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Warning to Claimants: Immediate Disclosure Required

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By Gregory Richards

Litigants asserting claims in Ontario will want to take careful note of a recent decision of the Court of Appeal. In *Tallman Truck Centre Limited v. K.S.P. Holdings Inc.*, 2022 ONCA 66 ("*Tallman*") the plaintiff's action was permanently stayed because it failed to *immediately* disclose to one defendant a settlement made with the other defendant that changed the settling defendant's adversarial position in the case. A delay in disclosure of three weeks was fatal.

The Undisclosed Settlement

The plaintiff Tallman sued two defendants: KSP and Secure. Tallman's claim against KSP was to enforce a right of first refusal in a real estate transaction. Tallman's claim against Secure was for damages concerning a leaseback agreement that it alleged existed between the two defendants. Both KSP and Secure denied the leaseback agreement in their defences.

Tallman then moved for summary judgment to enforce the right of first refusal against KSP. In parallel, and unknown to KSP, Tallman successfully negotiated a settlement with Secure. Secure agreed to provide supportive affidavit evidence acknowledging the existence of the leaseback agreement, and Tallman would discontinue the action against Secure. If the summary judgment motion failed, Secure had a "continuing obligation to provide support and cooperation" throughout the litigation. Tallman would provide a release to Secure only at the end of the litigation.

Steps were taken to implement the settlement. The lawyers for Tallman and Secure negotiated the wording of an affidavit that Secure's representative swore acknowledging the leaseback agreement. Secure's lawyer held the sworn affidavit while the terms of the settlement were reduced to writing. The settlement agreement was signed on June 7, 2018, and Secure served a responding motion record containing its affidavit on the same day.

While Secure's affidavit purported to be sworn "in response" to Tallman's motion for summary judgment, the Court of Appeal noted that the affidavit was really sworn *in support* of the motion. Secure had changed its position in the litigation because of the settlement.

The Settlement Comes to Light

Tallman ran into problems when it attempted to discontinue the action against Secure. KSP's consent was required because pleadings were closed. As of June 19, 2018, the court office was still refusing the notice of discontinuance. Tallman then sought KSP's consent.

Counsel for KSP suspected that a settlement had been reached between the other two parties. On June 21, 2018, he wrote to Tallman's counsel asking for confirmation of this. On June 24, 2018, Tallman's counsel responded, claiming there was no proper basis for KSP to withhold its consent to the filing of the notice of discontinuance. He did not, however, disclose the existence of the

settlement with Secure.

The settlement agreement was finally disclosed on June 27, 2018, three weeks after it was signed. Tallman's counsel refused to produce any other settlement documents. KSP was forced to bring a Master's motion to obtain production of the release that Tallman was holding in escrow.

KSP then successfully moved before a judge to permanently stay the action because of Tallman's failure to immediately disclose the settlement.

Tallman's Arguments on Appeal

Tallman argued on appeal that the motion judge erred in misapprehending the degree to which the settlement altered Secure's position in the litigation. The Court of Appeal rejected this, holding that the motion judge correctly viewed Secure's move from opposing to supporting Tallman's claim as a reversal of position. This amounted to a change in the "litigation landscape" as contemplated in a series of earlier Ontario Court of Appeal decisions: *Handley Estate v. DTE Industries Limited*, 2018 ONCA 324 ; *Aecon Buildings v. Stephenson Engineering Limited*, 2010 ONCA 898, leave to appeal refused (SCC); and, *Laudon v. Roberts*, 2009 ONCA 383, leave to appeal refused (SCC). (See a discussion of these cases in our June 26, 2018 post: Partial Settlements and Other Litigation Agreements in Multi-Party Actions: The Peril of Non-Disclosure.)

The Court of Appeal also rejected Tallman's argument that "functional disclosure" of the settlement agreement was made to KSP on June 8, 2018, when Tallman served its notice of discontinuance and delivered Secure's affidavit. The Court held that "an obligation of such importance cannot turn on hints offered by opposing counsel" or be left to "guesswork" (at para. 20).

Tallman's argument that the motion judge had misapplied *Handley* was rejected by quoting from para. 39 of that decision: "The obligation of immediate disclosure is not limited to pure *Mary Carter* or *Pierringer* agreements" but rather "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 cooperative one" (Court of Appeal's underlining).

The Court was also unpersuaded by Tallman's argument that the three-week interval between the signed settlement and disclosure was negligible and ought not to be caught by the immediate disclosure rule. First, the Court found it was open to the motion judge to find as he did that Secure's affidavit was misleading in its presentation and reached the level of "a sham". Second, the rule requires "immediate" disclosure, not "eventually" or "when it is convenient". Any agreement that involves a party switching sides from its pleaded position must be disclosed as soon as it is made.

The Remedy: Stay of the Action

Tallman submitted that its transgression did not warrant a permanent stay of its action. It was a misstep by counsel, the delay was brief, and KSP suffered no prejudice.

The Court of Appeal rejected these arguments. Quoting its previous decisions, the Court noted that failure to comply with the disclosure rule amounts to an abuse of process. It viewed a permanent stay as the only remedy strong enough to redress the wrong. Consequences of the most serious nature are needed to achieve justice, deter future breaches, and enable a court to control its own process.

Takeaway

Tallman is a sobering case. Courts in Ontario have established a bright-line rule that is strictly applied. Litigation lawyers are

expected to know the rule and follow it. If a claimant reaches a settlement that alters the adversarial orientation of one or more of the litigants, the settlement must be disclosed to the other parties *immediately*. If there is any doubt about what needs to be disclosed, a motion to the court for directions is the advisable course.

The information and comments herein are for the general information of the reader and are not intended as advice or opinion to be relied upon in relation to any particular circumstances. For particular application of the law to specific situations, the reader should seek professional advice.

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