Court of King's Bench of Alberta

Citation: Center Street v Lloyd's Underwriters, 2023 ABKB 709

Date: 20231214
Docket: 1601 07825
Registry: Calgary

Between:

Center Street Limited Partnership

Plaintiff

- and -

Lloyd's Underwriters

Defendant

Reasons for Judgment
of the
Honourable Applications Judge J.T. Prowse

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[1] The defendant Lloyd's Underwriters seeks an order under rule 5.13 requiring that the adjusting firm (and non party to this litigation) Charles Taylor Adjusting ("CTA") produce a copy of a witness transcript for use in this litigation.

[2] CTA resists production on the basis of litigation privilege. It bears the onus of establishing the existence of that privilege on a balance of probabilities [see ***Her Majesty The Queen v. Husky Energy Inc.***, 2017 SKQB 383 at para 14]

Background

[3] On March 7, 2015, a fire occurred in a building under construction. The building is owned by the plaintiff Center Street Limited Partnership.

[4] The fire occurred shortly after torch work was done on the building's roof. At the time, Over & Above Reno and Contracting Ltd. ("Over & Above") was the roofing contractor and TLC Roofing Inc. ("TLC") was the roofing subcontractor. Five of TLC's employees had been working on the roof prior to the fire.

[5] A number of lawsuits have ensued, two of which will be discussed in these reasons.

[6] The two lawsuits are:

- this Action, a claim by Center Street against its own property insurer, Lloyd's, for its refusal to reimburse the property damage suffered by Center Street. Lloyd's says coverage was not available unless certain precautions were taken during torch-on roofing operations, and those precautions were not taken.
- Action #1701-03093 ("#3093"), a claim by a neighbouring condominium corporation for damages caused to its nearby building as a result of the fire. Named as defendants are, *inter alia*, Center Street, Over & Above and TLC.

[7] Some of the defendants in action #3093, including Center Street, are being defended by lawyers appointed by the insurer TMK pursuant to a wrap up liability policy which Center Street had obtained from TMK.

The role of Charles Taylor Adjusting on behalf of Lloyd's

[8] Mr. Newman of CTA adjusted the fire loss for Lloyd's under the property policy issued to Center Street, which is the subject of this action.

[9] While Mr. Newman emphasized the work he did in quantifying claims, he was also involved in gathering facts regarding coverage. For example, in an action plan sent to Lloyds two days after the fire he indicated, among many items, that he would be 'interviewing ... the insured and the roofing contractor relating to the policy warranties.'

[10] While he was adjusting the file, Mr. Newman interviewed 4 of the 5 roofers. It is not clear to me if he did this while adjusting for Lloyd's or while adjusting for TMK (see the section below), nor is it clear whether he sent transcripts of those interviews to Lloyd's or to TMK or to both of them.

[11] Mr. Newman had been working on locating the fifth roofer, Mr. Down, to interview him, and expected that he would conduct or be part of that interview. There is no contrary evidence challenging Mr. Newman's expectation.

[12] However, before Mr. Newman was able to arrange an interview with Mr. Down, Lloyd's made a decision to deny coverage to Center Street, and Mr. Newman was instructed by Lloyd's to cease his adjusting work. At that point he ceased any work for Lloyd's or for TMK.

The role of CTA on behalf of TMK

[13] Mr. Newman also adjusted the loss on behalf of TMK. TMK had issued a liability (wrap up liability) policy to Center Street. As indicated above, TMK eventually ended up covering the liability claims in action #3093 on behalf of Center Street and some other defendants.

[14] When Mr. Newman ceased his work, CTA appointed its adjuster Isobel McNab to carry on adjusting for TMK.

[15] Ms. McNab participated in the August 10, 2015 interview of the fifth roofer, Lee Down.

[16] It is this 'fifth' transcript which is the subject of this application. CTA provided the transcript to TMK for use by its insureds under the liability policy issued by TMK, but Lloyd's was not provided a copy.

[17] CTA obtained the Down transcript on behalf of TMK, and it is in essence TMK's claim of litigation privilege that I am considering.

[18] Lloyd's seeks a copy of the Down transcript for use in this action i.e. in defence of Center Street's property insurance claim against it.

Lloyd's arguments as to why the transcript is not subject to privilege

[19] Lloyd's two primary arguments as to why litigation privilege does not attach to the Down interview transcript are:

> (i) the interview was not conducted with the expectation of privacy, in that parties with adverse interests were invited to participate in or witness the interview, so that there is no 'common interest' privilege.
>
> (ii) some of the parties to the interview (TMK and Tatton) were insurers, whose primary purpose for the interview was to decide on whether to extend coverage under their respective policies, and not for the purpose of assisting in the defence of anticipated litigation claims against their insureds.

[20] The key factual question is who was at the Down interview and why they were there.

Who was at the Down interview and why they were there

[21] The attendees at the Down interview were:

(i) Dan Hagg

(ii) John Wipf and James Murphy

(iii) Isobel McNab

(iv) Lee Down

Dan Hagg

[22] Mr. Hagg is an Edmonton lawyer who was representing Totten Insurance Group Inc. ("Totten"). Totten provided a Commercial General Liability policy ("CGL Policy") to Over & Above.

[23] At the time of the Down interview, Totten had not decided whether it would provide coverage to Over & Above with respect to future liability claims arising from the fire.

[24] When Mr. Murphy, Over & Above's lawyer, arranged the interview of Mr. Down, his client representative Mr. Wipf said the purpose was "to preserve Mr. Down's evidence for BD&P's litigation file and to aid the insurer, Totten, in assessing coverage issues under the CGL policy".

[25] In my view, the primary purpose for which Mr. Hagg attended the interview was not in contemplation of litigation, but rather to evaluate coverage for Over & Above on behalf of Totten.

John Wipf and James Murphy

[26] Mr. Wipf is a director and general manager of Over & Above, the roofing contractor.

[27] James Murphy, a lawyer from the firm of BD&P, was acting as Over & Above's lawyer.

[28] Mr. Wipf deposes that Over & Above managed the supply and installation of roofing on the subject building, and that it had in turn retained TLC to install the roofing materials. The five roofers, including Mr. Down, were hired by TLC.

[29] On July 14, 2015, just less than a month before the Down interview, Mr. Murphy emailed Over & Above. That email, headed "the status of your insurer's decision re coverage" noted that Totten wanted to interview Lee Down before making its coverage decision.

[30] It seems that Mr. Murphy and Mr. Wipf were at the interview for two purposes (i) hoping that it would result in Totten providing coverage for anticipated liability claims, and (ii) gathering facts that could be used by Over & Above in anticipated litigation if coverage was denied. The evidence does not show, on a balance of probabilities, that anticipated litigation was the dominant purpose.

Isobel McNab

[31] Isobel McNab attended the interview as an employee of CTA, who was adjusting the loss for the liability insurer TMK.

[32] Why was Ms. McNabb at the interview? We do not have an affidavit from her. She is no longer employed by CTA.

[33] CTA's current representative, Michael Guy, reviewed CTA's files and concluded that Ms. McNabb attended the interview 'on behalf of TMK to investigate coverage and the circumstance of the fire'. He further concluded that she would have reasonably contemplated the likelihood of litigation being advanced in the future. While Mr. Guy's conclusion is speculative, given that, prior to the Down interview, Mr. Newman had reviewed numerous outstanding potential claims, it would be natural to expect the likelihood of litigation at the time of the Down interview. However, on a balance of probabilities it has not been established that anticipated litigation was the dominant purpose of Ms. McNab's attendance at the interview, as opposed to obtaining facts on which TMK could make a coverage decision.

Lee Down

[34] I do not have evidence as to why Mr. Down agreed to be interviewed. He was no longer employed by TLC so it was not as directed by TLC. One can only presume that he was simply

being helpful as a witness. There is no evidence that he was provided with a copy of his interview transcript.

Discussion of privilege

[35] This is a somewhat unique case.

[36] Most cases dealing with waiver of litigation privilege discuss (i) whether the document was subject to litigation privilege when it was created, and (ii) whether the privilege was waived by subsequently disclosing the document to others. If there was disclosure to others, the question is whether those others had sufficient 'common interest' in the litigation that privilege was not waived by disclosure to them.

[37] However, this case involves the 'collapsing' of the two steps into one. It is not subsequent disclosure of the interview transcript to others which is relevant, it is whether privilege can exist when the 'others' were there when the document was created. In other words, did the attendees at the meeting have a 'common interest' in potential future litigation in which their interests would align, so that the document is subject to 'common interest privilege' from the outset?

[38] Counsel did not provide me with case law dealing with these somewhat unique circumstances, but rather with case law dealing with the usual two step analysis.

[39] Nevertheless, in my view, the principles of the case law provided do apply. If one of the parties had conducted the Down interview alone, and then shared it with the others, could they have established common interest privilege? If the answer is 'no' then I do not think the interview transcript is subject to privilege when those other parties were there at the outset.

[40] Three different parties were represented at the Down interview: Totten (via Mr. Hagg), Over and Above (via Mr. Wipf and Mr. Murphy), and TMK (via Ms. McNabb). Each of them had their own reason for being there, as discussed above.

[41] Mr. Down was a fourth party. He was not merely a witness to events, providing information to potential litigants. He was also a potential litigant himself, and indeed was subsequently sued for causing or contributing to the fire. His status as a potential litigant would have been apparent at the time of the interview, perhaps not to him but at least to the others.

[42] There is no evidence as to whether the participants at the interview discussed the confidentiality of the information being provided by Mr. Down at the interview. In fact, both CTA and Over & Above acknowledge that Lloyd's, the current applicant for the transcript, were welcome to have attended the interview!

[43] What is noteworthy at the Down interview is that:

- At least one of the parties, Mr. Hagg, was there primarily to consider insurance coverage, and not for the primary reason of potential future litigation.
- The parties had clear potential conflicts of interest. TMK's insureds might want to claim contribution and indemnity from Over & Above (and indirectly from its insurer Totten) in future litigation, and TMK's insureds

> and Over & Above might want to claim contribution and indemnity from Mr. Down in future litigation.

[44] Common interest privilege was described in ***CNOOC Petroleum North America ULC v 801 Seventh Inc.***, 2021 ABQB 861 at para 57 as follows:

> In the context of litigation privilege, the common interest inquiry is whether the parties share a common interest in current or anticipated litigation such that the sharing of information does not amount to a waiver of the privilege that protects their investigation and preparation of the case for trial [emphasis added]

[45] As noted, the primary purpose for which Mr. Hagg was at the meeting was evaluation insurance coverage and not anticipated litigation.

[46] With respect to potential conflicts of interest, a mere potential for conflict does not eliminate common interest privilege. As stated in ***Scott & Associates Engineering Ltd. v. Ghost Pine Windfarm LP***, 2011 ABQB 339 at para 26:

> For common interest privilege to apply, the persons sharing a common interest do not have to be co-parties. It is enough that they "anticipate litigation against a common adversary on the same issue or issues": *Genier v. CCI Capital Canada Ltd.*, 2008 CarswellOnt 209 (Ont. S.C.J.) at para. 18. As well, the position of the persons sharing information does not have to be identical, as long as there is sufficient common interest between them: *Sauvé v. Insurance Corp. of British Columbia*, 2010 BCSC 763 (B.C. S.C.). [emphasis added]

[47] The ***Sauve*** case, cited above, is an illustration of where there was a potential future conflict (two defendants blaming each other for an automobile accident) but nevertheless sufficient common interest (both defendants blaming the plaintiff for the accident) to allow common interest privilege to exist with respect to reports of an adjuster that were shared between the defendants.

[48] It is difficult to identify a strong common interest between the parties to the Down interview. So far as claims from others (such as the Condominium Corporation that commenced action # 3093) perhaps evidence of no negligence might be helpful, but if there was negligence then there would be a free for all regarding who was negligent or who was vicariously liable for someone else's negligence.

[49] Finally, in its written argument CTA states that its adjuster at the Down interview believed that Mr. Hagg was representing an insurer with an interest in the fire but was "not aware of which specific party Mr. Hagg was representing". With respect, its hard to argue that there was a common litigation interest being pursued during an interview when you do not know who else was represented at the interview.

[50] Considering the factors discussed above, my conclusion is that the Down transcript is not subject to litigation privilege.

Implied undertaking

[51] CTA makes the alternative argument that the Down transcript is subject to an implied undertaking. This is not a viable argument. Mr. Down was not examined under oath by compulsion of law. In fact there was no lawsuit underway at the time.

Conclusion

[52] The transcript of the Down interview is a relevant and material document in the possession of a non-litigant, CTA, which should be provided to Lloyd's for use in this litigation.

[53] If the parties cannot agree on the costs outcome of the application they may make written submissions to me in that regard.

Heard on the 04th day of December, 2023.
Dated at the City of Calgary, Alberta this 14th day of December, 2023.

J.T. Prowse
A.J.C.K.B.A.

Appearances:

Geoffrey Duckworth
Dolden Wallace Folick LLP
for Lloyd's Underwriters

Jeremy Ellergodt
Whitelaw Twining LLP
for Charles Taylor Adjusting