

COURT FILE NO.:3244/05
DATE: 2010/05/21

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: 1318910 Ontario Limited, Kejay Investments Inc.
Plaintiffs/Applicants

Frank Montgomery, North Kent Mutual Insurance
Company and Wayne Paling
Defendants/Respondents

BEFORE: Justice Bryant

COUNSEL: Jerry O'Brien Q.C., for the Plaintiffs/Applicants

Maura Thompson, for the Defendants/Respondents

DATE HEARD: May 11, 2010

ENDORSEMENT

Background

1. The Applicants insured their building and property including their produce in cold storage under a policy of insurance issued by the Respondents, North Kent Mutual Insurance Company. Mr. Montgomery was the claims manager and Mr. Pauling was an adjuster employed by the insurer.
2. The Applicants claim losses sustained in July 2004 when a refrigeration compressor unit located on the Applicants' premises

was damaged by lightning. The Applicants claim that 1,806 bins of washed carrots in the cold storage were spoiled.

3. The relief sought in the action is damages as follows: \$202,750.00 for the spoiled produce; \$100,000.00 for breach of contract; and, \$2,000,000.00 for breach of the Respondents' obligations of good faith and fair dealing and unfair insurance practices (sections 438 and 439 of the *Insurance Act*.)
4. The Respondents dispute liability on the following grounds:
 1. the Applicants failed to comply with the terms of the insurance policy;
 2. drought-like weather conditions caused or contributed to the loss of produce; and,
 3. the Applicants' failure to report any loss in a timely manner prejudiced the Defendants in their defense.

The Motion

5. The Applicants sought production of a copy of any and all opinions and advice given to the Defendants/Respondents by their counsel Mr. Mays. Mr. Mays sent letters dated February 21, 2005, March 7, 2005, April 28, 2005 and May 9, 2005 to his clients. These letters were received by the insurer prior to denying the claim in its letter to the Applicants, dated May 13, 2005. Mr. Mays' correspondence to his clients was not listed in Schedule B of the Affidavit of Documents.

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6. The Court has the authority, on a motion for production, to remit the matter and order the Respondents to produce a further and better affidavit of documents and that any claim for privilege be properly asserted in Schedule B: *Davies v. American Home Assurance Co.* [2002] O.J. No. 2696, at paras. 46, 47.

7. In the case at bar, the issue before the Court was production of specified documents and it is clear that these letters were communications from a lawyer to his client with respect to a claim by an insured to its insurers and that the basis for the refusal to produce the letters was the assertion of a solicitor client privilege. However, neither counsel requested an order directing the Respondents to provide a further and better affidavit of documents. Further, the Applicants did not adduce any evidence of prejudice as a result of the Respondents' failure to serve and file a proper Schedule B. It is my view that if I ordered the Respondents to produce a further and better affidavit of documents, the parties would incur additional expenses without any benefit.

8. Counsel on the motion informed the Court that Mr. Mays retained an investigator named Pearson. Further, Mr. Pearson's report was listed on Schedule B of the Respondents' affidavit of documents. The

issue of the Respondents' claim for litigation privilege for Pearson's report was not raised in the notice of motion.

Grounds for the Motion

9. The grounds for the motion include:
 - a. The Applicants seek damages because the Defendants breached their duty of good faith and fair dealing;
 - b. The insurer has admitted that it relied on the advice of counsel to deny the Plaintiffs'/Applicants' claim and has thereby waived any solicitor client privilege. The legal opinion is therefore producible;
 - c. The Defendants have unreasonably refused to produce the documents which are relevant to the triable issues in this action, and it would be prejudicial and unfair to require the Applicants to proceed to trial without the information sought; and,
 - d. The Defendants are improperly claiming privilege to information and documents that are not privileged, or if privileged, the privileged was waived.

Analysis and Decision

10. In *Davies v. American Home Assurance Co.* [2002] O.J. No 2696 (Div. Ct.), at para. 31, Blair J. (as he then was) stated:

A legal opinion from a lawyer to his or her client is the quintessential example of a communication between solicitor and client for the purpose of obtaining legal advice, and falls squarely into this category in my opinion. It is immune from attack in the absence of an expressed or implied waiver.

11. The Defendants'/Respondents' pleadings do not expressly waive their privilege for solicitor-client communications or waive any litigation privilege over any documents. For example, the Defendants in their pleadings did not deny or justify their denial of the claim on the ground of detrimental reliance based on legal advice received.

12. In *Davies v. American Home*, (*supra*), at paragraph 27, Blair J. stated:

The fact that an insurer has sought and obtained a legal opinion for purposes of assessing its ability to respond to an insured's claim, and presumably has considered that opinion in deciding what to do, is not sufficient in and of itself to render a legal opinion producible in litigation – even “bad faith” litigation – at the instance of the insured.

13. In my view, the fact that the insurer requested and received the assistance of a solicitor and that the solicitor gave advice to the Board of the insurer is not, without more, a basis for the production of a communication from a solicitor to her/his client.

14. Counsel for the Applicants submits that the Respondents waived their solicitor and client privilege during the examination for discovery of Montgomery which is reproduced in the attached Schedule A. A party may waive a solicitor client privilege by implication. Wigmore writes:

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final (8 Wigmore (McNaughton rev., 1961), at § 2327, at 635-36, note 28, quoted in *Rogers v. Hunter*, [1982] 2 W.W.R. 189, at 191, [1982] B.C.J. No. 1981 (B.C.S.C.); and *Verney v. Great-West Life Assurance Co.* (1998), 40 O.R. (3d) 249, at 252, [1998] O.J. No. 2582 (Ont. C.J.).

15. Thus, whether intended or not, waiver may occur when fairness requires it, for example, if a party has taken a position which would make it inconsistent to maintain the privilege. The notion of fairness has been invoked as a basis for waiver when a party directly raises in a pleading or during a proceeding the legal advice that he or she received, thereby putting that advice in issue.¹
16. The issue of implied waiver often arises when one party puts his/her state of mind into issue by alleging it acted in good faith upon the advice of counsel. The party, having asserted its position by raising the issue of reliance must disclose the opinion. For example, in *R. v. Campbell*, [1999] 1 S.C.R. 565, S.C.J. No. 16

¹ For examples where a client has raised an issue resulting in waiver of the privilege, see *Transportation Lease Systems v. Firdi*, [2007] B.C.J. No. 166, at para. 17 (B.C.S.C.).

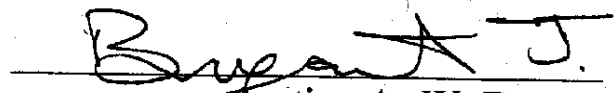
(S.C.C.) the R.C.M.P. put in issue its good faith belief in the legality of a reverse sting operation and asserted its reliance upon consultations with Department of Justice lawyers to buttress that position. The Supreme Court of Canada held that the R.C.M.P. waived the right to shelter the contents of the advice which it relied upon for its good faith claim under their solicitor client privilege.

17. Waiver must be voluntary; waiver cannot be forced on a party through questions raised by opposing counsel on cross-examination. For example, solicitor client privilege will not be waived where the person who seeks the information has raised the question of reliance: *Lloyds Bank Canada v. Canada Life Assurance Co.* (1991) 47 CPC (2d) 157, (Ont. Gen. Div.), at para. 32.
18. The solicitor client privilege is waived when the communication between solicitor and client is legitimately put in issue in the action. For example, when it is used as a basis for a claim or a defence: *Nowak v. Sanyshyn* (1979), 23 O.R. (2d) 797 (H.C.J.), *Harich v. Stamp* (1979), 59 C.C.C. (2d) 87.
19. In the examination for discovery of Mr. Montgomery, he responded to questions asked as he was required to do. Mr.

Montgomery did not put forth a position that the communications from the solicitor were a basis of a defence. The solicitor client privilege should not be viewed simply through the expedient of counsel seeking to set aside the privilege "setting-up" the claim by cross-examining the insurer's witness on discovery and establishing the not-unlikely scenario that the insurer has been prudent enough to obtain a legal opinion or even rely upon it: *Davies v. American Home Assurance Co.*, at para. 26.

20. Counsel for Montgomery on the motion before this Court advised that the Defendants were not advancing the position that they relied upon their lawyer's legal opinion as basis of a defence. In the event that the Defendants put the legal advice received in play in this proceeding, the matter can be revisited: *Gower v. Tolka Manitoba Ltd.*, [2001] M.J. No.39 (C.A.) at paras. 24-29, 52, 59.

21. If the parties cannot agree on costs, submissions can be filed. The Respondents have seven days from the date of the judgment. The Applicants have seven days from the date of the receipt of the Respondents' cost submissions. The submissions are limited to two pages plus any appendices.


Justice A. W. Bryant

DATE: May 21, 2010