

CANADA / JUDGMENT

Warde v. Slatter

2018 BCSC 1877

COURT

Supreme Court of British Columbia

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2018 BCSC 1877 Warde v. Slatter

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Warde v. Slatter,

2018 BCSC 1877

Date: 20181030

Docket: 21755

Registry: Fort St. John

Between:

Naomi Elaine Warde also known as Naomi Elaine Slatter

also known as Elaine Slatter

Claimant

And:

Brian Grant Slatter, Fern Slatter

and Slatter Holdings Ltd.

Respondents

Before: The Honourable Mr. Justice Grauer

Reasons for Judgment

Counsel for the Claimant:

Pamela Boles

Marti Katerberg

Counsel for the Respondent Brian Slatter:

Nick A. Vlahos

The Respondent Fern Slatter on her own behalf:

Fern Slatter

Place and Date of Hearing:

Vancouver, B.C.

August 24, 2018

Place and Date of Judgment:

Vancouver, B.C.

October 30, 2018

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1.0 INTRODUCTION

- [1] The claimant wife, Elaine Slatter, seeks an order for the production of documents in the possession of the defendant company, Slatter Holdings Ltd, of which she is now a director. She requires access to the documents, she submits, for two reasons: to permit her as a director to set the affairs of the company in order following my earlier judgment in this case, indexed at 2017 BCSC 274 (the "trial judgment"); and to allow her to explore evidence relevant to her ongoing claim against her husband.
- [2] The respondent husband, Brian Slatter, is also a director of Slatter Holdings. He opposes that application and seeks an order declaring the documents in question to be privileged, together with orders concerning the appointment of a solicitor to advise the directors, and appointing a third director.
- [3] Their dual capacities raise tangled questions of privilege and access.

2.0 BACKGROUND

- [4] As I did in the trial judgment, I will refer to the parties by their first names, meaning no disrespect. The background is fully set out in that judgment, but I will review it here briefly for convenience.
- [5] For many years before they separated, Elaine and Brian ran Slatter Holdings and its predecessor, PeeJay Contracting Ltd. They were the directors and officers of the company, but the shares were all registered in the name of Brian's mother, Fern Slatter.
- [6] After Brian left Elaine, Fern asserted full legal and beneficial ownership of the company and dismissed both Elaine and Brian from their positions as officers and directors. She appointed her daughter Tammey Savoie as a director in their place. The company had significant assets at that time.
- [7] In the previous proceeding, Elaine asserted (among other things) that the beneficial interest in the shares of the company belonged not to Fern, but to Brian, or alternatively to Brian and her. Fern, Brian and the company, all of whom were named as respondents, opposed that position, maintaining that Fern had the beneficial interest as well as the legal interest. That question was severed for the purposes of trial, so that the sole issue to be determined in the trial judgment was the ownership of the beneficial interest in the shares of Slatter Holdings Ltd.
- [8] In the trial judgment, I concluded that the beneficial interest belonged to Brian. I found that an intentional trust arose in April 1998 by which Fern held title to the shares in the company in trust for Brian. Regrettably, as I noted, a significant part of the company's assets seemed to have disappeared, evidently expended in legal fees in the defence of Elaine's claim.
- [9] The action now continues, with further amendments and proposed amendments to the notice of family claim.

- [10] Following the trial judgment, there seemed to be a shift in strategy. Brian formally admitted that his beneficial interest in the company was family property as between him and Elaine. They seemed much more cooperative. At their joint request and with their consent, I ordered that Brian and Elaine resume their former position as directors of the company, replacing Ms. Savoie. There was much to be sorted out with respect to the legal and tax consequences flowing from the trial judgment, and Elaine and Brian were the persons whose interests were affected.
- [11] In the company's possession are boxes of documents that contain the files of two law firms relating to their representation of the company during the litigation.
- [12] Elaine seeks access to those documents. She asserts that, as a director of the company, no privilege can arise between the company and her, and that it is essential that she have access to them to ensure that the affairs of the company are properly managed. These concern not only the matter of legal and tax consequences for the company and for Elaine and Brian personally arising from the trial judgment, but also a number of questions arising out of the legal representation of the company during the litigation. With respect to the latter, these include how such expenses are to be treated under the Income Tax Act, RSC 1985, c 1 (5th Supp) what filings have or have not been made, whether professional accounts ought to be taxed, and whether the company ought to pursue potential claims against its former solicitors.
- [13] But the context in which Elaine seeks production of those documents is this family law claim, not the provisions of the Business Corporations Act, SBC 2002, c 57 [BCA]. In this action, Elaine is seeking an order for an unequal division of family property in her favour under section 95(1) of the Family Law Act, SBC 2011, c 25, on the ground that equal division would be significantly unfair because, she contends, Brian's position in the litigation up to the end of trial contributed to the significant diminution in the value of the company. Accordingly, she says, she needs access to those documents in order to assess Brian's conduct in relation to the positions taken by him, the company and by Fern.
- [14] Brian accepts that it is necessary for the directors to take steps to protect the company's interests, but maintains that Elaine is in a conflict of interest, and should not be able to use her position as a director to gain access to his litigation strategy in a way that would never be permitted of an opposing litigant who was not a director. To get around the problem, he proposes that they be required to engage counsel for the company to advise it with respect to the statements of account rendered by previous counsel, and to appoint a third director of the company. But he has not brought on an application under the BCA to remove Elaine as a director, nor has he otherwise invoked the sections of that Act setting out the oppression remedy.
- [15] Fern adopts the same position as Brian.

- [16] Elaine has attempted to remove the suggestion of conflict by proposing an amendment to her already much-amended notice of family claim that would almost entirely eliminate any remaining claims against the company, as opposed to Brian and Fern. A claim against the company for costs remains in the proposed amended pleading.

3.0 DISCUSSION

3.1 Elaine's applications

- [17] Elaine's primary application is for a declaration that

solicitor-client privilege does not exist or has been waived with respect to correspondence, meetings, conferences, or other communications and dealings between Slatter Holdings Ltd, including its solicitors, servants, agents and representatives and any of the other respondents or their solicitors, servants, agents and representatives

- [18] As the matter was argued, this seems to be somewhat misconceived. The issue is not really whether privilege attaches to the documents in question, but whether Elaine is entitled to access them notwithstanding privilege.
- [19] Solicitor-client privilege is not only a rule of evidence, but also a fundamental civil and legal right, and a principle of fundamental justice under Canadian law: *Foster Wheeler Power Co v Société intermunicipale de gestion et d'élimination des déchets (SIGED) inc*, 2004 SCC 18 at para 34. In *Goodis v Ontario (Ministry of Correctional Services)*, 2006 SCC 31 at paras 20-21, the Supreme Court of Canada made it clear that communications protected by privilege should be disclosed only where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case."
- [20] I have not inspected the documents in question. But they comprise solicitors' files and clearly contain communications between the solicitors and their client that were intended to be confidential, entailing the giving or seeking of legal advice. They also contain communications made in confidence and in contemplation of litigation between the company's solicitors and the solicitors for Brian and Fern. It follows that many of them, at least, are privileged, and it is not disputed that the privilege is that of the client, in this case, Slatter Holdings. Once privilege has been established, it attaches whether or not it is claimed: *Pritchard v Ontario (Human Rights Commission)*, 2004 SCC 31 at para 16.
- [21] Corporations also enjoy the protection of solicitor-client privilege: *National Bank Financial Ltd v Potter*, 2005 NSSC 113 at para 83; Adam M. Dodek, *Solicitor-Client Privilege* (Markham: LexisNexis Canada Inc, 2014) at 178. The same applies to litigation privilege. The parties did not suggest otherwise. But corporations, of course, act through the directors who manage them under the relevant legislation (here, the BCA, section 136(1)). Accordingly, a corporation's directors have the power either to claim or to waive privilege on behalf of the corporation: see, for instance, *Gardner v Viridis Energy Inc*, 2014 BCSC 204 at para 47.

- [22] It is not necessary for privilege to be waived, of course, to enable a current director to inspect all documents of the corporation, including any that are privileged. The director, in this context, is the company.
- [23] It follows that, *prima facie*, Elaine, in her capacity as a director of the company, is entitled to inspect and review the documents in question, privileged or not. Directors are statutorily obliged to be diligent in supervising and managing the corporation's affairs: *Peoples Department Store Inc (Trustee of) v Wise*, 2004 SCC 68 at para 32. A corporation cannot choose to share legal advice with some, but not all, directors because each has an individual fiduciary obligation to the company: *Tyler v Envacon*, 2012 ABQB 631 at paras 70-71. Here, Elaine has as legitimate an interest as Brian in ensuring that the affairs of the company are in order, any necessary filings are made, and any appropriate claims pursued on the company's behalf.
- [24] The question is whether it makes a difference that Elaine brings this application in her capacity as claimant in a family law proceeding, and seeks production of the documents in part for a purpose that falls outside her duties to the corporation: to establish a personal claim against Brian and Fern.
- [25] I conclude unhesitatingly that it does make a difference. Within this action, if Elaine were not a director, there are no circumstances under which she would be granted access to Slatter Holdings' privileged documents in order to explore what legal strategies Brian employed in relation to the company and Fern--any more than she would be allowed to explore such documents in Brian's hands. Her former connection to the company would not be enough to overcome the privilege: see *Wang v British Columbia Medical Association*, 2011 BCSC 1658. Only present directors, acting as directors, may seek production. Here, Elaine is acting as a claimant in a family law proceeding and not solely as director of Slatter Holdings
- [26] In *Hamilton v Petrobon*, [2005] OJ No. 5212 (Sup Ct J), Mr. Justice Ground held that where a corporation is engaged in litigation with one or more of its directors, those directors' right of access to documents of the corporation is subject to any solicitor-client privilege or litigation privilege enjoyed by that corporation. Citing his previous decision in *Re Livent Inc* [1999] OJ No 5981, Ground J commented that to hold otherwise

would lead to the ludicrous result that the director engaged in litigation with the corporation would not be entitled to access in his capacity as a litigant, but would be entitled to access in his capacity as a director, thereby indirectly negating the solicitor client privilege or litigation privilege of the corporation.

- [27] That no doubt explains why Elaine has abandoned her claims against the company. But does it make the result she proposes any less ludicrous? It would mean that a director engaged in family law proceedings against another director that involves the company would be entitled to access in her capacity as a director to which she would not be entitled in her capacity as a litigant, thereby indirectly negating the solicitor-client privilege or litigation privilege of the other litigant, who, as it happens, is the beneficial owner of the company.
- [28] In the Peoples Department Store case, the Supreme Court of Canada said this:
- [35] The statutory fiduciary duty requires directors and officers to act honestly and in good faith vis-à-vis the corporation. They must respect the trust and confidence that have been reposed in them to manage the assets of the corporation in pursuit of the realization of the objects of the corporation. They must avoid conflicts of interest with the corporation. They must avoid abusing their position to gain personal benefit. They must maintain the confidentiality of information they acquire by virtue of their position. Directors and officers must serve the corporation selflessly, honestly and loyally: see K. P. McGuinness, *The Law and Practice of Canadian Business Corporations* (1999), at p. 715.
- [29] What Elaine proposes does not align with this stricture. To use privileged documents of the company to establish a claim against Brian, the beneficial owner of the company, would not maintain the confidentiality of information she acquired by virtue of her position as director, and in my view would amount to an abuse of her position to gain personal benefit. The company has no interest in the issue of whether there should be an unequal division of the family property of Elaine and Brian. That is a matter personal to Elaine, and, I find, gives rise to a conflict of interest even if she is no longer claiming directly against the company for anything other than costs. Furthermore, all of the documents in question were generated at a time when Elaine was suing the company and was clearly adverse in interest. That is the basis of her claim against Brian: his contribution to that adversity.
- [30] In *Kalisman v Friedman*, 2013 WL 1668205 (2013 Del Ch), the Delaware Chancery Court outlined three exceptions to a director's otherwise unfettered right to information, even if privileged. The third exception is where there is sufficient adversity of interest between the director and the corporation, such that the director could not reasonably expect to be considered acting for the client.
- [31] While that decision is not binding on me, and does not precisely address our situation (indeed, no case does), I find it helpful. In our case, while Elaine must indeed be considered as acting for Slatter Holdings in relation to her first proposed purpose of attending to the company's affairs, she could not reasonably expect to be so considered in seeking an evidentiary foundation for her claim against the company's beneficial shareholder and, quite possibly, its legal shareholder. I consider that in a closely held company, this amounts to a sufficient adversity of interest to deprive her of access, at least in the context of her family law action.

- [32] Elaine is, of course, entitled to pursue a claim for unequal division of family property against Brian, and has access to all of the pleadings, positions taken, evidence at trial and on discovery, and communications between solicitors that are not privileged. She must do so, however, without access to privileged documents.
- [33] As I see it, this is not a case where it would make any sense to allow Elaine access to the documents with the limiting provision that she can use them only for the purpose of fulfilling her duties as director, and is prohibited from using them in the family law action. First, in her role as litigant, she would have knowledge of the privileged contents of those documents, which the principle is designed to prevent. Second, she is seeking production in the context of her family law proceeding, not in any corporate governance context. If the documents are not going to be admissible in this proceeding, and they should not be, there is no reason to grant her access in this context.
- [34] Accordingly, Elaine's production application is dismissed.
- [35] Elaine also applied for leave to amend her amended notice of family claim, eliminating most of the claims against the company, and for a further examination for discovery of Brian after disclosure of the documents. If she still wishes to amend her notice of family claim in the form submitted, then I grant leave. As counsel for Brian observed, the threshold is low.
- [36] I make no order concerning discovery, as it was premised on the production of the privileged documents, which I have refused to order. That application is accordingly adjourned.

3.2 Brian's applications

- [37] Brian seeks a very broad declaration of privilege in relation to the files of Davidson & Co., and FH&P Lawyers, in relation to their representation of Slatter Holdings Ltd in this proceeding. I am not prepared to make that declaration because I have not reviewed the documents in question. I note that the applications proceeded on the footing that they were privileged, but such privilege would, of course, extend to those files only to the extent they consist of communications between solicitor and client that entail the seeking or giving of legal advice and were intended to be confidential, or attract litigation privilege. There may be documents in those files that do not qualify as such. I cannot tell. Accordingly, this application is adjourned.
- [38] Brian's applications for orders requiring that he and Elaine engage counsel for Slatter Holdings to advise the company with respect to accounts for services rendered by previous counsel, and requiring them to appoint a third director, are also dismissed.
- [39] Brian grounded his application for the appointment of company counsel on sections 147 and 232 of the BCA, and Rules 12-1 and 12-2 of the Supreme Court Family Rules. But none of those provisions assist him. Section 147 of the BCA deals with conflicts of interest in the form of a disclosable interest in a contract or transaction. That does not arise here. Section 232 governs derivative actions. No one has applied for leave to commence a derivative

action. Rule 12-1 concerns of the detention, custody or preservation of property, and that is not in issue. Rule 12-2 governs the appointment of receivers, for which no one has applied, and which would in any event be economically unpractical.

- [40] His application for an order requiring Elaine and him to appoint a third director was grounded on sections 12.1 and 13.1 of the company articles, sections 137 and 167 of the BCA, and Rules 12-1 and 12-2.
- [41] Section 12.1 of the company articles provides that the directors may be fixed or changed by ordinary resolution, while section 13.1 provides that the directors shall retire at each annual general meeting, at which time the members entitled to vote will elect the Board of Directors. These would permit a change in the directors at the behest of the company's members, but does not authorize the court to require directors to appoint an additional one.
- [42] Section 137 of the BCA concerns the ability of the company, by its articles, to transfer management duties from a director to another person. It does not authorize the court to appoint an additional director. Section 167 deals with the requisitioning of general meetings, and is equally irrelevant. And Rules 12-1 and 12-2 are as in applicable here as they were to the previous application.

3.3 What next?

- [43] In these circumstances, what are the parties to do? How is the company to move forward? For what it is worth, I offer the parties these thoughts.
- [44] It seems to me that so long as Elaine continues to pursue claims against Brian and Fern concerning their conduct in the lawsuit in relation to the company, then her position as a director puts her in a conflict. She may wish to consider resigning as a director. That would leave Brian free to appoint counsel to assist in assessing the solicitors' files, and to appoint another director if he feels it appropriate to do so. They can then attend to the affairs of the company.
- [45] Alternatively, Brian and Fern may wish to consider removing Elaine as a director through the means permitted in the company articles, or by court order.

4.0 CONCLUSION

- [46] Elaine's application for a declaration, and for production of the documents contained in the Company's solicitors' files, is dismissed.
- [47] Elaine's application for leave to amend her amended notice of family claim is granted, if she wishes to pursue it.
- [48] Elaine's application for further discovery of Brian is adjourned.
- [49] Brian's application for a declaration concerning privilege is adjourned. The balance of his applications are dismissed.

[50] Brian has been substantially successful in this matter, and is entitled to his costs.

"GRAUER, J."

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