IN THE SUPREME COURT OF NOVA SCOTIA
Citation: Di-Anna Aqua Inc. v. Ocean Spar Technologies L.L.C., 2005 NSSC 354

Date: 20051229
Docket: ST 09193
Registry: Truro

Between:

Di-Anna Aqua Incorporated

Plaintiff

v.

Ocean Spar Technologies L.L.C. and
Net Systems Incorporated

Defendants

Judge:	The Honourable Justice Hilroy S. Nathanson
Heard:	November 23 and December 1, 2005, in Halifax, Nova Scotia
Counsel:	Peter M. Rogers, Esq., for the plaintiff Margo Ferguson, Esq., for the defendant Ocean Spar Technologies L.L.C. Sheree Conlon, Esq., for the defendant Net Systems Incorporated

By the Court:

[1] The plaintiff applies in Chambers for the disqualification of Paul Bradley and any other partner or employee of PricewaterhouseCoopers as an expert for the defendants in this action, and restraining them from further involvement in it.

[2] The plaintiff purchased a sea cage system from the defendants for use at an aquaculture site which it had leased in the Annapolis Basin, near Digby. The system experienced difficulties and eventually collapsed. The plaintiff claimed damages from

the defendants as designers, manufacturers, vendors and installers of the system for breach of contract, negligence and breach of warranty. Each side retained the services of professional business valuators to provide advice and expert testimony at trial with respect to the issue of damages: the defendants retained Paul Bradley of PricewaterhouseCoopers and, 10 months later, the plaintiff retained Norman Raynard of Grant Thornton. Working on the file with Raynard was John Anthony who later resigned from Grant Thornton and went to work for PricewaterhouseCoopers.

[3] The central issue of this application is whether there exists a conflict of interest with respect to a prospective expert witness and his firm.

FACTS

[4] On August 27, 2003, the defendants retained Paul Bradley, C.A., C.B.V., of PricewaterhouseCoopers as their expert. Throughout the Fall, he provided services to the defendants relating to the pending litigation. On June 29, 2004, the plaintiff retained Norman Raynard, C.B.V., of Grant Thornton as its expert, to be assisted by John Anthony, a certified management accountant and C.B.V. - in-training. In doing so, counsel for the plaintiff emphasized the privileged and confidential nature of the retainer and of the information discussed between them. Counsel for the plaintiff did not inform counsel for the defendants of the retainer of Grant Thornton until January 5, 2005.

[5] Raynard and Anthony of Grant Thornton prepared a report. During preparation of the report, counsel for the plaintiff discussed candidly with Raynard and Anthony the strengths, weaknesses and theory of the plaintiff's case on the express basis that the conversations were privileged and confidential. The report is dated March 23, 2005. The plaintiff sent a copy of it to the defendants on April 1.

[6] Coincidentally, at about the same time, Anthony applied to PricewaterhouseCoopers for employment, was interviewed twice by Bradley and others and, on April 8, Bradley offered him a job. Bradley says in an affidavit that he did not discuss the file with Anthony either during the interview process or thereafter, and he is not aware of any information that would lead him to believe that anyone at PricewaterhouseCoopers discussed it with Anthony.

[7] On April 14, Anthony advised Raynard that he was contemplating leaving the employment of Grant Thornton to work for PricewaterhouseCoopers in Halifax.

Anthony verbally accepted a position as business valuator with PricewaterhouseCoopers on April 19.

[8] On April 20, Anthony resigned from Grant Thornton as of May 6.

[9] Raynard says in an affidavit that, between April 20 and May 6, he and Anthony discussed a potential conflict that would arise should PricewaterhouseCoopers be approached to advise the defendants on this matter. Anthony assured Raynard that he had communicated this to Bradley of PricewaterhouseCoopers, and would assist him in preparation for discovery and trial with respect to the report they had co-authored. Raynard communicated this to counsel for the plaintiff when he informed him that Anthony would be leaving the firm; as will be seen, this may have occurred as late as June 1.

[10] Bradley says that he received a copy of the Grant Thornton report on April 21, noted that Anthony had helped prepare it —— he had no prior knowledge that Grant Thornton had been retained by the plaintiff —— and immediately advised Anthony that PricewaterhouseCoopers had been retained by the defendants. He further advised Anthony of steps that PricewaterhouseCoopers would take immediately to allay concerns with respect to perception of conflict, specifically:

> a) Anthony would have no involvement with the Di-Anna Aqua file;
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> b) anyone assigned to the file would not have any discussions with Anthony regarding the file;
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> c) Anthony would have no contact with Grant Thornton regarding the file;
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> d) all hard copy file material and correspondence, reports or similar materials were immediately segregated from the filing area and maintained in a locked cabinet to which Anthony has had no access;
>
> e) all electronic files, including correspondence, reports and similar materials were segregated on the server where they are password protected with access provided only to the staff assigned to the file; and
>
> f) a written policy would be circulated, supported by an admonition that violation of the policy could result in sanctions up to and including dismissal.

Bradley says that the physical file access and communications set out were immediately implemented. Immediately upon reviewing the Grant Thornton report, he informed counsel for the defence that Anthony was about to begin employment at PricewaterhouseCoopers.

[11] Bradley says that, within one or two days of receipt of the Grant Thornton report, he contacted Anthony to discuss how to handle the potential conflict. Anthony informed him that he had discussed with Raynard the possibility of assisting Grant Thornton with some files, including the Di-Anna Aqua file. Bradley advised Anthony to suspend all discussions with Grant Thornton while he looked into the matter. After consultation with defendants' counsel, Bradley advised Anthony that he could have no further contact with Grant Thornton regarding the Di-Anna Aqua file. Other than the discussions referred to, Bradley says that he has not at any time discussed this file with Anthony, and he is not aware of any information that would lead him to believe that Anthony has not strictly followed the process outlined.

[12] On May 10, Anthony commenced work at PricewaterhouseCoopers.

[13] In support of a chambers application, Bradley swore an affidavit dated June 1 in which he swore that he had been retained by the defendants to review the expert opinion prepared by Raynard and Anthony of Grant Thornton. When counsel for the Plaintiff received a copy of this affidavit, he forwarded it to Raynard who informed counsel for the plaintiff that Anthony had left the employ of Grant Thornton to work for PricewaterhouseCoopers' Halifax office.

[14] Sometime in June, Raynard's assistant, Kim Garland, received a request from counsel for the plaintiff seeking Raynard's working papers on the file. With Raynard out of the office at that time, Garland contacted Anthony for assistance, which he provided. The working papers included Anthony's handwritten notes. Counsel for the plaintiff provided these working papers to counsel for the defendants.

[15] Counsel for the plaintiff, aware that Bradley had been retained by the defendants, e-mailed counsel for the defendants on June 7 requesting the date of retainer and the particulars of barriers in place. He saw nothing in the Canadian Institute of Chartered Business Valuators' Code of Ethics suggesting that barriers would suffice. He was skeptical about the ability of Bradley, Anthony and their support staff to refrain from talking about the matter. In a reply of the same date, counsel for the defendants stated that Bradley had been retained long before

Anthony's date of employment, and that PricewaterhouseCoopers had created appropriate barriers to any inappropriate information flow. Counsel for the plaintiff responded that he could not rule out calling Anthony as a witness and, in such event, would expect him to be available for witness preparation. He also pointed out that Raynard's assistant had phoned Anthony while Raynard was recently out of the province and spoken with him about the Grant Thornton working papers. Counsel for the defendants replied that she was satisfied that the necessary protection was in place, and would continue, to prevent "leakage". Counsel for the plaintiff expressed surprise that Bradley would hire Anthony without making inquiries about potential conflicts.

[16] On July 18, Marcus Wide, managing partner of the Halifax office of PricewaterhouseCoopers, informed staff in a memo of measures which "will be undertaken" (these are the same as the steps of which Bradley had advised Anthony on April 22 or 23).

[17] In an affidavit on file, Bradley swears that the physical file access and communication policies set out which were immediately implemented, were in place at the time Anthony commenced employment with PricewaterhouseCoopers. The file materials were, and are, maintained in his personal office. Anthony never had access to these materials. Electronic file access as set out was in place by July 18. The protocols set out have been, and will be, strictly monitored and followed.

[18] Anthony made a statutory declaration on July 20 in which he stated that he had not divulged to anyone at PricewaterhouseCoopers any confidential information regarding the Di-Anna Aqua action. He also signed a written undertaking in which he undertook that he would not participate in the action by the plaintiff against the defendants, that he would not discuss any matter or information relating to Di-Anna Aqua with any partner or employee of PricewaterhouseCoopers, that he would not access any relevant files of PricewaterhouseCoopers, and that he would abide by the measures implemented by PricewaterhouseCoopers and enumerated in the memorandum from Marcus Wide dated July 18.

[19] It is submitted on behalf of the plaintiff that assurances and responses given by and on behalf of PricewaterhouseCoopers are not trustworthy and ought not be accepted at face value. During communications between counsel after the potential conflict of interest became apparent, counsel for one defendant allegedly gave curt answers and bald assurances that barriers were then in place; however, the same counsel was still discussing the nature of the barriers at a later point in time.

Bradley's affidavit on file implies that the barriers were put in place immediately, but the undertaking given by Anthony and the memo of Marcus Wide suggest that the barriers were not fully in place until three months later, in July. The defendants respond that although the written policy and formal notice to staff were not given until July, staff had been notified of the policy which was in place almost immediately. I accept that all barriers were not put in place immediately.

[20] It is submitted on behalf of the plaintiff that while Bradley stated in his affidavit that he told Anthony not to have any further "contact" with Grant Thornton, it was later revealed that there was contact in June. Raynard's affidavit states that his assistant, Kim Garland, phoned Anthony in June for help in locating the file, implying that no matter of substance was discussed. It is further submitted on behalf of the plaintiff that because of the telephone conversation between Anthony and Raynard's assistant, Garland, either the appropriate screen was not then in place or Anthony disobeyed his instructions. I accept this submission.

[21] It is submitted on behalf of the plaintiff that Bradley stated in his affidavit that PricewaterhouseCoopers did not know until the report was received on April 21 that Grant Thornton were the experts retained by the plaintiff, but another affidavit on file indicates that PricewaterhouseCoopers knew more than three months earlier, on January 5. There is no substance to this submission. The other affidavit is apparently an affidavit of Jennifer J. Biernaski, an associate of counsel for the plaintiff, attaching a copy of a letter from counsel for the plaintiff addressed to counsel for the defendants. It is not addressed to PricewaterhouseCoopers, and there is no evidence that any of the counsel for the defendants passed this letter or otherwise informed PricewaterhouseCoopers that the plaintiff had retained the services of Grant Thornton.

[22] Counsel for the plaintiff further points out that Anthony shared support staff with others contrary to his governing Code of Ethics. The evidence on this point is vague.

[23] Bradley says in his affidavit on file that at the time Anthony was hired no one at PricewaterhouseCoopers was aware that Grant Thornton had been retained by the plaintiff. He asserts that there was no way to determine, prior to hiring Anthony, whether there was a conflict because PricewaterhouseCoopers has a professional and ethical obligation to maintain client confidentiality and thus was not able to disclose the identity of its clients. I have some doubts about the scope of this assertion.

APPLICABLE LAW

[24] The law relating to disqualification on the ground of conflict of interest is settled. In **MacDonald Estate** v. **Martin** (1990), 77 D.L.R. (4th) 249 (S.C.C.), Sopinka, J., speaking for a majority of the Court, discussed at p. 267ff the test for the existence of a conflict of interest:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor-and-client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?
>
> In answering the first question....once it is shown by the client that there existed a previous relationship which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant. This will be a difficult burden to discharge. Not only must the court's degree of satisfaction be such that it would withstand the scrutiny of the reasonably informed member of the public that no such information passed, but the burden must be discharged without revealing the specifics of the privileged communication. Nonetheless, I am of the opinion that the door should not be shut completely on a solicitor who wishes to discharge this heavy burden.
>
> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere....
>
> The answer is less clear with respect to the partners or associates in the firm....
>
> In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese walls and cones

> of silence. These concepts are not familiar to Canadian courts and indeed do not seem to have been adopted by the governing bodies of the legal profession.... Although I am not prepared to say that a court should never accept these devices as sufficient evidence of effective screening until the governing bodies have approved of them and adopted rules with respect to their operation, I would not foresee a court doing so except in exceptional circumstances. Thus, in the vast majority of cases, the courts are unlikely to accept the effectiveness of these devices until the profession, through its governing body, has studied the matter and determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession.
>
> A fortiori undertakings and conclusory statements in affidavits without more are not acceptable. These can be expected in every case of this kind that comes before the court. It is no more than the lawyer saying "trust me". This puts the court in the invidious position of deciding which lawyers are to be trusted and which are not. Furthermore, even if the courts found this acceptable, the public is not likely to be satisfied without some additional guarantees that confidential information will under no circumstances be used....
>
> These standards will, in my opinion, strike the appropriate balance among the three interests to which I have referred. In giving precedence to the preservation of the confidentiality of information imparted to a solicitor, the confidence of the public in the integrity of the profession and in the administration of justice will be maintained and strengthened. On the other hand, reflecting the interest of a member of the public to retain counsel of her choice and the interest of the profession in permitting lawyers to move from one firm to another, the standards are sufficiently flexible to permit a solicitor to act against a former client provided that a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information had occurred or would occur.
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> **[Emphasis Added]**

[25] In answering the second question with respect to partners or associates in the firm, the Court must consider whether all reasonable measures, including institutional mechanisms such as screening, have been taken to ensure that no disclosure will occur. Any screening mechanism must be in place when the conflict first arises. In

Ford Motor Co. of Canada, Ltd. v. **Osler, Hoskin & Harcourt** (1996), 131 D.L.R. (4th) 419 at pp. 441-2, Winkler, J. held:

> It is settled law... that the screening mechanism must be put in place when the conflict first arises.... Failure to fulfil this requirement is fatal .... For if the screen is not in place for a material period of time, in the instant case a substantial one, there is no "clear and convincing" evidence within the meaning of **Martin** v. **Gray**, with the result that the inference must be drawn that relevant confidential information was conveyed. To adopt the words of Huband J.A. in **York Investments**: "The appropriate measure cannot be put in place after the event and still satisfy the public concern that no breach of confidentiality will take place."
>
> **[Emphasis Added]**

[26] **MacDonald Estate v. Martin** concerned the disqualification for conflict of interest of a solicitor. However, it is common ground between the parties that the legal standard employed in respect of solicitors is also applicable to expert consultants: **United States Mineral Products Co.** v. **Pinchin Harris Holland Associates Ltd.** (1992), 70 B.C.L.R. (2d) 171 (B.C.S.C.); **Breda** v. **Breda** (1997), 10 C.P.C. (4th) 133 (Ont. C.J. Gen. Div.); **Arends** v. **Lockhart** [1999] B.C.J. No. 3181 (B.C.S.C.); **Burgess et al** v. **Wu** (2003), 235 D.L.R. (4th) 341 (Ont. S.C.J.).

ANALYSIS

[27] In applying the first branch of the test propounded by Sopinka, J., it is common ground that Anthony is a “tainted” person. The relationship between Anthony and his previous employer, Grant Thornton, was sufficiently related to the retainer with respect to the Di-Anna Aqua court action that this court infers that there was imparted to him confidential information which is relevant to his present employment by PricewaterhouseCoopers. No evidence to the contrary has been tendered.

[28] The second branch of the test is whether the confidential information will be misused. A chartered business valuator, having relevant confidential information, cannot act against his former client or his present client. The disqualification is automatic, and no assurances or undertakings not to use the information will avail.

[29] The critical point in the present case is whether the answer to the second question is equally applicable with respect to Anthony's new employer, PricewaterhouseCoopers, its partners and associates. There is a strong inference that chartered business valuators who work together share confidences. This court will draw that inference unless satisfied on the basis of clear and convincing evidence that all reasonable measures have been taken to ensure that no disclosure will occur by Anthony to Bradley or other members of PricewaterhouseCoopers who are engaged against Anthony's former client.

[30] It has been suggested that such reasonable measures would include the directions and mechanisms described in the Legal Ethics and Professional Conduct Handbook of the Nova Scotia Barristers' Society, Rule 6a of which applies where a member transfers from one firm to another and a conflict is discovered at or after time of transfer. Rule 6a includes a number of detailed and explicit subrules, and is followed by a commentary which discusses the following subjects: matters to consider before hiring a potential transferee; and reasonable measures to ensure non-disclosure of confidential information. That commentary is in turn followed by twelve (12) explicit guidelines. The directions and mechanisms set out are detailed and quite sophisticated.

[31] In my opinion, it is not appropriate to apply Rule 6a and its dependant commentary and guidelines to conflicts of interest of expert consultants such as chartered business valuators. Simply because the general legal standard applicable to solicitors is similarly applicable to chartered business valuators is no reason to hold that the detailed Rule 6a, its dependant commentary and guidelines, created by and for members of the Nova Scotia Barristers' Society, should be applicable to other professionals, in this case members of the Chartered Business Valuators Association of Canada. Only detailed rules and mechanisms established by the Chartered Business Valuators Association of Canada can give assurance that there exist institutional guarantees that will satisfy the need to maintain confidence in the integrity of that particular profession.

[32] The Code of Ethics of the Canadian Institute of Chartered Business Valuators, which is attached as exhibit "B" to the affidavit of Norman Raynard on file, contains simple provisions which are vaguely reminiscent of provisions in the Nova Scotia Barristers' Society's Legal Ethics and Professional Conduct Handbook which were in effect in 1990, that is, at approximately the same time that **MacDonald Estate** v.

Martin was decided. The Code of Ethics of the Canadian Institute of Chartered Business Valuators contains only one rule relevant to conflicts of interest, namely:

> 408.1 A Member or Registered Student shall take appropriate steps to assure they do not accept engagements which result or could be perceived to result in a conflict of interest.

In addition, practice guidelines included in the Code of Ethics contain only two potentially relevant provisions:

> G300.4 A Member or Registered Student should not advise or represent two or more parties in valuation or litigation matters having conflicting interests....
>
> G3005 A Member or Registered Student should immediately withdraw from an engagement when there is a conflicting interest....

[33] Thus, it is apparent that the profession of business valuators has not determined whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession. Therefore, we turn to ask whether all reasonable measures have been taken to ensure that no disclosure has occurred, or will occur, by the "tainted" lawyer to the member or members of the firm who are engaged against the former client.

[34] The pivotal date was April 21, 2005. Bradley had interviewed Anthony for a job sometime before April 8, and verbally hired him on April 19, but did not know that Anthony had co-authored the Grant Thornton report until April 21 when he received a copy of the report from counsel for the defendants and saw Anthony's name on it. He realized at once that a conflict of interest existed, and he immediately informed counsel for the defendants. Anthony started work with PricewaterhouseCoopers on May 10. If Bradley had discovered the conflict earlier, he might have delayed the hiring or isolated Anthony at the earliest possible date.

[35] Could Bradley have discovered the conflict before April 21? In my opinion, it is possible.

[36] It is now 15 years after **MacDonald Estate** v. **Martin**, *supra.* The intervening years constitute a sufficient period of time for all professional organizations and firms in Canada to have become aware of the decision and to have taken appropriate steps to establish rules and policies regarding conflicts of interest. The Canadian Institute of Chartered Business Valuators should have developed more detailed and

sophisticated rules such as those, for example, adopted by the Nova Scotia Barristers' Society. Professional firms, especially larger ones such as PricewaterhouseCoopers, should have developed standard policies ready to be followed if and when a conflict situation should arise. Armed with such rules and policies, a person in a position such as that occupied by Marcus Wide or Paul Bradley could, and should, have been able to act immediately to prevent or ameliorate a conflict situation.

[37] Bradley believes that PricewaterhouseCoopers has a professional and ethical obligation to maintain client confidentiality so that it could not disclose to Anthony, before hiring him, the names of its principal clients or their files. While this is generally true, I offer the suggestion that, at the very end of the interview process, after PricewaterhouseCoopers had decided to offer employment to Anthony, and just before or just after the offer of employment was made, on April 7 or 8, Bradley might have been able to reveal to Anthony some or all of the files on which he was expected to work once employment with PricewaterhouseCoopers began. If Bradley had done so, the present conflict of interest might have come to light 21 days earlier than it did, and Anthony might have been isolated immediately and with greater certainty.

[38] There is no evidence that PricewaterhouseCoopers had a screening policy or mechanisms in place on April 21 so as to satisfy the rule in **Ford Motor Co. of Canada, Ltd.** v. **Osler, Hoskin & Harcourt**, *supra*, Moreover, the evidence is less than clear as to whether all possible barriers were fully in place immediately after discovery and realization of the conflict of interest. First, four of the steps allegedly taken immediately, which Bradley communicated to Anthony and which were repeated in Marcus Wide's memo of July 18, are stated to be taken *in futuro*. Second, Bradley says that he did not contact Anthony to discuss how to handle the conflict until one or two days after receipt of the Grant Thornton report. Third, Bradley did not advise Anthony to have no further contact with Grant Thornton regarding Di-Anna Aqua file until after consultation with defendants' counsel, and the evidence is unclear when that consultation took place. Fourth, Anthony's conversation with Raynard's assistant, Garland, suggests that the indicated protocols and barriers were either not then in place or were not strictly monitored and followed. Fifth, Marcus Wide's memo of July 18 suggests the possibility that staff were not informed of barriers until three months after discovery of the conflict of interest and, because the memo states that the barriers will be undertaken, suggests that the barriers were not fully in place even at that late date. Sixth, Marcus Wide's memo of July 18, Bradley's subsequent affidavit, and Anthony's statutory declaration and undertaking are viewed to be, in the words of Sopinka, J. "*a fortiori* undertakings and conclusory statements in affidavits"

which are not acceptable. I see no additional guarantees that confidential information would under no circumstances be used. It might have been helpful if confirmatory statements of persons having first-hand knowledge, for example, Marcus Wilde, Kim Garland and all colleagues of Anthony, had been tendered.

[39] While there is no evidence of bad faith, this Court holds that the evidence is less than clear and convincing that all reasonable measures were taken in a timely manner to ensure that no disclosure by Anthony occurred to one or more members of PricewaterhouseCoopers This Court therefore draws the inference that confidential information was imparted.

DISPOSITION

[40] The application is granted. Paul Bradley and the members of his firm, PricewaterhouseCoopers, are disqualified from acting as expert witnesses for the defendants in the principal action, and are hereby restrained from further involvement in it.

[41] The applicant will have its costs of the application as agreed upon or as taxed. Counsel may speak to this issue at the time an order is taken out.

J.