciary being offered to prove that she was *not* a fiduciary, one of the main issues raised in the current litigation. Instead, the Defendants seek to introduce the evidence of what Unisys did not say during negotiations as evidence of conduct giving rise to an estoppel, which would bar Unisys's claims against Ms. Pineau in this proceeding.

[43] In my view, Unisys's silence during negotiations with respect to its position that Ms. Pineau was a fiduciary with ongoing obligations does not meet the test for settlement privilege. Even if it is assumed that silence amounts to a "communication", I am not satisfied that the communication was made with the express or implied intention that it would not be disclosed to the court if negotiations failed. Nor am I satisfied that the purpose of the communication was settlement; this was not a concession or compromise by Unisys in an effort to achieve a settlement. Were it otherwise, Unisys would presumably not have filed this action.

[44] If I am wrong, and Unisys's silence on whether it considered Ms. Pineau a fiduciary is covered by settlement privilege, I would find that disclosure is necessary to enable Ms. Pineau to defend herself against Unisys's claims. I will explain.

[45] Unisys argues that Ms. Pineau's right to a fair trial and her ability to defend herself will not be compromised if settlement privilege over the contested information is maintained. It says an employer has no legal duty on termination to inform an employee that it regards the employee as a fiduciary. Moreover, Unisys says, the release signed by Ms. Pineau at the time of settlement applied only to her claims against Unisys, not to any future claims Unisys might have against Ms. Pineau. It says that at the time of settlement, Ms. Pineau had not yet breached her fiduciary duties and Unisys had no reason to assume that she would. Unisys makes this submission notwithstanding the affidavit evidence of Mr. Oliver that Ms. Pineau's termination was related, in part, to discussions she had been having about starting a business to compete with Unisys and hiring Unisys employees.

[46] Unisys further states that the case law establishing a category of exception to settlement privilege based on estoppel is relevant only where there has been "a clear statement made by one party to negotiations". It says the exception does not apply where the party has made no statement at all. Unisys submits that privilege should not be set aside merely because a party gets creative in its pleadings and asserts a novel defence with no basis in law.

[47] The Defendants acknowledge that there are no authorities considering whether there is a duty on an employer on termination to communicate to an employee that it views the employee as a fiduciary. They argue, however, that such a duty is a logical extension of the duty of good faith implied in every contract of employment. The Defendants also submit that the list of categories of exceptions to privilege is not a closed one. They point out that silence has been found to constitute a representation giving rise to estoppel where there was a duty to disclose. The Defendants say Unisys had such a duty during settlement negotiations.

[48] In my view, the defence raised by the Defendants is an arguable one, rooted in existing law. I find that disclosure by Ms. Pineau of the fact that Unisys never advised her during negotiations that it considered her a fiduciary is necessary to enable her to engage fully in her own defence. The claims made by Unisys against Ms. Pineau and the other Defendants are serious, and the damages sought, including aggravated and punitive damages, are substantial. In this case, the public interest in a fair trial and the ability to make full answer and defence outweighs the public

interest in encouraging settlement. As such, the Defendants are entitled to rely on paragraph 23 of Ms. Pineau's affidavit, along with paragraphs 29, 135-137, and 139-140 of the Defendants' brief on the motion for summary judgment.

The settlement amount

[49] The Defendants concede that the amount of the settlement is *prima facie* privileged. Their argument as to why disclosure of the information is necessary can be summarized as follows. The settlement amount in the first paragraph of the Minutes of Settlement is a monetary figure. In her affidavit, Ms. Pineau describes the monetary amount as representing a specific number of months' worth of severance, based on her salary and non-salary benefits at Unisys. If the Court finds that Unisys's failure to tell Ms. Pineau during negotiations that it viewed her as a fiduciary amounted to a representation capable of giving rise to an estoppel, the Defendants' preferred remedy is that Unisys be estopped entirely from asserting that Ms. Pineau was a fiduciary. They say, however, that the court might prefer to find that Unisys is estopped from asserting that Ms. Pineau owed any fiduciary duties beyond the reasonable notice period for which Unisys paid severance.

[50] Unisys argues that paragraph one of the Minutes of Settlement provides a monetary figure that does not represent reasonable notice. It says the amount was the result of a negotiation where Unisys's position was that Ms. Pineau had been dismissed for cause and not entitled to any notice, while Ms. Pineau's position was that she had been wrongly dismissed and entitled to reasonable notice. Accordingly, the settlement figure was a compromise between those two positions, rather than an agreement as to the duration of reasonable notice. Unisys says disclosure of the settlement amount is not relevant or necessary to Ms. Pineau's defence.

[51] Settlement privilege will not be dispensed with lightly. The Defendants have not shown that Ms. Pineau will be unable to respond fully in her own defence in the absence of disclosure of the settlement amount. I agree with Unisys that the settlement amount is not relevant or necessary to Ms. Pineau's defence, nor to the court's ability to fashion an appropriate remedy if the estoppel argument is successful.

The commitment to provide positive references

[52] In paragraph three of the Minutes of Settlement, Unisys agrees to provide Ms. Pineau with a letter confirming her employment and to provide positive verbal

references as required in relation to her job search efforts. The Defendants submit that privilege over this paragraph of the agreement has been implicitly waived because, on its own terms, it is a commitment by Unisys to provide information to prospective third party employers. In other words, compliance with the term reveals its existence. In the alternative, the Defendants submit that an exception applies because the information is relevant to Ms. Pineau's defence and disclosure is necessary for the just disposition of the litigation. They say paragraph three is relevant to the estoppel argument because it shows that Unisys was seemingly assisting Ms. Pineau in finding new employment while holding back its position that she was a fiduciary.

[53] Unisys submits that paragraph three is privileged, as it is a concession by Unisys contained in a concluded settlement agreement. It further submits that disclosure is unnecessary for Ms. Pineau's defence and the just disposition of the litigation because Unisys's objection is limited to disclosure of the Minutes of Settlement, not to the content of the reference letter. Unisys says it has no objection to Ms. Pineau relying on the letter itself.

[54] Having reviewed the letter, I note that it does more than confirm that Ms. Pineau was employed by Unisys for 16 years. It states that she "received multiple promotions", eventually assuming the role of a service delivery manager in 2008. The letter identifies Ms. Pineau's responsibilities and highlights her many achievements. The letter closes with an offer to provide further information if the recipient has questions about Ms. Pineau's employment with Unisys.

[55] In my view, paragraph three is covered by settlement privilege. The Defendants have not provided any cases holding that an agreement to provide positive references contained in a settlement agreement is not subject to privilege. Although, as the Defendants note, paragraph three constitutes an agreement to provide information to a third party, any such third party would not know that the information is being provided pursuant to a term of a settlement agreement.

[56] I am not satisfied that disclosure of the third paragraph is necessary for the just disposition of the litigation. The Defendants' evidence on summary judgment will include the fact that Ms. Pineau did not sign a non-competition agreement while employed at Unisys; that she was terminated without notice; that her claim for wrongful dismissal was settled; that Unisys did not disclose during settlement negotiations that it considered her a fiduciary with ongoing obligations to it after termination (which includes the obligation not to compete for a reasonable period of

time); that if she had known that Unisys viewed her as a fiduciary with ongoing obligations, she would not have settled her claim for what she did; and that Unisys provided Ms. Pineau with a letter that confirms her employment, speaks of her performance at Unisys in positive terms, and offers to provide further information on request. In my view, the Defendants will have ample evidence to put forward their estoppel argument without disclosure of the third paragraph.

The need to plead estoppel

[57] As noted earlier, the Defendants have not pleaded estoppel. They argued, without authority, that estoppel does not need to be specifically pleaded. In *Halsbury's Laws of Canada - Estoppel* (2020 Reissue) at HES-198, Bruce MacDougall writes:

> Most authority is to the effect that estoppel needs to be pleaded, in order to give the opposing party the opportunity to properly address the issue. The pleading requirement includes establishing all the facts necessary to make out the estoppel by representation.

[58] There is some authority in other jurisdictions holding that estoppel need not be specifically pleaded so long as it is clear from the pleadings that estoppel is at issue (see, for example, *Casa Rio Developments Ltd. v. Hooymans*, 2014 BCCA 287, at para. 20). In the present case, neither estoppel nor material facts to support an estoppel were pleaded. The Defendants will therefore need to seek an amendment. The Defendants have already indicated that they are open to additional discovery of Ms. Pineau on the point if requested by the Plaintiff.

Conclusion

[59] The Defendants are entitled to rely on paragraph 23 of Ms. Pineau's affidavit, along with paragraphs 29, 135-137, and 139-140 of the Defendants' brief on the motion for summary judgment.

[60] I find that paragraphs one and three of the Minutes of Settlement are protected by settlement privilege, as are the last sentence in paragraph 22 of Ms. Pineau's affidavit and the final two sentences of paragraph 28 of the Defendant's brief. I order the Defendants to refile their materials to redact or otherwise remove the privileged information.

[61] I encourage the parties to reach agreement on costs. If they are unable to do so, I will accept written submissions on costs within 30 days of the release of this decision.

McDougall, J.