SUPREME COURT OF NOVA SCOTIA
Citation: Dawe v. Gordon, 2012 NSSC 403

Date: 20121120
Docket: Bwt No. 350335
Registry: Bridgewater

Between:

Wade Dawe

Plaintiff

v.

Barbara Selwyn Gordon, Tradewinds Realty Incorporated and Carol Reynolds

Defendants

- and

Cox and Palmer

Third Party

D E C I S I O N

Judge: The Honourable Justice Suzanne M. Hood

Heard: in Halifax, Nova Scotia on August 23, 2012

Written Decision: November 20, 2012

Counsel:
S. Bruce Outhouse, Q.C. for the Third Party
Franco Tarulli for the Defendants, Tradewinds Realty Incorporated and Carol Reynolds
Kathryn M. Dumke for the Defendant, Barbara Selwyn Gordon
Darlene Jamieson, Q.C. for the Plaintiff, Wade Dawe

By the Court:

[1] Cox and Palmer seeks to have the third party action against it severed from the main action brought by its former client.

[2] **ISSUES:**

1. Severance: *Civil Procedure Rule* 37;
2. Conflict of interest

FACTS

[3] Wade Dawe ("Dawe") entered into an agreement of purchase and sale with Barbara Selwyn Gordon ("Gordon") to buy her lands in Chester. Carol Reynolds ("Reynolds") and Tradewinds Realty Incorporated ("Tradewinds") were the realtors. Anthony Chapman of Cox and Palmer acted for Dawe on the purchase.

[4] Dawe subsequently sued Gordon, Reynolds and Tradewinds for misrepresentation. Cox and Palmer acted for him in commencing the action and for approximately nine months thereafter.

[5] Reynolds and Tradewinds had brought a motion to have Cox and Palmer removed as counsel for Dawe and to have Cox and Palmer added as a third party. Wade Dawe now has separate counsel and Cox and Palmer consents to being added as a third party. Bruce Outhouse now acts for Cox and Palmer and seeks to have the third party action severed from the main action.

[6] His principal reason for the motion is because of the position in which he says Cox and Palmer will be put in defending the third party action, having previously acted for the plaintiff not only on the real estate transaction but because it represented him in this litigation.

[7] **ANALYSIS**

[8] This motion places two important issues squarely against each other. The first is the basic right of a party to have all matters arising from the same circumstances heard together unless it is just and convenient to do otherwise. The second is the conflict of interest which can arise when a lawyer or law firm acts against its former client.

[9] It appears this has rarely been an issue as only two cases on point have been cited. Other authorities deal with the conflict of interest issue only peripherally if at all. The fact situations in those cases differ substantially from the facts here.

[10] *Rule 37.05* deals with severance:

> **Separating parts of a proceeding**
>
> **37.05** A judge may separate parts of a proceeding for any of the following reasons:
>
> (a) a party joined a party or claim inappropriately;
>
> (b) although appropriately joined in the first place, it is no longer appropriate for the party or claim to be joined with the rest of the parties and claims in the proceeding;
>
> (c) the benefit of separating the party or claim from another party or claim outweighs the advantage of leaving them joined

[11] All parties agree that (a) and (b) are not applicable. The question then becomes one of weighing the benefits of severance against the advantages of leaving the claims joined.

[12] *Jeffery v. Naugler*, 2010 NSSC. 385 has been cited as the authority that the onus rests on Cox and Palmer to satisfy me that severance should be granted. This test is not in dispute.

[13] In *Jeffery v. Naugler*, Duncan, J. referred to *Ocean v. Economical Mutual Insurance Company*, 2010 NSSC 314 as the only reported case to that date which had considered the new *Rule 37.05*. In that case, Smith, A.C.J. relied on the principles in *Rajkhowa v. Watson* 2000 NSCA 50. Duncan, J. quoted Smith, A.C.J. at para. 26 as follows:

> In the case of *Rajkhowa v. Watson*, 2000 NSCA 50 the Nova Scotia Court of Appeal dealt with the issue of severing liability and damages and in the course of its decision, stated the following principles:
>
> - It is a basic right of a litigant to have all issues in dispute resolved in one trial unless it is just and convenient considering the interests of all parties and the proper administration of justice to do otherwise. (para. 27)
>
> - In a judge alone trial the normal practice is that liability and damages are tried together although the court should be prepared to order separate trials whenever it is just and convenient to do so. (para. 51)
>
> - In order to determine what is just and convenient, the court must consider the effect of such a decision on all of the parties as well as its effect on the court system. (para. 53)

[14] At para. 29, Duncan, J. set out the factors to be considered in determining if severance should be granted. He said:

> [29] In the case at bar, all parties have advanced their arguments on the basis of factors set out in the case law that predates the new rule. ... Those may be summarized as follows ...
>
> - whether the proceedings 'will be lengthier by reason of severance' and whether the plaintiff would be required to go through two trials and two sets of pretrial proceedings, ...
>
> - the extent overlap of issues and evidence between the severable portions of the proceedings ...
>
> - whether severance would allow the parties to dispense with a major issue that may save time and resources in the long term ...
>
> - the relative complexity of the respective severable portions of the proceeding. i.e., whether one portion of the proceeding could proceed more expeditiously on its own than if tied to the more complex portion of the proceeding ...
>
> - whether 'substantial cost has already been incurred on both issues' of liability and damages. ...
>
> - whether 'several of the witnesses will give evidence on both issues of liability and damages'. ...
>
> - the reasonable likelihood that an appeal against the determination of liability may follow. ...

- whether the plaintiff's credibility is a significant issue to be resolved in the determination of liability as well as damages ...

- whether there is a reasonable basis to conclude that a trial on liability only will bring that matter to a conclusion, or only add to the cost and delay of the final determination. ...

[15] To this list, I would add, in these circumstances, whether there is a conflict of interest and a risk that confidential information will be disclosed. As Mr. Outhouse pointed out, the motion Cox and Palmer has brought is not for the benefit of Cox and Palmer but for the benefit of Cox and Palmer's former client, Wade Dawe, the plaintiff. He said the court's focus should be on the plaintiff when weighing the pros and cons of severance.

[16] Parties have the right to have all matters heard together. The *Judicature Act*, R.S.N.S. 1989 c. 240 provides in s. 41(g):

> 41 In every proceeding commenced in the Court, law and equity shall be administered therein according to the following provisions:
>
> (g) the Court, in the exercise of the jurisdiction vested in it in every proceeding pending before it, shall have power to grant, and shall grant, either absolutely or on such reasonable terms and conditions as to the Court seems just, all such remedies whatsoever as any of the parties thereto appear to be entitled to in respect of any and every legal or equitable claim properly brought forward by them respectively in the proceeding so that as far as possible all matters so in

> controversy between the parties may be completely and finally determined and all multiplicity of legal proceedings concerning any of such matters avoided.

[17] In addition, *Civil Procedure Rule* 1.01 provides for the "just, speedy, and inexpensive determination of every proceeding."

[18] The court has discretion to sever. As Saunders, J.A. said in *Kirby v. Dominion of Canada General Insurance Company*, 2008 NSCA 14 in para. 17:

> [17] ... The application to sever called for the exercise of discretion. ...

[19] He continued in para.19:

> [19] The Court's discretion to sever claims under **Rule** 5.03(1) is broad and can be adapted to the particular circumstances of the case. If it makes sense to sever claims to prevent injustice, inconvenience, delay or embarrassment, the court has the discretion to do so. The judicial exercise of that discretion comes down to this: applying proper legal principles the judge must weight all of the circumstances involved and determine a course of action that will best attain the object of the Rules which is to secure the just, speedy and inexpensive determination of every proceeding.

[20] Although it was the 1972 *Rule* to which Saunders, J. was referring, Duncan, J. in Jeffery, *supra*, said in para. 40:

> [40] The new rule has codified what the Court of Appeal previously determined - that there is, and has been, a broad discretion resting with the court which could be '... adapted to the particular circumstances of the case' as it seeks to resolve questions of severance. See Kirby supra, at para. 19.

[21] There is no presumption that these matters be heard together. Cox and Palmer says that the third party claim must be severed to avoid a conflict of interest. Wade Dawe has not waived the privilege attaching to his solicitor/client communications with Cox and Palmer.

[22] *Martin v. MacDonald Estate* [1990] 3 S.C.R. 1235 (also known as *Martin v. Gray)* is the leading authority on conflict of interest. The court in that case set out the test to determine if there is a disqualifying conflict of interest in para. 48 as follows:

> 48 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?

[23] It is presumed in this case that Cox and Palmer received confidential information from the plaintiff in commencing the action against the defendants and in the course of representing him in the following months. In *Churly v.*

Budnick, (1997) 34 O.R. (3d) 729 (Ontario Master), Master Peppiatt considered this issue. He said in para. 44:

> 44 Where, then, would that place Mr. Churly? Mr. Dillon has been his solicitor in the matter since late 1988. He has conducted the litigation until almost this point and is still Mr. Canning's instructing solicitor. There is a presumption which there has been no attempt to rebut that Mr. Churly has given him confidential information: *MacDonald Estate v. Martin,* [1990] 3 S.C.R. 1235, 48 C.P.C. (2d) 113, [1991] 1 W.W.R. 705, 70 Man. R. (2d) 241, 121 N.R. 1 (S.C.C.). Mr. Dillon knows the strength and weaknesses of the plaintiff's case; he knows what his settlement instructions are; he knows the strategy to be pursued at trial. It is to state the obvious to say that he would not for an instance be permitted to act against Mr. Churly in this litigation.

[24] Having been added as a third party, Cox and Palmer is in the position of having to act against its former client in defending itself. Sopinka, J. in *Martin v. Gray* at para. 50 said:

> 50 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.

[25] The defendants, Reynolds and Tradewinds, say they are not concerned in this litigation with what happened after the closing of the transaction. They also say that it is not certain that Cox and Palmer's position and that of the plaintiff,

Dawe, its former client, will be at odds. However, as Mr. Outhouse pointed out, Cox and Palmer has not yet filed its third party defence. Furthermore, in *Churly*, *supra*, Master Peppiatt said in para. 43:

> 43 The addition of Mr. Dillon would cause Mr. Churly prejudice that could not be compensated for in any way. By rule 29.05(1) a third party has the right to defend the main action. Mr. Dillon cannot be deprived of that right, and, quite properly, his counsel did not undertake that it would not be exercised. Indeed Mr. Dillon personally may not have any choice in the matter; he claims to be insured and to have the right to have any such action defended by the insurer. He is, of course, bound by the terms of the policy and the general law relating to insurance, to co-operate in any such defence.

Cox and Palmer would be in the same position. It has a right to defend the main action and to assist in its defence.

[26] The third party claim has been issued. Some of the authorities cited dealt with the issue of whether a claim could be made against the lawyer for the plaintiff either as a third party claim or a claim by the plaintiff against his or her former lawyer. Reynolds and Tradewinds cite a number of authorities in their supplementary written submissions which they say are cases where "actions against solicitors went forward" (p. 10, Supplementary Brief). The authorities that

do not deal with this in the context of a conflict of interest, I conclude, are not helpful.

[27] In *Smith et al v. McInnis* et al, [1978) 2 S.C.R. 1357, the plaintiff sued his own lawyers who then third partied the law firm they retained, with the plaintiff's consent, to assist them with the plaintiff's insurance claim. Conflict of interest did not arise in these circumstances. The issue in that case was stated by Laskin, C.J. at p. 1360:

> The crucial question in this case, in respect of the third party claim, was the nature and scope of Matthews' retainer.

[28] In *Lessner v. Wright* (1979), 26 N.B.R. (2d) 35 (Q.B.) the client and his lawyer were jointly sued. They were separately represented at trial and no conflict of interest issue was referred to in the decision.

[29] In *Phinny v. Macaulay*, 2008 CarswellOnt. 5477 (S.C.J.), the lawyer was third partied by his former client. Conflict of interest did not arise.

[30] In *St. Matthews Church v. C.W. Stone Contractors* (1994), 132 N.S.R. (2d) 103 (N.S.S.C.), the proposed third party was a firm of architects. The issue was whether it was too late to allow it to be added as a third party. Conflict of interest was inapplicable.

[31] In *Cardar Investments Ltd. v. Thorne Riddell*, [1989] O.J. No. 1930, (Ont. H.C.J. (Divisional Court)), the defendants sought to add the plaintiffs' lawyers as third parties. The court concluded a third party claim was appropriate. The issue of possible conflict of interest was not raised.

[32] In *478649 Ontario Limited v. Corcoran*, [1994] O.J. No. 2103 (C.A.), Laskin, J.A. concluded there could be a third party claim against the plaintiff's lawyer, but the issue of a conflict of interest was not raised on the appeal. Laskin, J.A. said at p. 3 of the decision:

> ... The parties addressed the issue of solicitor-client privilege in their factums and in oral argument, but the appeal does not relate to this issue and I do not propose to deal with it.

[33] In *Cerullo v. Transworld Realty Ltd.*, [2000] O.J. No. 179 (Ont. S.C.J.), the defendant brought a third party action against his own solicitor. This is unlike the present situation and conflict of interest was not an issue.

[34] In *Pentland v. Anderson,* [2001] O.J. No. 1386 (S.C.J.), the defendant vendors and the third party, their former lawyer, sought to strike the third party claim. Low, J. said in para. 6:

> [6] The Sindens have not and do not intend to make a third party claim against their solicitors. Until the solicitors were added as third parties in the proceeding, Ballachey Moore was representing the Sindens in this action.

[35] She continued in para. 7:

> [7] The solicitors now move to strike out the third party claims against them, asserting that the third party claims against them disclose no reasonable cause of action. The Sindens have brought a parallel motion, and assert in addition that the third party claims against their solicitors are frivolous, vexatious or otherwise an abuse of process. They have deposed in their affidavit in support of the motion that if their solicitors defend the third party claim, they must necessarily take a position contradictory to that of the Sindens. They also state that the solicitors are in possession of documents and information from, inter alia, the purchase and sale files, which, if disclosed, would cause the Sindens irreparable harm in the lawsuit with the plaintiffs.

[36] However, in the end result, she did not deal with the potential conflict of interest issue . She said in para. 23:

> [23] Finally, I turn to the Sindens' contention that the third party claim against their solicitors if frivolous, vexatious and an abuse if process. The factual basis for the argument is that if the solicitors must defend the third party claim, they will have to take a position which contradicts that of the Sindens and that they may or will produce documents and disclose information which will cause irreparable harm to the Sindens in the litigation. Neither of these possible happenstances would render a claim, otherwise legally reasonable, either frivolous or vexatious or abusive of the process of the court. As for waiver of privilege, the Sindens have in their statement of defence put in issue their state of knowledge and their state of mind by way of their plea of innocent misrepresentation. In such circumstances, quaere whether they could successfully resist disclosure of documents in their solicitors' purchase and sale files relevant to the issue of what they (the Sindens) knew at the relevant time. This issue was adverted to in argument but was not properly before me and I make no finding on it one way or the other.

[37] I must balance the competing interests to determine if the benefits of severance outweigh the disadvantages. Cox and Palmer relies on *Keddy v. Grand Sky Co.* (1998), 170 N.S.R. (2d) 57 (N.S.S.C.) as authority for the proposition that, because of the conflict of interest issue, I must determine that the benefits outweigh the disadvantages and the third party claim must be severed.

[38] *Keddy*, *supra,* is a 14 year old decision which Reynolds and Tradewinds say has never been considered since. They also say it was wrongly decided and I should not rely on it. In para. 2, Hall, J. said the issue before him was:

> ... . whether the Third party proceeding ought to be severed. Included in this general question are a number of sub-issues, including whether there is sufficient commonality of issues involved in the two proceedings; whether the plaintiffs have waived their solicitor client privilege by alleging duress and unconscionable transaction and conduct; and whether the Third party is in a position of conflict of interest in defending the Third party claim contemporaneously with the main proceeding.

[39] He cited, in para. 14, the reasons for third party proceedings:

> 14 The general objects of third party proceedings are set out in *The Law of Civil Procedure*, Williston and Rolls, Volume 1, at page 426-427 where the following is stated:
>
> The objects of third party procedure are:
>
> (1) to avoid a multiplicity of actions. The procedure provides a substitute for another action, and disposes of all issues arising out of a transaction as between the plaintiff and the defendant, and between the defendant and a third party;
>
> (2) to avoid the possibility that there might otherwise be contradictory or inconsistent findings in two different actions on the same facts;
>
> (3) to allow the third party to defend the plaintiffs claim against the defendant;

(4) to safe [sic] costs; and

(5) to enable the defendant to have the issue against the third party decided as soon as possible, in order that the plaintiff can not enforce a judgment against him before the third party issue is determined.

[40] In dealing with the issues that he referred to in para. 2, Hall, J. said in paras. 26 and 27:

26 The overriding consideration, however, in my opinion, is that by the third party participating in the trial as a third party defendant, it is placed in an extreme position of conflict of interest. It is significant that counsel for the third party has indicated that the third party would likely defend the main action. As I stated during the hearing, it appears unseemly to me that the law firm which initiated the action on behalf of the plaintiff should be placed in a position of opposing that very claim. In other words, after obviously having advised the plaintiffs that they have a good cause of action, to, at trial, say that they do not have a good cause of action, or that the claim is not supportable. This is clearly against the standards of conduct for members of the Nova Scotia Barristers Society with respect to a lawyer acting against a former client. Paragraph 8 of the Society's handbook entitled *Legal Ethics and Professional Conduct* states:

8. A lawyer or any associate of the lawyer who has acted for a person in a matter has a duty not to act against that person in the same or a related matter.

27 In my opinion, it is indisputable that in defending against the plaintiffs' claim in the main proceeding, the third party would be acting against its former client in a matter where it had previously acted for the client. It is also clear that as a result of this involvement in advising the plaintiff with respect to the project prior to the commencement of the action, and, more particularly, in the actual preparation of the originating notice and statement of claim that initiated this action, the third party law firm had to have been privy to much confidential information with respect to the plaintiffs.

He then referred to *Martin v. Gray* in paras. 28 to 30.

[41] Reynolds and Tradewinds say that if I were to follow that decision it would "deprive all litigants of the opportunity to bring third party claims against counsel for an opposing party" (quoting from para. 25 of their supplementary brief). However, in most situations, that would not be the case. The lack of authority on this issue is some indication of how uncommon it is for severance to be sought in such circumstances. As Hall, J. pointed out, the law firm in *Keddy* had commenced the action for its then client. He also pointed out that it had therefore acted for that client in the very matter in which it was now being made a party and in which it would defend the main action brought by its former client.

[42] In my view, that is a significant difference from the more common instances where, for example, the client sues his or her own lawyer or where the lawyer had ceased to act for the plaintiff when the action was commenced. In many cases, it would be foreseeable or probable that a third party claim against the plaintiff's lawyer would be made and that lawyer or law firm would decline to act for the plaintiff in the action. That fact may also explain the paucity of case law on the subject.

[43] In *Churly*, *supra*, the issue of severance was raised indirectly. In that case, Master Peppiatt, in denying the third party action said in paras. 45 and 46:

> 45 It was urged upon me that it is unfair to Mr. Budnick to prevent him from asserting his claim for contribution and indemnity. To this there are two answers.
>
> 46 The first is that he is not being prevented from asserting it; as Mr. O'Sullivan pointed out he can always commence a separate action. There are of course disadvantages to doing this rather than to proceeding by way of third party claim, but they do not deprive him of his right.

[44] Master Peppiatt therefore concluded a separate action would be the appropriate course of action.

[45] Reynolds and Tradewinds also say that the plaintiff has put his state of mind in issue in the action by alleging misrepresentation and therefore has implicitly waived solicitor/client privilege. In response, Cox and Palmer says that the plaintiff's state of mind is irrelevant. It also says that a plaintiff's litigation counsel cannot be forced to testify every time misrepresentation is alleged by a plaintiff.

[46] In this case, the misrepresentation alleged is not Dawe's knowledge of the law or what legal advice he received. The misrepresentation alleged is with respect to the size of the property.

[47] In my view, this is not the type of claim for misrepresentation that implies a waiver of solicitor-client privilege.

[48] A benefit of severance in this case is the elimination of a conflict of interest on the part of Cox and Palmer and the adverse effects of a breach of confidentiality on Dawe. Cox and Palmer would not be put in a position where there is a conflict between its duty of loyalty to its former client and its own interests as a litigant.

[49] The disadvantages of severing are that there may be two trials at which the evidence of some of the same witnesses must be repeated. That would, of course, result in additional cost. There may also be additional costs arising from such things as separate discoveries, although some duplication may be avoided with counsels' cooperation.

[50] There could be prejudice to Reynolds and Tradewinds if they are found to be liable to the plaintiff before the third party claim is considered.

[51] They say that the conflict of interest issue was resolved when Cox and Palmer withdrew as counsel for Wade Dawe. However, I cannot conclude that to be the case because Cox and Palmer represented Dawe in this litigation, not only on the property transaction.

[52] Reynolds and Tradewinds also say that it is too early in the litigation for there to have been a discussion of settlement or trial strategy. That may be true with respect to trial strategy but the plaintiff's settlement position may very well have been discussed at the outset, as well as the strengths and weaknesses of his case.

[53] The advantage to the court in not granting the severance is that one trial only will be required as opposed to the possibility of there being two trials, which will be of greater total length than one trial because of duplication of witnesses, etc.

[54] In *Rajkhowa,* Saunders, J.A. said that the Court must be satisfied that it is "just and convenient" to order severance. In *Jeffery*, *supra*, Duncan, J. referred to that principle, saying in para. 27:

> [27] This has certainly been the general test applied to date and, in my view may continue to instruct the inquiry to be made under the new rule, ...

[55] It would be desirable, in my view, if this matter could be dealt with in one trial. Obviously, the third party action is appropriate and normally these claims which are related would be heard together. However, I conclude that the benefits of severance far outweigh the advantages of leaving the claims joined. I conclude in my discretion that it is just and convenient that the third party claim be severed from the main action. It would be unjust to have the claims heard together.

[56] In my view, Cox and Palmer owes a duty of loyalty to Dawe which is of paramount importance in these circumstances. Wade Dawe has the right to expect his former counsel to respect his confidences and not act against him; in other words, to be loyal to him as the *Code of Professional Conduct* provides.

[57] Cox and Palmer could not act for anyone else in this litigation and, in my view, it follows that Cox and Palmer cannot be a party in these circumstances.

[58] In this case, the two trials may not be as "inexpensive" as one trial would be. There may be no effect on the "speediness" with which both matters can be resolved. However, the "just" result in this case must be severance of the claims. The overriding consideration is avoidance of a conflict of interest.

[59] If the claims are not severed, the public, would, in my view, have a concern that the right of parties to have their lawyers maintain their confidences and remain loyal to them would be sacrificed to expediency. The public would be concerned that confidential information imparted to a lawyer could in future be used against the client. This would have an adverse effect, not only on the reputation of the legal profession, but also would bring the administration of justice generally into disrepute. I therefore conclude that the benefits of severance outweigh the advantages of leaving the claims joined. The motion is granted.

[60] If the parties cannot agree on costs, I will accept written submissions within 30 days.

Hood, J.