IN THE SUPREME COURT OF NOVA SCOTIA

Citation: South West Shore Development Authority v. Ocean Produce International Ltd., 2008 NSSC 240

Date: 20080801
Docket: SH 187898
Registry: Halifax

Between:

South West Shore Development Authority
(formerly known as the Shelburne Park Development Association)

Plaintiff/Defendant
by Counterclaim
Applicant (herein)

and

Ocean Produce International Limited

Defendant/Plaintiff
by Counterclaim
Respondent (herein)

Judge: The Honourable Justice Glen G. McDougall

Heard: April 23, 2008, in Halifax, Nova Scotia

Counsel: Gavin Giles, Q.C., on behalf of the Plaintiff/Defendant by Counterclaim, Applicant (herein)
Rubin Dexter, Ll.B., on behalf of the Defendant/Plaintiff by Counterclaim, Respondent (herein)
David Farrar, Q.C., Colin Piercey, Ll.B. and Laura Meagher, Ll.B., on behalf of KPMG, LLP, and Mary Jane Andrews, C.A.

By the Court:

[1] Ocean Produce International Limited ("OPIL") has applied for an order:

> 1. Directing that Mary Jane Andrews, C.A., and/or the firm of KPMG, LLP, produce true copies of all of the documentation of the "private client" of KPMG, which documentation was considered by Ms. Andrews in arriving at the annual growth rate as set out in her expert report dated March 31, 2004, and which documentation is referred to in the transcript of the examination for discovery of Ms. Andrews held on November 7, 2007;
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> 2. For costs of the herein application;
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> 3. For such further and other Order as to this Honourable Court seems just.

[2] It is joined in the application by South West Shore Development Authority ("SWSDA").

[3] The application is opposed by the accounting firm of KPMG, LLP ("KPMG") and Mary Jane Andrews (Ms. Andrews"). Neither KPMG nor Ms. Andrews are parties to the action. Ms. Andrews is the author of a report entitled: "Ocean Produce International Limited, Report on Economic Loss Assessment, March 31, 2004."

[4] The report was commissioned by OPIL's former counsel, Mr. Craig Garson, Q.C. It's purpose was to provide an assessment of the economic loss sustained by OPIL which formed the basis of its counterclaim against SWSDA. OPIL's current counsel intends to use the expert's report at trial. He wishes to avoid any challenge to its admissibility or to the use and weight that may be attributed to it by the trier of fact arising out of any alleged failure to comply with the requirements of **Civil Procedure Rule** 31.08(1).

[5] **Civil Procedure Rule** 31.08(1) provides that:

> 31.08. (1) Unless a copy of a report containing the full opinion of an expert, including the essential facts on which the opinion is based, a summary of his qualifications and a summary of the grounds for each opinion expressed, has been
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> > (a) served on each opposite party and filed with the court by the party filing the notice of trial at the time the notice is filed, and

> (b) served on each opposite party by the person receiving the notice within thirty (30) days of the filing of the notice of trial, the evidence of the expert shall not be admissible on the trial without leave of the court. [Amend. 5/10/96]

[6] **Civil Procedure Rule** 20.06 is also relevant to this application. This rule deals with the discovery and production of documents relating to every matter in question in the proceeding. Rule 20.06 states:

> 20.06 (1) The court may order the production, for inspection by any party or the court, of any document relating to any matter in question in a proceeding at such time, place and manner as it thinks just. [E. 24/11/12]
>
> (2) Where a document is in the possession, custody or control of a person who is not a party, and the production of the document might be compelled at a trial or hearing, the court may, on notice to the person and any opposing party, order the production and inspection thereof or the preparation of a certified copy that may be used in lieu of the original.
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> (3) An order for the production of any document for inspection by a party or the court shall not be made unless the court is of the opinion that the order is necessary for disposing fairly of the proceeding or for saving costs and is not injurious to the public interest. [E. 24/13/15]

ISSUE AND FACTUAL BACKGROUND

[7] The Court is being asked to order the disclosure of certain financial information of one of the private clients of KPMG. It was referred to during discovery examination and also noted in the working papers provided by Ms. Andrews at discovery. Counsel for KPMG and Ms. Andrews is opposed to its release. He argues that the evidence on discovery makes it clear that Ms. Andrews neither made use of nor did she place any reliance on her private client's information in compiling her report.

[8] He further submits that the requested financial information was not part of the foundation material relied upon by Ms. Andrews in the preparation of her report.

[9] Furthermore, he suggests there are valid policy reasons for not ordering production of previously acquired confidential information. Such confidential

information, he submits, is captured by case-by-case privilege as set out in the Supreme Court of Canada case of **Slavutych** v. **Baker**, [1976] 1 S.C.R. 254.

[10] The evidentiary basis for this application consists of a copy of the expert's report prepared by Ms. Andrews and a copy of a transcript of her examination for discovery by SWSDA's counsel. These are attached to an affidavit of Adelard A. Cayer, Vice-President and Secretary-Treasurer of OPIL. Also attached to this affidavit are copies of certain correspondence exchanged between counsel regarding production of the sought-after documents.

[11] In addition, counsel for SWSDA has filed an affidavit to which he has attached copies of excerpts of Ms. Andrews' working papers as well as copies of certain correspondence exchanged between counsel regarding the production of the sought-after background information.

[12] The Court was not presented with any affidavits in support of the position advanced on behalf of Ms. Andrews and KPMG.

[13] The particularly relevant portions of Ms. Andrews' discovery examination and excerpts from her working papers are attached respectively as Schedules "A" and "B" to this decision.

[14] Before getting into any further discussion of the facts, I want to turn my attention to the existing law of disclosure particularly as it relates to disclosure of confidential information that might have been considered by an expert in formulating a report intended for use at trial.

LEGAL FRAMEWORK

[15] Perhaps the leading case out of our Court regarding the on-going disclosure requirements imposed by the **Civil Procedure Rules** is **Flinn** v. **McFarland**, 2002 NSSC 272. In that case MacAdam, J., at para 17 stated:

> 17. Whatever information and materials were provided to the expert must be disclosed. If this involves discussions with the party, counsel for a party or with a third party, it is, may be, or perhaps should have been, part of the informational basis used by the expert in reaching his conclusion, and must be disclosed. The comments

> by counsel, on the draft report of the accident re-constructionist, must be disclosed to the defendants.

[16] The "**Flinn**" case is somewhat different from the present case in that it dealt with materials provided to the expert by counsel for the party commissioning the report. Justice MacAdam ordered disclosure of what would ordinarily be litigation privileged correspondence because of its possible influence on the contents and results of the final report.

[17] Earlier in his decision Justice MacAdam in referring to a decision of Justice Hart in **Greenwood Shopping Plaza** v. **Neil J. Buchanan Ltd.**, et. al. (1979), 31 N.S.R. (2d) 135, held that para 59 of that decision was applicable:

> It seems to me only logical that if the party wished to rely upon the testimony of its expert and was prepared to waive the privilege that he must also have intended to waive the privilege which extends to his discussions with the expert which form the basis of his report. Surely if a solicitor were called to testify as to an opinion given to his client he would have to reveal the facts related to him upon which the opinion was based. Similarly, in my opinion, an expert employed by the solicitor for the benefit of the party must, as an integral part of his evidence, be subject to cross-examination on the factual basis for his opinions, and this must be known to the party at the time the decision is made to waive the privilege and present the evidence.

[18] Justice MacAdam also referred to the decision of Ferguson, J., in **Browne (Litigation Guardian of)** v. **Lavery** (2002), 58 O.R. (3d) 49. Although this case dealt with the rule in Ontario, he concluded at para 11 that "it is clear, the principles reviewed and upheld by Justice Ferguson are no less applicable in Nova Scotia." Justice MacAdam then goes on, at para 12, to say:

> 12 Referring to the decision of the Supreme Court of Canada in R. v. Stone, [1999] 2 S.C.R. 290, Justice Ferguson in Browne, supra, at paras 57-60 stated:
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> > [57] The trial judge in Stone ordered production of the expert's report on the ground that opposing counsel 'ought to be in a position of being able to explore on cross-examination with accused whatever statements Dr. Janke may or may not have relied upon in his report': at para 20 [my emphasis]. The fact that his ruling was upheld implies that opposing counsel is entitled to disclosure of what information was provided to the expert even if it is not relied on.

> [58] The Supreme Court in Stone said that the purpose of the production is to permit opposing counsel to test the expert's opinions. It contemplated that the content of a report might contradict the opinion given in testimony. So might other information in the expert's possession. An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel - for instance, by removing damaging content.
>
> [59] It is difficult to understand how a determination could be made as to what was influential. Would counsel decide? Why should this decision not be open to scrutiny? The expert might not realize or acknowledge the extent to which information provided has influenced his or her opinion.
>
> [60] It seems logical that if counsel sends the expert information counsel does so because he or she believes this information is relevant to the expert's task. If it is relevant to the task then it seems to me it should be available to counsel who must test the opinion.

[19] In **Descôteaux** v. **Mierzwinski** (1982), 70 C.C.C. (2d) 385 (S.C.C.), the Supreme Court of Canada recognized that a privilege or a right to confidentiality was a substantive rule which afforded protection from disclosure of certain types of communication. The most recognized privileged communication is that of solicitor and client. The privilege belongs to the client and can be waived. Once waived, however, it is lost forever.

DISCUSSION and ANALYSIS

[20] Counsel for KPMG and Ms. Andrews submitted that the financial statements requested by the applicant are of a type of confidential information captured by case-by-case privilege as set out by the Supreme Court of Canada in **Slavutych** v. **Baker**, *supra.* Counsel also argued that the report's author did not use or rely on her private client's information in determining the annual growth rates related to OPIL and therefore the sought-for information is irrelevant.

[21] While it may be true that Ms. Andrews did not use the information gleaned from her private client's financial statements to derive the growth rates used in estimating OPIL's financial losses there can be no denying that she, nevertheless, used it as a (in her own words) "...measure of sustaining the reasonableness of the selected growth rate." [Refer to Schedule "A" – Transcript of Discovery of Ms. Mary Jane Andrews, p. 61, lines 1 - 3]. She repeats the use to which she put her private client's information [See lines 22 - 24, p. 61 of the Discovery Transcript] by answering a question put to her by SWSDA's counsel as follows:

> This is simply a measure of estimating or sustaining.... measuring the reasonableness of the selected growth rate."

[22] Further references to information obtained from Ms. Andrews private clients can be found in her working papers. [See Schedule "B", p. 1 (near bottom of page) and p. 4].

[23] Even if the information had not been relied on by Ms. Andrews, in determining industry growth rate estimates, it was at least considered and used to some extent as a check on their reasonableness. Referring once again to **Browne**, *supra*, para 58:

> ...An opinion can obviously be tested in many ways: by comparing the conclusion to the data relied on, by comparing the opinion to data which was available but not relied on, by considering whether the expert's opinion was influenced by the nature of the request of counsel or by information provided by counsel which was not relied on, and by considering whether the opinion was altered at the request of counsel - for instance, by removing damaging content.

[24] Counsel for the applicants – KPMG and Ms. Andrews" – urged the court to order that the confidential information of the private clients not be disclosed. Such a case-by-case analysis employs the four-step test suggested by Dean Wigmore.

[25] The Supreme Court of Canada in the case of **R.** v. **Gruenke** (1991), 8 C.R. (4th) 368 made a distinction between "class" and "case-by-case" privileges. In class privilege cases there is a *prima facie* presumption that the communication is privileged and inadmissible. The party seeking to have the evidence admitted has the burden of showing why it should not be privileged. In the case-by-case situation there is a *prima facie* assumption that the communications are not privileged and are admissible. The party urging exclusion must show why the communications are

privileged. The Supreme Court accepted the "Wigmore" test as a general framework to determine whether privilege applies. The four Wigmore conditions are:

> (1) The communication must originate in a confidence that they will not be disclosed;
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> (2) This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
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> (3) The relation must be one which in the opinion of the community ought to be sedulously fostered;
>
> (4) The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.
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> [Reference to J.H. Wigmore, Evidence in Trials at Common Law, vol. 8, 3d ed., rev. by J.T. McNaughton (Boston: Little, Brown, 1961) s. 2192]

[26] While I can accept that the information contained in the financial statements of KPMG's private client was intended to be held in confidence and only disclosed as required by law or as permitted by the client, its use has a direct bearing on the counterclaim being advanced by OPIL against SWSDA. SWSDA's counsel should not be denied the right to full disclosure of this information in accordance with **Civil Procedure Rule** 20.06 and 31.08. It forms part of the "essential facts on which the opinion is based." If full disclosure is not ordered the injury that would result to both SWSDA and OPIL (and by extension the proper disposal of the litigation) would exceed the injury that would inure to the relations between KPMG and Ms. Andrews and their client.

[27] The implied undertaking rule, which prohibits use of the disclosed information for purposes other than the present litigation, would serve to protect the private company from any unnecessary disclosure. SWSDA, OPIL and their respective counsel are all bound by this rule.

[28] If the financial statements are eventually tendered and admitted as evidence at trial, counsel can request they be sealed after use by the Court. The trial judge can then decide the appropriate disposition of such a request.

[29] As for now, the Court orders OPIL to obtain a true copy of the financial statements of KPMG's private client which were used by Ms. Andrews in the preparation of her report and to provide it to SWSDA's counsel. KPMG and Ms. Andrews, upon receiving the request, are ordered to provide the financial information sought in accordance with **Civil Procedure Rule** 20.06(2).

[30] If the parties cannot agree on costs, I will arrange a time to hear from their counsel or to receive their further written submissions.

McDougall, J.

SCHEDULE "A"

Attached are pages 52, 58-63, 65-71 and 86 from the transcript of the November 7, 2007 discovery of Ms. Mary Jane Andrews

SCHEDULE “B”

Attached are excerpts from working papers of Ms. Mary Jane Andrews [4 pages, unnumbered]