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Sable Offshore Energy Inc. v. Ameron International Corp., 2013 SCC 37

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"The protection is for settlement *negotiations*, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement. Since the negotiated amount is a key component of the content of successful negotiations, reflecting the admissions, offers and compromises made in the course of negotiations, it too is protected by privilege".

In a recent Supreme Court of Canada ("SCC") decision, *Sable Offshore Energy Inc. v. Ameron International Corp.*[1], the SCC provided clarification pertaining to what may be considered a customary demand from defendants' counsel during the course of settlement negotiations involving co-defendants who have reached settlement by way of Pierringer Agreements ("settling defendants"). In such contexts, defendants' counsel have been known to request the terms of settlement, and on occasion, the settlement amount reached. In clear and explicit terms, the SCC in Sable enunciated the extent to which non-settling defendants are entitled to such information; and by extension, the extent to which plaintiff's counsel may deny such requests.

Facts

The plaintiff, Sable Offshore Energy Inc. ("SOE"), undertook a project involving the construction of multiple offshore structures and onshore gas processing facilities. The defendants, Ameron and Amercoat, supplied the plaintiff with anti-corrosion paint. The paint was not fit for its intended purpose insofar that it failed to prevent corrosion.

The plaintiff also sued a number of other contractors and applicators. The plaintiff sued the aforementioned defendants for negligence, negligent misrepresentation and breach of a collateral warranty.

The plaintiff entered into three Pierringer Agreements with a number of defendants. While the non-settling defendants, Ameron and Amercoat, received the non-financial terms of settlement, they requested disclosure of the particular settlement amounts. Ameron and Amercoat filed an application for disclosure of the settlement amounts. In response, the plaintiff took the position that the settlement amounts were subject to settlement privilege.

The trial judge dismissed the defendants' application seeking disclosure of the settlement amounts, on the basis that the settlement amounts were covered by

[1] 2013 SCC 37 [*Sable*]

settlement privilege. The Court of Appeal subsequently overturned the trial judge's decision, and ordered that the settlement amounts be disclosed to the non-settling defendants. The SCC allowed the appeal, for reasons discussed below.

Pierringer Agreements- Underlying Principles

The SCC cited principles enunciated in *Pierringer v. Hoger*[2], with respect to the central tenets underpinning Pierringer Agreements. Specifically, the court stated, "a Pierringer Agreement allows one or more defendants in a multi-party proceeding to settle with the plaintiff and withdraw from the litigation, leaving the remaining defendants responsible only for the loss they actually caused". Moreover, "there is no joint liability with the settling defendants, but non-settling defendants may be jointly liable with each other".[3]

(i) The Rule: Settlement Amounts Not Disclosed in Pierringer Agreements

The SCC neatly summarized the purpose and protection afforded by Pierringer Agreements as follows, "the protection is for settlement negotiations, whether or not a settlement is reached. That means that successful negotiations are entitled to no less protection than ones that yield no settlement". The SCC concluded, "since the negotiated amount is a key component of the content of successful negotiations, ***reflecting the admissions, offers and compromises made in the course of negotiations, it too is protected by privilege***" [emphasis added].[4] This is based upon the understanding that "parties will be more likely to settle if they have confidence from the outset that their negotiations will not be disclosed".[5]

(ii) Exception to the Rule: Competing Public Interest

As with other class privileges, the SCC recognized an exception to the aforementioned rule with respect to settlement amounts contained in Pierringer Agreements. To come within such exception, a defendant must demonstrate that "on balance, a competing public interest outweighs the public interest in encouraging settlement".[6] As such, a competing public interest is required to vitiate the prejudice-free arena which is afforded by Pierringer Agreements; and moreover, such public interest must outweigh the benefits of encouraging settlement. Moreover, the SCC endorsed the perspective that "…while there is a prima facie presumption of inadmissibility, exceptions will be found when the justice of the case requires it".[7] The SCC stated that "countervailing interests" have been found to include allegations of misrepresentation, preventing a plaintiff from being overcompensated, as well as fraud or undue influence.[8]

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[2] 124 N.W.2d 106 (Wis. 1963) [*Pierringer*]
[3] *Supra note 1* at para 6.
[4] *Ibid*. at p 3.
[5] *Ibid.* at para 3.
[6] *Ibid*. at p 4.
[7] *Supra note 1* at para 12.
[8] *Ibid*. at para 19.

The SCC recognized the benefits to allowing parties to reach a "mutually acceptable resolution to their dispute", "without prolonging the personal and public expense and time involved in litigation".[9] The SCC further cited the benefits of settlement which were enunciated in *Sparling v. Southam Inc.*[10], as follows:

> "[T]he courts consistently favour the settlement of lawsuits in general. To put it another way, there is an overriding public interest in favour of settlement. this policy promotes the interests of litigants generally by saving them the expense of trial of disputed issues, and it reduces the strain upon an already overburdened provincial Court system".[11]

The SCC endorsed the above-noted perspective regarding the benefits of settlement in *Kelvin Energy Ltd. V. Lee*[12]. In *Kelvin*, the SCC acknowledged that "promoting settlement was 'sound judicial policy' that 'contributes to the effective administration of justice".[13]

Reasons & Concluding Remarks

In *Sable*, the SCC allowed the appeal and concluded that there was "no tangible prejudice created by withholding the amounts of the settlements which can be said to outweigh the public interest in promoting settlements"[14]. In light of 1) the defendants having received all non-financial terms of the Pierringer Agreements; 2) all relevant documents and evidence that was in the settling defendants' possession; 3) assurance that the defendants will not be held liable for more than their share of damages; and 4) agreement that at the end of the trial the settlement amounts would be disclosed. Among other factors, the SCC held that knowledge of settlement funds did not materially affect the ability of the non-settling defendants "to know and present their case". [15] In conclusion, while knowledge of settlement amounts may place the defendants in a better position to determine litigation strategy insofar as providing a better understanding of cost-benefit analysis with respect to investment in their case, as well as creating a possible incentive (or possible disincentive) to engage in settlement, the SCC deemed such a reasons as not rising to a "level of importance" that would "displace the public interest in promoting settlements".[16]

As such, the plaintiff was not required to disclose the settlement amounts pertaining to the Pierringer Agreements entered into with the settling defendants.

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[9] *Ibid*. at para 11.
[10] (1988), 66 O.R. (2d) 225 (H.C.J.) [*Sparling*]
[11] *Ibid*. at p 230.
[12] [1992] 3 S.C.R. 235 [*Kelvin*]
[13] *Ibid* at p259.
[14] *Ibid.*
[15] *Ibid.*
[16] *Ibid* at para 27.