NOVA SCOTIA COURT OF APPEAL
Citation: ***Cushing v. Hood***, 2008 NSCA 47

Date: 20080520
Docket: CA 282489
Registry: Halifax

Between:

Wendy Cushing, Future Group Realty Limited and Russell Cushing

Appellants

v.

S. Clifford Hood

Respondent

Judges: MacDonald, C.J.N.S.; Bateman and Cromwell, JJ.A.

Appeal Heard: May 20, 2008, in Halifax, Nova Scotia

Written Judgment: May 21, 2008

Held: Appeal is dismissed with costs fixed at 40% of the costs awarded at trial, plus reasonable disbursements on appeal, per oral reasons for judgment of Cromwell, J.A.; MacDonald, C.J.N.S. and Bateman, J.A. concurring.

Counsel: Rubin Dexter, for the appellants
S. Bruce Outhouse, Q.C. and Adrienne Bowers, for the respondent

Reasons for judgment: (orally)

[1] The appellants sued the respondent solicitor for alleged breach of solicitor-client privilege. The trial judge, Boudreau, J., dismissed the action holding that the appellants had not consulted the respondent in his professional capacity, but rather sought his "off-the-cuff", "two cents worth" concerning "... his common sense thoughts on what may be a proper or ethical way to conduct business in small town...": 2007 NSSC 97, paras. 31 and 34. While the appellants advance a number of submissions, their principal argument is that the trial judge made a reviewable error in reaching this conclusion.

[2] This issue raises a question of mixed law and fact. Absent some error in legal principle, the standard of review is that of palpable and overriding (that is clear and determinative) error.

[3] We find no error in legal principle and no palpable and overriding error in the judge's application of the principles to the evidence.

[4] The judge correctly instructed himself on the legal principles relating to the circumstances under which a communication is protected by solicitor-client privilege. Contrary to the appellants' submissions, we do not understand the judge to have restricted those circumstances to an actual or contemplated formal retainer. The judge referred three times to a passage from Wigmore's evidence treatise as approved by the Supreme Court of Canada, which states that the privilege arises "[w]here legal advice ... is sought from a professional legal adviser in his capacity as such...": **Descôteaux et al. v. Mierzwinski**, [1982] 1 S.C.R. 860 at 872-73; 2007 NSSC 97 paras. 27, 29, 33.

[5] The judge reviewed all of the evidence and made findings of fact which are supported by the record. The appellants, in essence, request that we place a different interpretation on the evidence than that arrived at by the trial judge. That is not our role absent some palpable and overriding error on his part. We see no such error and conclude that there is no basis for appellate intervention.

[6] The appeal is dismissed with costs fixed at 40% of the costs awarded at trial, plus reasonable disbursements on appeal.

Cromwell, J.A.

Concurred in:

MacDonald, C.J.N.S.

Bateman, J.A.