

# [Par-Pak Ltd. v. Morguard Investments Ltd., \[2010\] O.J. No. 4488](#)

Ontario Judgments

Ontario Superior Court of Justice

M.A. Penny J.

October 19, 2010.

Court File Nos. 07-CV-331042PD2; 07-CV-331042A

## **[2010] O.J. No. 4488**

Between Par-Pak Limited, Plaintiff, and Morguard Investments Limited, SWO Distribution Centres Ltd, formerly known as TBGC Properties Inc., Rutherford Properties Ltd., Tibbett & Britten Group Canada Inc., SCM Supply Chain Management Inc., and Totalline Transport Inc., Philips Canada, Philips Electronics Ltd. d.b.a. Philips Lighting, and Philips Electronics North America Corporation, Defendants, and Hilroy A. Division Of Meadwestvaco Canada LP, Plaintiff, and Morguard Investments Limited, SWO Distribution Centres Ltd. formerly known as TBGC Properties Inc., Rutherford Properties Ltd., Tibbet & Britten Group Canada Inc., SCM Supply Chain Management Inc., and Totalline Transport Inc., Defendants, and Philips Canada, Third Party

(15 paras.)

## **Case Summary**

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**Civil litigation — Civil procedure — Pleadings — Amendment of — Adding subsequent facts — Discovery — Production and inspection of documents — Objections and compelling production — Orders for production — Privileged documents — Documents prepared for the purpose of settlement — Motion for leave to amend pleadings to reflect the settlement of many aspects of the underlying action adjourned — Motion by Tibett & Britten Group Canada Inc./SCM Distribution Centres Ltd. for an order disclosing to it the minutes of settlement between Totalline and Philips dated Oct. 6, 2010 allowed — The non-settling Tibett/SCM was entitled to know the amount of remaining damages paid to the plaintiffs it was potentially liable to pay — It could only know what this amount was if the amount of the Philips contribution was disclosed.**

Motion for leave to amend the pleadings to reflect the settlement of many aspects of the action. Motion by Tibett & Britten Group Canada Inc./SCM Distribution Centres Ltd. for an order disclosing to it the minutes of settlement between Totalline and Philips dated Oct. 6, 2010. The minutes of settlement had been provided. The amount contributed by Philips to the settlement had been redacted. This was the portion Tibett/SCM claimed to be entitled to see. In the underlying two actions, the plaintiffs' claims were already settled. On Oct. 6, 2010, Totalline settled with Philips, the third party. All that remained was the apportionment of the settlement amounts paid to the plaintiffs as between Totalline, Tibett and SCM. The minutes of settlement provide that the terms of the agreement and the agreed settlement sum paid by Philips was to be kept fully confidential by all parties.

HELD: Motion adjourned; second motion allowed.

Tibbett/SCM was entitled to production of an unredacted copy of the minutes of settlement. The non-settling Tibett/SCM was entitled to know the amount of remaining damages paid to the plaintiffs it was potentially liable to pay. It could only know what this amount was if the amount of the Philips contribution was disclosed. While Philips had a significant interest in confidentiality worthy of protection, the protection of both interests could be achieved by imposing on Tibbett/SCM and its principals, agents, employees and insurers exactly the same obligations as the parties to the agreement imposed on themselves. The agreement could not be shown to any

non-party to the litigation except the limited disclosure to agents and insurers set out in the agreement. With respect to the amendments to the pleadings, a new issue was raised relating to the expiry of a limitation period necessitating an adjournment to Nov. 15, 2010.

## Counsel

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B. Thomas Q.C./G. Kim, for the moving party, Totalline.

J. Strung, for the Third Party, Phillips Canada.

**A. Sciacca**, for the responding parties, Tibbett and SCM.

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### M.A. PENNY J.

1 There are two motions before me. One motion is principally for leave to amend the pleadings to reflect the settlement of many aspects of this action. The other, related motion is by Tibbett/SCM for an order disclosing to it the Minutes of Settlement between Totalline and Philips, dated October 6, 2010.

1. Whether the Minutes of Settlement should be disclosed.

2 The Minutes of Settlement in redacted form have been provided. The amount contributed by Philips to the settlement, however, has been redacted. It is the redacted portion that Tibbett/SCM claims to be entitled to see.

3 Two actions, one by Hilroy and one by Par-Pak, arose out of a warehouse fire. The plaintiffs both had goods stored in the warehouse that suffered smoke and water damage.

4 In both actions, the sub-lessors, lessors and owners of the warehouse were sued. The defendants in turn made a Third party claim against Philips, the lighting supplier.

5 In both actions, the claims of the plaintiffs have been settled. There remained the proper apportionment of liability among the defendants and the Third party. On October 6, 2010, however, Totalline settled with Philips, the Third party. Accordingly, all that really remains in the action is the apportionment of the settlement amounts paid to the plaintiffs (net of the contribution of Philips) as between Totalline, Tibbett and SCM.

6 The Minutes of Settlement provide, in paragraph 16 that the terms of the Agreement and the agreed settlement sum being paid by Philips "shall be kept fully confidential by the parties to this Agreement". There are two exceptions. The first exception is that the Argument shall be provided to the Ontario Superior Court of Justice and to counsel for the Non-Settling Defendants "to the extent required by the laws of the Province of Ontario and ethical guidelines of the Law Society of Upper Canada". The second exception is that it may be disclosed to the parties' professional advisors.

7 Tibbett/SCM say this is a relevant document because it contains information required to know the limit of their exposure in these proceedings, because the most they could be called upon to contribute is the total amount (which they know) net of the Philips contribution (which they do not know). Tibbett/SCM further argues that the information

they seek is not protected by any form of privilege and that Philips confidentiality interest must yield to the litigation interests of another party to the legal proceedings.

8 Tibbett/SCM relies on the decision of Master McLeod in Noonan v. Alpha-Vico [\[2010\] O.J. No. 2807](#), paras., 48-50 and para. 56, wherein the Master said:

"In my view settlement privilege does not extend to the executed settlement agreement. The agreement itself is a contract entered into between the settling parties which is relevant to the remaining action with the non-settling parties".

See also LSUC Rules of Professional Conduct R 4.01(1) commentary.

9 Totalline and Philips argue that Philips required confidentiality as a condition of the settlement to protect its interests, as a worldwide supplier of lighting equipment, in connection with other possible litigation elsewhere. They argue that the interest in promoting settlement will be enhanced by upholding the confidentiality of the amount Philips was willing to contribute. They argue that Master McLeod recognized that each case is different and that, in Noonan, the non-settling party had nothing but the pleading from which to show its possible exposure whereas here, Tibbett/SCM know the total amount in issue to be apportioned and have had the benefit of an offer to settle, which tell them what they could settle for.

10 In my view, the non-settling Tibbett/SCM is entitled to know the amount of remaining damages paid to the plaintiffs that it is potentially liable to pay. It can only know what this amount is if the amount of the Philips contribution is disclosed.

11 I believe Philips also has a significant interest in confidentiality worth of protection. The protection of both interests can be achieved by imposing on Tibbett/SCM and its principals, agents, employees and insurers exactly the same obligations as the parties to the Agreement imposed on themselves.

12 Accordingly, Tibbett/SCM shall be entitled to production of an unredacted copy of the Minutes of Settlement. The terms of paragraph 16 of the Minutes of Settlement apply to Tibbett, SCM and their principals, agents, employees and insurers as if Tibbett and SCM had been parties to the Agreement. Accordingly, the Agreement may not be shown to any non-party to the litigation except the limited disclosure to agents and insurers set out in the Agreement. Further, the Agreement is not to be shown to the trier of fact except by further order of a Justice of the Superior Court.

13 I would add the further requirement that, at the conclusion of these proceedings, within 30 days following the expiry of any appeal period following a final order disposing of these proceedings, that Tibbett and SCM certify to Philips that all copies of the Minutes of Settlement made by them for the purposes of this litigation have been destroyed.

#### **AMENDMENTS TO THE PLEADINGS**

14 A new issue was raised for the first time relating to the expiry of a limitation period and Totalline's claim for \$374,000 (approx.). This necessitated an adjournment to put the matter properly in issue and allow Totalline the opportunity to respond. This issue is adjourned before me to November 15, 2010 at 10:00 a.m., in a courtroom to be determined.

15 Tibbett/SCM to deliver all material in support of the limitations issue by October 26, 2010. Totalline's materials in response on this issue to be delivered by November 3, 2010. Any reply material to be delivered by the 8th of November. All material may be delivered directly to my attention, Judges Reception, 361 University Avenue.

M.A. PENNY J.

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