
CANADA / JUDGMENT

Brown v. Wilkinson

2012 BCSC 398

COURT

Supreme Court of British Columbia

DECIDED

20 March 2012

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2012 BCSC 398 Brown v. Wilkinson

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Brown v. Wilkinson,

2012 BCSC 398

Date: 20120320

Docket: S095025

Registry: Vancouver

Between:

Stephen Richard Brown and

Catharina Theresia Johanna Goossen

Plaintiffs

And

Glory Ann Wilkinson and

Kenneth George Wilkinson

Defendants

And

Behr Process Corporation

Third Party

Before: Master Baker

Reasons for Judgment

In Chambers

Counsel for the plaintiffs:

S.L. Kovacs and M. Toulch

Counsel for the defendants:

J.G. Dives, Q.C.

Place and Date of Hearing:

Vancouver, B.C.

February 24, 2012

Place and Date of Judgment:

Vancouver, B.C.

March 20, 2012

ISSUE

- [1] The plaintiffs apply for an order compelling the production of a series of documents listed in Part 4 of the defendants' list of documents, i.e. documents over which privilege is claimed. They also request production of certain drawings received from City Hall, together with field notes and the like of any investigator, adjuster, or fire expert retained by the defendants.

BACKGROUND

- [2] The parties were next door neighbours on July 17, 2008, when a fire began on the defendants' premises. The plaintiffs allege that the fire spread to their property, damaging their home. They further allege that the cause of the fire was spontaneous combustion of tung oil-soaked rags on the defendants' premises.
- [3] Mr. Lally, an adjuster with the defendants' insurer, attended almost immediately and began investigations. These investigations included retaining and instructing Mr. Michael Bodnar, a fire investigator. Mr. Bodnar examined the scene on July 23rd, trying to determine the origin and cause of the fire. He then had a conversation with Mr. Douglas Miller, the defendants' adjuster who succeeded Mr. Lally, and who instructed Mr. Bodnar not to make a written report.

- [4] Mr. Bodnar did, however, take 185 photographs and made rough notes. He did not take a statement from the defendants, but "...was present when they provided some information to Mr. Miller at my request".[1] The photos were not produced to the plaintiffs' counsel until January 2012, fully 3 ½ years after the event. I understand this to be an oversight and that the existence of the photos was not realized until late 2011 whereupon Mr. Dives requested them from Mr. Bodnar and quickly forwarded them to plaintiffs' counsel.
- [5] Continuing the chronology - Mr. Lally was on the file for four days, after which the matter was transferred to Mr. Miller. Mr. Lally's file has been produced, but generally speaking privilege is claimed over Mr. Miller's file.
- [6] On July 23rd, six days after the fire, Mr. Woods, a professional fire investigator retained by the plaintiffs' insurer, inspected the plaintiffs' damaged residence. He concluded that fire had travelled from the defendants' home to the plaintiffs' and therefore sought access to the defendants' residence to investigate further. This access was refused by the defendants' insurer.
- [7] As it happened, Mr. Miller was at the defendants' home when Mr. Woods' request was relayed to him by Mr. Lehtinen, the adjuster for the plaintiffs. Mr. Miller contacted the defendants' insurer for instructions. As he explains it: [2]

Shortly thereafter the claims examiner contacted me and advised that they had consulted with Nigel Kent and had decided not to give access to the site. I was aware that Nigel Kent was a Vancouver lawyer who was engaged in practicing insurance law. I informed Mr. Lehtinen of the decision.

- [8] Clearly this response went back up the ranks of the plaintiffs' insurer, so that by letter dated July 25th Marie-Anne Alward, Unit Manager for Dominion of Canada, wrote the defendants' insurer and addressed this refusal. Two important points were made in Ms. Alward's letter. First, she advised them of a probable subrogated claim:

There is a strong probability that we will be pursuing a subrogated claim against your insured with respect to the damage caused to our insured's property.

Second, she requested that all physical evidence be preserved:

We hereby put you on notice that we will require you, your agents and representatives, including but not limited to your adjusters, your investigators, your experts and your legal counsel, to take all necessary steps to preserve all of the physical evidence, statements, photographs and any other information collected during the course of your investigation into the circumstances of the fire, as some or all of this may become evidence in legal proceedings that have yet to be commenced.

- [9] It is not disputed that, despite this letter and request, the physical evidence of the fire has been removed, destroyed, or in some other manner made unavailable for inspection. The only record of the damage is contained in photos contained in the Langley fire department's

report and in Mr. Bodnar's photos. There are, of course, the observations and conclusions of the Langley Fire Chief in his report and Mr. Bodnar's rough notes. Neither the rough notes nor the 185 photos had been listed on the defendants' list of documents, either as privileged or otherwise, and, as I have said, the photos have been produced to plaintiffs' counsel [3].

- [10] Continuing with the timeline - On the 25th there was an e-mail from someone named Acheson, presumably the claims examiner or someone else with the defendants' insurer, to Mr. Miller. Privilege is claimed over that document.
- [11] On July 29th there was a further e-mail exchange between Acheson and Miller and two e-mails between Miller and someone named Johnston. Johnston sent Miller another e-mail the next day, July 30th. Privilege is claimed for all of these e-mail notes.
- [12] On July 31st Mr. Miller made an audio-recording of an interview with the defendants. The defendants claim privilege over that recording.
- [13] The defendants also claim privilege over six further adjuster's reports dated September 28th through July 22nd 2009, all of which are titled, in part, "confidential", and over Mr. Bodnar's notes and file opening sheet, and, finally, the vaguely-described "37 pages of typed and handwritten notes to file with irrelevant material redacted" and dated July 21, 2008 through January 31, 2012.
- [14] On July 8th, 2009 these proceedings were commenced.

PARTIES' POSITIONS

- [15] The plaintiffs argue that all, or substantially all, of the documents listed in Part 4 of the defendants' list of documents are producible and not privileged. They submit that the defendants' response, claiming both solicitor-client privilege and litigation privilege is vague and amorphous, but conclude that the claim is largely based on litigation privilege. In either case, they argue, the onus resting on the defendants, i.e. to prove privilege on the balance of probabilities, has not been met.
- [16] In the event that the documents are privileged, the plaintiffs argue in the alternative that there has been spoliation or the likelihood of spoliation such that fairness and equity require that privilege be waived and that justice requires the production of the documents.
- [17] The defendants argue that the documents are privileged on either of the two bases. They argue that as early as July 23rd the involvement of Mr. Kent meant that documents were being created for, or as part of obtaining, legal advice and are therefore protected by solicitor-client privilege. Alternatively, they submit that litigation was such an obvious likelihood that all of the documents in Part 4 were prepared in that context and with litigation as their dominant purpose.

[18] The defendants submit further that no case for spoliation exists, that no injustice has occurred and that Mr. Wood was entirely capable of conducting an adequate investigation with the information available to him either from the fire department's files or Mr. Bodnar's photos. They argue that if Mr. Wood is, as he says, unable to prepare a report it is because he has either overlooked available evidence, or it has not been given to him by the plaintiffs. Finally, they say that the removal or destruction of the physical evidence was purely due to requirements of safety imposed by the fire department and that Mr. Wood could not have investigated the site before that occurred in any event.

THE LAW

Privilege

[19] First, it is worth noting the distinction between solicitor-client privilege and litigation privilege. Wedge, J., in *Azuma Foods (Canada) Ltd. v. Versacold Canada Corp.*[4], following on the Supreme Court of Canada's reasoning in *Blank v. Canada (Minister of Justice)* [5] explained the difference:

...solicitor-client privilege applies only to confidential communications between the solicitor and his or her client. The privilege exists any time a client seeks legal advice from his or her solicitor whether or not litigation is contemplated.

... litigation privilege, unlike solicitor-client privilege, arises and operates even in the absence of a solicitor-client relationship, and applies to all litigants whether or not they are represented by counsel.

As is often said, solicitor-client privilege protects a relationship, while litigation privilege protects a process. To establish the relationship, the communications must be for the purpose of obtaining legal advice and there must be an intention to maintain confidentiality.

[20] For litigation privilege, on the other hand, it must be established that at the time the document was created litigation was "in reasonable prospect" and that litigation was the "dominant purpose" for the document's creation [6].

[21] Even if privilege exists, the court can waive it if the administration of justice requires it. Finch, J. expressed it thusly [7]:

...there are a number of factors to weigh in considering the justice of a party's demand for disclosure of an otherwise privileged document. The factors include the need to correct any imbalance between the parties, to avoid trial by ambush, to see that the litigants are not taken by surprise late in the day, and to develop conditions that will lead to settlement of the litigation short of trial.

ANALYSIS

[22] Do the facts of this case establish either form of privilege and, if so, should that privilege be waived in the interest of justice? I will consider each issue in turn.

Solicitor-client Privilege

[23] I agree with Ms. Kovacs that, while the defendants' list of documents claims "solicitor-client privilege", and while the application response addresses that, the emphasis in the defendants' response was on litigation privilege. Still, solicitor-client privilege must be considered. First, what is the evidence of -

- a) a solicitor - client relationship;
- b) a communication; and
- c) an intention that the communication remains confidential?

The only evidence of a solicitor's involvement at the material times is in Mr. Miller's affidavit. On July 23rd, in a telephone conversation with a claims examiner he was told [8] that "...they had consulted with Nigel Kent and had decided not to give access to the site." It is not clear from that whether Mr. Kent was even retained or instructed, although I doubt it, as Mr. Miller deposes later that:

On September 28, 2008, I prepared and sent my 'Adjuster's Confidential Report No. 2'. By this time the Insurer had formally retained Nigel Kent... (emphasis added).

I do not think, therefore that Mr. Kent had been retained on July 23rd.

[24] Even if Mr. Kent had been retained and the solicitor-client relationship established, what was the communication? By inference it concerned access to the defendants' property; that's all that is said by Mr. Miller. But the plaintiffs are not seeking the contents or record of that communication, nor anything flowing from that communication. Mr. Miller's report of July 23rd did not involve counsel; he sent it to the insurer. Moreover, I doubt that there was any intention of confidentiality; in fact, the contents of the discussion were disclosed, i.e. that access to the defendants' property would not be permitted. By September 28th, however, Mr. Kent had been retained and Mr. Miller dealt directly with him and sent his Report #2 to Mr. Kent.

[25] Mr. Miller says at para. 7 of his affidavit that his sole purpose was to submit his report to counsel, but for reasons given above, I do not think this sufficient to establish solicitor-client privilege and there is nothing more said about it, other than to say he intended to submit it to counsel for the insurer. The simple or, as in this case, vague, presence of counsel does not by any means establish solicitor-client privilege. Each communication is judged on its own, and the party claiming the privilege must establish it on the balance of probabilities. The defendants have not done that for Part 4 documents 4.1, 4.2, 4.3, 4.4, 4.5, 4.6, or 4.7, 4.14, 4.15, or that portion of 4.16 pre-dating September, 2008. As Grey J. commented in Keefer

Laundry Ltd. v. Pellerin Milnor Corp.[9], "A lawyer is not a safety-deposit box". Nor can he or she become a shield, deflecting any request for access simply by his or her general or background presence.

- [26] By September 28, however, positions had become hardened and Mr. Kent had been retained and instructed, and the adjuster's reports were, I infer from their description on the list of documents and Mr. Miller's affidavit, specifically titled "confidential". Finally, the purpose of the reports was to instruct counsel and in return receive advice. I find no difficulty in concluding that the Adjuster's Confidential Reports thereafter would meet the test.

Litigation Privilege

- [27] As I indicated above, litigation privilege involves a two-step test - Was litigation "in reasonable prospect" and, if so, was the litigation the "dominant purpose" for the creation of the document or communication? Much ink has been spilled on the first step because, as observed by Wood J.A. in Hamalainen there is a tolerably wide spectrum between "mere possibility" at the one extreme and "certainty" at the other. To a professional in the insurance industry, practically every claim could result in litigation.

- [28] Thankfully, Hamalainen [10] offers more guidance:

In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it.

This definition includes two important aspects. Firstly, it imports objectivity to the question. It is not enough for one of the parties to the communication or creation of the document to say "I anticipated litigation" or "I thought that litigation was inevitable"; there must be objective indicia to confirm or negate that subjective view. Secondly, it must be a fully informed view, and that is the point emphasized by Ms. Kovacs in her submission. In her view the available chronology indicates that well after the point in time at which the defendants claim privilege the insurer was still gathering information in various forms, presumably to assess and decide upon the plaintiffs' claim.

- [29] I agree with that view. One important evidentiary aspect of this, however, was lessened at the hearing itself and should be mentioned. In his affidavit Mr. Bodnar said "I did not take a statement from the Wilkinsons but was present when they provided some information to Mr. Miller at my request." [11] The only statements listed in the defendants' list of documents are document 1.4 ("Statement of Glory Wilkinson", July 17th 2008, before Mr. Bodnar was involved) and document 4.7 ("Statement - Recorded - Ken & Glory Wilkinson" July 31, 2008). Ms. Kovacs drew the reasonable inference that Mr. Bodnar must have been referring to the second statement, over which privilege is claimed. Her point was simple - if Mr. Bodnar was still involved July 31, to the extent of having Mr. Miller obtain information from the Wilkinsons at his request, he must have still been investigating, so that it cannot be said that a reasonable person on that date could be "possessed of all pertinent information including

that peculiar to one party or the other...".

- [30] Mr. Dives, however, assured the court clearly and emphatically that the discussion to which Mr. Bodnar averred was not the discussion referenced as document 4.7. Mr. Dives is obviously an officer of the court so that, as I decided at the hearing, I accept his assurance on that point.
- [31] Even if Mr. Bodnar was not a party to the July 31st discussion between the defendants and Mr. Miller I conclude that during that discussion the insurer was still fact-gathering. In other words, up to that point an objective, reasonable person would not likely be possessed of all pertinent information such that he or she could conclude that a potential claim by the plaintiffs could not be resolved without litigation. Mr. Miller said that he obtained the statement "...for the express and sole purpose of obtaining a more detailed statement from them related to the third party claim which was being advanced by Mr. Lehtinen and submitting that interview to counsel for the insurer." (emphasis added)
- [32] But Mr. Miller also describes the purpose of e-mails 4.2 through 4.6 as relating to, among other things, "...instructions to do a more detailed statement of the insureds relating to the anticipated liability issues and instructions to conduct further investigations regarding those anticipated liability issues". (emphasis added).
- [33] I conclude therefore that at least until August 2008 the defendants' insurer was still gathering pertinent facts and was therefore still in the so-called investigation stage. If I am wrong in that, and if litigation was obviously inevitable before that point, is the second step of the test met? Was litigation the dominant purpose for the communication? I cannot conclude that it was. As I have indicated, representatives of the defendants' insurer said that at various points in time they were gathering information or exchanging communications to deal with the third party's actual or potential claims. A claim can be resolved by negotiation and settlement. It is axiomatic that the facts and information needed to pursue or defend against a claim are, by and large, the exact same facts that are necessary to negotiate and resolve a claim outside of court. A party can only press or defend a suit when possessed of the essential facts, but just as certainly a party can only negotiate from a position of strength, with the assurance that he or she is possessed of reliable and provable facts. So fact-gathering serves a dual purpose. Cases have often commented on this, and in *Shaughnessy Golf & Country Club v. Drake International Inc.*[12], Esson J.A. noted that even if an adjuster anticipated litigation, and even if he or she was "...on the lookout for any clues which might assist in developing such a cause of action" it did not necessarily follow that the dominant purpose for such fact-gathering was litigation.

- [34] The Supreme Court of Canada in *Blank* pointed out that, while solicitor-client privilege may have been strengthened in recent years, litigation privilege had narrowed, yielding to "...the trend toward mutual and reciprocal disclosure which is the hallmark of the judicial process." [13] That comment by the court was made in the context of rejecting the lower standard of "substantial purpose test" for the narrower dominant purpose test. Clearly the court expected a party claiming litigation privilege to meet the higher standard.
- [35] I do not think that the defendants have met that test for communications prior to September of 2008. There is no evidence whatsoever that negotiations were bound (or even more than likely) to fail and that any facts or information gathered would therefore not aid in negotiations. Other than various subjective assertions to that effect the defendants have simply not established that the dominant purpose was litigation.

Fairness, Equity, and the Interests of Justice

- [36] Ms. Kovacs argues that even if privilege applies, it must be waived in the interests of justice. This is founded on the consequences (or lack of them) of Ms. Alward's letter of July 25th (para. 8 above). That letter's notice and the accompanying expectation (a requirement, in fact) were so clear and emphatic regarding the preservation of available evidence that the alleged failure on the part of the defendants' insurer to do so justifies the waiver of privilege. Mr. Wood or any other representative of the plaintiffs, including their adjuster Mr. Lehtinen, was unable to reasonably inspect the evidence and investigate the facts, so that their position has been so seriously compromised that the only available way "...to correct any imbalance between the parties, to avoid trial by ambush, to see that the litigants are not taken by surprise late in the day..." [14] and to encourage settlement is to waive privilege.
- [37] The defendants basically have three responses . First Mr. Lally said that when he visited the site of the fire on July 17th "...the fire department was still present and had removed a substantial amount of debris from the garage particularly from the area of the garage where the kilns and shelving had been". [15] He then formed an opinion "from my experience as an adjuster" and conversations with the fire department as to the likely cause and point of origin of the fire. Similarly, Mr. Bodnar said that by the time he visited the scene the fire department had removed "...substantial amounts of debris...and someone...had cleaned up the areas where it appears that the fire may have originated, as the building structure had to be reinforced to make the site safe." [16]
- [38] Second, the defence argues that if access were so important the plaintiffs could have commenced proceedings much quicker and applied for an order for access. Finally, Mr. Bodnar challenges Mr. Woods' assertion that a personal visit to and inspection of the fire site would have allowed the detailed examination, mapping, and reconstruction that cannot be achieved by access only to the fire department's report and photos, and to the 185 photos taken by Mr. Bodnar. Mr. Bodnar says that fire inspectors "...frequently and routinely perform these functions without the opportunity to physically inspect the scene..". [17] It is interesting that Mr. Bodnar prefaces his comment with "...while it is the ideal to be able to

identify all potential ignition sources and to conduct a detailed examination..." (emphasis added). He also doubts the use of fire mapping in small residential compartments, but, again, prefaces that with "...arc mapping is a technique which in certain situations may assist in determining fire origin".[18]

- [39] I do not accept these arguments. It is not for the defence to simply assert and rely upon the fire department's activity at the scene. Obviously (or at least inferentially) Mr. Bodnar found enough evidence at the scene to draw conclusions and report back to Mr. Miller, even if Mr. Miller asked him not to make a written report. Obviously there was enough interest to prompt Mr. Bodnar to make rough notes and take 185 photos. Moreover, there is absolutely no indication that, in face of Ms. Alward's request, the defendants or their insurer did anything to put a stop to further clean-up, removal, or disturbance to the site. And it is not for the defendants to expect the plaintiffs to rely simply on Mr. Lally's observations and conclusions (para. 37, above). Without detracting from Mr. Lally's competence as an adjuster, he is, with respect, just that - an adjuster, and not a professional fire inspector.
- [40] Nor is it for the defendants to criticize, even mildly, the plaintiffs for not commencing these proceedings immediately and seeking, basically, injunctive relief. One would have thought that Ms. Alward's warning of possible spoliation of evidence and adverse inferences to be drawn there-from to be enough. In any event had the proceedings been commenced and had the application been made, if the court did not order access under Rule 7-6(5) it would have been surprising if it did not order preservation of the evidence under Rule 7-6(4).
- [41] Finally, I doubt that any two experts in any particular field approach the same question in the identical way. Certainly I would not expect that in, say, accident investigation and reconstruction, or, as here, in fire investigations. It may be that certain observations and conclusions might have been available from the fire department report and photos and from the Bodnar photos, but Mr. Wood may well, and apparently does, hold himself to a higher standard, one that requires personal attendance at the scene and a hands-on investigation. Moreover, I have no doubt that greater evidentiary weight would attach to conclusions drawn from such an investigation.
- [42] Preventing Mr. Wood or anyone else on the plaintiffs' behalf from attending at the fire site was not a trivial matter. I do not have to conclude whether or not spoliation per se has occurred; that is for a trial Judge to decide. But not only is it, by any reasonable and objective view, essential that the on-site investigation be permitted, it was specifically and emphatically made clear by Ms. Alward that the investigation was sought and that at the very least the evidence should be preserved. In the face of all this all physical evidence was eventually removed without any opportunity for physical examination by the plaintiffs. That resulted in such an obvious imbalance that justice requires the production of the communications and documents over which privilege is claimed. I think that any evidence in these documents that may address the physical evidence in all likelihood would be found in documents 4.1 through 4.6 , 4.14, 4.15, and in that portion of 4.16 pre-dating September 2008. It seems reasonable that documents after August would have "moved on" to other

aspects of the claim.

CONCLUSION

[43] In summary:

- Neither solicitor-client nor litigation privilege will attach to documents produced before September, 2008, but
- If either privilege does attach it must be waived in respect of pre-September 2008 documents and communications in the interest of justice.

[44] In the circumstances the plaintiffs are entitled to their costs in any event of the cause.

"D. Baker, M."

[1] Bodnar Affidavit #1 para. 2

[2] Miller Affidavit #1 para. 3

[3] the documents are, however, now listed on the defendants' further amended list of documents dated March 1, 2012

[4] (2008) B.C.J. No. 916 at paras. 73 and 74

[5] 2006 SCC 39

[6] Hamalainen (Committee of) v. Sippola (1991) 62 B.C.L.R. (2d) 254 at p. 6

[7] Lowry v. Canadian Mountain Holidays Ltd. (1984) 59 B.C.L.R. 137 at para. 20

[8] note that the hearsay is not attributed as required by Rule 22-2(13), although the plaintiff did not take exception to this at the hearing.

[9] 2006 BCSC 1180, at para. 61

[10] at p. 7

[11] Bodnar Affidavit #1 para. 2

[12] (1986) B.C.J. No. 266 at p. 8

[13] at para. 61

[14] Finch, J. in Lowry v. Canadian Mountain Holidays Ltd. at para. 20

[15] Lally Affidavit #1 para. 9

[16] Bodnar Affidavit #1 para. 5(c)

[17] Ibid at para. 5(a)

[18] Ibid at para. 5(b)

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