

In the event that the Defendants put the legal advice received in play in this proceeding the matter can be revisited.

[4] The plaintiffs have advanced a bad faith claim against the defendants based on the defendants' refusal to pay the plaintiffs claim for damages sustained when a cooler malfunctioned in a lightning storm. The purpose of the motion is to compel the defendants to disclose the opinion and advice they received from their solicitor because the plaintiffs claim that the defendants have waived solicitor and client privilege.

[5] During examination for discovery, Frank Montgomery gave the following answers and responded to the intervention of his counsel as follows:

Q. Do you rely upon advice of counsel as part of your allegation in this action that you acted in good faith?

A. Can you repeat the question?

Q. Do you rely upon the advice of counsel in this action as part of your allegation that you acted in good faith?

A. I did act in good faith.

Q. Right. And is part of the reason you say that that you were following legal advice?

A. I was following legal advice but I was acting in good faith on the file.

Mr. Mays: Yeah. What he is saying is that his – you're saying you acted in good faith. What can you use to demonstrate that you did that. Is one of the things that you would use to demonstrate that you acted in good faith is that you called a lawyer to get legal advice and going through the investigation and decision process.

Witness: Yes ...

[6] Those questions and answers were not included in the appendage to Justice Bryant's decision and counsel for the plaintiffs conclude that therefore the motion judge did not properly consider the merits of the argument that the defendants had waived solicitor and client privilege.

B. Analysis

[7] In my view, the decision in *Davies v. American Home Assurance Co.* has closed the door on any argument that solicitor and client privilege can be waived as a result of questions and answers given at an examination for discovery by a defendant in an action where a bad faith response is alleged by a plaintiff in an action. Justice Bryant said as much in his decision although, he may not have referred to the exact questions and answers at the discovery.


[8] To put it as clearly as possible, one can safely assume that when a party obtains a legal opinion concerning a matter where a potential law suit may be forthcoming as a result of an allegation of a bad faith response to claim based on a contractual connection between the parties (for example, terms or exclusions in an insurance contract), the piercing of this legal opinion **will not be allowed** unless the state of mind of the party denying the claim is formed by this opinion

and is put in issue through the statement of defence or through clear correspondence to the other side.

[9] Furthermore, the refusal to provide a payment to a party, who then claims that this refusal is a bad faith response to a legitimate claim and entitlement, does not entitle that same party to expose this opinion through a discovery process regardless of whether the examinee relies on this opinion or not. I conclude based on the questions and answers at discovery that the examinee (Frank Montgomery, a named defendant) did rely on a legal opinion. Frankly, this reliance seems to be both reasonable and logical. However, this does in any way expose the legal opinion to scrutiny by the opposing party.

[10] Finally, the recent cases provided to me *Toronto-Dominion Bank v. Leigh Instruments Ltd.*, the reference to the decision in *Woodglen & Co. v. Owens*, and *Sovereign General Insurance Company v. Tanar Industries Ltd.*, are distinguishable on their facts and bluntly affirm the proposition that only where the state of mind of the defendant is put in issue in the action does waiver of privilege result. None of this occurred in the leave application before me.

[11] In the result, leave to appeal the decision of Justice Bryant is denied. Costs fixed at \$2,500.00 to the defendant in any event of the cause.


The Honourable Mr. Justice John A. Desotti

Released: November 24, 2010

CASES CONSIDERED

R. v Campbell, [1999] 1 SCR 565; *Samoila v Prudential of America General Insurance Co. (Canada)*, (2000) 50 O.R. (3d) 65; *Bank Leu Ag v. Gaming Lottery Corp.*, [1999] O.J. No. 3949 (S.C.J.) appeal to Divisional Court dismissed [2000] O.J. No. 1137; *Jones v Smith*, [199] 1 SCR 455; *Whiten v Pilot Insurance Co.*, [2002] 1 SCR 595; *702535 Ontario Inc. v. Lloyd's London, Non-Marine Underwriters 2000 CanLII 5684 (ON C.A.)*, (2000), 184 D.L.R. (4th) 687 (Ont C.A.); *Ferme Gerald Laplante & Fils Ltee. V. Grenville Patron Mutual Fire Insurance Co.*, 61 O.R. (3d) 481 (Ont. C.A.) para 76; *General Accident Assurance Co. v Chrusz*, (1999) 45 O.R. (3d) 321 (C.A.); *Davies v American Home Assurance Co.*, [2002] O.J. No. 2696, 60 O.R. (3d) 512; *Canadian Egg Marketing Agency v. Sunnylea Food Ltd.*, (1977) 3 C.P.C. 348 (Ont H.C.); *Toms v Agro* (1992), 8 O.R. (3d) 95; *TD Bank v Leigh Instruments*, 32 OR (3d) 575; *Sovereign*

General v Tanar Industries 2002 ABQB 101 (CanLII); *1207301 Ontario (c.o.b. Juliana Fine Furniture) v. Zurich Insurance Co.*, [2003] O.J. No 4692 (S.C.J.) (QL); *Ash v Lloyd's Corp.*, [1992] O.J. No. 894 (Gen. Div.) (QL); *Comtrade Petroleum Inc. v. 490300 Ontario Ltd.*, [1992] O.J. No. 652 (Div. Ct.) (QL); *Davies v American Homes Assurance Co.*, [2001] O.J. No. 3050 (S.C.J.) (QL); *Davies v American Homes Assurance Co.*, [2002] O.J. No. 2696 (Div. Ct) (QL); *Dorman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, [2004] B.C.J. No. 2045 (C.A.)(QL); *Enbridge Gas Distribution Inc. v. Ontario (Energy Board)*, [2006] O.J. No. 1355 (C.A.)(QL); *Janda v. Riley-Meggs Industries Inc.*, [1994] O.J. No. 440 (Gen. Div.)(QL); *Ontario Realty Corp. v. P. Gabriele & Sons Ltd.*, [2003] O.J. No. 4344 (S.C.J.) (QL); *Pytka v Pytka Estate*, [2010] O.J. No. 1946 (S.C.J.)(QL); *Rankin v McLeod, Young, Weir Ltd.*, [1986] O.J. No. 2380 (H.C.J.)(QL); *Smith v London Life Insurance Co.*, [2007] O.J. No. 189 (Div. Ct.)(QL); *Dexter Estate v Murphjy*, [2007] N.B.J. 133 (Q.B.)(QL); *Dorman Forest Products Ltd. v. GMAC Commercial Credit Corp.*, [2004] B.C.J. No. 2045 (C.A.)(QL); *Woodglen & Co. v. Owens* (1995), 24 O.R. (3d) 261, 38 C.P.C. (3d) (Gen. Div.)

CITATION: # ONTARIO LTD et al v MONTGOMERY et al, 2010 ONSC 6476
COURT FILE NO.: 3244/05 (Chatham)

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

1318910 ONTARIO LIMITED

KEJAY INVESTMENTS INC.

Plaintiff

- and -

FRANK MONTGOMERY, NORTH KENT MUTUAL
FIRE INSURANCE COMPANY, WAYNE PALING

Defendants

REASONS FOR JUDGMENT

DESOTTI, J.

Released: November 24, 2010