COURT OF APPEAL FOR ONTARIO

CITATION: Handley Estate v. DTE Industries Limited, 2018 ONCA 324
DATE: 20180329
DOCKET: C64227

Hoy A.C.J.O., Simmons and Brown JJ.A.

BETWEEN

Helen Handley, deceased, by her Estate Executor Sharon Kruger

Plaintiff (Respondent)

and

DTE Industries Limited, *H&M Combustion Services Ltd.*, Geo. Williamson Fuels Ltd. and Ultramar Fuels Ltd.

Defendants (Appellant) (*Respondent*)

and

Kawartha Lakes HVAC Inc., Don Park Inc. and SLM Toronto Inc.

Third Parties

Donald Dacquisto and Eric Zadro, for the appellant

Sean Dewart and Mathieu Bélanger, for the Lawyers' Professional Indemnity Company, on behalf of the respondents

Heard: February 13, 2018

On appeal from the order of Justice Stephen T. Bale of the Superior Court of Justice, dated July 17, 2017, with reasons reported at 2017 ONSC 4349.

BROWN J.A.:

I. OVERVIEW

[1] This appeal concerns whether the failure to disclose immediately an agreement between or amongst parties to a lawsuit that converts their adversarial relationship into a co-operative one ordinarily should result in the stay of the non-disclosing party's claim.

[2] In this 2009 action, the plaintiff entered into litigation agreements with one of the defendants, H&M Combustion Services Ltd. ("H&M"). Under the 2011 agreement, H&M agreed to defend the action and commence a third party claim, which the plaintiff would fund. Under the 2016 agreement, H&M assigned all its interest in the lawsuit to the plaintiff, who indemnified H&M from any exposure in the litigation and undertook to prosecute the third party claim.

[3] Neither the plaintiff nor H&M disclosed the agreements to the other parties immediately upon their execution. They were disclosed in a piecemeal fashion throughout 2016.

[4] One of the defendants, Geo. Williamson Fuels Ltd. ("Williamson"), moved to stay the action on the basis that the plaintiff and H&M had failed to comply with the obligation of immediate disclosure set out in the decision of this court in *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 328 D.L.R. (4th) 488, leave to appeal refused, [2011] S.C.C.A. No. 84.

[5] The motion judge held that the 2011 and 2016 litigation agreements should have been disclosed. However, he refused to stay the action concluding, in effect, that the late disclosure of the agreements had not caused Williamson any prejudice.

[6] Williamson appeals. I would grant the appeal. Having found that the agreements were of the type requiring immediate disclosure under the principles set out in *Aecon*, the motion judge erred in principle by failing to apply the remedy for such non-disclosure specified in *Aecon* – staying the claim of the non-disclosing party.

II. THE HISTORY OF THE LITIGATION

[7] In 2004, Helen Handley bought a new outdoor oil tank for her residence. She alleged that in 2007 she discovered that it had leaked, discharging several hundred litres of fuel oil into the surrounding soil. This litigation ensued.

[8] In 2009, Ms. Handley's insurer, Aviva Insurance Company of Canada ("Aviva"), commenced this subrogated claim in the name of Ms. Handley against those involved: (i) in the sale and installation of the oil tank – DTE Industries Limited ("DTE") and H&M; and (ii) in the delivery of fuel oil to the tank – Williamson and Ultramar Ltd. Since this is a subrogated claim, I will refer to Aviva as if it were the plaintiff throughout these reasons.

The 2011 Litigation Agreement

[9] H&M had been dissolved in 2007. Aviva was aware of that fact; the statement of claim pleaded it. As well, H&M was not insured.

[10] Aviva had not named as defendants in the main action one of the oil tank vendors in the supply chain, Kawartha Lakes HVAC Inc. ("Kawartha Lakes"), and its corporate successors, Don Park Inc. and SLM Toronto Inc. By the time it decided to sue Kawartha Lakes, the limitation period for the main action had expired. Aviva decided to explore initiating a third party claim against Kawartha Lakes.

[11] Starting in the spring of 2011, as the deadline for issuing a third party claim approached, counsel for Aviva and H&M discussed striking a litigation agreement. Under the resulting August 10, 2011 agreement amongst Aviva, H&M, and H&M's principal, Jim Richards (the "2011 Litigation Agreement"), Aviva agreed to provide financial support to H&M to prosecute a third party claim. The key terms of the agreement were that:

(i) H&M would defend the main action and commence the third party claim;

(ii) Aviva would contribute $5,000 to cover H&M's costs of prosecuting the third party claim through the examinations for discovery;

(iii) Richards would revive H&M should that be necessary to prosecute the third party claim; and

(iv) All communications between counsel for Aviva and H&M pertaining to the prosecution of the third party claim would be subject to common-interest privilege.

[12] On August 24, 2011, H&M filed its statement of defence and cross-claim and issued the third party claim against Kawartha Lakes and its successors. H&M cross-claimed against Williamson, and Williamson cross-claimed against H&M.

[13] At the time, neither Aviva nor H&M disclosed the 2011 Litigation Agreement to the other parties. Disclosure was not made until the fall of 2016.

The 2016 Litigation Agreement

[14] The litigation moved slowly ahead. In May 2012, the third parties delivered statements of defence to the main action and third party action. They then sought security for costs from H&M.

[15] In early 2013, H&M agreed to post security of $20,000 for costs through discoveries. Aviva provided H&M with the required funds, a fact not disclosed to the other parties.

[16] Examinations for discovery were conducted throughout 2013 and 2014.

[17] In January 2016, the third parties proposed a settlement to H&M, which forwarded the proposal to Aviva's counsel advising it would await Aviva's direction before responding. In the result, H&M rejected the settlement proposal.

[18] In late February 2016, the third parties scheduled a motion to: (i) amend their defence to plead the expiration of the limitation period by reason of H&M's status as a dissolved corporation; and (ii) increase the security for costs posted by H&M.

[19] In early March, the court assigned a November 2016 trial date.

[20] That activity led Aviva and H&M to conclude a further litigation agreement on March 7, 2016 (the "2016 Litigation Agreement"), which was in two parts: (i) a letter; and (ii) an e-mail. Under the 2016 Litigation Agreement:

(i) H&M assigned to Aviva all its rights in the action, including the rights to receive all proceeds from the third party claim;

(ii) Aviva agreed to indemnify H&M and Richards against all costs and damages that might be awarded against H&M;

(iii) Aviva would assume responsibility for defending H&M and prosecuting its third party claim;

(iv) Aviva assumed responsibility for all reasonable costs and disbursements incurred by H&M's counsel but reserved the right to appoint its own counsel; and

(v) The parties would disclose the assignment to the other parties if required by law or reasonably necessary in the circumstances.

[21] As a result, for all intents and purposes Aviva stepped into the litigation shoes of H&M.

The slow disclosure of the litigation agreements

[22] On March 7, 2016, counsel for H&M advised the third parties that Aviva had undertaken to pay any costs assessed against H&M. No further disclosure of the terms of the 2011 and 2016 Litigation Agreements was made. However, that limited disclosure resolved the third parties' motion for security for costs.

[23] Later in March, counsel for Williamson made an overture to H&M to jointly retain a damages expert. H&M declined, disclosing it had assigned its rights in the third party proceeding to the plaintiff and that "the interest of both the Plaintiff and H&M are aligned". At the end of March, Aviva's counsel sent the other parties a copy of the part of the 2016 Litigation Agreement contained in the letter; the part contained in the e-mail was not sent.

[24] Further correspondence ensued in April and May 2016, with counsel for the third parties pointing out to Aviva its obligation to disclose immediately any litigation agreement.

[25] In early August 2016, Aviva produced the 2016 Litigation Agreement; the 2011 one was not disclosed. Yet more correspondence amongst counsel ensued.

[26] The third parties moved to adjourn the trial and compel the delivery by Aviva and H&M of a further affidavit of documents containing a Schedule B that particularized the documents over which privilege was claimed. Aviva's counsel thereupon delivered a proper affidavit of documents, which identified on Schedule B the 2011 and 2016 Litigation Agreements. The third parties' motion settled, with Aviva and H&M agreeing to produce the Schedule B documents and waive any common interest privilege. Aviva ultimately produced all the litigation agreements by late October 2016.

[27] At that point, Williamson and the third parties moved for an order staying the action on the basis that Aviva and H&M had failed to disclose immediately agreements that affected "the litigation landscape", contrary to the principles set down by this court in *Aecon*.

[28] The third party action settled on the eve of the motion hearing; only Williamson's motion to stay proceeded.

III. THE REASONS OF THE MOTION JUDGE

[29] Before the motion judge, Aviva conceded the 2016 Litigation Agreement should have been disclosed immediately upon completion. However, it submitted the 2011 Litigation Agreement was merely a funding agreement that did not require disclosure. The motion judge disagreed, holding that the 2011 Litigation

Agreement did not maintain adversity between Aviva and H&M and, therefore, should have been disclosed to all parties immediately upon completion.

[30] Notwithstanding that finding, the motion judge refused Williamson's request for a stay of the action. He distinguished *Aecon*. In his view, since the litigation agreement in *Aecon* was between the plaintiff and the sole defendant, and the stay granted affected only third and fourth party claims, *Aecon* did not stand for the proposition that the claims against all parties to the litigation should "automatically" be stayed: at paras. 44-45.

[31] Instead, the motion judge drew on this court's decision in *Abarca v. Vargas*, 2015 ONCA 4, 123 O.R. (3d) 561, to hold that the principle of proportionality should inform the consideration of the remedy for the failure to disclose the 2011 and 2016 Litigation Agreements. The motion judge appeared to conclude that Williamson suffered no prejudice from the delayed disclosure for two reasons: (i) as a supplier of the oil in the tank, and not the tank, Williamson was unaffected by the third party claim, which was against an entity in the tank supply chain (notwithstanding that H&M and Williamson had cross-claimed against each other); and (ii) there was no reason for Williamson to spend money litigating the third party claim because H&M had been a dissolved corporation throughout. In those circumstances, the motion judge concluded that a stay of the action against Williamson would not be an appropriate remedy.

IV. THE ISSUE IN DISPUTE ON THIS APPEAL

[32] The parties do not dispute the motion judge's finding that the 2011 and 2016 Litigation Agreements should have been disclosed immediately because they changed the adversarial relationship between Aviva and H&M.

[33] Their dispute centres on the appropriate remedy for such non-disclosure. Williamson submits the principle in *Aecon* is clear: where such an agreement is not disclosed immediately, an abuse of process has occurred, with the result the claim of the defaulting party should be stayed. The motion judge erred in law in failing to grant a stay.

[34] Aviva responds that a stay is a discretionary remedy. Accordingly, deference must be given to the motion judge's exercise of his discretion not to stay the action in the particular circumstances of this case.

V. ANALYSIS

The obligation of immediate disclosure

[35] Since at least the 1993 decision in *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Gen. Div.), the law in Ontario has been clear that *Mary Carter*-type

agreements[1] must be disclosed to the court and to the other parties to the lawsuit as soon as the agreement is made.

[36] In the 2009 decision in *Laudon v. Roberts*, 2009 ONCA 383, 249 O.A.C. 72, at para. 39, leave to appeal refused, [2009] S.C.C.A. No. 304, this court repeated the obligation to disclose such an agreement to the court and to the other parties to the lawsuit "as soon as it is concluded". That disclosure obligation, and its rationale, were explained by this court at para. 39 of its reasons:

> The existence of a [*Mary Carter* agreement] significantly alters the relationship among the parties to the litigation. Usually the position of the parties will have changed from those set out in their pleadings. It is for this reason that the existence of such an agreement is to be disclosed, as soon as it is concluded, to the court and to the other parties to the litigation. The reason for this is well stated in [*Pettey*, at pp. 737-738]:
>
> > The answer is obvious. The agreement must be disclosed to the parties and to the court as soon as the agreement is made. *The non-contracting defendants must be advised immediately because the agreement may well have an impact on the strategy and line of cross-examination to be pursued and evidence to be led by them*. The non-contracting parties must also be aware of the agreement so that they can properly assess the steps being taken from that point forward by the plaintiff and the

[1] A typical *Mary Carter* agreement contains the following features: (i) the contracting defendant guarantees the plaintiff a certain monetary recovery and the exposure of that defendant is "capped" at that amount; (ii) the contracting defendant remains in the lawsuit; (iii) the contracting defendant's liability is decreased in direct proportion to the increase in the non-contracting defendant's liability: *Pettey*, at p. 732; *Laudon*, at para. 36; *Moore v. Bertuzzi*, 2012 ONSC 3248, 110 O.R. (3d) 611, at para. 67.

> contracting defendants. In short, procedural fairness requires immediate disclosure. *Most importantly, the court must be informed immediately so that it can properly fulfil its role in controlling its process in the interests of fairness and justice to all parties*. [Emphasis added.]

[37] One year later in *Aecon*, this court considered an agreement between the plaintiff, Aecon, and the sole defendant, the City of Brampton, that capped the damages for which Brampton might be liable to Aecon. Those parties did not disclose their agreement to the third and fourth parties until several months after its conclusion. This court held that agreements which "change entirely the landscape of the litigation" must be disclosed immediately, stating, at para. 13:

> We do not endorse the practice whereby such agreements are concluded between or among various parties to the litigation and are not immediately disclosed. While it is open to parties to enter into such agreements, the obligation upon entering such an agreement is to *immediately* inform all other parties to the litigation as well as to the court … *The reason for this is obvious. Such agreements change entirely the landscape of the litigation.* [Italics in original and underlining added.]

[38] In *Aecon*, the failure of the plaintiff and defendant to disclose immediately their litigation agreement led this court to stay the third and fourth party proceedings.

Litigation agreements covered by the obligation of immediate disclosure

[39] The obligation of immediate disclosure is not limited to pure *Mary Carter* or *Pierringer*[2] agreements. The disclosure obligation extends to any agreement between or amongst parties to a lawsuit that has the effect of changing the adversarial position of the parties set out in their pleadings into a co-operative one: *Aviaco International Leasing Inc. v. Boeing Canada Inc*. (2000), 9 B.L.R. (3d) 99 (Ont. S.C.), at para. 23. To maintain the fairness of the litigation process, the court needs to "know the reality of the adversity between the parties" and whether an agreement changes "the dynamics of the litigation" or the "adversarial orientation": *Moore v. Bertuzzi*, 2012 ONSC 3248, 110 O.R. (3d) 611, at paras. 75-79.

[40] In *Aviaco*, at para. 23, the court formulated the question to pose to ascertain whether an agreement triggers the immediate disclosure requirement:

> 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?

[41] In the present case, the motion judge rejected Aviva's argument that the 2011 Litigation Agreement did not alter the adversarial orientation in the lawsuit

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[2] Paul M. Perell & John W. Morden, *The Law of Civil Procedure in Ontario*, 3d ed. (Toronto: LexisNexis Canada, 2017), at p. 762, describes the features of a *Pierringer* agreement as: "(1) the settling defendant settles with the plaintiff; (2) the plaintiff discontinues its claim [against] the settling defendant; (3) the plaintiff continues its action against the non-settling [defendant] but limits its claim to the non-settling defendant's several liability (a 'bar order'); (4) the settling defendant agrees to co-operate with the plaintiff by making documents and witnesses available for the action against the non-settling defendant; (5) the settling defendant agrees not to seek contribution and indemnity from the non-settling defendant; and (6) the plaintiff agrees to indemnify the settling defendant against any claims over the by non-settling defendants."

between it and H&M. Aviva does not challenge that finding, and properly so. Although the 2011 Litigation Agreement was not a "pure" *Mary Carter* agreement, and while the terms of the 2011 and 2016 Litigation Agreements were not identical to those in the agreement at issue in *Aecon*, nevertheless they shared the same essential element: they changed the relationship between two parties from an adversarial one into a co-operative one. As such, the 2011 and 2016 Litigation Agreements were ones that changed the litigation landscape.

The remedy for failing to disclose immediately an agreement that changes the litigation landscape

[42] Aviva submits the *Aecon* decision did not lay down a general rule about the remedy a court should grant where a party's conduct amounts to an abuse of process because the party failed to disclose immediately an agreement that changed the landscape of the litigation. *Aecon*, it contends, must be confined to its facts, which differ from those in the present case. Aviva contends that in any case where a court finds that a party has committed an abuse of process, the court must engage in a case-specific proportionality analysis to craft an appropriate remedy, as was done in the *Abarca* decision. Not to do so, Aviva argues, would ignore the flexible application of the doctrine of abuse of process articulated by cases such as *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77.

[43] I do not accept this submission.

[44] First, the *Abarca* case did not involve a litigation agreement and did not discuss the consequences of a failure to disclose immediately such an agreement.

[45] By contrast, *Aecon* squarely addressed the consequences that should flow from a specific kind of abuse of process – a party's failure to disclose immediately an agreement that alters the adversarial posture of the litigation. Several clear messages emanate from *Aecon*:

(i) The obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation" is "clear and unequivocal" – they must be produced immediately upon their completion: at paras. 13 and 16;

(ii) The absence of prejudice does not excuse the late disclosure of such an agreement: at para. 16;

(iii) "Any failure of compliance amounts to abuse of process and must result in consequences of the most serious nature for the defaulting party": at para. 16; and

(iv) The only remedy to redress the wrong of the abuse of process is to stay the claim asserted by the defaulting, non-disclosing party. Why? Because sound policy reasons support such an approach:

> Only by imposing consequences of the most serious nature on the defaulting party is the court able to enforce and control its own process and ensure that justice is

> done between and among the parties. To permit the litigation to proceed without disclosure of agreements such as the one in issue renders the process a sham and amounts to a failure of justice: at para. 16.

[46] *Aecon* identified the remedy for a specific kind of abuse of process. As a matter of litigation procedural policy, no unfairness is likely to arise from the application of the *Aecon* principles. At least one party to a litigation agreement usually is an insurer or other sophisticated litigation participant who should be well aware of the *Aecon* principles. Where such a sophisticated party fails to comply with its clear disclosure obligation, judicial time should not be spent on inquiring into what, if any, prejudice was caused by a breach of the party's clear obligation (or, as argued by Aviva, whether the undisclosed litigation agreement somehow actually benefited the parties who knew nothing of its existence).

[47] Moreover, if a party to a litigation agreement is unclear whether the agreement has the effect of changing the adversarial position of the contracting parties, thereby attracting the mandatory disclosure obligation, it is always open to the 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.

Conclusion

[48] I conclude that the motion judge misdirected himself regarding the principles in *Aecon*. He erred by failing to apply *Aecon's* remedy of staying the claim of the

party that did not immediately disclose a litigation agreement. Given that misdirection, his discretionary decision is not entitled to deference in the circumstances: *Canada (Minister of Citizenship and Immigration) v. Tobiass*, [1997] 3 S.C.R. 391, at para. 87. The motion judge should have applied *Aecon* and granted the stay Williamson requested.

VI. DISPOSITION

[49] For the reasons set out above, I would allow the appeal, set aside the order of the motion judge, and grant an order staying Aviva's action (the third party claim having settled).

[50] In accordance with the agreement of the parties on costs, the respondents shall pay Williamson its costs of the appeal fixed at $10,000, inclusive of disbursements and HST, and its costs of the motion below fixed at $15,000, inclusive of disbursements and HST.

[51] As to the remaining costs of the action, the parties advised they will attempt to agree upon them, failing which such costs will be assessed.

Released: "DB" Mar 29 2018

"David Brown J.A."
"I agree. Alexandra Hoy A.C.J.O."
"I agree. Janet Simmons J.A."