

1999

S.H. No. 149108

IN THE SUPREME COURT OF NOVA SCOTIA

BETWEEN:

MARSHA JANE WATKINS

Plaintiff

- and -

SALLY B. FAUGHT

Defendant

DECISION

HEARD BEFORE: The Honourable Justice David W. Gruchy at Halifax, Nova Scotia
in Chambers

DATE(S) HEARD: June 17, 1999

DECISION DATE: June 17, 1999 (Oral)

**WRITTEN RELEASE
OF DECISION:** July 2, 1999

COUNSEL: J. Patrick L. Atherton for the Plaintiff
Wendy J. Johnston for the Defendant

GRUCHY, J.:

This application concerns an action against the defendant, essentially for solicitor's negligence. The plaintiff has alleged that the defendant was negligent in the manner in which she conducted the plaintiff's divorce against her former husband and that by reason of that alleged negligence the plaintiff has lost the right to share in certain pension and severance settlements to which her former husband was entitled.

This application is taken pursuant to *Civil Procedure Rule 20.06* and *Civil Procedure Rule 18.01* for an order to compel the production of file documents of Kathleen Hall, a barrister and solicitor, regarding the plaintiff and compelling the attendance of Ms. Hall at examinations for discovery.

At issue, of course, is the question of solicitor-client privilege. Ms. Faught has filed her affidavit in support of the application. She has said that in 1992 she was retained by the plaintiff to represent her in divorce proceedings against her former husband. At that time Ms. Faught says the plaintiff requested that the divorce be handled as quickly as possible so that she could marry her fiancé who was a Russian seeking refugee status in Canada. The marriage was essential so that he could remain in Canada. Ms. Faught took instructions on the division of assets and she says that she specifically asked her former client about her husband's pension status and was informed that "her former husband did not have a pension". Ms. Faught says that she specifically advised the plaintiff that upon the granting of the divorce any claim to a division of matrimonial property and assets would cease to exist.

Since the controversy concerning the matters at issue in this action arose Ms. Faught has indicated that her counsel has discovered in the records of the Dartmouth Family Court evidence that the former husband had disclosed that he had pension

entitlement from his employer of an approximate value of \$26,000.00. At the time of those Family Court proceedings the plaintiff was represented by Kathleen Hall.

The plaintiff's claim against Ms. Faught includes the following allegations that she:

8(b) Failed to make adequate, or any, inquiries concerning pension and severance benefits available to Watkins and Paul Vincent Forwood;

8(f) Failed to include in the petition for divorce a request for relief under the *Pension Benefits Act*;

8(j) Failed to advise Watkins as to her rights pursuant to the *Pension Benefits Act*.

These subjects were addressed at least in part by the defence filed by the plaintiff's former husband in the divorce proceedings when he set forth paragraphs 5 and 6 as follows:

(5) Throughout the course of his employment with Moosehead Breweries Limited, Forwood accumulated certain pension and severance rights, entitlements, and benefits by way of contributions made by him and contributions made by Moosehead Breweries Limited on his behalf ("the pension and severance").

(6) At the time of the separation and divorce Watkins and Forwood discussed the pension and severance and agreed that a division would occur at a later date. Subsequent to the divorce, Forwood inquired of Watkins as to whether she would be prepared to release her share of the

pension and severance in exchange for his agreement to continue to pay spousal support after her remarriage.

Ms. Faught concluded her affidavit with her statement of belief that the plaintiff was aware of the pension prior to the commencement of divorce proceedings and at that time she was represented by solicitor Kathleen Hall in the Family Court proceedings. She has accordingly requested that Kathleen Hall be compelled to produce her file as relevant documents in this proceeding and to compel the discovery of Kathleen Hall as to her knowledge of the plaintiff's awareness of the pension benefits.

Counsel have informed me that the defendant has requested that Ms. Hall's file be produced but the plaintiff has refused to waive privilege over her dealings with Ms. Hall.

For the purposes of this oral decision, I will not set forth the provisions of *Civil Procedure Rules* 20.06 and 18.01. It is clear, however, that this court has jurisdiction to control its own processes and procedures and may issue an order to compel the attendance of any person and to order that solicitor-client privilege has been waived.

In ordinary circumstances there is no doubt that the solicitor-client privilege would attach to the communications between the plaintiff and her former counsel Ms. Kathleen Hall. In view of the specific allegations made by the plaintiff, however, the defendant has taken the position that there has been an implied waiver of the privilege.

The matter of solicitor-client privilege was dealt with extensively in the Supreme Court of Canada in *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3rd) 490. The solicitor-client privilege has also been recently noted by the decision of Freeman, J.A. of the Nova

Scotia Court of Appeal in *Commercial Union Insurance Company of Canada v. Baker*, [1995] N.S.J. 54.

But it is also clear that solicitor-client privilege can be waived voluntarily or by implication. MacLaughlin, J. (as she then was) in *S & K Processors Limited v. Campbell Avenue Herring Producers Limited*, [1983] 4 W.W.R. 762 clearly expressed the principle of implied waiver at pages 764, 765 and 766.

In the case before me the plaintiff has made an issue of something that would ordinarily be covered by solicitor-client privilege.

Waiver of privilege has also been dealt with extensively in *Lloyd's Bank of Canada v. Canada Life Assurance Company* (1991) 47 C.P.C. 157 and in *Toronto-Dominion Bank v. Leigh Instruments Limited* (1997) 32 O.R. (3rd) 575.

The issue herein by virtue of the pleadings makes the state of the plaintiff's knowledge an issue. Knowledge implies a consideration of the advice obtained from her solicitor. That subject is the precise matter considered by the Nova Scotia Court of Appeal in *Family and Children Services of Lunenburg v. G.D.* (1997) 160 N.S.R. (2nd) 270. Of similar effect are the cases of *United Services Funds (Trustees of) v. Tory, Tory, Delauriers and Binnington*, [1996] O.J. 4264 and *Woodglenn & Co. et al v. Owens et al* (1995) 24 O.R. (3rd) 261 at 271.

Finally I refer to Sopinka's *The Law of Evidence in Canada* where the learned author (as he then was) explored the notion of fairness in relation to solicitor-client privilege. Similarly, Sopinka and Letterman in the *Law of Evidence in Civil Cases* at p. 182:

Two essential elements must be present for a waiver to be established. The holder of the privilege must possess knowledge of the existence of the privilege which he is foregoing and also a clear intention of waiving the exercise of his right of privilege. Although waiver may be expressly given such cases are few. More frequent are those cases in which the waiver is by implication only. If the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of the communication, then there will be a waiver.

I have concluded in this case that fairness dictates that the solicitor-client privilege has been waived with respect to the matter at issue between the plaintiff and the defendant and that Ms. Hall will be required to produce such documents as pertain to those matter and will be required to submit to examinations for discovery with respect to those matters.

Costs will be in the cause.

A handwritten signature in black ink, appearing to be 'A. H. ...', written in a cursive style.