Date: 20090212

Docket: T-1148-01

Citation: 2009 FC 151

Ottawa, Ontario, February 12, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

UNIVERSAL SALES, LIMITED
ATLANTIC TOWING LIMITED
J.D. IRVING, LIMITED
IRVING OIL COMPANY, LIMITED
IRVING OIL LIMITED

Plaintiffs

and

EDINBURGH ASSURANCE CO. LTD.
ORION INSURANCE CO. LTD
BRITISH LAW INSURANCE CO. LTD.
ENGLISH & AMERICAN INS. CO. LTD.
ECONOMIC INSURANCE CO. LTD.
ANDREW WEIR INS. CO. LTD.
INSURANCE CO. OF NORTH AMERICA
LONDON & EDINBURGH GENERAL INS. CO. LTD.
OCEAN MARINE INS. CO. LTD.
ROYAL EXCHANGE ASSURANCE
SUN INSURANCE OFFICER LTD.
SPHERE INSURANCE CO. LTD.
DRAKE INSURANCE CO. LTD.
EAGLE STAR INSURANCE CO. LTD.
STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582

Defendants

REASONS FOR JUDGMENT AND JUDGMENT

[1] This motion by the Pleading Defendants (Defendants) is brought under Rules 51, 97 and 232 of the *Federal Courts Rules*, *1988* to appeal and reverse in part an order of Prothonotary Lafrenière dated August 6, 2008.

[2] The Defendants think that Prothonotary Lafrenière was clearly wrong to conclude that the document marked as Exhibit "A1" to the examination for discovery of Mr. W. David Jamieson, which took place on December 20, 2007, was privileged, and they want the Court to reverse those aspects of his order based upon that conclusion, and to order Mr. Jamieson to re-appear and submit to further examination with regard to Exhibit "A1."

BACKGROUND

[3] These proceedings involve an insurance claim dispute between the Plaintiffs (the insureds) and the Defendants (the insurers) over coverage for certain expenses incurred by the Plaintiffs related to the sinking and raising of the Irving Whale. The ship sank in the Gulf of St. Lawrence on September 7, 1970 with a cargo of fuel oil and was raised by the Federal Government on July 31, 1996.

[4] The Federal Government took legal action against the Plaintiffs that concluded in a settlement on or about July 13, 2000. As part of the settlement the Plaintiffs agreed to pay the government $5 million dollars without admission of liability.

[5] The Plaintiffs then sought indemnity from the Defendants for the amount paid to the Federal Government, as well as legal costs incurred in the government action. The Defendants denied the insurance claim and the Plaintiffs then commenced the present proceedings in June 2001 for indemnity under the relevant insurance policies.

[6] The interest in Exhibit "A1" and in having Mr. Jamieson answer questions about that document arises from that part of the dispute between the parties over who is responsible for the legal fees incurred by Ogilvy Renault, who represented the Plaintiffs in the government claim. The document in question is a transcript of a telephone conversation between Mr. W. David Jamieson (a representative of the Plaintiffs) and the lawyer at Ogilvy Renault who represented the Plaintiffs in the government action.

DECISION OF PROTHONOTARY

[7] In his decision, Prothonotary Lafrenière concluded that, although Exhibit "A1" had been disclosed to the Defendants as part of a larger production of documents, it nevertheless remained privileged and should not be used or relied upon by the Defendants in these proceedings:

> Based on the uncontradicted evidence of John A. MacDonald, I conclude the Plaintiffs inadvertently disclosed the documents identified as Exhibit "A1" to the examination for discovery of Mr. W. David Jamieson. On its face, the document is a confidential record of communication between a lawyer and her client for the purpose of seeking legal advice, and *prima facie* covered by solicitor client privilege. The Plaintiffs immediately asserted solicitor-client privilege over the document once they became aware that it had been included as part of a larger production. The fact that the privileged

> document contains relevant information is not germane in the circumstances.

[8] Prothonotary Lafrenière ordered the Defendants to return the document and any copies to the Plaintiffs and not to use the document as evidence in these proceedings.

[9] The Defendants say that Prothonotary Lafrenière was clearly wrong to come to these conclusions because Exhibit "A1" does not record a communication between "a lawyer and her client" (the government action had been settled and Ogilvy Renault was no longer acting for the Plaintiffs), and because the communication was not, on its face, "for the purpose of seeking legal advice" (the conversation relates purely to facts, and there is no discussion of a legal nature).

[10] The Defendants say that the transcript of the conversation (Exhibit "A1") does not contain, on its face, any solicitor-client privileged information or communication.

STANDARD OF REVIEW

[11] The Defendants rely upon the decision of Justice Blais in *Groupe Tremca Inc. v. Techno-Bloc Inc.*, [1998] F.C.J. No. 1458 (F.C.T.D.) for the proposition that an error as to the existence of privileged and/or confidential information or communications constitutes a misapprehension of the facts for the purpose of the test in *Canada v. Aqua-Gem Investments Ltd.*, [1993] F.C.J. No. 103 (F.C.A.), so that they are entitled to a hearing *de novo* on this matter.

[12] The Plaintiffs say that if the Prothonotary's conclusion on solicitor-client privilege is one of law, then the standard of review should be correctness but that the result is the same regardless of whether the Court uses correctness on the *Aqua-Gem* test because the decision in this case was not clearly wrong. They say that Prothonotary Lafrenière did not misapprehend the facts before him and his decision is consistent with the relevant jurisprudence which stresses the sanctity of solicitor/client communications.

[13] I am of the view that, in accordance with *Merck & Co. v. Apotex Inc.* (2003), 30 C.P.R. (4th) 40 (F.C.A.) at paragraphs 17-19 and *Aqua-Gem*, the issue before me is whether Prothonotary Lafrenière's decision regarding the privileged nature of Exhibit "A1" was clearly wrong as being based upon a wrong principle of law or upon a misapprehension of the facts.

ANALYSIS

[14] The Defendants say that Exhibit "A1" does not contain any privileged information and, even if it did, such privilege was waived when the transcript was provided to the Plaintiffs' lawyers.

[15] As regards legal advice privilege, the Defendants say that, under Canadian law, although communications between a solicitor and a client relating to legal advice benefit from the protection of privilege, communications of pure fact do not. The Defendants rely upon the decision of Justice Scaravelli of the Nova Scotia Supreme Court in *A.B. v. Home of the Guardian Angel*, 2008 NSSC 9 for this distinction. In that case, Justice Scaravelli had the following to say at paragraphs 11-12:

> **11** Not everything communicated between solicitor and client is subject to privilege. In *Maranda c. Québec* [2003] 3 S.C.R. 193, Deschamps J. reviewed the scope of privilege at paragraph 42:
>
> > Not all communications with a lawyer will be protected by privilege. In other words, it is not the capacity in which the person is party to the communication that gives rise to the privilege. Accordingly, a commercial lawyer who works in an advertising agency and whose time is spent exclusively on developing products for his or her client will not be able to claim privilege for promotional work done. Similarly, the mere fact that a client considers certain information to be confidential will not suffice for it to be protected by solicitor-client privilege. I mention these examples as a reminder that the three prerequisites for privilege to attach, as laid down by Dickson . (as he then was) in *Solosky v. Canada* (1979), [1980] 1 S.C.R. 82 (S.C.C.), at p. 837, still apply:
> >
> > (i) a communication between solicitor and client; (ii) which entails the seeking or giving of legal advice; and (iii) which is intended to be confidential between the parties.
>
> **12** There is a distinction between communications for the purposes of obtaining legal advice and communications of matters of pure fact as well as acts. Manes and Silver at page 127:
>
> > *Legal Advice v. Fact*
> >
> > 1.01 There is a distinction between a privileged communication and a communication regarding a matter of fact. Where a communication to a solicitor is made for the purpose of conveying or receiving information on matters of fact, the communication is not privileged.

[16] It is not entirely clear to me from the *A.B.* case what is meant by a distinction between legal advice and "matters of pure fact."

[17] In the present case, however, no such distinction can be made. The transcript shows clearly that Mr. Jamieson is seeking advice from his lawyer in the government action on the matter related to paragraph 28 of the Statement of Defence filed in the present proceedings. Paragraph 28 of the Statement of Defence reads as follows:

> On or about January 15, 1998, via an agreement concluded between the Plaintiffs and the Pleading Defendants through their respective counsels, it was agreed that the Plaintiffs would be entirely responsible for the legal fees incurred by Ogilvy Renault in defending the Government of Canada's claim, to the exclusion of the Pleading Defendants.

[18] A discussion concerning the existence of such an agreement cannot, in my view, be characterized as a discussion about "pure fact," whatever meaning that term might have in other contexts. Exhibit "A1" is clearly a record of a discussion about an issue that arises in the present proceedings and it clearly involves the communication of information and advice on that issue.

[19] My review of the case law suggests that the Plaintiffs are correct to stress the broad scope of solicitor-client privilege and its application to Exhibit "A1." As the Supreme Court of Canada recently held in *Canada (Privacy Commissioner) v. Blood Tribe Department of Health* (2008), 294 D.L.R. (4th) 385 (S.C.C.) at pages 393-394, solicitor-client privilege "is now unquestionably a rule of substance applicable to all interactions between a client and his or her lawyer when the lawyer is engaged in providing legal advice or otherwise acting as a lawyer rather than as a business counselor or in some other non-legal capacity."

[20] In *Maranda v. Richer*, [2003] 3 S.C.R. 193 (S.C.C.) the Supreme Court of Canada made it clear that "the scope of the privilege is broad" and "courts should exercise great caution before trying to circumscribe or create exceptions to that privilege …" (p. 209).

[21] The privilege attaches to all communications made within the framework of the solicitor-client relationship. The Supreme Court of Canada in *Maranda* at page 213 specifically dealt with the dangers of attempting to make the kind of distinction between facts and other communications that the Defendants are attempting to make in the present case:

> The protection conferred by the privilege covers primarily acts of communication engaged in for the purpose of enabling the client to communicate and obtain the necessary information or advice in relation to his or her conduct, decisions or representation in the courts. The distinction is made in an effort to avoid facts that have an independent existence being inadmissible in evidence (*Stevens, supra*, at para. 25). It recognizes that not everything that happens in the solicitor-client relationship falls within the ambit of privileged communication, as has been held in cases where it was found that counsel was acting not in that capacity but simply as a conduct for transfers of funds …".
>
> *Sopinka, Lederman and Bryant, supra,* highlighted the fineness of that distinction and the risk of eroding privilege that is inherent in using it (at p. 734, 14.53):
>
> > The distinction between "fact" and "communication" is often a difficult one and the courts should be wary of drawing the line too fine lest the privilege be seriously emasculated.

[22] In the present case, the communication involved a client seeking information from the client's lawyer for the purpose of dealing with paragraph 28 of the Statement of Defence filed by the Defendants. It does not involve neutral facts where a lawyer is not really acting as a lawyer. As

the Federal Court of Appeal pointed out in *Samson Indian Nation and Band v. Canada*, [1995] 2 F.C. 762 (C.A.) at page 769, "it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communication in which the solicitor tenders advice; it is not confined to telling the client the law and it includes advice as to what should be done in the relevant legal context."

[23] The communication in Exhibit "A1" is constrained in nature because of the "Chinese wall" arrangements devised by the parties in this case, but it remains part of a continuum within which a solicitor tenders advice to his or her client. It is not about some neutral fact that can be severed from the solicitor-client relationship.

[24] In my view, then, there is nothing clearly wrong about Prothonotary Lafrenière's conclusion that "[o]n its face, the document is a confidential record of communication between a lawyer and her client for the purpose of seeking legal advice, and *prima facie* covered by solicitor-client privilege." Even if I apply a standard of correctness and consider this matter *de novo*, my decision would still be that Prothonotary Lafrenière was entirely correct to reach this conclusion. It is the same conclusion that I come to after a review of Exhibit "A1" in the context of the record placed before me in this motion.

[25] Having reached this conclusion it is unnecessary for me to consider whether, in the context of these proceedings, Exhibit "A1" also attracts litigation privilege. The only remaining issue is whether the Plaintiffs waived privilege.

[26] Once again, on this issue, I have to conclude that Prothonotary Lafrenière was not clearly wrong, and was in my view clearly correct, in his conclusion that the inadvertent disclosure that occurred in this case does not constitute waiver: “The Plaintiffs immediately asserted solicitor-client privilege over the document once they became aware that it had been included as part of a larger production.”

[27] The uncontradicted evidence of Mr. MacDonald makes it clear that the Plaintiffs never intended to waive privilege over the communication contained in Exhibit “A1.” The Plaintiffs and their counsel were simply not aware of the existence of the transcript on the CD when the large production was disclosed. Immediately upon learning of the existence of the transcript in the production, Plaintiffs’ counsel repeatedly asserted privilege over the document.

[28] As the Plaintiffs point out, the mere physical loss of custody of a privileged document does not automatically end privilege, especially in the context of modern litigation where large quantities of documents, such as the electronic production of a CD in this case, are exchanged between counsel and accidental disclosure is bound to occur from time to time.

[29] In this case, there was neither knowledge on the part of the Plaintiffs when the CD was produced to the Defendants, nor any silence when the Plaintiffs learned of the inadvertent disclosure at the discovery.

[30] As the Manitoba Court of Appeal pointed out in *Metcalfe v. Metcalfe* (2001), 198 D.L.R. (4th) 318 (Man. C.A.), at paragraphs 13 and 14:

> **13** The privilege arising out of the solicitor-client relationship belongs to the client, not the solicitor … . Thus, it is only the client or the client's agent or successor who can waive the solicitor-client privilege… . It has been said that waiver of privilege will only occur where the holder of the privilege knows of the existence of the privilege and demonstrates a clear intention of waiving the privilege … .
>
> **14** Thus, where there is an inadvertent disclosure of a document covered by solicitor-client privilege, and it is clear that there is no intention of waiver, the case law has generally upheld the privilege over the document itself … .

[31] In the present case, the uncontradicted evidence of Mr. MacDonald establishes inadvertent disclosure in the context of a large production, and a clear intention not to waive privilege that was manifested as soon as the disclosure was revealed to the Plaintiffs. There is no waiver on these facts.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The Defendants' motion is dismissed.
2. The Plaintiffs shall have their costs of this motion (but not on a solicitor-client basis as requested) payable forthwith within 30 days and in any event of the cause.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1148-01
STYLE OF CAUSE:	**UNIVERSAL SALES, LIMITED** **ATLANTIC TOWING LIMITED** **J.D. IRVING, LIMITED** **IRVING OIL COMPANY, LIMITED** **IRVING OIL LIMITED** **and** **EDINBURGH ASSURANCE CO. LTD.** **ORION INSURANCE CO. LTD** **BRITISH LAW INSURANCE CO. LTD.** **ENGLISH & AMERICAN INS. CO. LTD.** **ECONOMIC INSURANCE CO. LTD.** **ANDREW WEIR INS. CO. LTD.** **INSURANCE CO. OF NORTH AMERICA** **LONDON & EDINBURGH GENERAL INS. CO. LTD.** **OCEAN MARINE INS. CO. LTD.** **ROYAL EXCHANGE ASSURANCE** **SUN INSURANCE OFFICER LTD.** **SPHERE INSURANCE CO. LTD.** **DRAKE INSURANCE CO. LTD.** **EAGLE STAR INSURANCE CO. LTD.** **STEPHEN ROY MERRITT, AS REPRESENTATIVE OF UNDERWRITERS SUBSCRIBING TO LLOYD'S POLICY NO. 614/B94656-A/1582**
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	17-DEC-2008
REASONS FOR :	RUSSELL J.
DATED:	February 12, 2009

APPEARANCES:

Laura K. Fric Jennifer Fairfax	FOR THE PLAINTIFFS

Matthew Liben	FOR THE DEFENDANTS

SOLICITORS OF RECORD:

OSLER, HOSKIN & HARCOURT TORONTO, ONTARIO	FOR THE PLAINTIFFS
STIKEMAN ELLIOTT LLP MONTREAL, QUEBEC	FOR THE DEFENDANTS