Court of King's Bench of Alberta

Citation: Alberta Drywall & Stucco Supply (Calgary) Inc v Alberta Drywall & Stucco Supply Inc, 2023 ABKB 696

Date: 20231207
Docket: 1503 16770
Registry: Edmonton

Between:

Alberta Drywall & Stucco Supply (Calgary) Inc

Applicant

- and -

Alberta Drywall & Stucco Supply Inc

Respondent

Reasons for Decision
of the
Honourable Justice G.S. Dunlop

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1. Introduction

[1] The defendants apply for an order requiring the plaintiff's expert or the plaintiff to provide the documents referred to by the expert in his report and used by the expert in preparing his report which have not previously been disclosed by the expert or the plaintiff. The defendants also seek an order directing the expert to attend questioning on his report. In oral submissions, the defendants expanded on their filed application to also seek disclosure of documents received but not relied upon by the plaintiff's expert.

2. Rules of Court

[2] The *Rules of Court* do not contain a specific requirement for an expert to list documents reviewed and they provide for court ordered questioning of an expert only in exceptional circumstances.

[3] The substantive portion of Form 25 reads:

> An expert's report must contain, at a minimum,
>
> (a) the expert's name and qualifications,
>
> (b) the information and assumptions on which the expert's opinion is based, and
>
> (c) a summary of the expert's opinion.

[4] Rule 5.37(1) reads:

> The parties may agree, or in exceptional circumstances the Court may direct, that an expert be questioned by any party adverse in interest to the party proposing to call the expert witness at trial.

3. Waiver of Privilege

[5] In support of their application for production of records the defendants submit that the plaintiff waived privilege over its expert's file when it filed the expert report and served it on the defendants. They rely on the recent decision of ***Ho v Connell***, 2023 ABKB 133.

[6] In ***Ho*** the defendants obtained a private investigator's report and provided it to a medical expert. The medical expert's report was disclosed to the plaintiff, but the private investigator's report was not. Feasby, J ordered that the private investigator's report be disclosed, holding that litigation privilege over that report had been waived by the combined effect of the investigator's report being provided to the medical expert and the medical expert's report being served on the plaintiff. The Court in ***Ho*** held that service of an expert's report waives privilege over the records the expert reviewed in forming his or her opinion, while acknowledging earlier decisions of this court which held the opposite, specifically ***Chernetz v Eagle Copters Ltd***, 2005 ABQB 712, ***Grammer v Langpap***, 2014 ABQB 74 and ***Reid v Bitangcol***, 2016 ABQB 122.

[7] There appear to be two lines of authority in Alberta, one which holds that privilege over an expert's report and the material the expert relied upon is not waived until the expert is called as a witness at trial and the other holding that privilege over those things is waived when one party serves the other with the expert's report, as is required for the expert to be called at trial, pursuant to r 5.35.

[8] For the most part, it is not necessary for me to take a position on this point because the plaintiff's expert, Justin Thoman, lists the information and documents he relied in his report upon under the heading "Procedures Performed and Documents Relied On":

> The information relied on in preparation of this report was as follows:
>
> - Amended Statement of Claim dated November 27, 2015 by Alberta Drywall & Stucco Supply Inc. against Alberta Drywall & Stucco Supply (Calgary) Inc. et al, Court File Number 1503 16770.

- Statement of Defence dated February 1, 2016 in the above-named action.
- Plaintiff Affidavit of Records sworn by Blair Cunningham dated February 15, 2017.
- Defendant Alberta Drywall & Stucco Supply (Calgary) Inc. Affidavit of Records sworn by Richard Browne dated August 18, 2017 (reconstituted and Supplemental Affidavit of Records Schedule "A" provided January 31, 2022).
- Continuing Production of Defendant (undated).
- ADSSI-Calgary General Ledgers for the years ended January 31, 2013 and 2014.
- Browne & Sons Plastering General Ledgers for the years ended January 31, 2013 and 2014.
- Additional records requested from Defendants from ACE Point of Sale system and provided via download on in March 2023 (four folders, Upload 1, 2, 3, 4).
- Discussions with Blair Cunningham as well as additional documentary information provided by Mr. Cunningham, attached as an Appendix to this report.

[9] In addition to that comprehensive summary, Mr. Thoman includes pinpoint references to documents in footnotes to the "Detailed Findings" section of his report and in the twelve schedules which form part of his report. Frequently, Mr. Thorman's references are to production numbers in a party's document production.

[10] With one exception, all the information relied upon by Mr. Thoman has been disclosed to the defendants. Privilege and waiver of privilege is not in issue with respect to what has been disclosed by the parties through discovery.

[11] The one exception is discussions between the expert and the principal of the plaintiff. Those discussions are referred to in the expert's report in the last bullet under the heading "Procedures Performed and Documents Relied On", as follows:

> Discussions with Blair Cunningham as well as additional documentary information provided by Mr. Cunningham, attached as an Appendix to this report.

[12] The appendix to Mr. Thoman's report begins with the following description:

> Additional information provided by Blair Cunningham
>
> - Summary and invoices of slate tile purchases, 2009 – 2013 (7 pages).
> - ADSSI (Edmonton) slate tile sales, 2013 (4 pages).
> - November and December 2013 correspondence between Blair Cunningham and Richard Browne with respect to slate tile discrepancies (3 pages).

[13] The documents referred to are included in the appendix. The discussions with Blair Cunningham are not.

[14] The narrow issue for me is whether by serving the expert's report on the defendants, the plaintiff waived privilege over discussions between the principal of the plaintiff, Mr. Cunningham, and the expert, Mr. Thoman.

[15] In ***R v Stone***, [1999] 2 SCR 290 the Supreme Court of Canada considered whether an accused had waived privilege over an expert report provided by a psychiatrist to which the accused's counsel made explicit reference in his opening statement to the jury. The Supreme Court of Canada wrote as follows:

> The appellant, through his counsel, waived the privilege in the report at the opening of the defence case. At that time defence counsel made the following references to the content of Dr. Janke's anticipated evidence:
>
> > As I have indicated earlier, you have heard during the Crown's case what happened. You are now about to hear from Mr. Stone and from a forensic psychiatrist, Dr. Janke, why it happened. Dr. Janke will explain that Mr. Stone's state of mind at the time of the killing was known in psychiatric terms as a dissociative state.
> >
> > Dr. Janke is a psychiatrist who works in private practice, on contract with the government, and he teaches at UBC. He will give evidence to explain in psychiatric terms his diagnosis of Mr. Stone's state of mind at the time of the attack. He will say that Mr. Stone was in a dissociative state or acting as an automaton, that is, somebody who is acting unconsciously. He will say that as Mr. Stone was not acting consciously, he could not have intended to kill his wife. [Emphasis added.]
>
> By disclosing what he wanted from the report in favour of the accused, defence counsel could not then conceal the balance of the report whose contents might contradict or put in context what had been disclosed. It is true that Dr. Janke's report included not only his diagnosis, but a recital of the facts as provided by the appellant, and which formed the basis of his expert opinion. It was through disclosure of the report, for example, that the Crown learned that the accused, contrary to his initial trial testimony, appeared to have some recall of the beginning of the fatal assault by way of a dream. The contents of the report, including the statements attributed to the appellant, were of course known to defence counsel at the time he chose to make the disclosure to the jury. It was not open to the appellant to pick and choose the portions of an expert report to be put before the trier of fact. Accordingly, the trial judge acted appropriately by ordering the production of Dr. Janke's report at the conclusion of the defence opening address.
>
> However, I would also, if it were necessary, give effect to the alternative ground accepted by McEachern C.J. The act of calling of Dr. Janke would certainly constitute waiver of any privilege attached to his report. As noted by McEachern C.J., once a witness takes the stand, he/she can no longer be characterized as

> offering private advice to a party. They are offering an opinion for the assistance of the court. As such, the opposing party must be given access to the foundation of such opinions to test them adequately. Given the fact that the report would have to have been disclosed after Dr. Janke's direct examination, the prior disclosure of the report cannot be said to have had any material impact on the outcome of the trial. Absent the earlier disclosure, the Crown would have been entitled to stand the appellant down before completing its cross-examination of him, and to recall him once they had been given an opportunity to consider the contents of the report.
>
> ***Stone*** at para 97 – 99 (emphasis added)

[16] The passage quoted above comes from the dissenting judgment, but on this point, the majority agreed: ***Stone*** at para 228.

[17] Ferguson, J of the Ontario Superior Court of Justice, considered ***Stone*** in ***Browne (Litigation Guardian of) v Lavery***, [2002] OJ No 564 and held as follows:

> As there was no statute or rule regulating these issues in ***Stone*** the court's decision constitutes a statement of the common law which should inform my analysis concerning our civil Rules.
>
> The decision indicates that the applicable common law rules are these:
>
> > (a) A report prepared by an expert at the request of counsel for litigation purposes is privileged. This would be under the category of litigation privilege.
> >
> > (b) By announcing in an opening jury address the opinion of the expert contained in the report, counsel waives the privilege in the content of the entire report.
> >
> > (c) The waiver extends to information in the report which would otherwise be subject to solicitor and client privilege. In ***Stone*** there was such information in the form of a statement by the client provided to the expert for litigation purposes.
> >
> > (d) Counsel cannot waive privilege in only part of the report.
> >
> > (e) Once an expert is called as a witness at trial the opposing party is entitled to production of the "foundation" of the expert's opinion.
>
> While there is no mention in ***Stone*** of any information being disclosed in addition to the expert's report the reasoning of the court has much broader application.
>
> ***Browne*** at para 29 – 30 (emphasis added)

[18] While ***Stone*** was a criminal case, I agree with Ferguson, J that on this point ***Stone*** sets out the common law with respect to expert's reports which, in the absence of changes to the common law by *Rules of Court* or other legislation, applies in civil cases.

[19] In my view, ***Stone*** stands for the principle that once a party has committed to calling an expert at trial, privilege over the expert's report is waived and the opposing party is entitled to the report and all foundational information.

[20] In ***Ho***, Feasby, J wrote:

> The right to question an expert in Rule 5.37, even though it is a contingent right, necessarily implies the right to explore the foundations of the expert's report. The waiver of privilege with respect to foundational information occurs when the expert report is exchanged because it is at that time when the party delivering the expert report signals to the other side its intention to rely at trial on the expert report and, by extension, the foundational information underlying the expert report.
>
> ***Ho*** at para 26 (emphasis added)

[21] Rule 5.37 permits the court to order questioning of an expert only "in exceptional circumstances" and only where the expert is one a party is "proposing to call … at trial".

[22] With respect, I do not agree that by serving an expert report "the party delivering the expert report signals to the other side its intention to rely at trial on the expert report". A party is free to not call an expert at trial whose report it previously served on the opposing party: ***Rances v Scaplen,*** 2008 ABQB 708 at para 219. All that a party serving an expert report does is keep its options open, to call or not call that expert.

[23] I also do not agree that the possibility that pre-trial questioning of an expert may be ordered in exceptional cases results in a waiver of privilege over the foundational documents in every case. In my view, a better interpretation of r 5.37 is that production of the foundational documents may be ordered as a condition about questioning pursuant to r 5.37(3), as was done in ***BJM v SLM***, 2012 ABQB 731 at para 36 – 37.

[24] Obviously, serving an expert's report waives privilege over the report. In my view, it does not waive privilege over anything else. McMahon, J reached the same conclusion in ***Chernetz*** at para 12.

[25] This is particularly important with respect to communications between a party or its principal and its own expert. Those communications are subject to litigation privilege and solicitor client privilege: ***Browne*** at para 30.

[26] I find that the plaintiff did not waive privilege over Mr. Cunningham's communications with Mr. Thoman, merely by serving Mr. Thoman's report on the defendants. That waiver will occur only when the plaintiff calls Mr. Thoman as a witness at trial, or earlier if the plaintiff does something that commits the plaintiff to calling Mr. Thoman as a witness at trial.

4. Questioning the Expert

[27] ***BJM v SLM***, 2012 ABQB 731 is the only reported decision counsel were able to find where an expert was ordered questioned pursuant to r 5.37. The circumstances of that case include:

- An affidavit sworn June 6, 2011 by a counsellor, Dr. Wollman, that attached her report which included an allegation that ***BJM*** had sexually

abused his child, which resulted in an immediate restriction of ***BJM's*** parenting time to supervised access.

- A report dated November 2, 2011 by Dr. Darby stating that ***BJM*** did not pose a risk to his child.
- Questioning of Dr. Darby resulting in the parties agreeing that his opinion would not be relied upon.
- A risk assessment dated June 12, 2012, prepared for Alberta Child, Youth and Family Enhancement, by Dr. Peter Choate, stating that supervised access was not required.
- A consent order granted on April 13, 2012 for a bi-lateral assessment by Dr. Terri Pezzot-Pearce.
- An affidavit sworn August 8, 2012 by Dr. Pezzot-Pearce attaching her July 12, 2012 report which indicated that ***BJM*** was not a risk to the child and recommending shared parenting.
- A critique of the Dr. Pessot-Pearce's report by Dr. Jeff Chang based in part on Dr. Pessot-Pearce's notes and test results which Dr. Pessot-Pearce provided on ***SLM's*** counsel's request.
- A request by ***SLM*** to question Dr. Pessot-Pearce on her affidavit, which was initially agreed to by Dr. Pessot-Pearce and agreed to by ***BJM***, but ***BJM*** later changed his position and objected to the questioning of Dr. Pessot-Pearce and the release of her file.
- A custody and access trial scheduled for two weeks in February 2013.

[28] ***BJM*** was decided by Phillips, J as Case Management Justice. She described the context for her reasons as follows:

> At the commencement of the case management meeting on November 22, 2012, the parties indicated that they had reached an agreement to allow the questioning of Dr. Pessot-Pearce. Nevertheless, I would have allowed the questioning and, given the uncertainty in the Rules of Court that will be described below, the parties asked for me to release written reasons following my reading of same for the future guidance of the Bar.
>
> ***BJM*** at para 13 (emphasis added)

[29] The Court held that Dr. Pessot-Pearce was a court-appointed expert, presumably because of the April 13, 2012 consent order, and that consequently r 6.42 applied: ***BJM*** at para 16. Rule 6.42 does not require exceptional circumstances for a court to order questioning of a court-appointed expert. The court found that questioning pursuant to r 6.42 was warranted, reasoning as follows:

> As the evidence of Dr. Pezzot-Pearce is directly relevant to the issues between the parties, I can see no reason why questioning should not be ordered. Nor can I see any prejudice when the whole purpose of the questioning is to assist the Court or the parties in narrowing the issues and perhaps even settling the matter.

BJM at para 17

[30] The Court went on to consider the application of Rule 5.37, which does require exceptional circumstances, in case her decision that Rule 6.42 applied was wrong. In finding that there were exceptional circumstances, Phillips, J wrote:

> However, in contrast with the old Rule 218.8(1), Rule 5.37(1) provides that this Court may direct pre-trial questioning of an expert only in "exceptional circumstances". My review of the materials produced by the Alberta Law Reform Institute during the development of the new *Rules of Court* indicates that this addition arose out of a concern about undue delay and expense associated with permitting unrestricted questioning of experts. Are the circumstances of this case "exceptional" such that the order could be granted?
>
> *Black's Law Dictionary* defines exceptional circumstances as "Conditions which are out of the ordinary course of events; unusual or extraordinary circumstances". In my view, the circumstances of this case fall within that definition. This is a difficult family law action that has been under case management. It is not, therefore, a standard or ordinary family matter. A serious allegation has been made against Mr. which has resulted in significant restriction on his access to the Child for the last several months. Other experts have since arrived at conclusions that stand in stark contrast to that allegation. Significantly, one of those subsequent experts has been questioned and his report discredited, with the result that it will not be relied upon in further proceedings. The expert Ms. sought to question was appointed by the Court, rather than hired by either party. Further, there appeared initially to be agreement between the parties as to the questioning, but Mr.'s consent subsequently was withdrawn prior to the case management meeting on November 22, 2012, though the reasons for that are not clear.
>
> ***BJM*** at para 27 – 28 (emphasis added)

[31] The case before me is nothing like ***BJM***. The only similarity is case management.

[32] The defendants submit that the exceptional circumstances in this case are that it is in case management, it is highly contentious, and the quantum of damages claimed is significant. None of those things is exceptional.

[33] The defendants further submit that questioning Mr. Thoman may simplify the trial or lead to settlement. It may but given my experience with this file since I was appointed Case Management Justice in November 2020, I doubt it. On the other hand, questioning Mr. Thoman before trial is certain to add delay and expense.

[34] Rule 5.37 gives me the discretion to order questioning of an expert in exceptional circumstances. I have found there are no exceptional circumstances here, so I have no discretion. Even if I had found there are exceptional circumstances, I would exercise my discretion not to order questioning of Mr. Thoman, because in my view it would add delay and expense with little benefit to the parties.

5. Documents Not Relied On by the Expert

[35] The defendants' application seeks production of:

> ... all of the records and documents (including handwritten notes of discussion with any individual) referred to in and used to prepare the Expert Report which have not previously been disclosed by the Plaintiff of Thoman to the Defendants.

[36] The defendants' written submissions make no reference to seeking production of material Mr. Thoman had but did not refer to or use.

[37] However, during the oral hearing of this application, the defendants submitted that it is not enough for them to know which documents and information the expert relied upon; they also need to know and are entitled to know which documents and information the expert received but did not rely upon. In support of this proposition, they refer to ***Lamont Health Care Centre v Delnor Construction Ltd***, 2002 ABQB 1125, in which Macklin, J ordered production of witness statements the expert received. This order was made during the expert's cross-examination at trial. The court reasoned as follows:

> The expert, therefore, relies on some of the information provided in reaching his opinion and consciously ignores other information. There is no doubt that the information relied upon is subject to production so that opposing counsel can explore the factual underpinnings of the opinion given by the expert. In my view, it is equally important for opposing counsel to be able to explore with the expert in cross-examination the factual information, which may include statements of parties or witnesses, that the expert had but did not consider probative to the opinion he or she formed. In other words, the information the expert had in his possession but disregarded or did not rely upon or which he had for other reasons ignored when forming an opinion, may very well be considered by others, including the Court, as relevant to the determination of the issue being considered and, more particularly, the credibility of the expert and the validity of his opinion. To hold otherwise would be to allow single pieces of information or evidence to be cherry picked out of all of the information provided without the opposing side having the opportunity of determining from where it was picked and from what context it was picked.
>
> ***Lamont*** at para 12

[38] In ***Lamont*** the Court suggested that production of that material could have been sought in a pre-trial application before the case management justice, writing as follows:

> I am troubled, however, by the lateness of this application. This matter had been in case management for some time prior to trial. The expert report of Mr. Bear was provided in advance of trial. And we have now been in trial since October 28. Further, but no less important, the individual roofers who were named as defendants have already testified with the exception of the deceased Barry Crews.
>
> ***Lamont*** at para 14

[39] On this point, I adopt the reasoning of McMahon, J in ***Chernetz***:

> In ***Lamont***, an application for the expert's working papers was not made until the trial was underway. The trial judge expressed frustration with the timing of the application given that the case, like this one, had been in case management for some time. It appears that he felt an earlier application would have been appropriate.

> ...
>
> As I have already noted, the comments made in Alberta Central and in Lamont are obiter. While I can readily understand their reluctance to see trials delayed by the need for an adjournment to deal with additional production, the issue of privilege is too fundamental to be trumped by the desire for trial efficiency. With respect, I prefer the view that it is the introduction of the expert's report or opinion into evidence at trial that creates the waiver of privilege.
>
> ***Chernetz*** at para 8 and 11

[40] The defendants may be entitled to know what material Mr. Thoman had but did not rely on if he testifies at trial. At this stage in the proceedings, that information is privileged.

6. Conclusion

[41] For those reasons, I dismiss the defendants' application. If the parties are unable to agree on costs, a procedure to address costs may be spoken to at the next case management meeting.

Heard on the 26th day of September, 2023.
Dated at the City of Edmonton, Alberta this 7th day of December, 2023.

G.S. Dunlop
J.C.K.B.A.

Appearances:

Richard Cotter Q.C./
Kurtis Letwin
for the Applicant

Eliza A. Maynes
for the Respondent