CITATION: Masse v. TerraFarma Inc, 2024 ONSC 789
COURT FILE NO.: CV-21-76164-000
DATE: 2024/02/06

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Todd Masse, Plaintiff/Moving Party

AND:

TerraFarma Inc., Defendant/Responding Party

BEFORE: I. R. Smith J.

COUNSEL: Alex Van Kralingen and Katherine Chau, Counsel for the Plaintiff/Moving Party

Bonnie Roberts Jones, Counsel for the Defendant/Responding Party

HEARD: October 17, 2023

REASONS ON MOTION

Introduction

[1] The plaintiff sues the defendant for wrongful dismissal. On this motion, he seeks production of documents and answers to questions refused during discovery respecting legal advice received by the defendant in connection with a workplace investigation which resulted in the termination of the plaintiff's employment for cause. He takes the position that the defendant has waived any privilege that might have prevented such an order from being made.

[2] The defendant takes the position that there has been no waiver and that this portion of the motion should be dismissed.[1]

Facts

[3] The plaintiff was the Chief Commercial Officer of the defendant corporation. In December of 2020, a workplace investigation was commenced into the conduct of the plaintiff and an outside investigator was hired. In the course of her work, the investigator interviewed a member of the

[1] The defendant consents to the granting of other relief sought by the plaintiff.

board of the defendant, one Horst Hueniken, and subsequently prepared a bullet point summary of that interview. The 15-page single spaced summary included the following bullet point:

> - The lawyer that Geoff Hoover hired, who drafted the letter, had recommended to Geoff that he consider termination with pay and hiring someone like the Investigator for an independent assessment.

[4] The plaintiff characterizes this information as (1) an indication that the defendant had received legal advice at some point before the investigation to terminate the plaintiff without cause and (2) that Mr. Hueniken intentionally revealed this legal advice to an outsider of the company, the investigator. The plaintiff argues that this constitutes the first waiver of privilege.

[5] Eventually, on February 11, 2021, the investigator issued a report comprising of 755 pages with its appendices. The summary of the interview of Mr. Hueniken was attached as an appendix to the report.

[6] The plaintiff was terminated for cause on March 4, 2021. He commenced this action, and a statement of claim was issued on May 28, 2021. In its statement of defence, the defendant referred to the investigation report to which I have referred, writing as follows:

> The Defendant asserts and relies on the contents of the investigation report issued February 11, 2021, in establishing the reasonableness of its manner of termination.

[7] The plaintiff says that this constitutes a second waiver of privilege given that the statement of defence refers to the investigation report, which includes the summary of the interview of Mr. Hueniken, which in turn includes the legal advice summarized therein.

[8] On September 3, 2021, the plaintiff brought a motion to compel the production of the investigation report. Nightingale J. granted that relief and, on September 13, 2021, the defendant's then counsel provided the report, including the summary of the interview of Mr. Hueniken with the legal advice left unredacted. The plaintiff says that this constitutes the third waiver of privilege.

[9] On January 31, 2022, the plaintiff's counsel wrote by email to propose a discovery plan to counsel for the defendant. In so doing, he pointed out the disclosure of legal advice in the investigation report, quoted it, and the wrote as follows:

> Given this disclosure in the investigation report (especially after resisting disclosing the report to us), and the failure of TerraFarma to take any steps to shield this reference from disclosure, we believe the content of the advice is relevant to the proceeding. We believe this information speaks to the propriety of TerraFarma's choice to terminate Mr. Masse's employment on a "for cause" basis, as well as relates to additional claims for aggravated and punitive damages. Give the standard for relevance of documentary disclosure, we believe it [the legal advice] should be produced.

[10] Following receipt of this email, the defendant took no steps to retract the legal advice which was disclosed in the investigation report. Instead, on March 31, 2022, the investigation, unredacted, was produced to the plaintiff again when the defendant delivered its affidavit of documents to the plaintiff. The plaintiff says that this constitutes the fourth waiver of privilege.

[11] On October 13, 2022, I heard a motion, brought by the plaintiff, for a further and better affidavit of documents. Part of that motion included a request for production of all documents relating to the legal advice referred to in the investigation report. In my endorsement dated October 14, 2022, I disposed of this issue as follows:

> The defendant produced to the plaintiff an investigator's report of several hundred pages' length in which, on one page, the investigator summarizes an interview conducted with a member of the defendant corporation's board. In one bullet point of that summary, it indicates that the board member revealed to the investigator advice received from the defendant's lawyer.
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> The plaintiff claims that the disclosure to the investigator and the subsequent production of the report to the plaintiff constitute a waiver of any privilege over the advice in question and have sought further evidence of communications between TerraFarma's counsel and TerraFarma regarding the termination of the plaintiff's employment (category 12 of Appendix A).

> This issue was first flagged for the defendant in a discovery plan prepared by the plaintiff in January of this year. Counsel for the defendant advises that she did not understand the reference in the discovery plan to communications with the defendant's counsel because she could not find any reference to such communications in the very lengthy investigation report. Further, she reports that she did not understand until very recently that the plaintiff intended to argue that the defendant had waived privilege.
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> Counsel advises that the disclosure of the legal advice in question was inadvertent and that she intends to take steps to retract the privileged information from the plaintiff.
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> I am prepared to accept the representations of counsel as an officer of the court. Given the near sacrosanct nature of solicitor-client privilege in our law, I am not prepared at this time, on this limited record, to conclude that waiver has been established. To that extent, the relief requested by the plaintiff is denied, but without prejudice to the right of the plaintiff to bring a further motion on this issue at which time the issue can be litigated on a proper record, if the issue cannot first be resolved between the parties.
>
> However, to the extent that the documents sought by the plaintiff exist, it seems to me that they are relevant and should be listed in Schedule B of a further and better affidavit of documents.

[12] The defendant's representative was discovered in November 2022, and refused to answer questions respecting the legal advice referred to in the interview summary.

Discussion

[13] In *McQueen, et al. v. Mitchell, et al.*, 2022 ONSC 649, Backhouse J., writing for the Divisional Court, helpfully summarized some of the principles respecting waiver of privilege as follows (at paras. 56, 57 and 59):

> In *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, 90 B.C.L.R. (5th) 318, Harris J.A. explained the starting point for understanding the test for implied waiver at para. 50:

> The starting point of an articulation of the test for implied waiver must recognize what the Supreme Court of Canada has made clear about the importance of solicitor-client privilege. In *R. v. McClure*, 2001 SCC 14 (S.C.C.) at para. 35, the Court said that solicitor-client privilege "must be as close to absolute as possible to ensure public confidence and retain relevance. *As such, it will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis"* (emphasis added). Furthermore, the Court said (at para. 17) that solicitor-client privilege "is part of and fundamental to the Canadian legal system. ... [I]t has evolved into a fundamental and substantive rule of law." This view was affirmed in *Goodis v. Ontario (Ministry of Correctional Services*), 2006 SCC 31 at paras. 20-21, where the Supreme Court of Canada made clear that communications protected by privilege should be disclosed only where "*absolutely necessary*", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case." [Underlining in original; italics added.]

Caution must be exercised not "to treat implied waiver as ultimately a discretionary call about trial fairness." The implication of waiver must be consistent with "the near absolute protection of solicitor-client privilege mandated by the Supreme Court": *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263, 11 B.C.L.R. (6th) 365, quoting *Soprema Inc.*, at para. 51.

[…]

Solicitor-client privilege can be implicitly waived by a client "where the voluntary conduct of that person indicates an *implied or objective intention to waive it*" (emphasis in original) though it will only yield in the clearest of cases, and does not involve a balancing of interests: *Oliva et al. v. Dickson et al.*, 2019 ONSC 173, at para. 17. Consideration must be given to the "near absolute protection" over the privilege mandated by the Supreme Court of Canada: *Oliva*, at para. 20.

[14] The onus to show that privilege has been waived and ought to be set aside rests on the plaintiff (*Jones v. Smith*, [1991] 1 S.C.R. 455, at pp. 475; *General Assurance Co. v. Chrusz* (1999),

45 O.R. (3d) 321 (C.A.), per Rosenberg J.A., at pp. 369 – 370). Here, the defendant argues that the plaintiff has failed to discharge that onus for several reasons. First, the evidence does not establish that Mr. Hueniken had either the authority or the intention to waive privilege. Further, no waiver is established where, as here, the party said to have waived privilege has no intention of relying on the advice in question at trial. Last, the defendant argues that Mr. Hueniken did nothing more that reveal the bottom line of advice received and that doing so does not constitute a waiver of privilege over that advice. In my view, there is merit to each of these submissions.

[15] Nothing in the evidence before me established that Mr. Hueniken had the authority to waive privilege on behalf of the defendant. All that I know of Mr. Hueniken is that he is an independent member of the defendant's board, that there are other board members and executives at the defendant corporation, and that he is not a lawyer. In my view, it has not been established that he had the authority to waive privilege on behalf of the defendant. In this respect, I note that Corbett J. wrote in *Guelph v. Super Blue Box Recycling Corp.* (2004), 2 C.P.C. (6th) 276 (Ont. S.C.J.), at para. 84, as follows respecting an alleged waiver by the City of Guelph: "Surely no one staff person, City Councillor, or even the Mayor herself, has the authority to waive privilege unilaterally on behalf of Guelph." Here, there is no evidence that Mr. Hueniken had the unilateral authority to waive privilege on behalf of the defendant corporation.

[16] In the absence of evidence of such authority, it is difficult to conclude the Mr. Hueniken intended to waive privilege when he spoke to the investigator. Clearly, Mr. Hueniken was acting voluntarily when he was speaking to the investigator, but there is no evidence that he intended to bind the company or open up its counsel's file for inspection. As the defendant argues, the single brief reference to a lawyer having given advice to Geoff Hoover (who is the president and C.E.O. of the defendant) appears in the summary in the Hueniken interview to be an offhand comment, made to provide background for the investigator, in the context of an interview that approached 2 hours in length.

[17] In any case, it is evident that the defendant did not rely on the advice and has no intention of doing so at the trial of this matter. Assuming that what Mr. Hueniken told the investigator is true, the advice was that the CEO of the company "consider termination [of the plaintiff] with

pay." That, however, is not what happened. The plaintiff was terminated for cause and without pay. Again, the judgment of Corbett J. in *Guelph v. Blue Box, supra,* at paras. 87 – 88, is apt:

> In my view, mere disclosure of the receipt and reliance upon legal advice, in the discovery process, is not sufficient to give rise to waiver of privilege. Where the reliance on the legal advice will be relied upon at trial in respect to a substantive issue between the parties, that is another matter. That is covered by "waiver by reliance". But mere disclosure, by itself, that legal advice was received and followed to explain why a party did something should not be sufficient, by itself, for a waiver of privilege. […]
>
> […] However, solicitor-client privilege is not waived by disclosing that a solicitor's advice was obtained. It is waived when the client relies upon the receipt of the advice to justify conduct in respect to an issue at trial: see *Livent v. Drabinsky*, [2003] O.J. No. 1618 (S.C.J.) per Farley J.; and *Stuart Olson Construction Inc. v. Sawridge Plaza Corp.*, [1996] 2 W.W.R. 396 at 404 (Alta. Q.B.) per Dea J.

[18] Last, I agree with the defendant that Mr. Hueniken's one sentence description of what the lawyer recommended that Mr. Hoover consider, constitutes the "bottom line" of the advice which was given. As such, it cannot be used to justify a finding of waiver. Clancy J. summarized the law on this point in *3464920 Canada Inc. v. Strother*, 2001 BCSC 949, at para. 15:

> I can see no basis for concluding that there was a voluntary intention to waive privilege on the part of the defendants. There was no expressed intention to do so. It is true that the opinions were used to reassure investors as to the probable outcome of the litigation but, on the authorities, disclosure of the "bottom line" of the opinion is not a waiver of privilege.

[19] See also *Paul v. Madawaska*, 2021 ONSC 1689, at para. 93; *Mackin v. New Brunswick*, (1996), 141 D.L.R. (4th) 352 (N.B. Q.B.). Similar conclusions have repeatedly been reached by the Information and Privacy Commissioner of Ontario. See, in this respect, *Re Oro-Medonte*, 2023 CanLII 17172; *Re Vaughan*, 2002 CanLII 46317; *Re Vaughan*, 1998 CanLII 14387, and *Re Bradford West Gwillimbury*, 1999 CanLII 14468.

[20] Here, Mr. Hueniken reported to the investigator that a lawyer recommended to Mr. Hoover "that he consider termination with pay." None of the reasoning behind the advice is revealed and no reliance was or is placed on it. There is no basis upon which to conclude that this offhand comment revealing the barest of descriptions of legal advice constitutes a waiver.[2]

[21] For all these reasons, I have concluded that Mr. Hueniken's comment to the investigator did not constitute a waiver of the defendant's solicitor client privilege.

[22] I am further of the view that the defendant did not waive privilege by including reference to the investigation report in the statement of defence, or by producing a copy of the report pursuant to the order of Nightingale J., or by including another copy of the report in its affidavit of documents. Given that I have concluded that Mr. Hueniken's statement to the investigator did not constitute a waiver of privilege, reference to the document or delivery of a copy of it also does not constitute a waiver of privilege.

[23] In this respect, it bears repeating that the defendant did not rely on the legal advice in question and does not intend to rely upon it in these proceedings. On the contrary, the defendant relies on the conclusions of the investigator as set out in the report that the plaintiff engaged in misconduct and that these conclusions justified termination of the plaintiff's employment with the defendant for cause. The advice reported by Mr. Hueniken was to the opposite effect and was not relied upon by either the investigator or the defendant. As the defendant submits, the advice was contrary to the position the defendant has taken in this litigation and is of limited relevance given that it was provided before the investigation was conducted and all the facts had been reviewed.[3]

[24] Accordingly, I have concluded that no waiver of privilege has been established in this case.

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[2] In this respect the facts render this case distinguishable from the case upon which the plaintiff relies, *Peach v. Nova Scotia*, 2011 NSCA 27, where the disclosure of legal advice in question revealed "the solicitor's opinion and reasons" and "the heart of the opinion" (see para. 37). Here we know almost nothing about what the lawyer's opinion was, nothing at all about the reasoning leading to that opinion, and nothing at all about what other things, if any, Mr. Hoover was advised to "consider."

[3] In this respect, then, and contrary to the argument of the plaintiff, this is not a case like *Regina v. Campbell*, [1999] 1 S.C.R. 565, where privilege was lost because the Crown sought to rely on legal advice given to the police to establish their good faith. Here, the defendant renounces all reliance on the advice provided to Mr. Hoover.

Order and costs

[25] An order will go in the form of the amended draft filed by the plaintiff subject to the following amendments:

- Paragraph 1 of the order will be deleted and the subsequent paragraphs re-numbered.

- In what is now paragraph 4 (and will be paragraph 3 after the paragraphs are renumbered), the words “and Appendix B” will be deleted.

[26] Costs are awarded to the defendant in the amount of $3,000.00 inclusive of taxes.

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I.R. Smith J.

DATE: February 6, 2024