
CANADA / JUDGMENT

Business Development Bank v. Interline Motor Freight Inc.

2013 BCSC 771

COURT

Supreme Court of British Columbia

DECIDED

3 May 2013

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2013 BCSC 771 Business Development Bank v. Interline Motor Freight Inc.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Business Development Bank v. Interline Motor Freight Inc.,

2013 BCSC 771

Date: 20130503

Docket: S123424

Registry: Vancouver

Between:

Business Development Bank of Canada

Plaintiff

And

Interline Motor Freight Inc.

Sukhraj Kaur Bal and Hardev Bal

Defendants

Before: The Honourable Mr Justice Abrioux

Reasons for Judgment

Counsel for Plaintiff:

Dennis K. Fitzpatrick and

Stephen Z. Schwartz

Agent for the Defendants:

Harman Bal

Place and Date of Hearing:

Vancouver B.C.

February 22, 2013

Place and Date of Judgment:

Vancouver B.C.

May 3, 2013

I: INTRODUCTION

- [1] The defendant Hardev Bal ("Mr. Bal") applies to have the law firm Burns, Fitzpatrick, Rogers, Schwartz & Turner LLP (the "Firm") removed as counsel for the plaintiff Business Development Bank of Canada ("BDC") in this proceeding.
- [2] The defendants are currently not represented by counsel. Mr. Bal's son Harmon Bal, who is not a party in this proceeding, appeared as agent for his father on this application. The defendant Sukhraj Kaur Bal ("Mrs. Bal") is Mr. Bal's wife.
- [3] The Notice of Application sets out the following factual and legal basis for the relief sought:
- Factual basis: [the Firm] has clearly acted for Hardev Bal and Sukhraj Bal in actions in November - December 2012 [sic 2011];
 - Legal basis: [the Firm] is in clear conflict of interest as they have acted for Hardev Bal and Sukhraj Bal on another matter with counsel Scott Turner. Mr. Fitzpatrick has been informed of this conflict on several occasions.
- [4] The alleged confidential information that forms the basis of the defendants' concern is apparently contained in statutory declarations pertaining to assets and liabilities provided to the Firm in November 2011.
- [5] The plaintiff opposes the application for disqualification on the following basis:
- there is no actual conflict. The Firm's previous representation was of Hardev Bal, the personal defendants' son, in an entirely unrelated matter. That representation concluded before the Firm was retained by BDC in this matter;
 - no information was received by Mr. Turner which could be used by BDC in this litigation;

- appropriate safeguards have been taken by the Firm to ensure that no information from the previous retainer can come into possession of anyone at the Firm who may act against the defendants;
- the defendants have waited far too long to bring this application;
- the defendants are estopped from seeking this relief on the basis of prior bad faith conduct;
- the application is, at least in part, moot as a result of the reasons for judgment and order of Mr. Justice Thompson dated January 9, 2013. This court is in part functus officio pending a decision of the British Columbia Court of Appeal.

[6] For the reasons that follow the application is dismissed.

II: BACKGROUND/THE EVIDENCE

[7] The plaintiff's claim is against the defendant Interline Motor Freight Inc. ("Interline") for moneys advanced to it pursuant to certain loan agreements. The claim against the personal defendants is pursuant to the guarantees they provided to the plaintiff in relation to Interline's borrowings.

[8] Mr. Turner is a partner at the Firm. In his affidavit #1 sworn February 20, 2013, he deposes to, amongst other things, the following:

- he opened a file on November 4, 2011, for Interline and Harmon Bal. He was retained to act for them in connection with claims made by the Bank of Montreal ("BMO"). The claims included allegations of fraud (the "BMO Fraud Action");
- no other lawyer at the Firm acted in any capacity in connection with the BMO Fraud Action;
- he was not retained to act for either of the personal defendants in this action. He was made aware, however, by Harmon Bal that BMO had made claims against them in other proceedings, which have been referred to as the "BMO Tracing Action" (the alleged fraud and tracing actions collectively referred to as the "BMO matters");
- he was not made aware at the time of any other actions by BMO against the Bals or Interline;
- he did meet Mr. Bal on at least two occasions in connection with the BMO matters. He may also have spoken to him on the telephone. He did not ever speak to or represent Mrs. Bal in any respect;
- he received instructions from Harmon Bal regarding the BMO matters and gave legal advice to him, which included a forbearance agreement as part of proposed terms of settlement. Mr. Bal participated in those discussions;
- he was not consulted regarding the claims of the BDC in this action or any claims other than those made by BMO. He was unaware of the BDC's claims at the time;

- on December 22, 2011, he closed his file for all purposes and did not act for Interline or Harmon Bal, or anyone else in connection with the BMO matters, after that date;
 - Kitty Rajpal was his legal assistant between November 4, 2011, and December 22, 2011. Since March 5, 2012, she has no longer worked as either his assistant or for the Firm. She was the only assistant who would have had any dealings with the impugned file;
 - on or about June 29, 2012, his paper file was packaged and removed to secure storage at Iron Mountain;
 - he received no confidential information from Harmon or Mr. Bal that might be of use to BDC in connection with the claims made in this action. In fact, BDC did not make demand on the defendants in this action until January 2012, which was after he had ceased acting in connection with the BMO matters;
 - he first learned about BDC's involvement in this action on or about November 30, 2012. He was advised by his partner Dennis Fitzpatrick that Harmon Bal had asserted in court that day, for the first time, that the Firm was in a potential conflict due to prior representation in connection with the BMO matters. He did not discuss his earlier representation with Mr. Fitzpatrick except to say it related to fraud and debt claims made by BMO and had nothing to do with BDC. Except for that very brief discussion and his involvement in preparing his affidavit, he has not discussed his prior representation of Interline and Harmon Bal with anyone at the Firm;
 - although he did not have any confidential information to impart, the Firm instituted a "firewall" to ensure that any information he did have relating to the BMO matters was not imparted to anyone else at the Firm;
 - he also undertook not to discuss this action or the BMO matters or anything having to do with the Bals or Interline with any other person at the Firm, including Mr. Fitzpatrick and his assistant;
 - the paper file in relation to the BMO actions is in storage. The file will remain there and no person other than he and his assistant will be permitted access to the stored file;
 - his assistant has taken steps in connection with the electronic file since he was informed of the alleged conflict. This includes having it copied and stored at a secure site, being Iron Mountain. In addition, the entire electronic file has been removed from the client directory and encrypted.
- [9] BDC made formal demand on the defendants in January 2012. The Notice of Civil Claim in this action was filed on May 14, 2012. On August 7, 2012, a Response to Civil Claim was filed by counsel on behalf of the defendants. It contained a general denial.
- [10] Mr. Bal's affidavit #1 sworn January 28, 2013, contains one paragraph:
- [The Firm] has acted for myself and my wife on another matter and are acting in direct conflict in this current matter.

- [11] In his second affidavit sworn February 18, 2013, Mr. Bal repeats this allegation and appends as an exhibit an email from Mr. Turner to counsel dated November 24, 2011, advising he would no longer be acting for any of the proposed parties to settlement agreements. The email also states that Mr. Harmon Bal would be acting for himself from that point onwards as would, presumably, Interline. It goes on to say, "I do not know about his parents".
- [12] Mr. Bal's second affidavit also refers to health difficulties that he was experiencing in 2012 and the circumstances under which he raised the Firm's alleged conflict with Mr. Fitzpatrick at a court appearance on November 27, 2012.
- [13] Mr. Fitzpatrick deposes this occurred on November 30, 2012. This appearance related to the BDC's application for summary judgment which had been scheduled that day. It had been adjourned on several occasions in the past at the request of Mr. Bal or his counsel. The application for summary judgment was once again adjourned at that time and again adjourned on December 6, 2012, by consent on the basis of Mr. Bal's health difficulties.
- [14] In Mr. Bal's second affidavit he states he was invited to Mr. Turner's residence to discuss "my case his firm was handling." He also says he used computers at the Firm to provide personal bank statements and his wife's bank statements.
- [15] In Mr. Turner's second affidavit sworn February 21, 2013 he states:
- with respect to Mr. Bal having been invited to his home, what occurred was that Harmon Bal had called him at his office that day to ask whether he was able to act for him and his company in relation to the BMO matters;
 - since Harmon Bal was unable to meet at Mr. Turner's office he (that is Mr. Turner) suggested he come to his house. That occurred and Harmon Bal was accompanied at the first meeting by his father;
 - the meeting at Mr. Turner's home occurred as an accommodation to Harmon Bal who had expressed an urgent need to discuss the BMO matters. At the time the "invitation" was extended he was unaware Mr. Bal would accompany his son to the meeting;
 - he did not recall Mr. Bal ever using the computers at the Firm's offices;
 - he has no record of Mr. Bal having ever provided him with his or Mrs. Bal's personal bank statements. If that did occur, which he believes unlikely, they were not retained in the Firm's file.
- [16] Mrs. Bal in her affidavit sworn February 21, 2013, deposes that the Firm had acted for herself and her husband on another matter and was "acting in direct conflict in this current matter". Exhibit A to her affidavit contains two emails from which I reach the following conclusion. On or about November 22, 2011, Mr. Turner had in his possession a statutory declaration in relation to Harmon Bal relating to his assets and liabilities. This was a document that was required in connection with the settlement discussions which were ongoing with BMO and, in particular, the proposed forbearance agreement.

- [17] From the emails in question it would appear Harmon Bal anticipated that on November 23, 2011, Mr. Turner would be in possession of statutory declarations in relation to Mr. and Mrs. Bal. The statutory declarations were then to be forwarded to counsel for BMO. It is not clear from the evidence whether Mr. Turner in fact received statutory declarations in relation to Mr. and Mrs. Bal.
- [18] On December 11, 2012, Mrs. Bal provided a notary public with a title transfer of real property in her name to a person whose last name is the same as the personal defendants. The consideration was \$1 and "natural love and affection". The transfer was registered on December 21, 2012.
- [19] BDC's summary judgment application was again adjourned on December 12, December 19 and December 21, 2012 at the request of the defendants' counsel all with the plaintiff's consent due to Mr. Bal's health difficulties. It was also adjourned from January 7 to January 9, 2013.
- [20] On January 8, 2013, the Firm became aware of the conveyance of the real property.
- [21] On January 9, 2013, the summary judgment application proceeded before Mr. Justice Thompson. Although the Firm's potential conflict had been raised in late November 2012, this was the first occasion the defendants took the position the Firm could not act for the plaintiff.
- [22] The defendants sought an adjournment of the summary judgment application on two bases. The first related to Mr. Bal's health and the second was their expressed wish to bring an application to disqualify the Firm from acting for BDC due to its alleged conflict of interest. In denying the application to adjourn, Thompson J. stated:
- [14] I am not persuaded, particularly in the absence of even a whiff of an assertion of a meritorious defense, that the interests of justice would be served by adjourning this application for judgment to embark on a late-arising application to disqualify the plaintiff's solicitor. I note that the Notice of Civil Claim was served in June 2012, and for the personal defendants to "play this card" at this juncture in the absence of supporting material does not in my view give rise to a proper basis for an adjournment.
- [23] Mr. Justice Thompson then granted BDC judgment against Mr. and Mrs. Bal. He did so in that no material had been filed by them to supplement the bare denial in the response to civil claim. He was satisfied there was no genuine issue for trial.
- [24] Mr. and Mrs. Bal filed a notice of appeal from Thompson J.'s order.
- [25] They then filed this application seeking to disqualify the Firm.
- [26] In addition to what has been deposed to by Mr. Turner with respect to the Firm's file arising from his earlier retainer, Mr. Fitzpatrick has deposed:

- except for searches and what BDC and the Bals have provided to him, he has obtained no information by reason of Mr. Turner's previous retainer and has obtained no confidential information which would reasonably affect BDC's claim;
- it was not until November 30, 2012, that he knew about Mr. Turner's file, which was closed on December 22, 2011;
- although the paper file went to storage on June 29, 2012, the electronic file remained on the Firm's server. He was unaware of its existence and has not referred to it;
- he undertakes not to discuss BMO's claim against Interline and Harmon Bal or BDC's claims against Interline and Mr. and Mrs. Bal with either Mr. Turner or his assistant.

III DISCUSSION

(a) The Applicable Principles

- [27] A litigant is not to be lightly deprived of counsel of choice. It is an extreme remedy to do so. This should only occur in cases of clear necessity. Courts must act with great caution before they interfere with the parties' choice of counsel and must consider all the circumstances surrounding the current and previous retainer: *Moffat v. Wetstein*, 1996 CanLII 8009 (Ont. S.C.) at paras. 123 & 131.
- [28] In *LS Entertainment Group Inc. v. Wong*, 2000 BCSC 1789, Bennett J. (as she then was) applied the principles set out in *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, as follows:
- [34] ... [In *MacDonald Estate v. Martin*] Sopinka J. set out the relevant test and standard to apply to determine if there is a disqualifying conflict of interest (see pp. 267-270). He held at p. 267 that the "probability of mischief" standard is not sufficiently high to satisfy the public requirement that there be an appearance of justice, stating "the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur." Typically, two questions must be answered:
- (1) Did the lawyer receive confidential information attributable to a solicitor-client relationship relevant to the matter at hand?
 - (2) Is there a risk that it will be used to the prejudice of the client?
- [29] There may be cases in which a simple description of the two retainers shows them to be so closely connected that the court will infer the possible misuse of confidential information and thus find the retainers to be sufficiently related. It is for the client to demonstrate that the possibility of relevant confidential information having been acquired is realistic, not just theoretical: see *Chapters Inc. v. Davies, Ward & Beck LLP* (2001), 52 O.R. (3d) 566 at para. 30 (C.A.), cited with approval in *CLS Catering Services Ltd. v. Mahil*, 2011 BCCA 321 at para. 13; *Tahal Singh Kaila v. Khalsa Diwan Society*, 2004 BCCA 236 at paragraph 63.

[30] Given the drastic nature of the remedy, there should be "compelling and cogent evidence which provides a sufficient connectiveness between the partners". Furthermore, as stated in *Moffat v. Wetstein* at para. 110:

A party does not meet its onus of establishing that the prior relationship is sufficiently related to the present retainer, merely by making a bald assertion that the past relationship has provided the solicitor with access to insurance policies, partnership agreements, and litigation philosophy. At the very least, in order to discharge its onus, the client should describe how the solicitor gained that information, and why it is related to the matter at hand.

[31] The relevant excerpts of the Code of Professional Conduct issued by the Law Society of British Columbia (January 2013), provides the following guidelines:

Acting against former clients

3.4-10 Unless the former client consents, a lawyer must not act against a former client in:

- (a) the same matter,
- (b) any related matter, or
- (c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

Commentary

[1] This rule prohibits a lawyer from attacking legal work done during the retainer, or from undermining the client's position on a matter that was central to the retainer. It is not improper, however, for a lawyer to act against a former client in a matter wholly unrelated to any work the lawyer has previously done for that person if previously obtained confidential information is irrelevant to that matter.

3.4-11 When a lawyer has acted for a former client and obtained confidential information relevant to a new matter, another lawyer in the lawyer's firm may act against the former client in the new matter, if the firm establishes, in accordance with rule 3.4-20, that it is reasonable that it act in the new matter, having regard to all relevant circumstances, including:

- (a) the adequacy and timing of the measures taken to ensure that no disclosure of the former client's confidential information to the partner or associate having carriage of the new matter will occur;
- (b) the extent of prejudice to any party; and
- (c) the good faith of the parties.

[32] In addition, Rule 3.4-20 also applies. Although it governs a situation that arises when a lawyer transfers firms, the procedure which is set out is incorporated by reference in Rule 3.4-11:

Law firm disqualification

3.4-20 If the transferring lawyer actually possesses confidential information relevant to a matter referred to in rule 3.4-18 (a) respecting the former client that may prejudice the former client if disclosed to a member of the new law firm, the new law firm must cease its representation of its client in that matter unless:

- (a) the former client consents to the new law firm's continued representation of its client; or
- (b) the new law firm can establish, in accordance with rule 3.4-25, when called upon to do so by a party adverse in interest, that
 - (i) it is reasonable that its representation of its client in the matter continue, having regard to all relevant circumstances, including:
 - (A) the adequacy and timing of the measures taken under clause (ii);
 - (B) the extent of prejudice to the affected clients; and
 - (C) the good faith of the former client and the client of the new law firm; and
 - (ii) it has taken reasonable measures to ensure that there will be no disclosure of the former client's confidential information by the transferring lawyer to any member of the new law firm.

[33] A Code of Professional Conduct is "merely a guide, albeit a highly persuasive one": LS Entertainment Group at para. 31. As was stated by Sopinka J. in MacDonald Estate at pp. 256-257:

... The courts, which have inherent jurisdiction to remove from the record solicitors who have a conflict of interest, are not bound to apply a code of ethics. Their jurisdiction stems from the fact that lawyers are officers of the court and their conduct in legal proceedings which may affect the administration of justice is subject to this supervisory jurisdiction. Nonetheless, an expression of a professional standard in a code of ethics relating to a matter before the court should be considered an important statement of public policy. The statement in Chapter V [Chapter five of the Canadian Bar Association's Code of Professional Conduct, 1974] should therefore be accepted as the expression by the profession in Canada that it wishes to impose a very high standard on a lawyer who finds himself or herself in a position where confidential information may be used against a former client. The statement reflects the principle that has been accepted by the profession that even an appearance of impropriety should be avoided.

(b) Is the Defendants' Application Moot?

[34] I do not accept BDC's submission that as a result of Thompson J.'s order this application is, at least in part, moot and the court is in part functus officio pending the appeal.

[35] In my view it is clear that Mr. Justice Thompson considered the alleged conflict issue only within the context of the adjournment application made on January 9, 2013. There was no application before him to have the Firm disqualified. There was no finding made with respect to this issue.

[36] Accordingly, I will now consider the application on its merits.

(c) Assumptions

[37] For the purposes of my analysis, I have assumed that Mr. Turner obtained statutory declarations from Mr. and Mrs. Bal and Harmon Bal pertaining to their respective assets and liabilities in November 2011. I have also assumed copies of those statutory declarations are in Mr. Turner's closed file.

(d) Are the Matters Sufficiently Related?

[38] It is for the defendant to establish that the BMO and BDC matters are sufficiently related. This is the first stage of the MacDonald Estate test, whether the impugned confidential material is relevant to the matter at hand.

[39] In my view, Mr. and Mrs. Bal have done no more than make a bald assertion that the BMO and BDC matters are sufficiently related. They have presented no "clear and cogent" evidence from which I can reach that conclusion. I note that the phrase "cogent and compelling evidence" does not signify a heightened standard of proof: see CLS Catering Services Ltd. at paras. 24-32.

[40] I accept BDC's submission that the two matters are unrelated. That is because:

- Mr. Turner acted for Harmon Bal who is not a party to this action and for Interline. While Interline is a party to this action, no relief was sought against it at the application for summary judgment;
- Mr. Turner's involvement was in relation to a matter involving a different creditor than BDC;
- there is no real relationship between the two matters in issue.

[41] In my view, the personal financial information communicated to the Firm by Mr. and Mrs. Bal and Harmon Bal in November 2011 does not make the BMO and the BDC matters sufficiently "connected" or "related": see CLS Catering Services Ltd. at paras. 19-21.

(e) Risk of Prejudice

[42] If I am wrong in my conclusion that the matters are not sufficiently related, I now consider the second part of the MacDonald Estate test.

- [43] If the defendants had established that the BMO and BDC matters were sufficiently related, then a rebuttable presumption would have arisen that confidential information has passed to the respondent on this application, being BDC. The burden is then on BDC to satisfy the court that no relevant confidential information has been passed to it by the Firm: see *LS Entertainment Group* at para. 48.
- [44] The confidential information in question relates to the statutory declarations that I have assumed were in fact provided to Mr. Turner by Mr. and Mrs. Bal and Harmon Bal in November 2011 in connection to settlement discussions with BMO.
- [45] The defendants' material in support of this application does not suggest that there has been any improper use or transmission of privileged or confidential communications prior to the application for summary judgment heard on January 9, 2013 or thereafter.
- [46] Both Mr. Turner and Mr. Fitzpatrick's affidavits establish there has been no transmission of any confidential or relevant information to the other members of the Firm. Accordingly, on the material before me I conclude that the presumption confidential information was passed to BDC by the Firm has been rebutted.
- [47] Additionally, there is no risk the confidential information will be misused in the future.
- [48] Mr. Turner has deposed that his retainer ended three months before the Firm was retained by BDC. The physical file was closed and moved to secure storage in June 2012. He has also described the "firewall" that the Firm has put into place. This will continue to preclude any information whatsoever in relation to Mr. Turner's previous retainer from being accessed by anyone at the Firm with the exception of Mr. Turner and his assistant.
- [49] Mr. Turner and his assistant have provided undertakings that they will not discuss the earlier retainer with any person at the firm nor review the electronic or paper components of the BDC file even if they were made available to them.
- [50] Mr. Fitzpatrick has provided similar undertakings.
- [51] It is for the Firm to establish that a reasonably informed person would conclude that conveyance of relevant confidential information has not and will not occur. I am satisfied it has done so.
- [52] In addition, in that judgment has now been obtained against Mr. and Mrs. Bal by BDC, even if BDC were obliged to retain different counsel than the Firm, the statutory declarations sworn by Mr. and Mrs. Bal in November 2011 in relation to the proposed BMO forbearance agreement may well be producible to BDC in any event in proceedings in aid of execution pursuant to Rule 13-4.
- (g) Other Factors
- [53] In reaching the conclusion the application should be dismissed, I have also considered *Baumgartner v. Baumgartner*, 1995 CanLII 2354 (B.C.C.A.) per Southin J.A. at para. 28:

... as an application of this kind is, in effect, an application to the equitable jurisdiction of the court to protect the applicant from a loss of the confidentiality to which the solicitor/client relationship entitles him, it may well follow that the respondents to such an application, usually the opposing party and the solicitor in issue, may raise in answer, where the facts warrant it, the usual discretionary considerations, such as delay, which are relevant to equitable remedies.

[54] There is nothing in the materials before me which provides an explanation for the defendants' delay in bringing this application. I also note the defendants were successful when they brought a similar application in relation to other solicitors who had been involved in the BMO matters.

[55] Another factor is the numerous adjournments agreed to by BDC in relation to the summary judgment application. When viewed within the context of the timing of the transfer of real property in December 2012, and the fact the alleged disqualifying conflict was first raised in a formal sense on January 9, 2013, on yet another adjournment application, this raises a serious issue with respect to the applicant's bona fides. This is a factor that I can and do take into account in light of the equitable remedy sought.

IV: CONCLUSION

[56] The application is dismissed with costs to the plaintiff at Scale B.

"Abrioux J."

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