

**SUPREME COURT OF NOVA SCOTIA**

**Citation:** *Ionian Sea Investments Inc. v. Sushi Nami Franchising Limited*,  
2023 NSSC 268

**Date:** 20230301

**Docket:** Hfx No. 509638

**Registry:** Halifax

**Between:**

Ionian Sea Investments Inc.

*Applicant*

v.

Sushi Nami Franchising Limited, a body corporate, Noodle Name Quinpool  
Restaurant Inc., a body corporate, Fan Yang and 3268652 Nova Scotia Limited  
carrying on business as Keller Williams Selects Realty

*Respondents*

**Date:** 20230301

**Docket:** Hfx No. 517562

**Registry:** Halifax

**Between:**

Fan Yang and 3268652 Nova Scotia Limited, carrying on business as Keller  
Williams Select Realty, a body corporate

*Applicants*

v.

Benjamin Pryde and McInnes Cooper, a partnership

*Respondents*

**DECISION**

**Judge:** The Honourable Justice C. Richard Coughlan  
**Heard:** February 16, 2023, in Halifax, Nova Scotia  
**Oral Decision:** March 1, 2023  
**Written Decision:** September 13, 2023  
**Counsel:** Andrew Sowerby, Counsel for Fan Yang and 3268652 Nova  
Scotia Limited  
Sarah A. Walsh, Counsel for Sushi Nami Franchising Limited  
and Noodle Nami Quinpool Restaurant Inc.  
Justin Adams, Counsel for Benjamin Pryde and McInnes  
Cooper

**By the Court:**

[1] Sushi Nami Franchising Limited (Sushi Nami) owns real property at 6450/6452 Quinpool Road in Halifax, Nova Scotia. The ground floor of the building on the property was leased to a related company Noodle Nami Quinpool Restaurant Inc. (Noodle Nami) for a period of ten years commencing in 2020, with an option to extend for an additional five years. Sushi Nami decided to sell the real property. It retained Fan Yang, a real estate agent associated with 3268652 Nova Scotia Limited carrying on business as Keller Williams Select Realty (Keller Williams) to act for it in connection with the sale. Eventually, Sushi Nami entered into an agreement of purchase and sale of the property with Ionian Sea Investments Inc. (Ionian Sea) which provided the purchaser would have vacant possession.

[2] The issue of the Noodle Nami lease arose and Sushi Nami gave notice of termination of the Agreement. Ionian Sea refused to accept termination and commenced an application in court for specific performance of the agreement or in the alternative damages. Two additional applications in court were filed. The issue of solicitor-client privilege was raised.

[3] Mr. Yang and Keller Williams filed the following motions. In the application *Ionian Sea v. Sushi Nami* (Hfx No. 509638) for:

- 1) Declaration that Sushi Nami Franchising Limited has implicitly waived solicitor-client privilege over all its communications with Benjamin Pryde and McInnes Cooper regarding 6450/6452 Quinpool Road in Halifax, Nova Scotia (the “Property”), up to and including July 23, 2021; and
- 2) An order that Sushi Nami Franchising Limited disclose all communications between it and Benjamin Pryde and McInnes Cooper regarding the Property up to and including July 23, 2021.

In the application *Fan Yang and Keller Williams v. Benjamin Pryde and McInnes Cooper* (Hfx No. 517562) for:

- 1) Declaration that Sushi Nami Franchising Limited has implicitly waived solicitor-client privilege over all its communications with Benjamin Pryde and McInnes Cooper regarding 6450/6452 Quinpool Road in Halifax, Nova Scotia (the “Property”), up to and including July 23, 2021; and

- 2) An order that Benjamin Pryde and McInnes Cooper disclose all communications with Sushi Nami Franchising Limited regarding the Property up to and including July 23, 2021.

[4] The facts are as follows: Sushi Nami owns real property located at 6450/6452 Quinpool Road in Halifax, Nova Scotia which consists of a three storey, mixed use building, containing retail, office and residential units. Sushi Nami leased the ground floor of the building to a related company Noodle Nami, which had a 10 year lease commencing in 2020 with an option to extend the lease for an additional five years.

[5] In March 2021, Catherine Luo, recognized agent for Sushi Nami contacted Mr. Yang, a real estate salesperson affiliated with Keller Williams, who operated as an independent contractor, to discuss the potential sale of the property.

[6] On June 24, 2021, Ms. Luo, on behalf of Sushi Nami engaged Keller Williams to list and sell the property. Approximately July 13, 2021, the property was listed on the multiple listing service MLS and described in the sales listing as:

This is a rare opportunity to own a mixed use investment property on one of the busiest street near downtown Halifax with parking spaces. This could be owner occupied or pure investment. Quinpool Road is a well established commercial district that is surrounded by large residential community, variety of retail businesses and services, Dalhousie university, etc. This property is an attractive 4,296 SF 3 story building plus 989 SF basement for storage. First level is retail with 10 years lease. Second level has two offices and a board room, this could be the office space for your business. Alternatively it can be turned into a 3 bedroom apartment. Third level is a 3 bedrooms apartment is currently renting to Dalhousie students. There are 4 parking spaces on site at the rear, plus free nearby street parking on Beech Street. The building was significantly renovated in 2015. Some other improvements carried to the building in 2018 including separation of floors, ductless heat pump; HRV, rear staircase, etc. It's in a great condition and easy to maintain! Don't miss out.

[7] On July 21, 2021 Ionian Sea made an offer to purchase the real property for \$1,250,000. Sushi Nami presented a counter-offer in the amount of \$1,390,000, which was accepted. The agreement of purchase and sale contained the following clauses:

2.1. This Agreement shall be completed on or before the 30 day of September, 2021 (the closing date). Upon completion, vacant possession of the Property shall be given to the Buyer unless otherwise provided as follows:

...

8.1. This Agreement is subject to the review by both the Buyer's and the Seller's lawyers, acting reasonably with respect to wording and content within the Agreement. This review shall be deemed to have been acceptable to both parties, unless the other party or their Agent is notified to the contrary, in writing, on or before the 23<sup>rd</sup> day of July, 2021.

If notice to the contrary is received, either party shall be at liberty to terminate this Agreement and the deposit shall be returned to the Buyer.

[8] On July 22, 2021, Ms. Luo emailed Sushi Nami legal counsel Benjamin Pryde stating:

Hi Ben,

We are selling the Quinpool road building and we have an accepted offer, please check and advise what I need to do next. Attached the accepted offer and I think Fan Yang (our realtor agent) will need some documents from you to provide to the buyer's agent.

Should you have any further question please let me know.

Catherine Luo

[9] Prior to the expiration of the lawyer review period set out in clause 8.1 of the agreement of purchase and sale, Mr. Pryde did not communicate to Mr. Yang any concerns about the wording of the agreement of purchase and sale.

[10] On August 6, 2021 Marilisa Benigno, Ionian Sea's real estate agent, emailed Mr. Yang to determine if Noodle Nami wished to stay on as a month to month tenant after closing, as Ionian Sea had no immediate plans for the property. On August 9, 2021 Mr. Yang told Ms. Benigno Sushi Nami intended Noodle Nami's lease to remain in effect after closing.

[11] Ms. Luo and Dae Jon, President of Sushi Nami, consulted with Mr. Pryde and in discussions on August 10, 2021, Mr. Pryde advised Ms. Luo there may be an issue with the sale.

[12] Sushi Nami informed Ionian Sea it was prepared to sell the property without the Noodle Nami lease if Ionian Sea was prepared to pay an additional \$350,000. Ionian Sea was not prepared to pay the additional money. Sushi Nami terminated the agreement of purchase and sale. The stated reason for the termination was “commercial lease agreement cannot be terminated and property cannot be vacant per the signed APS.” Ionian Sea did not accept the termination.

[13] On October 8, 2021 Ionian Sea commenced an application in court against Sushi Nami (Hfx No. 509638) alleging breach of the agreement of purchase and sale and seeking relief including specific performance. Sushi Nami filed a notice of contest.

[14] On June 23, 2022, Sushi Nami and Noodle Nami filed an application in court against Mr. Yang and Keller Williams (Hfx No. 515858) seeking contribution to and indemnity for damages owing to Ionian Sea. Mr. Yang and Keller Williams filed a notice of contest.

[15] On September 2, 2022, Mr. Yang and Keller Williams commenced an application in court against Mr. Pryde and McInnes Cooper (Hfx No. 517562) seeking contribution to and indemnity for damages owing to Sushi Nami and Noodle Nami. Mr. Pryde and McInnes Cooper filed a notice of contest in which they stated at para. 4:

Paragraphs 23, 25 to 27, and 35 to 37 of the KW Application refer to matters that are arguably subject to privilege. The holders of the privilege, namely Sushi Nami Franchising Limited and Noodle Nami Quinpool Restaurant Inc. (“Privilege Holders”), have asserted that they wish to uphold the privilege.

[16] Applications Hfx No. 509638 and Hfx No. 515858 were consolidated by Order issued November 7, 2022 as Hfx No. 509638.

## **Law**

[17] The issue of this motion is whether Sushi Nami implicitly waved privilege over solicitor-client communications with Mr. Pryde and McInnes Cooper in relation to the real property.

[18] The nature of solicitor-client privilege was described by Beveridge, J.A. in *Nova Scotia (Attorney General) v. Cameron*, 2019 NSCA 58 where he stated at para. 64:

It cannot be gainsaid that solicitor-client privilege is fundamental to the proper functioning of our legal system. It has evolved from its roots as a rule of evidence to not just one of substance but also a principle of fundamental justice (*Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, [2008] 2 S.C.R. 574 at paras. 9-10; *Minister of National Revenue v. Thompson*, 2016 SCC 21 at para. 17). Except for limited exceptions, all information protected by solicitor-client privilege is out of reach of the state. It cannot be forcibly discovered or disclosed and is inadmissible in court. Arbour J., in *Lavalee, Rackel & Heintz v. Canada (Attorney General)*, 2002 SCC 61, for the Court, explained:

24 It is critical to emphasize here that all information protected by the solicitor-client privilege is out of reach for the state. It cannot be forcibly discovered or disclosed and it is inadmissible in court. It is the privilege of the client and the lawyer acts as a gatekeeper, ethically bound to protect the privileged information that belongs to his or her client. Therefore, any privileged information acquired by the state without the consent of the privilege holder is information that the state is not entitled to as a rule of fundamental justice.

[19] The solicitor-client privilege belongs to the client. In this case Sushi Nami has not consented to the disclosure of the solicitor-client information sought.

[20] In *S. & K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd.*, [1983] B.C.J. No. 1499 (S.C.), McLachlin J., as she then was, stated at para. 6:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege: (1) knows of the existence of the privilege; and (2) voluntarily evinces an intention to waive the privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter*, [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

This is the leading decision on waiver in Canada *Nova Scotia (Attorney-General) v. Cameron*, 2019 NSCA 38 at para. 30.

[21] This matter deals with the issue of whether there has been an implied waiver of the privilege. Are the facts such that “fairness and consistency” require waiver. In *S. & K. Processors Ltd.*, McLachlin J. addressed fairness and consistency at para. 10:

Notwithstanding the fact that the Evidence Act, s. 11, does not require production of the documents in question, can it be said that in the interests of fairness and consistency the doctrine of waiver requires their disclosure? As pointed out in *Wigmore on Evidence*, McNaughton revision (1961), vol 8, pp. 635-36 relied on by Meredith J. in *Rogers v. Hunter*, supra, double elements are predicated in every waiver – implied intention and the element of fairness and consistency. In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent. The law then says that in fairness and consistency it must be entirely waived. In *Rogers v. Hunter*, the intention to partially waive was inferred from the defendant’s act of pleading reliance on legal advice. In *Harich v. Stamp* (1979), 27 O.R. (2d) 395, 11 C.C.L.T. 49, 14 C.P.C. 247, 59 C.C.C. (2d) 87, 106 D.L.R. (3d) 340 (C.A.), it was inferred from the accused’s reliance on alleged inadequate legal advice in seeking to explain why he had pleaded guilty to a charge of dangerous driving. In both cases, the plaintiff chose to raise the issue. Having raised it, he could not in fairness be permitted to use privilege to prevent his opponent exploring its validity.

[22] In *The Law of Evidence in Canada* 6<sup>th</sup> ed., Sopinka, Lederman & Bryant, the authors state at page 1107:

14.170 For there to be deemed waiver of solicitor-client privilege, the party who received the legal advice must have made its receipt an issue in the claim or defence. Therefore, where the state of mind in question is whether the party acted in good faith or in reliance upon the other party’s representations, compelled disclosure of solicitor-client communications requires two elements, namely: (1) that the presence or absence of legal advice is relevant and material to the existence or non-existence of a claim or defence; and (2) that the party who received the legal advice made receipt of it an issue in the case.



[23] The situation in which the person claiming solicitor-client privilege relied upon advice received from the person it was claiming against was addressed in *Rogers v. Bank of Montreal*, [1985] B.C.J. No. 2116 (B.C.C.A.) where Hutcheon J.A., in giving the Court's judgment stated at para. 17:

The issue in this case is not the knowledge of the Bank. The issue is whether the Bank was induced to take certain steps in reliance upon the advice from the Receiver on legal matters. To take one instance, the Receiver, according to the Bank, advised the Bank that it was not necessary to allow Abacus time for payment before the appointment of the Receiver. A significant legal decision had been rendered some months earlier to the opposite of that advice. The extent to which the Bank had been advised about that decision, not merely of its result, is important in the resolution of the issue whether the Bank relied upon the advice of the Receiver.

and at para. 19:

...What underlines both that defense and the defense in this case is that the party claiming the privilege relied upon the advice, in one case of the Government, and in the other case of the Receiver, and acting on that reliance took certain steps. That necessarily involves an enquiry into the corporate state of mind of the Bank when it was induced and decided to act...

[24] A party claiming solicitor-client privilege who pleads reliance on another party, and that it, acting on that reliance, took certain action puts the state of mind of the privilege holder in issue. (See *R. v. Campbell*, [1999] 1 S.C.R. 565 at paras. 68-71; *Roynat Capital Inc. v. Repeatseat Ltd.*, 2015 ONSC 1108; *Lloyd's Bank Canada v. Canada Life Assurance Co.* (1991), 47 C.P.C. (2d) 157 (Ont. G.D.); *Toronto-Dominion Bank v. Leigh Instruments Ltd. (Trustee of)*, [1997] O.J. No. 1175 (Ont. G.D.))

### **Motion in Hfx No. 509638**

[25] Applications in Court Hfx No. 509638 and Hfx No. 515858 were consolidated by an Order issued November 7, 2022.

[26] In the notice of application in court Hfx No. 509638, Ionian Sea sought specific performance of the agreement of purchase and sale or in the alternative damages against Sushi Nami. Sushi Nami filed an amended notice of contest in

which it denied Ionian Sea's claim including pleading of Mr. Yang's lack of experience as a real estate agent and lack of familiarity with the English language.

[27] In the notice of application in court Hfx No. 515858, Sushi Nami and Noodle Nami claimed against Mr. Yang and Keller Williams for a declaration that Mr. Yang and Keller Williams must make contribution to and/or indemnify Sushi Nami in respect of any liability that arises or is apportioned against Sushi Nami in Hfx No. 509638, judgment for damages and interest or costs that Sushi Nami may be ordered to pay Ionian Sea and to indemnify Sushi Nami and Noodle Nami for their losses sustained if specific performance is ordered in Hfx No. 509638.

[28] Sushi Nami and Noodle Nami pleaded they relied on Mr. Yang and Keller Williams stating at paras. 20 and 29 of the notice of application in court:

20. In reliance on Mr. Yang and Keller Williams, Sushi Nami signed the Agreement. Therefore, despite Sushi Nami's intentions and instructions that the Commercial Lease remain intact after the sale of the Property, the Vacant Possession Clause meant that upon closing, the Property was *not* subject to any tenancy.

...

29. Sushi Nami and Noodle Nami relied on the skill and expertise of Mr. Yang and Keller Williams to properly advise it on all relevant aspects surrounding the sale of the Property, to its detriment. Had Sushi Nami been aware that Ionian was seeking vacant possession of the Property, it would not have entered into the Agreement. Sushi Nami's losses are a result of the actions and omissions of Mr. Yang and Keller Williams.

Mr. Yang and Keller Williams pleaded the *Tortfeasors Act*, RSNS 1989 c. 471 and the *Contributory Negligence Act*, RSNS 1989 c. 95.

[29] Sushi Nami and Noodle Nami filed a notice of contest denying the claim.

[30] In an affidavit filed December 16, 2022 Dae Jon, president of Sushi Nami and Noodle Nami stated at para. 64:

I relied on the experience and my prior dealings with Fan to correctly and accurately reflect our instructions in the Agreement. Based on this reliance, and knowing that Fan clearly understood our

intention that the Noodle Nami Lease remain intact post-sale, I authorized Catherine to sign the Agreement.

[31] I find that in Hfx No. 509638 by pleading reliance on Mr. Yang and Keller Williams, Sushi Nami put its corporate state of mind in issue. The presence or absence of legal advice is relevant and material to the existence or non-existence of a claim or defence and Sushi Nami made the presence or absence of legal advice an issue in the application. Fairness and consistency require the waiver of the solicitor-client communications.

[32] The waiver of privilege and disclosure should be as narrow as possible and limited to discussions between Sushi Nami and its counsel regarding 6450/6452 Quinpool Road, Halifax, Nova Scotia between July 21, 2021 and July 23, 2021. This application arises out of a proposed real property transaction. When dealing with real property much information is available from public sources at the appropriate Land Titles office or registry of deeds. Corporate information is available from the office of the Registrar of Joint Stock Companies. There is no need to waive solicitor-client privilege prior to July 21, 2021.

[33] The Motion in Hfx No. 509638 is allowed upon the following terms:

1. Declaration that Sushi Nami Franchising Limited has implicitly waived solicitor-client privilege over all its communications with Benjamin Pryde and McInnes Cooper regarding 6450/6452 Quinpool Road in Halifax, Nova Scotia (the "Property") from July 21, 2021 up to and including July 23, 2021.
2. An order that Sushi Nami Franchising Limited disclose all communications between it and Benjamin Pryde and McInnes Cooper regarding the Property from July 21, 2021 up to and including July 23, 2021.

### **Motion Hfx No. 517562**

[34] Sushi Nami, the holder of the privilege is not a party to this application in court. However, the reason for this application in court is that Sushi Nami and Noodle Nami commenced the application in court Hfx No. 509638 (formerly Hfx No. 515858) against Mr. Yang and Keller Williams in which Sushi Nami pleaded reliance on Mr. Yang and Keller Williams' expertise in support of its claim, putting Sushi Nami's corporate state of mind in issue. In the application Hfx No. 509638, Sushi Nami and Noodle Nami pleaded the *Tortfeasors Act, supra*. Both applications Hfx No. 517562 and Hfx No. 509638 have as a basis the same real property

transaction, the proposed sale of 6450/6452 Quinpool Road, Halifax, Nova Scotia from Sushi Nami to Ionian Sea.

[35] In Hfx No. 517562 Mr. Yang and Keller Williams are seeking among other relief that Mr. Pryde and McInnes Cooper make contribution to or indemnify Sushi Nami and Noodle Nami with respect to any liability that arises or is apportioned against them in the application of Hfx No. 509638.

[36] Considering the particular facts of this application, in the words of McLachlin, J. “fairness and consistency require” waiver of the solicitor-client privilege in this application.

[37] As with the waiver in Hfx No. 509638, the waiver of privilege and disclosure should be as narrow as possible and limited to discussions between Sushi Nami and its counsel regarding 6450/6452 Quinpool Road, Halifax, Nova Scotia between July 21, 2021 and July 23, 2021.

[38] The Motion in Hfx No. 517562 is allowed upon the following terms:

1. Declaration that Sushi Nami Franchising Limited has implicitly waved solicitor-client privilege over all its communications with Benjamin Pryde and McInnes Cooper regarding 6450/6452 Quinpool Road in Halifax, Nova Scotia (the “Property”) from July 21, 2021 up to and including July 23, 2021.
2. An order that Benjamin Pryde and McInnes Cooper disclose all communications with Sushi Nami Franchising Limited regarding the Property from July 21, 2021 to and including July 23, 2021.

Coughlan, J.