Federal Court  Cour fédérale

Date: 20130130

Docket: T-877-11

Citation: 2013 FC 101

Vancouver, British Columbia, January 30, 2013

PRESENT: The Honourable Mr. Justice Harrington

ADMIRALTY ACTION *IN REM* AGAINST THE VESSEL "HELIOS I" AND *IN PERSONAM*

BETWEEN:

RUDY HAGEDORN, GREGORY SHERWOOD, PAMELA FEATHERSONE, ADRIAN BARRETT, GREG ROHLAND and BAYSHORE GARDENS REAL ESTATE HOLDINGS LIMITED and JOSEPH LOUIS GORFINKLE

Plaintiffs

and

THE OWNERS AND ALL OTHERS INTERESTED IN THE SHIP "HELIOS I", THE SHIP "HELIOS I" and SHASTA EQUITIES LTD., LORNE SHANDRO, JOHN DOE REPAIRER, JOHN DOE REPAIR COMPANY and WEBASTO PRODUCT NORTH AMERICA, INC.

Defendants

and

WEBASTO PRODUCT NORTH AMERICA, INC., KENT CARBIS YACHT SALES LTD., SHASTA EQUITIES LTD. and LORNE SHANDRO

Third Parties

REASONS FOR ORDER AND ORDER

[1] The issue in this appeal from an order of Prothonotary Lafrenière is whether certain documents in the possession of the Defendants and Third Parties, Shasta Equities Ltd. and Lorne Shandro, are immune from discovery on the grounds of privilege.

[2] The learned Prothonotary held that they were not privileged and therefore were subject to discovery.

[3] The Appellants Shasta and Sandro are the owners or otherwise interested in the yacht "Helios I". A fire broke out within her the morning of October 13, 2009, at a marina located in Coal Harbour, Vancouver. The fire quickly spread to nearby yachts.

[4] Paul Mendham, the broker who placed the insurance on the "Helios I", quickly came to learn of the incident. He appointed Timothy McGivney of Aegis Marine Surveyors Ltd. and Chris Reed of Sereca Fire Consulting Ltd. to, to use his words "attend the scene and investigate the Fire on behalf of underwriters on risk. Believing that third parties may advance claims against the Respondents, I advised both Mr. McGivney and Mr. Reed that they were being retained on behalf of counsel, and that counsel would be in touch with them shortly to instruct them and guide them in their investigation. I also advised that they would be reporting directly to counsel."

[5] Thereafter, he retained Kim Wigmore of Whitelaw Twining Law Corporation. He informed him that he believed the "Helios I" was heavily damaged as a result of the fire and that third party vessels were also damaged: "I therefore retained Mr. Wigmore on behalf of underwriters at risk to conduct all necessary investigations in order to defend any claims that I believed would be advanced

by the owners of those third party vessels." There is no suggestion Mr. Wigmore was to probe insurance cover, or that Mr. Mendham was not authorized to make the appointment.

[6] Mr. Wigmore in his affidavit says that later that same afternoon his office was contacted by one John Bromley, a partner at Bull Housser & Tupper, solicitors. He stated he was representing owners of a number of vessels damaged in the fire and requested a joint inspection of the "Helios I". An agreement was reached.

[7] He then spoke to Mr. Reed and instructed him "to conduct an inspection of the Helios I to determine both the cause and origin of the fire and to report directly to our office with a preliminary opinion to assist our office in investigating."

[8] Mr. Reed carried out a joint survey with experts retained by counsel for third party vessel owners and subsequently prepared a report which was addressed to Mr. Wigmore.

[9] Later on, Mr. Wigmore retained Canadian Claims Services Inc. to conduct an interview with Mr. Shandro, the dominant purpose of which was to assist in defending any claims against Shasta and Mr. Shandro.

[10] In the litigation a finger of blame is pointed at Webasto Product North America, Inc., a defendant and third party, on the basis that the "Helios I" was equipped with a Webasto diesel-fired coolant heater, the failure of which created, caused, or exacerbated the fire.

[11] Webasto wants production of the documents prepared and sent to Mr. Wigmore.

[12] Rule 223 of the *Federal Courts Rules* requires every party to serve an affidavit of documents including a separate list of documents over which privilege is claimed, with a statement of the grounds for which each claim of privilege is asserted.

[13] The Prothonotary first found that the affidavit was inadequate in its description of the documents and the grounds on which privilege was being asserted. A revised schedule was issued and the documents were delivered to the Court under seal. Both Mr. Wigmore and Mr. Mendham provided affidavits setting out the circumstances in which the documents had been created.

[14] In a six-page ruling, the Prothonotary ordered that documents 3 to 20 and 22 of the revised affidavit of documents be produced.

THE DOCUMENTS IN QUESTION

[15] Document 3 is the initial report of Aegis Marine Surveyors Ltd. issued to Mr. Wigmore the day following the fire. Its author, Mr. McGillivray, states "the survey was undertaken in order to ascertain the cause, the nature and extent of damage sustained in consequence of a fire on the morning of October 13, 2009—." He notes that in addition to Mr. Shandro, also in attendance were other yacht owners, personnel from Vancouver Police and Fire, representatives of the marina and representatives of the Vancouver Port Corporation, and the Canadian Coast Guard. He provided a list of other yachts damaged by the fire, and gave particulars of the incident based on a discussion with Mr. Shandro, and limited details of the inspection.

[16] Document 4 is Sereca's report of October 20, 2009. It comprises a report of the inspection and various causation scenarios which warranted further analysis. The author, Mr. Reed, also said he was coordinating examination of the "Helios I" with parties representing the other yachts damaged.

[17] Document 5 is a report prepared by Canadian Claims Services at the request of Mr. Wigmore. That firm was retained on November 4, 2009, to meet with Mr. Shandro for the purposes of obtaining a recorded statement from him and additional documentation with respect to the fire. Attached were reports Mr. Shandro provided of surveys prepared by Western Marine Surveyors years earlier, including a market evaluation.

[18] Documents 6 through 20 are updates from the surveyors as to damage to the other yachts and whether it was economically feasible to repair them.

[19] Finally, document 22 is another report from Canadian Claims Services to Mr. Wigmore dated March 19, 2011, advising as to the then current status.

THE DECISION UNDER APPEAL

[20] The Prothonotary noted that the issue was whether the documents were covered by litigation privilege as opposed to solicitor-client privilege. Relying on *Blank v Canada (Minister of Justice)* 2006 SCC 39, [2006] 2 SCR 319, he held that the party asserting privilege must prove (a) that litigation was ongoing or reasonably contemplated at the time the document was created, and (b) the dominant purpose of creating the document was to prepare for that litigation. After considering the

evidence in the affidavits of Mr. Wigmore and Mr. Mendham and the documents, the gist of his decision is as follows:

> It appears that on the date of the fire, and for at least a certain period thereafter, the Respondents' insurer's agents were investigating the facts and circumstances surrounding the cause and origin of the fire and the resulting damage. Although there may have been a prospect of litigation by third party claimants, neither the Respondents nor their insurer were in a position to determine whether any claim would be covered, or the nature of any dispute, let alone whether the dispute could be resolved without litigation, until a preliminary investigation into the cause of the fire was conducted.

[21] He was not satisfied that the documents in question were "wholly or mainly" created with litigation in mind. He relied upon *Waugh v British Railways Board* [1980] AC 521 (HL) at p 541 and *Hamalainen v Sippola*, 9 BCAC 254, 1991 CanLII 440 (BC CA), [1991] BCJ No 3614 (QL) at pages 9, 14 and 16.

POINTS IN ISSUE

[22] There are three points in issue. The first is whether the Prothonotary's decision was discretionary in nature. The second is whether the documents are privileged, and the third is whether they should nevertheless be disclosed.

ANALYSIS

[23] The parties have proceeded on the basis that the decision was discretionary. If so, the judge sitting in appeal must first determine whether the potential effect of the order was vital to the issue in the case. If so, the matter must be determined *de novo* irrespective of whether or not the judge is

in agreement. If not vital, the Court should not interfere unless the order was clearly wrong in the sense that the discretion was exercised upon a wrong principle or a misapprehension of the facts (*Merck & Co v Apotex Inc* 2003 FCA 488, [2004] 2 FCR 459).

[24] If the decision is not discretionary, on a question of law the standard is correctness. On findings of fact, the decision should not be set aside unless there is a palpable and overriding error (*Stein v Kathy The*, [1976] 2 SCR 802, *Housen v Nikolaisen*, 2002 SCC 33, [2002] 2 SCR 235).

[25] Both parties proceeded on the basis that the Prothonotary's decision was discretionary in nature. Webasto pointed out that discretionary orders relating to discovery of documents have rarely been held to be vital to the outcome of the case. Shandro and Shasta submit that there is a time and place for the production of expert reports, and that that time and place is not at the discovery of documents stage. Both parties were guided by the decision of Mr. Justice Russell in *Brass v Her Majesty the Queen*, 2012 FC 927. The facts of that case were far more complicated than the facts in this. That was another appeal from a decision of Prothonotary Lafrenière with respect to the production of documents. Some documents over which privilege had been claimed had been inadvertently produced, and others got into the hands of the plaintiffs by means unknown. The case related to compensation issues arising from Manitoba Hydro constructing a dam on the Saskatchewan River. There had been 30 years of discussion, followed by 20 years of litigation. When all was said and done, documents which were subject to solicitor-client privilege remained immune from disclosure. Documents which had once been subject to litigation privilege were produced.

[26] In *Brass*, as in this case, the parties proceeded on the assumption that the Prothonotary's order was discretionary in nature. Their difference of opinion was whether documents were vital, whether privilege had been waived, and whether in any event some of the documents should be produced in the public interest to prevent equitable fraud.

[27] At paragraph 80, Mr. Justice Russell stated "it seems to me that whether or not a particular document is privileged cannot, *per se*, be vital to the case." Unfortunately, I cannot ascribe to that view. In my opinion, the issue is not whether production of the documents is vital to the outcome of the case, but rather whether it is vital to our fundamental sense of justice. For instance, having found that the documents in this case did not attract litigation privilege it may have been open to the Prothonotary to delay production of the expert reports until the parties were preparing for a settlement conference. Such a decision would be discretionary in nature.

[28] Suppose, however, that the Prothonotary had found that some or all of the documents were subject to litigation or to solicitor-client privilege. Could he nevertheless, in his discretion, order their production? I think not.

[29] The leading case is the decision of the Supreme Court in *Blank*, above. There, it was necessary to distinguish between solicitor-client or legal advice privilege on the one hand and litigation privilege on the other, as the litigation with respect to which the documents had been created had long ended.

[30] Mr. Justice Fish noted that solicitor-client privilege has been firmly entrenched for centuries as our system of justice "depends for its vitality on full, free and frank communication between those who seek legal advice and those who are best able to provide it" (para 26).

[31] Turning to litigation privilege, he said at paragraph 27:

> Litigation privilege, on the other hand, is not directed at, still less, restricted to, communications between solicitor and client. It contemplates, as well, communications between a solicitor and third parties or, in the case of an unrepresented litigant, between the litigant and third parties. Its object is to ensure the efficacy of the adversarial process and not to promote the solicitor-client relationship. And to achieve this purpose, parties to litigation, represented or not, must be left to prepare their contending positions in private, without adversarial interference and without fear of premature disclosure.

[32] He referred to R.J. Sharpe, now Mr. Justice Sharpe of the Ontario Court of Appeal's lecture "Claiming Privilege in the Discovery Process", in Law in Transition: Evidence [1984] *Special Lectures Law Society of Upper Canada* 163. He said, in part:

> Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[33] Nevertheless, as Mr. Justice Fish went on to say, there is a commonality to both, i.e. "the secure and effective administration of justice according to law."

[34] He added, at paragraph 34: "the purpose of the litigation privilege, I repeat, is to create a "zone of privacy" in relation to pending or apprehended litigation." *Blank* dealt with litigation which was over. This case deals with litigation which had not yet begun.

[35] As noted by Prothonotary Lafrenière, there is a burden on the party asserting litigation privilege to prove that (a) litigation was ongoing or reasonably contemplated at the time the document was created and (b) the dominant purpose of creating the document was to prepare for that litigation, on a document by document basis.

[36] Having determined the Prothonotary's order was not discretionary in nature, I must now determine whether he erred in law or made a palpable and overriding error in a finding of fact, based on the evidence which was before him, being the affidavits of Messrs. Mendham and Wigmore, and the documents themselves.

[37] In my opinion, he erred in law with respect to Document 5, the report of the interview with Mr. Shandro carried out by Canadian Claims Services at Mr. Wigmore's request. That interview was subject to solicitor-client privilege, just as it would have been if the interview had been carried out by Mr. Wigmore, himself, or by an employee of his office, rather than by an agent. However, the survey reports attached thereto which had been prepared by Western Marine Surveyors before the fire are not privileged.

[38] The other documents are all subject to litigation privilege. There are a number of cases which have held that there is a demarcation between the investigation stage and the litigation stage, depending of course on the facts of each case. See for instance *Hamalainen v Sippola*, above.

[39] In the marine context, outturn surveys may be ordered as a matter of course as it is always possible that cargo might be damaged and a claim submitted. That was the situation in *Marubeni Corp v Gear Bulk Ltd*, (1986) 4 FTR 265, [1986] FCJ No 364. Mr. Justice Strayer, as he then was, stated that such surveys had to have been prepared for the purpose of being provided to counsel and for the purpose of counsel using it in respect of litigation existing, or contemplated, at the time of its preparation. As he found on the evidence that such surveys were done routinely, no litigation was in existence when they were prepared nor was there any evidence to indicate that any litigation was specifically in contemplation.

[40] One of the cases Mr. Justice Strayer referred to was *Santa Ursula Navigation SA v St Lawrence Seaway Authority*, [1981] FCJ No 428, 25 CPC 78. The facts were quite different. The shipowners had sued for damage to their ship allegedly caused by the defective condition of fenders along the approach wall to one of the locks within the Seaway. The documents in question were created after the incident and at the request of the defendant's solicitors in anticipation of an action. Mr. Justice Dubé went through the documents one by one and held that certain documents were privileged.

[41] I must conclude, on the facts of this case, that the Prothonotary clearly erred in his findings of fact as per the *Kathy K* and *Housen v Nikolaisen*, above. The third party yacht owners, through

solicitors, had called for a joint survey of the "Helios I" the very day of the fire. The only purpose was to determine the cause of the fire in order to ascertain whether a claim against the "Helios I" would be successful. The only purpose to have Mr. Wigmore involved was to defend or pursue claims if circumstances warranted. The parties were in an adversarial situation before any of the documents were created. This type of situation is far different from that in *Hamalainen* which dealt with certain adjusters reports prepared for the Insurance Corporation of British Columbia under a compulsory insurance scheme. More to the point is *Canada (Privacy Commissioner) v Air Canada*, 2010 FC 429, 367 FTR 76, [2010] FCJ No 504 (QL). Reports of an incident on board an Air Canada Jazz flight were prepared when the airline and the passenger were clearly in an adversarial relationship. They were held to be protected by litigation privilege.

[42] The other documents were follow ups and are also subject to litigation privilege.

[43] The parties are well aware that a fact is not immune from disclosure because it was ascertained by a surveyor, or even by a lawyer. When a representative of a party on discovery is asked what his or her information, knowledge or belief is on a certain point, the facts and information must be disclosed irrespective of source.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The appeal is maintained, save with respect to the surveys prepared by Western Marine Surveyors attached to Document 5.

2. The Appellants are entitled to their costs.

"Sean Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-877-11
STYLE OF CAUSE:	RUDY HAGEDORN et al v THE SHIP "HELIOS I" et al
PLACE OF HEARING:	VANCOUVER, BC
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DATED:	JANUARY 30, 2013

APPEARANCES:

No one	FOR THE PLAINTIFFS Rudy Hagedorn, Gregory Sherwood, Pamela Feathersone, Adrian Barrett, Greg Rohland and Bayshore Gardens Real Estate Holdings Limited
No one	FOR THE PLAINTIFF Joseph Louis Gorfinkle
Franco R. Cabanos	FOR THE DEFENDANTS and THIRD PARTIES Shasta Equities Ltd. and Lorne Shandro
James Doyle Vernon J. Pahl	FOR THE DEFENDANT and THIRD PARTY Webasto Product North America, Inc.
No one	FOR THE THIRD PARTY Kent Carbis Yacht Sales Ltd.

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