SUPREME COURT OF NOVA SCOTIA
Citation: *Ng'ang'a v. Mburu*, 2018 NSSC 26

Date: 201802012
Docket: Hfx, No. 458404
Registry: Halifax

Between:

Michael Ng'ang'a

Applicant

v.

Peter Kiarie Mburu

Respondent

Editorial Notice:	E-mail addresses have been removed from this electronic version of the judgment.
Judge:	The Honourable Justice Patrick J. Duncan
Heard:	January 24, 2018, in Halifax, Nova Scotia
Final Written Submissions:	January 9, 2018
Counsel:	Michael Donovan Q.C., for the Applicant Tim Hill Q.C., and Allison Reid, for the Respondent

By the Court:

Introduction

[1] The defendant was the father of a child who was the beneficiary of a trust fund established following a medical malpractice claim arising from the child's injuries at birth. The defendant took no role in parenting the child during his lifetime.

[2] When the child died, the defendant claimed that he, as a parent of the child who died intestate, was entitled to a share of the child's estate. His claim was settled and the defendant received monies from the child's estate.

[3] The plaintiff claims that he assisted the defendant in achieving success in the estate claim, and that the parties had entered into a contract to share whatever proceeds the defendant obtained from the child's estate. The defendant denies that the plaintiff has a valid claim.

Motion for Production

[4] The plaintiff seeks production, pursuant to **Rules 14 and 16**, of six emails included in the defendant's Affidavit Disclosing Documents. The entire text of three emails has been disclosed in hard copy and the defendant has agreed to provide an electronic copy of those. The other three emails have been partially redacted and the defendant claims solicitor – client privilege over the redacted information. The defendant agrees to provide an electronic copy of those emails.

[5] The plaintiff seeks an order:

1. To require the defendant to provide unredacted copies of the three emails over which privilege has been claimed; and
2. Production of all six emails in "native" form, in order for the plaintiff to examine the "metadata" embedded in the emails.

[6] The defendant objects to both of these demands.

Relevance of sought after information

[7] The evidence on this motion consists of two affidavits of the plaintiff with attached documentary evidence, and the affidavit of its defendant's solicitor.

[8] The plaintiff alleges that he obtained emails from the child's mother, Carol Sampson, which he forwarded by email to the defendant to assist in the defendant's claim against the child's estate. The plaintiff says that copies of some of those emails were produced in the defendant's affidavit and that they have been altered from their original form. Those emails that were produced without redaction show that they were emails from Ms. Sampson, that were forwarded by the defendant to his legal counsel at the time, George Ash. (The reason, I am told, for production is that these unredacted emails had previously formed part of a court record and so were already available to the plaintiff.)

[9] The plaintiff contends that the altered emails were provided to the court in support of the defendant's claim against the estate of his child. If true, says plaintiff's counsel, it brings the defendant's credibility into question.

[10] I agree that the credibility of the plaintiff and of the defendant are relevant issues in this case. I also agree that if it can be demonstrated that the defendant sought to mislead the court charged with hearing the estate claim, for his own advantage, then evidence of that deception is relevant. To the extent that these six emails relate to those issues they are relevant.

[11] For the reasons that follow I have concluded that the information that has been redacted has not been shown to attract the protection of solicitor-client privilege.

Solicitor Client Privilege

[12] During the hearing I ordered, pursuant to **Rule 85.06(2)(c)**, that the defendant provide me with unredacted copies of the three emails over which privilege has been claimed. I have reviewed those and heard submissions of counsel as to why, if privileged, they might still be produced.

[13] The first question is whether the redacted information is privileged.

[14] The three documents over which privilege has been claimed are itemized as "F", "H", and "I" in the defendant's brief.

[15] At the top of each email the words "From:", "Sent", "To:", "Subject", and "Attachments" are included but the information following each of these words has been redacted. Below this and in the body of each email is: "Peter Mburu…. Begin forwarded message". Below this, the three emails have the following unredacted information:

> F: Email #3: Carol Ann and Jamie Royal, sent to two recipients and copied to […] and one other, dated March 22, 2006. Subject line: [no subject]
>
> H: Email #5: Carol Ann and Jamie Royal to eight email addresses, including […], and copied to four other addresses, which email is dated June 20, 2006. Subject line: [no subject];
>
> I: Email #6: Carol Ann and Jamie Royal to four email addresses and copied to four recipients including […], which email is dated June 22, 2006. Subject line: FW: emailing: Tristans grad 014. (The email also includes the original email from "Denise Codiac" to Carol Ann and Jamie Royal on the same date.)

[16] Taking the information already available to the plaintiff from what has been disclosed, the issue is:

> When a client forwards third party information by email to their solicitor, without further comment, is the fact that the information was sent, who it was sent to, the date/time that it was sent, the subject, or the contents of attachments, subject to solicitor client privilege?

[17] Solicitor-client privilege is a substantive legal right.

[18] To find solicitor client privilege the following key requirements must be found to have existed:

1. That the communication was made within the ordinary scope of professional employment between the solicitor and client, and made confidentially;
2. That the circumstances indicate that the parties intended to keep the contested communications secret; and
3. That the communications were made in the course of seeking legal advice.

See, Solosky v. The Queen [1981] SCR 821 at page 837

[19] The onus is on the party asserting privilege to establish that the communications in question are privileged. Such claims are to be assessed on the facts specific to that claim. Once privilege has been established, the onus is on the party seeking to overcome the privilege to establish that the communications should be disclosed. *See*, R. Hubbard, Susan Magotiaux, & Suzanne M. Duncan, *The Law of Privilege in Canada*, Volume 2., loose-leaf (Toronto: Thomson Reuters Canada Limited, 2016,2017), c. 11 and authorities cited therein.

[20] The defendant has not given evidence on this motion to explain what he understood about solicitor-client privilege. I am left to infer from the affidavits of the plaintiff and the documentary evidence that these emails were "made within the ordinary scope of professional employment between the solicitor and client". The evidence demonstrates that the time these emails were apparently sent and forwarded, was consistent with the time that the defendant was consulting with Mr. Ash in relation to his estate claim, and the contents appear to speak to issues that might have been relevant in the estate claim. It is a less than ideal evidentiary foundation for a privilege claim.

[21] There is no evidence to support the position that the redacted information was intended to be confidential or, even if it was, why it should be privileged.

[22] The uncontradicted evidence of the plaintiff is that he met with Mr. Ash "on behalf of the Defendant" and he was present on at least one occasion when the defendant consulted Mr. Ash by telephone. He also avers that there was an agreement that he would be copied on all email communications between Mr. Ash and the defendant in relation to the estate claim. This is evidence that runs contrary to the suggestion that the email communications were intended to be confidential.

[23] The redacted portions neither seek nor provide legal advice. There is some evidence that would be consistent with the communication being part of a continuum of communications between the defendant and Mr. Ash in relation to the estate claim, but again in the absence of evidence it would be speculative to conclude that. This is particularly so where other emails that might form part of that continuum have been produced without redactions.

[24] The text in the original emails from "Carol Ann and Jamie Royal" were sent or copied to a number of addresses, none of which have been linked to this

litigation or the estate claim, so the information being forwarded by the defendant to Mr. Ash was clearly not confidential or privileged, a fact acknowledged by the defendant's production.

[25] Not everything that happens in a solicitor-client relationship is privileged. S*ee, Jetport v. Global Aerospace* 2013 ONSC 6380 in which Frank, J.distinguished the fact of a discussion from the substance of the discussion:

> 44 [The test for solicitor-client privilege]… to attach is couched in terms of communications. But, the courts have cautioned against drawing too fine a line between a "communication" and a "fact". LeBel J., speaking for the majority in Maranda at para. 31, citing Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2nd ed. (Toronto: Butterworths, 1999), referred to the fineness of the distinction between a fact and a communication and the risk of eroding privilege in which making such a distinction can result.
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> 45 To avoid this erosion, only facts that have an independent existence outside of solicitor-client privileged communications are not protected by the privilege*: Currie v. Symcor Inc.* (2008), 244 O.A.C. 3 (Div. Ct.), at para. 49. This approach recognizes that not everything that happens in the solicitor-client client relationship falls within the ambit of privileged communications while at the same time acknowledging that apparently neutral information or facts can reveal volumes about a communication and can reveal information that would be protected by solicitor-client privilege (*see Maranda*, at paras. 27 and 48).

[26] The timing of receipt of legal advice is not necessarily protected by solicitor-client privilege. *See*, *Blue Line Hockey Acquisitions v. Orca Bay Hockey Ltd.* 2007 BCSC 143, at paras. 23-26.

[27] The purpose for which these emails were sent to Mr. Ash is unknown. To say that by sending them to a lawyer, the emails (or parts thereof) are privileged is insufficient to meet the burden that rests on the defendant. If for example, the information was intended to be relied upon to prove facts that the defendant would rely on in support of his case, then privilege would not attach. *See*, *Blue Line Hockey*, *su*pra, at paras. 154-157:

[28] Having regard to the circumstances I conclude that the evidence in this motion is wholly insufficient to establish the existence of privilege in relation to the redacted information. Therefore, the plaintiff's motion is granted. The defendant will produce the three redacted emails in their original form without redactions.

Production in "Native" form

[29] The plaintiff also seeks production of the six emails in what was characterized as "native form", the goal being to examine the "metadata".

[30] In *Laushway v. Messervey* 2014 NSCA 7, the plaintiff appealed from an order directing him to turn over his computer to the defendants for the purpose of a forensic analysis of its hard drive on the basis it was thought to contain information necessary for a fair trial.

[31] The issues in that case, as enumerated by Saunders J.A., were:

1. Did the sought-after metadata in the appellant's computer fall within the definition of "electronic information" in **Rule 14.02**?
2. If so, was the metadata "relevant" as defined in **Rule 14**?
3. If so, which party bore the burden of satisfying the court that the production order ought to be granted, or refused?

[32] The Court held that there is a broad judicial discretion to order production of electronic information where it is found to be "relevant". An order for production must ensure that the legitimate privacy interests of the holder of the metadata are effectively protected in the production order, while affording the opposite party limited access necessary to fairly advance their position.

[33] In that case, the moving party lead evidence of two experts that spoke to the type of information that should be available and the methods to be used to obtain that information, while protecting the privacy interests of the holder of the information. The trial judge's order was detailed in setting out the conditions on which the examination was to be carried out and how to meet these objectives.

[34] In this motion, assuming the relevancy of the sought-after information, I have no evidence that demonstrates:

- whether such "metadata" would exist,
- in what form it might exist;
- where or how it would be retrieved;
- who would conduct the forensic examination;

- what would be necessary for a proper examination to isolate relevant information;
- what steps would be necessary to ensure that the legitimate privacy interests of the defendant are safeguarded.

[35] Counsel for the plaintiff made submissions as to what he believes should exist, and what he hopes it will show. With respect, his views, however informed, are not sufficient for a court to properly exercise its judicial discretion to make such an order. More is required. It is not possible to fashion an order that responds to the balancing that is required in crafting such a production order, in the absence of evidence that responds to these issues.

[36] For this reason, the plaintiff has not met the burden to show that the "native form" of the email should be produced.

Conclusion

[37] The claim of solicitor-client privilege over three emails is rejected. Copies of those emails will be produced without redaction.

[38] The six emails in question will be produced in electronic form, but the request that they be produced in "native" form is denied.

[39] If the parties cannot agree on costs, I will receive their written submissions as to costs, on a schedule they agree to. If they cannot agree on a schedule I will set one for them, and if necessary direct oral submissions.

[40] Order accordingly.

Duncan, J.