COURT OF APPEAL FOR ONTARIO

CITATION: Skymark Finance Corporation v. Ontario, 2023 ONCA 234
DATE: 20230406
DOCKET: C69799

Doherty, Lauwers and Trotter JJ.A.

BETWEEN

Skymark Finance Corporation

Plaintiff
(Appellant)

and

His Majesty the King in Right of Ontario, Harley Smith's Farm Delhi Equipment Ltd., Lorraine Madeline Smith, Harley Carson Smith, Kormans LLP, Jerry Korman, Waterous Holden Amey Hitchon LLP and David Clement

Defendants
(Respondents)

Jordan Katz and Simon Bieber, for the appellant

David M. Golden, for the respondents Kormans LLP and Jerry Korman

Peter Wardle, for the respondents Waterous Holden Amey Hitcheon LLP and David Clement

Dona Salmon and Michael Saad, for the respondent His Majesty the King in Right of Ontario

Heard: November 18, 2022

On appeal from the order of Justice Alexander Sosna of the Superior Court of Justice, dated July 27, 2021.

Trotter J.A.:

A. INTRODUCTION

[1] This is an appeal from a decision dismissing an action for abuse of process, based on the appellant's (formerly the plaintiff) failure to disclose a settlement agreement.

[2] The appellant, Skymark Finance Corporation ("Skymark"), entered into Minutes of Settlement with Lorraine Smith, a central figure in two related actions with Skymark – the action under appeal (the "Main Action"), and a related action in which she was the sole defendant (the "Mortgage Action"). Ms. Smith agreed to assist Skymark in its case against the other defendants in this case by providing an affidavit and agreeing to give evidence consistent with her affidavit during the discovery process. If she fulfilled her obligations, Skymark agreed to release her from the actions.

[3] Skymark waited eight months before disclosing the Minutes of Settlement to the non-settling defendants, and only after being threatened with an abuse of process motion.

[4] The motion judge found that the Minutes of Settlement changed the entire litigation landscape. Because it was not disclosed immediately, he stayed the action in favour of all of the moving parties.

[5] Skymark appeals, contending that the motion judge erred in concluding that the Minutes of Settlement changed the entire litigation landscape. In the

alternative, it submits that the motion judge should have considered the appropriateness of a stay on a defendant-by-defendant basis.

[6] The following reasons explain why I do not accept either submission and would dismiss the appeal.

B. BACKGROUND FACTS

[7] Skymark is in the business of consumer and commercial financing. Ms. Smith and her husband, Harley Smith, own and control Delhi Farm Equipment Ltd. ("Delhi").

[8] In 2015, the Smiths and Delhi wished to get into the business of manufacturing, selling, importing, and exporting cigarettes. They applied to the Ontario government for licences that would permit Delhi to engage in this business. As part of the application process, they were required to provide the Ministry of Finance ("MOF") with a $1 million security bond.

[9] This is where Skymark came into the picture. The Smiths did not have $1 million. Skymark agreed to finance this transaction. It advanced $1.2 million to Delhi. The additional $200,000 represented fees charged by Skymark and related entities.

[10] Other terms of this loan agreement included the following: (1) Ms. Smith would partially secure the loan by granting mortgages to Skymark on two

properties she owned; and (2) the Smiths would sign an irrevocable Acknowledgment and Direction to the MOF that, when the $1 million security bond was no longer required, the $1 million would be returned directly to Skymark.

[11] In October 2015, the Smiths executed the irrevocable Acknowledgment and Direction and Skymark forwarded $1.2 million to its lawyers, Kormans LLP and Jerry Korman (the “Korman Defendants”). The Korman Defendants forwarded the $1 million to the MOF. However, although the MOF received the funds, it claimed to never have received the Acknowledgment and Direction.

[12] Things unravelled quickly. By January 2016, Ms. Smith defaulted on her mortgage obligations, failing to even make her first payment. On May 9, 2016, Skymark commenced an action against Ms. Smith to enforce Skymark’s mortgages (“the Mortgage Action”).

[13] In the meantime, on March 31, 2016, the Smiths wrote and signed a new Letter of Direction that was forwarded to the MOF. This document directed that the funds were to be forwarded to the Smiths’ lawyers, Waterhouse Holden Amey Hutchinson LLP and David Clement (the “Clement Defendants”), who would return the funds to Skymark.

[14] In August of 2016, Delhi’s tobacco permits were cancelled, at the request of the Smiths. In accordance with the March 31, 2016 Letter of Direction, the MOF returned the $1 million deposit to the Clement Defendants. The Clement

Defendants kept $25,000 for legal fees, and then forwarded $975,000 to Delhi's bank account. That money disappeared very quickly, apparently gambled away by Mr. Smith.

C. THE PLEADINGS IN THE MAIN ACTION

[15] On July 20, 2017, Skymark commenced the Main Action against the Smith Defendants (the Smiths and Delhi), the Korman Defendants, the Clement Defendants, and the Government of Ontario ("Ontario").

[16] In its statement of claim, Skymark alleged that the Smith Defendants engaged in a fraudulent course of conduct to deceive Skymark. Skymark alleged negligence against the Korman Defendants for failing to forward the initial Acknowledgement and Direction to the MOF. It also alleged negligence against the MOF for returning the deposit money to the Clement Defendants, and against the Clement Defendants for its handling of the March 31, 2016 Letter of Direction and the release of funds to the Smiths.

[17] In their statement of defence, the Smith Defendants denied all responsibility for any loss incurred by Skymark. They alleged fraud on the part of Skymark in conjunction with other named individuals in misusing the tobacco licences. The statement of defence makes no mention of the other defendants. The Smith Defendants did not crossclaim against any other defendant.

[18] The Korman Defendants filed a statement of defence and crossclaim. They denied any negligence. They claimed contribution and indemnity against Ontario and the Smith Defendants. The Clement Defendants also filed a statement of defence and crossclaim. Their crossclaim was against the Smith Defendants only, claiming contribution and indemnity. Ontario filed a Statement of Defence. It did not crossclaim against any other defendant.

[19] The Smith Defendants filed a defence to crossclaim against the Korman and Clement Defendants. In a very brief pleading, they denied any responsibility and asserted that the Korman and Clement Defendants acted independently and without coercion. As discussed below, however, Ms. Smith's affidavit portrayed a dramatically different story.

[20] Pleadings closed on June 16, 2018.

D. THE SETTLEMENT AGREEMENT

[21] Skymark was taking steps to resolve the Mortgage Action. On June 4, 2019, Skymark's counsel advised all parties to the Main Action of its hope that the Mortgage Action could be resolved and that, if successful, it "may impact upon the quantum of damages our client is seeking in [the Main Action]."

[22] By June 6, 2019, Skymark and Ms. Smith executed the Minutes of Settlement in the Mortgage Action. The Minutes of Settlement refer to the Mortgage Action and to "another action", being the Main Action under appeal:

> AND WHEREAS Skymark commenced another action in Newmarket, Ontario, under Court File CV-17-131909-00 (the "Newmarket Action") against Lorraine and others.

[23] The Minutes of Settlement contain the following clause, which makes it clear that Skymark intended to settle both actions as they related to Ms. Smith:

> NOW THEREFORE THIS AGREEMENT WITNESSETH that parties to hereto agree, for the consideration as set out herein and for other good and valuable consideration the receipt and sufficiency of which is acknowledged by Skymark and Lorraine, to settle the Actions with respect to Lorraine on the following basis…. [Emphasis added.]

[24] As for the Mortgage Action, Ms. Smith would give up vacant possession of the two mortgaged properties. Her liability would be limited to the proceeds of sale of the two properties. This turned out to be considerably less than the roughly $1,341,324 that was owing at the time; the properties were eventually sold under power of sale with net proceeds of approximately $420,000.

[25] The conditions in the Minutes of Settlement that are relevant to the Main Action are as follows:

- Ms. Smith provides an affidavit that was drafted and attached to the Minutes "which evidence shall be intended for and used by Skymark in the [Main Action]";
- Ms. Smith waives solicitor-client privilege in respect of all communications with the Clement Defendants with respect to both actions; and

- Ms. Smith “agrees to cooperate during the Examination of Discovery of her by Skymark in the [Main Action] and to provide evidence that is true, and consistent in every material respect with her Affidavit”.

[26] In exchange for Ms. Smith’s cooperation, Skymark agreed that it would dismiss the Main Action against her on a without costs basis.

[27] Ms. Smith’s draft affidavit was appended as an exhibit to the Minutes of Settlement. She described the circumstances resulting in the cancellation of the tobacco licence. She swore that her husband, Mr. Smith, was concerned that his business partner was using the licence unlawfully. She overheard a telephone call with Mr. Clement who advised that the only way to guarantee that the licence would not be misused was to cancel it.

[28] Ms. Smith further swore that Mr. Clement advised her and her husband to send a new direction to the MOF that would see the funds returned to them, which could then be used as leverage to settle Skymark’s claim. In short, Ms. Smith blamed Mr. Clement for causing the second direction to be sent to the MOF. She said: “Mr. Clement did *not* suggest to us that sending a second direction could be viewed as in any way fraudulent, and because of Mr. Clement’s advice, I believed it was perfectly legal.” (emphasis in original).

[29] Ms. Smith’s affidavit further stated that she attended a meeting with her husband at Mr. Clement’s office. At that meeting, Mr. Smith and Mr. Clement

agreed that, but for $25,000 that would be retained by Mr. Clement for legal fees, the remainder would be deposited in Delhi's bank account. She assisted Mr. Smith in removing the money from the account by way of cash withdrawals and bank drafts. Ms. Smith suggested that her husband gambled all of the money away.

[30] On July 30, 2019, Ms. Smith signed a copy of this affidavit. On September 5, 2019, a copy of the affidavit was sent to the non-settling defendants. The Minutes of Settlement were not. Skymark's counsel indicated that their client would be relying on the affidavit as evidence "in this action" – being the Main Action.

[31] The action continued to examinations for discovery. On August 12, 2019, counsel for the Clement Defendants requested that Skymark disclose any settlement documents relating to the Mortgage Action. The request was refused based on an assertion of privilege.

[32] A principal of Skymark, Michael Slattery, was examined for discovery on February 4, 2020. He brought no documents with him in relation to the settlement with Ms. Smith. On the advice of counsel, he refused to answer any questions about the existence of a settlement agreement.

[33] On February 12, 2020, counsel for the Clement Defendants wrote to all counsel advising that he believed that there was a settlement agreement between

Skymark and Ms. Smith. He threatened to bring an abuse of process motion against Skymark.

[34] The Minutes of Settlement were finally disclosed on February 18, 2020, roughly eight months after they were entered into. In disclosing this document, counsel for Skymark explained:

> These Minutes are not from the current action but were entered into in respect of Skymark's mortgage action…. To be clear, there are no Minutes of Settlement that exist as between Skymark and Ms. Smith that are framed under the current action nor, for that matter, is there any other settlement as between Skymark and another party to the current action.

However, as I noted in para. 23, this statement was not accurate.

[35] The Clement Defendants, the Korman Defendants, and Ontario moved to stay the action as an abuse of process. The other defendants did not.

E. THE MOTION JUDGE'S REASONS

[36] The motion judge allowed the motion to stay proceedings. He found that the Minutes of Settlement changed the entire litigation landscape. Accordingly, Skymark was required to disclose immediately the Minutes of Settlement to all non-settling parties. Its failure to do so amounted to an abuse of process, requiring a stay of proceedings.

[37] The motion judge considered the explanation provided by Skymark's counsel for refusing to disclose the agreement. In an affidavit, counsel for Skymark swore:

> It was only when the discovery process was complete that Skymark would permit the release or dismissal against [Ms. Smith] in the [Main Action].
>
> Principally for this reason, it was never my understanding or belief that the adversarial relationship between Ms. Smith and Skymark had changed in the [Main Action], and would not until the discovery process was complete.

[38] The motion judge did not accept this explanation. He found that the relationship between Skymark and Ms. Smith was fundamentally altered when they executed the Minutes of Settlement. As he wrote at para. 53:

> As already found, the relationship between Skymark and Ms. Smith changed from an adversarial one to a cooperative one, with Ms. Smith incentivized to cooperate to the satisfaction of Skymark. Only in those circumstances would she be ensured that her liability in the Main Action would be capped by Skymark from $1.2 million to the value of her two mortgaged properties later sold under power of sale for approximately $420,000. [Emphasis added.]

[39] In terms of its impact on the Clement and the Korman Defendants, the motion judge made the following findings, respectively, at paras. 45-46, 66:

> In her affidavit, Mr. Smith portrayed the Clement Defendants as being responsible for the actions of the Smith parties, and thereby liable to Skymark for its damages. As a result, the Smith's litigation objective

> shifted, from defending Skymark's claim as set out in the pleadings, to pointing the finger at the Clement Defendants. In doing so, Ms. Smith sought to limit her liability in the Main Action.
>
> As such, the Smith parties and Skymark were no longer litigation adversaries, but were allies, while the Smith parties' relationship with the Clement Defendants changed from one of cooperation, to one of adversity.
>
> . . .
>
> The Litigation Agreement in the case at bar, altered the adversarial position of Skymark and Ms. Smith to one of cooperation, and altered the relationship between Mr. Smith and her counsel the Clement Defendants to one of adversity. The Litigation Agreement also impacted on the Korman Defendants crossclaim by delivering the Smith affidavit in a form specified by Skymark and inconsistent with her Defence and Counterclaim to the Korman Crossclaim. [Emphasis added.]

[40] The motion judge found that, although the Minutes of Settlement changed the entirety of the litigation landscape, Ontario was "not affected" and suffered "no prejudice, since the relationship between Skymark, Ms. Smith and Ontario stayed the same at the time of close or pleadings" (para. 67). However, he relied on *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324, 421 D.L.R. (4th) 636, where this court held that a non-settling defendant is not required to demonstrate prejudice in order to be entitled to a stay of proceedings.

[41] The trial judge also rejected Skymark's submission that its disclosure obligations were essentially met by providing Ms. Smith's affidavit on August 1, 2019. He found that the disclosure of the affidavit was insufficient

because it failed to inform the defendants that Ms. Smith's affidavit was one aspect of the Minutes of Settlement that required Ms. Smith's ongoing support to Skymark, and what Ms. Smith stood to gain in exchange for her continued cooperation.

[42] As a postscript to these events, on July 27, 2021, the same day that the application judge released his reasons, Skymark obtained an order declaring void the conditional consent to release Ms. Smith in Minutes of Settlement. Through its questioning of Ms. Smith during discoveries, Skymark established that Ms. Smith had made certain misrepresentations in her affidavit. Consequently, Skymark was permitted to proceed against Ms. Smith in the Main Action.

F. ISSUES ON APPEAL

[43] Skymark submits that the Minutes of Settlement did not change the entire litigation landscape because, as the motion judge found, at least one non-settling defendant – Ontario – was not affected. Second, and in the alternative, Skymark submits that the application judge erred in staying proceedings against Ontario because it was not affected by the Minutes of Settlement.

[44] Before turning to these issues, I wish to address a side issue that emerged during oral argument at the hearing. When asked why Skymark did not disclose the Minutes of Settlement right away, counsel responded that the Minutes settled a discrete action – the Mortgage Action.

[45] This submission can be disposed of quickly. As noted in paras. 23 and 34 above, in his letter to the defendants in which he finally disclosed the Minutes of Settlement, Skymark's counsel purported to maintain this fictional distinction. Although the Minutes of Settlement bear the title of proceedings in the Mortgage Action, they explicitly resolve both actions as they relate to Ms. Smith. There is no merit in this submission.

G. ANALYSIS

(1) The immediate disclosure rule

[46] This court has held, repeatedly, that settlement agreements reached between some parties, but not others, need to be immediately disclosed to non-settling parties if they entirely change the litigation landscape. This litigation obligation may be traced back to this court's decision in *Laudon v. Roberts*, 2009 ONCA 383, 308 D.L.R. (4th) 422, leave to appeal refused [2009] S.C.C.A. No. 304, *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, and *Handley Estate*. It has been restated and refined numerous times, especially in recent years: see *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, at para. 23; *Waxman v. Waxman*, 2022 ONCA 311, 471 D.L.R. (4th) 52, leave to appeal refused, [2022]

S.C.C.A. No. 188 , at para. 24; *Poirier v. Logan*, 2022 ONCA 350, leave to appeal refused [2022] S.C.C.A No. 255, at para. 47.

[47] A helpful summary of how this rule operates is found in *CHU de Québec–Université Laval v. Tree of Knowledge International Corp.,* 2022 ONCA 467, in which Sossin J.A. said, at para. 55:

> The following principles can be drawn from this court's decisions on the abuse of process that arises from a failure to immediately disclose an agreement which changes the litigation landscape:
>
> > a) There is a "clear and unequivocal" obligation of immediate disclosure of agreements that "change entirely the landscape of the litigation". They must be produced immediately upon their completion: *Handley Estate*, at para. 45, citing [*Aecon* at paras. 13 and 16]; see also *Waxman*, at para. 24;
> >
> > b) The disclosure obligation is not limited to pure *Mary Carter or Pierringer* agreements. The obligation extends to any agreement between or amongst the parties "that has the effect of changing the adversarial position of the parties into a co-operative one" and thus changes the litigation landscape: *Handley Estate*, at paras. 39, 41; see also *Tallman*, at para. 23; *Waxman*, at paras. 24, 37; *Poirier*, at para. 47;
> >
> > c) The obligation is to immediately disclose information about the agreement, not simply to provide notice of the agreement, or "functional disclosure": *Tallman*, at paras. 18-20; *Waxman*, at para. 39;

> d) Both the existence of the settlement and the terms of the settlement that change the adversarial orientation of the proceeding must be disclosed: *Poirier*, at paras. 26, 28, 73;
>
> e) Confidentiality clauses in the agreements in no way derogate from the requirement of immediate disclosure: *Waxman*, at para. 35;
>
> f) The standard is “immediate”, not “eventually” or “when it is convenient”: *Tallman*, at para. 26;
>
> g) The absence of prejudice does not excuse a breach of the obligation of immediate disclosure: *Handley Estate*, at para. 45; *Waxman*, at para. 24; and
>
> h) Any failure to comply with the obligation of immediate disclosure amounts to an abuse of process and must result in serious consequences: *Handley Estate*, at para. 45; *Waxman*, at para. 24; *Poirier*, at para. 38. The only remedy to redress the abuse of process is to stay the claim brought by the defaulting, non-disclosing party. This remedy is necessary to ensure the court is able to enforce and control its own processes and ensure justice is done between the parties: *Handley Estate*, at para. 45; *Tallman*, at para. 28; *Waxman*, at paras. 24, 45-47; *Poirier*, at paras. 38-42.

[48] I wish to stress an additional point. The immediate disclosure rule is not designed to discourage settlements – far from it. The rule simply compels the immediate disclosure of such agreements when they profoundly impact the litigation. This was clear from inception of this line of authority. In *Aecon*, MacFarland J.A. said the following, at para. 13:

> 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. [Emphasis in original.]

[49] In her reasons the previous year in *Laudon*, at para. 39, MacFarland J.A. adopted the following rationale for the rule in *Pettey v. Avis Car Inc.* (1993), 13 O.R. (3d) 725 (Gen. Div.), in which Ferrier J. said, at pp. 737-738:

> 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 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.]

More recently, this passage was endorsed by Brown J.A. in *Handley Estate*, at para. 36, and by Paciocco J.A. in *Poirier*, at para. 42.

[50] This case illustrates these concerns. As noted above, the defendants were forced to discover Mr. Slattery without knowing the terms of the Minutes of Settlement and not knowing how Skymark had negotiated Ms. Smith's cooperation. Similarly, a judge reading the bare pleadings in this case would have no idea of the seismic shift in the litigation caused behind the scenes by the

Minutes of Settlement. Ms. Smith's disclosed affidavit would have gone a long way, but it did not tell the entire story.

(2) The entirety of the litigation landscape

[51] What does the expression, "to change the entirety of the litigation landscape", mean? That is an often recurring issue in this line of cases. As the cases cited above demonstrate, the determination is fact-specific, based on the configuration of the litigation and the various claims among the parties. On appeal, a motion judge's finding with respect to the change to the litigation landscape is a question of mixed fact and law and, barring an extricable error of law, is entitled to deference on appeal: *Waxman*, at para. 27; *Performance Analytics v. McNeely*, 2022 ONCA 731, at para. 3.

[52] This concept – a change to the entire litigation landscape – has been explained in similar, yet not identical ways in this court's cases. In *Laudon*, at para. 39, MacFarland J.A. described such an agreement as one that "significantly alters the relationship among the parties to the litigation." In *Aecon Buildings*, at para. 13, she referred to agreements that "change entirely the landscape of the litigation", restated by Brown J.A. in *Handley Estate*, at para. 37.

[53] More recently, in *Crestwood Preparatory College Inc v. Smith*, 2022 ONCA 743, at para. 57, Feldman J.A. referred to agreements that have "the effect of changing entirely the landscape of the litigation in a way that significantly alters the

dynamics of the litigation" (emphasis added). I would adopt this more specific language.

[54] In this case, Skymark narrows in on the word "entirely" from the formulation in *Aecon* and *Handley*. Its basic position is that, unless all parties are impacted by a settlement agreement, the landscape has not been changed entirely. A logical corollary of this proposition is that, if a single, non-settling defendant – no matter how minor – is not impacted by a litigation agreement, the landscape cannot be said to have been changed "entirely". I would not adopt such a narrow and literal interpretation.

[55] The necessary magnitude of the change to the litigation landscape must be informed by the values that the rule is meant to advance. This court has repeatedly held that the rule is meant to preserve fairness to the parties. It is also designed to preserve the integrity of the court process. That is why the failure to observe the immediate disclosure rule is considered to be an abuse of the court's process, which can only be remedied by a stay of proceedings: see *Handley*, at para. 45. In *Tallman*, this court said, at para. 28: "This remedy is designed to achieve justice between the parties. But it does more than that – it also enables the court to enforce and control its own process by deterring future breaches of this well-established rule."

[56] In my view, the motion judge did not err in finding that the entirety of the litigation landscape was changed by the Minutes of Settlement. The Minutes significantly altered the dynamics of the litigation. This conclusion was not undermined, as Skymark submits, by the motion judge's conclusion that Ontario was unaffected by the Minutes. In any event, as I will explain below, I am not convinced that Ontario was left unaffected by the Minutes of Settlement.

[57] I accept Mr. Wardle's submission, on behalf of the Clement Defendants, that the settlement between Skymark and Ms. Smith had implications for all of the defendants. Ms. Smith (and her husband) were at the epicentre of this litigation. Their alleged conduct affected all other parties to this litigation. When Skymark settled with Ms. Smith in a manner that transformed her into a litigation ally, a friendly participant, it fundamentally changed the litigation landscape because it significantly altered the dynamics of the litigation, even though it did not impact on all the parties in the same way, or to the same extent.

[58] If the scope of this concept were narrowed in the manner suggested by Skymark, it would create perverse incentives. If a plaintiff reaches a settlement with one defendant – including one that is central to the litigation – which has no impact on just one of the other defendants, it would not be required to disclose it to any of the non-settling defendants even though the settlement might have a dramatic impact on one or more of those other defendants. The proceedings could

continue with the non-settling defendants being left in the dark and taking litigation decisions and steps in ignorance of the true state of affairs. This might involve examinations for discovery, retaining experts, and the like. Judges called upon to guide the case to completion would also be flying blind.[1] This is precisely what the immediate disclosure rule seeks to prevent.

[59] In an attempt to make its point, counsel for Skymark marched the court through the pleadings between all of the parties in an attempt to show how some things had changed for some defendants, not necessarily in the same way, but not for all. But as Paciocco J.A. explained in *Poirier*, at paras. 48-49, it is not necessary for a moving party to show that a settlement agreement has altered the relationships reflected in the pleadings, although that will often be the case.

[60] This granular exercise was not helpful to Skymark; it did not obscure the more obvious impact that the Minutes of Settlement had on the litigation as a whole. Again, it had implications for all parties to the litigation.

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[1] See also, *Tallman Truck Centre Ltd. v. K.S.P. Holdings Inc.*, 2021 ONSC 984, at para. 68, in which the motion judge, Myers J. explained how judges may be impacted:

> I, for one, read the evidence before I read the parties' factums. In preparing for the motion, due to the misleading manner of presentation, I would not have known at the outset, as required, that the defendant Secure was on the plaintiff's side pursuant to a settlement agreement that requires its support to the plaintiff's satisfaction.

[61] I agree with the motion judge's conclusion that the Clement Defendants were seriously impacted by the Minutes of Settlement and Ms. Smith's affidavit. When the litigation was commenced against them, Skymark alleged negligence. The Clement Defendants defended the action and crossclaimed against the Smiths. As noted above, in their defence to crossclaim, the Smiths merely contended that "The Defendants/Plaintiffs in the Crossclaim acted independently and without coercion from the Smiths. If the Plaintiffs in the Crossclaims acted negligently, the Smiths did not contribute to their negligence". However, the affidavit that emerged from the Minutes of Settlement, after the close of pleadings, made serious allegations of misconduct against the Clement Defendants. They were not just alleged to be negligent (as per the defence to crossclaim); instead, Ms. Smith claimed that they were a party to a fraudulent enterprise. Things changed dramatically for the Clement Defendants.

[62] It may be that the motion judge overstated the potential negative impact of the Minutes of Settlement on the Korman Defendants, as reproduced at para. 38, above. But, on the other hand, it might be said that, in a significant way, the landscape shifted in a manner that was very favourable to the Korman Defendants. When Ms. Smith pointed the finger at the Clement Defendants, it arguably took the heat off of the Korman Defendants. Ms. Smith's change of course triggered these corresponding changes to the litigation landscape.

[63] In a more general sense, all of the non-settling defendants were impacted by Ms. Smith's negotiated testimony. Remember, the focus is on the Minutes of Settlement, not what transpired afterwards. Had Ms. Smith fulfilled her end of the bargain and managed to extricate herself from this litigation (at least insofar as Skymark was concerned), all of the non-settling defendants, including Ontario, were each potentially exposed to liability for the original amount of Skymark's claim. Of course, this would also be contingent on the success of crossclaims. There was nothing inherently wrong with the deal that was struck and these possible consequences. But because it had such a dramatic effect on the litigation, it had to be disclosed immediately. Instead, it took a long time to pry the Minutes of Settlement loose from Skymark's counsel, which did not occur until after the discovery of Skymark's principal.

[64] In conclusion, notwithstanding the motion judge's views about the impact of the Minutes of Settlement on Ontario's liability, on the facts of this case, the motion judge did not err in finding that the entirety of litigation landscape had been changed by the Minutes of Settlement. It had to be disclosed immediately. It was not.

[65] I would not give effect to this ground of appeal.

(3) Which parties get a stay?

[66] Skymark submits that, even if it can be said that the Minutes of Settlement changed the entirety of the litigation landscape in a way that significantly alters the dynamics of the litigation, a stay of proceedings should not be granted against Ontario. It relies on the application judge's finding concerning Ontario, at para. 67:

> Although the non-disclosure of the Litigation Agreement changed the entirety of the litigation landscape, Ontario was not affected. There was no prejudice caused to Ontario, since the relationship between Skymark, Ms. Smith and Ontario stayed the same as the time of close of pleadings.

Skymark makes a similar submission in relation to the Korman Defendants, although that was not forcefully pressed in oral argument.

[67] I do not accept this submission, which has its roots in a broader submission initially advanced by Skymark. In its factum, filed months before the hearing of the appeal, Skymark submitted that this court should reconsider whether the automatic remedy of a stay of proceedings is too Draconian. However, in the meantime, a number of decisions have rejected that submission: see *Poirier* at paras. 40-42, *Waxman*, at para. 47, and *Tallman*, at para. 28. Accordingly, Skymark did not maintain this ground of appeal.

[68] As I have explained above, all of the moving defendants were impacted by the Minutes of Settlement, including Ontario. Accordingly, each is entitled to a

remedy. Requiring Ontario to remain in litigation that is stayed against its co-defendants would result in a significant widening of Ontario's exposure to damages. Recall that Ontario made no crossclaim against any co-defendant. To find that the immediate disclosure rule was breached, but then deny Ontario a stay, would lead to a perverse result, especially given that, compared with its co-defendants, the case against Ontario would appear to be the weakest

H. CONCLUSION

[69] This court has reiterated the importance of the immediate disclosure rule in countless decisions. Where a settlement agreement fundamentally changes the litigation landscape because it significantly alters the dynamics of the litigation, it must be immediately disclosed to all the parties. This rule, and the consequences of failing to observe it, could not be any clearer. However, in certain factual scenarios, perhaps where thorny questions of privilege arise, counsel may be unsure of their obligations. In these circumstances, I would commend the approach in *Handley*, in which Brown J.A. said, at para. 47, that it is always open to a party to move before the court for directions.

[70] In this case, Skymark had two options: (a) disclose the Minutes of Settlement immediately; or (b) seek direction from the court. It did neither. The path chosen amounted to an abuse of process, warranting a stay of proceedings in favour of all the moving parties.

I. DISPOSITION

[71] I would dismiss the appeal.

[72] The respondents are entitled to their costs in the amount of $12,000 to the Clement Defendants, and $8,000 each to Ontario and the Korman Defendants inclusive of disbursements and HST.

Released: April 6, 2023 “D.D.”

“Gary Trotter J.A.”
“I agree. Doherty J.A.”
“I agree. P. Lauwers J.A.”