COURT OF APPEAL FOR ONTARIO

CITATION: Crestwood Preparatory College Inc. v. Smith, 2022 ONCA 743
DATE: 20221031
DOCKET: C70149

Feldman, Hoy and Favreau JJ.A.

BETWEEN

Crestwood Preparatory College Inc., Crestwood School, Mandrake Management Consultants Corporation, NexCareer Inc., and Radar Headhunters Inc., formerly known as Wwwork!com Inc.

Appellants

and

David Smith, Thomas Thorney, Rita Botelho, ~~James Kemble and Fish Recruit Inc.~~

Respondent

Sean Dewart and Brett Hughes, for the appellants

Stephen Aylward, for the respondent

Heard: October 14, 2022

On appeal from the order of Justice Marie-Andrée Vermette of the Superior Court of Justice, dated December 6, 2021, with reasons reported at 2021 ONSC 8036.

Feldman J.A.:

Introduction

[1] It is an abuse of process for a plaintiff to settle with one defendant and not immediately disclose the settlement to the other defendants, "where the settlement agreement changes entirely the landscape of the litigation in a way that

significantly alters the adversarial relationship among the parties to the litigation or the 'dynamics of the litigation'": *Poirier v. Logan*, 2022 ONCA 350, at para. 47, leave to appeal requested, [2022] S.C.C.A. No. 255. In Ontario, the sole remedy the court will impose for the failure to disclose is a stay of the proceedings.

[2] This case is one of a number of recent appeals that raises the issue whether the circumstances of a failure to make immediate disclosure of a partial litigation settlement require the drastic remedy of a stay of the proceedings.[1]

[3] The appellant argues that the settlement agreement did not entirely change the litigation landscape because the settling defendants and remaining defendant had not yet pleaded in the action. In the absence of statements of defence, the defendants had not yet taken positions against one another in the litigation.

[4] For the reasons that follow, I would dismiss the appeal.

(1) Factual background

[5] Mr. Peerenboom is the chairman of the appellant corporations, Mandrake Consultants Corporation ("Mandrake"), NexCareer Inc. ("NexCareer") and Radar Headhunters Inc. ("Radar"), and a corporate principal of the appellants, Crestwood Preparatory College Inc. and Crestwood School. Mr. Peerenboom became

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[1] Leave to appeal to the Supreme Court of Canada was dismissed in two of three recent appeals from this court where this issue was sought to be appealed: *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, 466 D.L.R. (4th) 324, leave to appeal refused, [2022] S.C.C.A. No. 170; *Waxman v. Waxman*, 2022 ONCA 311, 471 D.L.R. (4th) 52, leave to appeal refused, [2022] S.C.C.A. No. 188; and *Poirier v. Logan*, 2022 ONCA 350, leave to appeal requested, [2022] S.C.C.A. No. 255.

involved in a personal dispute with another resident in his Florida home community, Mr. Perlmutter. Subsequently, Mr. Peerenboom was the target of a vicious hate mail campaign against himself and the appellant corporations, which he attributed to Mr. Perlmutter. He later learned that the respondent, Mr. Smith, a former employee, was directly implicated in the hate mail campaign along with his business partner, Mr. Thorney. Mr. Smith's employment with Mandrake, an executive search firm, had previously been terminated in December 2011, resulting in a settlement agreement and Minutes of Settlement between Mr. Smith and Mandrake, NexCareer, and Radar in January 2012 (the "Mandrake Settlement Agreement").

[6] The above facts led to litigation in Florida and in Ontario. Mr. Peerenboom sued Mr. Perlmutter in Florida in relation to the hate mail campaign. When he learned that Mr. Smith and Mr. Thorney were also involved, he sued them in a separate Florida action.

[7] The first Ontario action against Mr. Smith, commenced in August 2017, alleged breaches of the non-competition and confidentiality clauses of the Mandrake Settlement Agreement. That claim was amended in August 2018, without naming Mr. Thorney as a defendant, to plead that Mr. Thorney knowingly assisted in the breaches and that Mr. Smith and Mr. Thorney were involved in the hate mail campaign.

[8] The second Ontario action was commenced by the appellants against Mr. Smith, Mr. Kemble and Fish Recruit Inc. (the “Kemble defendants”) in August 2018, alleging that Mr. Smith breached the Mandrake Settlement Agreement by conspiring with the Kemble defendants to place job candidates with Fish Recruit Inc. using confidential information from Mandrake.

[9] The appellants commenced the third Ontario action in September 2018 against Mr. Smith and Mr. Thorney in respect of their involvement in the hate mail campaign, with both parties as named defendants.

[10] Mr. Peerenboom and the appellants entered into a number of settlement agreements with the defendants in the Ontario actions other than Mr. Smith, which contemplated the co-operation of the settling defendants with the plaintiffs in the Florida and Ontario actions.

[11] In respect of the second Ontario action, the appellants entered into a Tolling and Cooperation Agreement with the Kemble defendants on March 29, 2019, which required them to provide evidence in their possession concerning Mr. Smith’s misappropriation of Mandrake’s confidential information and to cease doing business with Mr. Smith, in exchange for a release (the “Kemble Agreement”). This agreement was not disclosed to the respondent.

[12] In respect of the Florida action and prior to the commencement of the third Ontario action, Mr. Peerenboom and Mr. Thorney entered into a Tolling and

Cooperation Agreement and Release of Liability Agreement on April 26, 2018 (the "First Thorney Agreement"). As part of this settlement, Mr. Thorney agreed to provide co-operation in the Florida action and in "any related proceedings" which were defined in such a way as to include proceedings related to the hate mail campaign. The First Thorney Agreement was not disclosed to the respondent following the commencement of the third Ontario action in September 2018.

[13] Over one year following the commencement of the third Ontario action, which named both Mr. Smith and Mr. Thorney as defendants, the First Thorney Agreement was supplemented and amended in November 2019 to include the third Ontario action (the "Second Thorney Agreement", collectively the "Thorney Agreements"). That agreement was signed by Mr. Peerenboom on his own behalf and on behalf of the appellant corporations with intent to bind them. The terms of co-operation required Mr. Thorney to waive certain defences and to provide Mr. Peerenboom with extensive evidence, including submitting to DNA testing, agreeing to a forensic examination of his electronic devices, and producing all documents and information in his possession relevant to his relationship with Mr. Smith. The Second Thorney Agreement was not disclosed to the respondent.

[14] Beginning in January 2019, counsel for the appellants sought the consent of the defendants in the Ontario actions to consolidate the actions. In April 2019, counsel delivered a proposed draft order which did not disclose the forthcoming dismissal of the action against the Kemble defendants, which actually occurred on

May 22, 2019. On May 15, 2019, counsel for the Kemble defendants left a voicemail for the respondent's former counsel, advising that the Kemble defendants had settled with the plaintiffs without disclosing the co-operation terms of the Kemble Agreement.

[15] In July 2019, after appointing new counsel, the respondent consented to the consolidation of the Ontario actions. The consolidation order was obtained on July 19, 2019 based on an affidavit of plaintiffs' counsel which was not served on the respondent's counsel. This affidavit referred to the dismissal of the second Ontario action against the Kemble defendants but maintained that no "litigation agreement" was reached between the plaintiffs and the Kemble defendants. The consolidated statement of claim served on August 6, 2019 inadvertently continued to include the claims against the Kemble defendants.

[16] After serving the consolidated statement of claim, appellants' counsel then sought an order to preserve and inspect the respondent's electronic devices and to implement a schedule for discoveries, without disclosure of the Kemble Agreement or the First Thorney Agreement.

[17] The issue of disclosure of the Kemble Agreement arose in December 2019 when the respondent's new counsel requested all information regarding the Kemble Agreement, which was initially refused. In response to a stay motion, the terms of the Kemble Agreement were disclosed in part.

[18] The Thorney Agreements were produced in the Florida litigation in November 2020. Appellants' counsel initially took the position that they were not relevant or applicable to the Ontario action. The Thorney Agreements were eventually produced by Mr. Thorney's counsel. After the Thorney Agreements were terminated by Mr. Peerenboom on February 15, 2021, they were then disclosed to the respondent on February 19, 2021.

[19] Throughout this period, and up to the present, the respondent has not delivered a statement of defence in the action.

Motion Judge's Decision

[20] The issue before the motion judge was whether the appellants were obliged to immediately disclose the Kemble Agreement and the Thorney Agreements. The motion judge reviewed all of the following recent case law from this court and the Superior Court: *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, 98 C.L.R. (3d) 1, leave to appeal refused, [2011] S.C.C.A. No. 84; *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636; *Tribecca Finance Corp. v. Harrison*, 2019 ONSC 1926; *Magnotta Winery Corporation v. Ontario (Alcohol and Gaming Commission)*, 2021 ONSC 178; *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2021 ONSC 984; *Poirier v. Logan*, 2021 ONSC 1633; *Waxman v. Waxman*, 2021 ONSC 2180; *Mann Engineering Ltd. v. Desai*, 2021 ONSC 2245, 77 C.P.C. (8th) 430; *Caroti v. Vuletic*, 2021 ONSC 2778;

Skymark Finance Corporation v. Her Majesty the Queen in Right of Ontario et al. (27 July 2021), Oshawa, 17/131909 (Ont. S.C.).

[21] I note that since the motion judge's reasons were delivered, the decisions in *Tallman*, *Waxman* and *Poirier* were upheld by this court: *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66, 466 D.L.R. (4th) 324, leave to appeal refused, [2022] S.C.C.A. No. 170; *Waxman v. Waxman*, 2022 ONCA 311, 471 D.L.R. (4th) 52, leave to appeal refused, [2022] S.C.C.A. No. 188; and *Poirier v. Logan*, 2022 ONCA 350, leave to appeal requested, [2022] S.C.C.A. No. 255. The decision in *Skymark* is also pending appeal before this court.[2]

[22] Applying the principles from those cases, the motion judge found that both the Kemble Agreement and the Thorney Agreements fundamentally changed the litigation landscape in the circumstances of this case, by changing the "dynamics of the litigation" and the "adversarial orientation", citing *Handley Estate*, at para. 39. Importantly, she found that the settlement agreements "changed the expected relationship between the Plaintiffs and certain Defendants from an adversarial one to a co-operative one", citing *Handley Estate*, at paras. 40-41.

[23] Referring to *Magnotta*, the motion judge found that it was the natural expectation from the allegations of conspiracy between Mr. Smith and Mr.

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[2] Another case which was not referred to by the motion judge was appealed and recently decided in *Performance Analytics Corporation v. McNeely*, 2022 ONCA 731.

Thorney, and between Mr. Smith and the Kemble defendants, that such conspirators would have a common interest in defeating the plaintiffs' claims. In addition, the settling defendants did not play a peripheral role in the action, but were central to the allegations against Mr. Smith in respect of the breaches of the Mandrake Settlement Agreement and in respect of the hate mail campaign.

[24] The motion judge also concluded that the settlements were tactical and strategic on the part of the plaintiffs, as was keeping them secret. She found that the settling defendants' turning on their co-defendant Mr. Smith "was not a small matter in the litigation landscape", quoting from *Poirier*, at para. 71.

[25] The motion judge directly addressed the appellant's argument that the obligation of immediate disclosure does not apply where the settling defendant has not yet pleaded in the action and therefore not yet stated whether they are adverse in interest to the position of the plaintiff. She referred to this court's decision in *Handley Estate* where the court looked at whether the apparent or expected relationships of the parties would be altered by the settlement agreements, and inferred that they were not limited to what is disclosed in the pleadings.

[26] The motion judge observed that because filing the statement of defence is such an important step in the litigation, the defendant should know before doing so whether, despite the claims in the statement of claim, another defendant is, in fact on the plaintiff's side and providing assistance to the plaintiff. She observed that in

the seminal *Aecon* case, there was no indication that statements of defence had been delivered when the settlement agreements were executed and not disclosed.

[27] She also noted that it would be contrary to the rationale for the disclosure obligation to hold that it is not triggered before production and discovery are scheduled.

[28] She also rejected the appellants' argument that the disclosure obligation only applies where the settling defendants remain in the action to assist the plaintiff, referring to this court's statement in *Handley Estate* that the obligation applies to *Pierringer* agreements, where the action is discontinued against the settling defendants. In any event, the settling defendants all remained connected to the action by their co-operation obligations, and Mr. Thorney remains a party.

[29] Finally, the motion judge distinguished two cases, relied on by the appellants, *Tribecca* and *Caroti*, as being factually dissimilar in significant ways.

[30] In the result, she concluded that the appellants' failure to disclose the settlement agreements that "fundamentally changed the landscape of the litigation" required a permanent stay of the proceedings against the respondent.

Issues on Appeal

[31] In their factum, the appellants identify three issues: (1) did the motion judge err by failing to identify any pleaded position or other representation from which the settling defendants switched; (2) did the motion judge err in finding that co-

defendants are presumed to be aligned with each other in an action; and (3) did the motion judge err in finding that the immediate disclosure obligation applies to settlements with defendants against whom the action is dismissed. However, in oral argument, counsel confirmed that the focus of the appeal is the proposition that the disclosure obligation does not arise where there have been no pleadings by the settling defendants and therefore their positions in relation to the plaintiff and the other defendants have not yet been taken and cannot be presumed.

Analysis

(a) State of the law

[32] The two seminal cases from this court that identify and describe the parameters of the disclosure obligation are *Aecon* and *Handley Estate*. However, since this motion was originally argued there have been a number of further decisions by this court that have reinforced those principles: see *Tallman*; *Waxman*; *Poirier*; *Hamilton-Wentworth District School Board v. Zizek*, 2022 ONCA 638; *CHU de Québec-Université Laval v. Tree of Knowledge International Corp.*, 2022 ONCA 467.

[33] In *Aecon*, while Aecon sued the City of Brampton for damages arising out of a construction project, those parties agreed in advance that Brampton would bring a claim against the third and fourth parties and would only be liable to Aecon for the amount recovered from those parties. This agreement was not immediately

disclosed to the other parties, although it was ultimately disclosed before they had to plead, and it was conceded that no prejudice therefore resulted.

[34] The court held the fact of no prejudice did not negate the obligation of immediate disclosure because "[s]uch agreements change entirely the landscape of the litigation": *Aecon*, at para. 13. The failure to comply results in an abuse of process which requires a very serious deterrent consequence, a permanent stay of the proceedings. The court in *Aecon* concluded, at para. 16:

> 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.

[35] The issue was addressed again in 2018 in *Handley Estate*. In that case, Aviva brought a subrogated insurance claim that arose out of the insured's leaky oil tank against the oil tank provider and a fuel delivery company, but neglected to include a third oil tank supplier in a timely manner. It therefore agreed with one of the defendants, H&M, a party which would not be able to pay a judgment for a number of reasons, to bring a timely third-party claim against the third oil tank supplier which claim would essentially be funded by Aviva. The claims proceeded with no disclosure of the litigation agreement. When H&M was ordered to pay security for costs of $20,000, Aviva provided the funds, again without disclosure to the other parties: *Handley Estate*, at para. 15. In response to the setting of a trial date and other activity in the litigation, Aviva and H&M entered into a second

litigation agreement whereby Aviva fully stepped into the shoes of H&M: *Handley Estate*, at paras. 19-21.

[36] After that, the existence and contents of the settlement agreements were disclosed in piecemeal fashion to the other parties: *Handley Estate*, at para. 3. Eventually a stay motion was brought. On appeal, the parties acknowledged that both agreements should have been disclosed immediately because they changed the adversarial relationship between Aviva and H&M: *Handley Estate*, at para. 41. The issue on appeal was whether the remedy of a stay was required.

[37] The court went back to the history of the disclosure obligation of *Mary Carter* agreements from the cases of *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Gen. Div.) and *Laudon v. Roberts*, 2009 ONCA 383, 308 D.L.R. (4th) 422, leave to appeal refused, [2009] S.C.C.A. No. 304, but went on to state that the obligation arises in both *Mary Carter* and *Pierringer* agreements and extends to any agreement "that has the effect of changing the adversarial position of the parties into a co-operative one": *Handley Estate*, at para. 39, citing *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 9 B.L.R. (3d) 99, 48 C.P.C. (4th) 44 (Ont. S.C.), at para. 23.

[38] Turning to the remedy, the court rejected a discretionary approach that applies proportionality principles. It stated that there would be no unfairness because at least one party to a litigation agreement would normally be an insurer

that would be aware of the disclosure obligation. In addition, a party could seek direction from the court where the obligation to disclose may be unclear: *Handley Estate*, at paras. 46-47. In the result, this court in *Handley Estate* found that *Aecon* applied and ordered a stay.

[39] A number of recent cases from this court have restated and reinforced the principles from *Handley Estate*. Most recently in *Hamilton-Wentworth*, the court emphasized that the rule from *Aecon* is intended to be a bright line rule that requires immediate disclosure of a settlement agreement: at para. 11. If there is an issue about whether certain terms of the agreement remain privileged, that issue can be brought to court following the initial disclosure, as occurred in *Tree of Knowledge: Hamilton-Wentworth*, at para. 8. The court added that the purpose of making the rule so clear is to avoid the type of motion that is being pursued in the recent cases: *Hamilton-Wentworth*, at para. 11. It emphasized again that whether prejudice has resulted from the non-disclosure is not a factor to be considered *Hamilton-Wentworth*, at para. 9.

[40] In *Poirier*, the settlement agreement between one defendant and the plaintiff was made after all pleadings were exchanged, including cross-claims among the defendants, although they had all agreed to co-operate in a defence strategy that involved deferring their examinations of one another to avoid obtaining admissions that would assist the plaintiff: at paras. 8-10. The settlement agreement was not disclosed for six months: *Poirier*, at para. 21. In his affidavit given to fulfill the

settlement obligation, the defendant accountant provided evidence to the plaintiff of financial misfeasance by the other defendants who were involved in the impugned sale of the business to the plaintiff: *Poirier*, at paras. 15-17.

[41] One of the plaintiff's submissions on appeal was that the settlement agreement did not result in a change of position from the pleadings, and that making the pleadings into a sham was a requirement of the principle set out in *Handley Estate*. He argued that otherwise a stay of proceedings amounts to a disproportionate remedy that has the effect of discouraging settlements: *Poirier*, at paras. 44-46.

[42] The court in *Poirier* firmly rejected this submission. It is worth quoting the reasons for that rejection, at paras. 47-48:

> I would reject these arguments. Neither a change in the position of the parties reflected in the pleadings, nor a "sham" inquiry, are essential parts of the disclosure test. As I have indicated, it is settled in this court's jurisprudence that the obligation to disclose arises where the settlement agreement changes entirely the landscape of the litigation in a way that significantly alters the adversarial relationship among the parties to the litigation or the "dynamics of the litigation": *Aecon*, at para. 13; *Tallman*, at para. 12; *Handley Estate*, at paras. 12, 29 and 37; *Laudon*, at para. 39. This is the inquiry that the motion judge identified and applied, and he was correct to do so.
>
> To be sure, it may almost invariably be the case that if this inquiry is satisfied the settling party's pleadings will no longer fully reflect the post-settlement state of the litigation, but the authorities do not support the proposition that a finding that a settlement agreement

> has altered the adversarial relationship disclosed in the pleadings is a condition precedent to a determination that an obligation to disclose has arisen. In *Laudon*, at para. 39, when describing agreements that significantly alter the relationship among the parties to the litigation, MacFarland J.A. said, "Usually the position of the parties will have changed from those set out in their pleadings" (emphasis added). She did not say this must always be so. Similarly, when Nordheimer J. (as he then was) expressed the test in *Aviaco International Leasing Inc. v. Boeing Canada Inc.* (2000), 48 C.P.C. (4th) 44, at para. 23, in a passage approved by Brown J.A. in *Handley Estates*, at para. 40, he asked: "Do the terms of the agreement alter the apparent relationships between the parties to the litigation that would otherwise be assumed from the pleadings or expected in the conduct of the litigation?" (emphasis added).

[43] The principles that arise from the case law were most recently summarized by this court in *Tree of Knowledge*, at para. 55. For the purposes of this appeal, the following are the relevant principles:

(a) The "clear and unequivocal" obligation of immediate disclosure is triggered where partial settlement agreements "change entirely the landscape of the litigation": *Handley Estate*, at para. 45, citing *Aecon* at paras. 13, 16;

(b) The disclosure obligation applies to *Mary Carter*, *Pierringer* and any other settlement agreement that has the effect of changing the pleaded or expected adversarial position of the parties into a co-operative one: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;

(c) Identifying a change in the parties' pleaded positions is not an essential part of the disclosure test: *Poirier*, at para. 47.

(d) Parties may bring a motion for directions where the extent of the duty to disclose may be unclear: *Handley Estate*, at para. 47; see also *Hamilton-Wentworth*, at para. 8;

(e) The absence of prejudice does not justify late disclosure of such an agreement: *Handley Estate*, at para. 45, citing *Aecon*, at para. 16; and

(f) The failure to provide immediate disclosure in these circumstances amounts to an abuse of process where the sole remedy is an automatic stay of proceedings: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-40.

(b) Application to this case

[44] As indicated above, counsel for the appellants confirmed in oral argument that the basis of the appeal is the proposition that without pleadings by the settling defendants, the obligation of immediate disclosure of a settlement agreement with some of the defendants does not arise. The reason is because without the pleadings, one cannot know whether the effect of the agreement is to change "the dynamics of the litigation" or the "adversarial orientation" between the parties: *Handley Estate*, at para. 39.

(i) Error of law

[45] To the extent that the appellants argue that this is a legal requirement, in my view it is clear from the case law from this court that it is not. It is clear from the language used in the cases that the court is not limited to an examination of the pleadings in order to discern whether the settlement agreement significantly altered the adversarial relationship among the parties as articulated in *Poirier*, at para. 47.

[46] For example, in *Handley Estate*, at para. 40, the court approved the test from *Aviaco,* quoted above, that refers to a change in the "apparent relationships" between any parties "that would otherwise be assumed from the pleadings or expected in the conduct of the litigation" (emphasis added). In other words, from early on in the development of the rule, the analysis of the relationships among the parties was not limited to what was disclosed in the pleadings.

[47] Most recently in *Poirier,* the court made it clear that a change in the position of the parties reflected in the pleadings is not an essential part of the disclosure test and is not a condition precedent to the determination that the obligation to disclose has arisen: at paras. 47-49. While there were pleadings in that case, the principle applies as well where the pleadings are not complete.

[48] To hold otherwise could defeat the intent of the disclosure obligation which is to ensure that when parties take steps in the litigation, and when the court makes

rulings, the parties and the court are not being actively misled as to the consequences of those steps or rulings. If they are, the process becomes “a sham and amounts to a failure of justice”: *Aecon*, at para. 16.

(ii) Error of mixed fact and law

[49] The appellant also submits that the motion judge erred by failing to conduct the necessary inquiry, in the absence of pleadings, to determine whether there was other evidence to establish that the settling defendants would be expected to be aligned in their positions with the respondent.

[50] The appellants submit that such evidence could include, for example, correspondence among counsel regarding defence coordination. What was missing from the record, the appellants argue, was any evidence that the respondent believed that the settling defendants would have been aligned with him. They point to other cases where the settlement agreement or evidence given by a settling defendant following such an agreement created misrepresentations in the settling defendant’s pleading or in his conduct with the other defendants: see *Aecon*; *Handley Estate*; *Tallman*; *Waxman*; *Poirier*; *Skymark*. The appellants say that the motion judge failed to consider whether there were any such misrepresentations here.

[51] The appellants argue further that the motion judge erred by relying instead on the expectation that where two defendants are alleged to have conspired

together or been involved in joint wrongdoing, they "would have a common interest in defeating a plaintiff's claim". In this case, they postulate, Mr. Smith may well have expected that Mr. Thorney would seek to put all the blame on him for the hate mail campaign, or that the Kemble defendants would deny that they knew that the information they were receiving from him was confidential.

[52] I would not give effect to this argument. It amounts to an attack on the inferences drawn by the motion judge from the record and the application of the legal test to those facts. The motion judge made no palpable or overriding error in drawing the inference from the statement of claim that one would expect the defendants to be adverse to the plaintiffs' interest based on the allegations of conspiracy and common action. The motion judge was not required to find any specific misrepresentation.

[53] Contrary to the appellants' contention, this case is not akin to *Caroti* where the court held that the terms of a settlement agreement did not change, let alone "entirely" change, the adversarial landscape: at para. 77. The settling and non-settling defendants in *Caroti* were found to be adverse in interest from the outset: at para. 92. The co-operation terms to meet with plaintiffs' counsel, provide a will say statement and testify simply required the settling defendant to do what he was entitled to do anyway: *Caroti*, at paras. 77-79, 97.

[54] In this case, the motion judge reviewed the specific co-operation terms in the Kemble Agreement and the Second Thorney Agreement to support her finding that there was a change in the relationship between the plaintiffs and the settling defendants from an adversarial one to a co-operative one. As per the Kemble Agreement, Mr. Kemble provided a sworn affidavit attesting to Mr. Smith's use of Mandrake's proprietary and confidential information to obtain clients for Fish Recruit Inc. and advised Mr. Smith to stop referring clients to Fish Recruit Inc. In the Thorney Agreements, the settling defendant agreed to testify against Mr. Smith, submit to DNA testing and to extensive forensic examination of his electronic devices. The conduct required of the settling defendants under the terms of these settlement agreements would not be expected by the non-settling defendant in the normal course of the litigation.

[55] The motion judge further added that "the allegations in this case do not foreshadow any 'natural' alliance or cooperation between the Plaintiffs and any of the Defendants." In my view, this shows that she was careful in her analysis and alive to the need to find, based on the record, that the effect of the settlement agreements was to sufficiently change the litigation landscape and the adversarial positions among the parties that immediate disclosure of the settlement agreements was required.

[56] Lastly, the appellants argued in their factum that the obligation of immediate disclosure does not apply where the action is promptly dismissed against a settling

defendant. I would reject this submission largely for the same reasons provided by the motion judge. This court in *Tallman*, at para. 23, citing *Handley Estate*, at para. 39, affirmed that the obligation of immediate disclosure applies to *Pierringer* agreements where, by definition, the claim against the settling defendant is discontinued in exchange for the settling defendant's co-operation in the plaintiff's action against the non-settling defendant. In any event, Mr. Thorney remains a defendant in the action due to the termination of the Second Thorney Agreement and the Kemble defendants have ongoing disclosure obligations under the Kemble Agreement.

Conclusion

[57] The motion judge made no error in applying the law as consistently articulated by this court, that where a settlement agreement has the effect of changing entirely the landscape of the litigation in a way that significantly alters the dynamics of the litigation, it must be immediately disclosed to the non-settling defendant(s). Failure to do so amounts to abuse of process, the remedy for which is an automatic stay of the proceeding. In this case, while the respondent had not yet delivered a statement of defence when he learned of the settlements, including the Thorney Agreements which are no longer in effect, the fact that no prejudice is suffered by the non-settling defendant as a result of the failure to disclose is of no import in the analysis.

[58] As a result, I would dismiss the appeal with costs fixed in the amount of $17,500 inclusive of disbursements and HST.

Released: October 31, 2022 “K.F.”

“K. Feldman J.A.”
“I agree. Alexandra Hoy J.A.”
“I agree. L. Favreau J.A.”