

Date: 20070710

Docket: T-1791-06

Citation: 2007 FC 735

Vancouver, British Columbia, July 10, 2007

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MID-WEST QUILTING CO. LTD.

Plaintiff

and

HER MAJESTY IN RIGHT OF CANADA

Defendant

REASONS FOR ORDER AND ORDER

[1] The plaintiff has requested an order relieving it from the requirement to produce all documents requested in a Direction to Attend served on the plaintiff on February 26, 2007, on the basis that the requested documents, in whole or in part, are privileged, irrelevant and unduly onerous to produce.

(a) Context of the motion

[2] The plaintiff, Mid-West Quilting Co. Ltd., has made an application under Part II, s. 14(1) of Manitoba's *Limitation of Actions Act*, C.C.S.M., c. L150 for leave to begin an action against Her

Majesty for abuse of public authority and negligence relating, at least in part, to actions that took place prior to the six-year limitation period provided in s. 2(1)(n) of the Act (see Annex for relevant statutory provisions). Prior to the plaintiff's application being heard, the defendant served on the President of Mid-West, Mr. Paul Knight, a Direction to Attend dated February 26, 2007 asking him to appear for cross-examination on his affidavit of October 5, 2006. He was asked to bring with him all written or electronic communications, "including notes, memoranda, letters or e-mail, concerning requests for, receipt of, and actions taken based upon, legal advice from any all legal advisors" during the period from January 1, 1988 and October 24, 2005. Mid-West refused on the grounds that the communications were privileged, irrelevant and unduly onerous to produce. It brought this motion seeking relief from the Direction to Attend.

[3] In order for it to succeed on its application for leave under Part II of the Act, Mid-West must establish that not more than 12 months have elapsed between "the date on which it first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based" and "the date on which the application was made to the court for leave" (s. 14(1)). "Material facts of a decisive character" include facts "which a reasonable person of [the plaintiff's] intelligence, education and experience, knowing those facts and having obtained appropriate advice in respect of them" would have regarded as giving rise to a cause of action which would have a "reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the action" (s. 20(3)).

[4] In his affidavit of October 5, 2006, Mr. Knight said that he had sought legal advice in 1989 or 1990 and “was not advised to commence any legal proceeding, nor was it suggested that I initiate an access to information request”. He went on to say that he had “received a second opinion from another law firm to the same effect”. In a subsequent affidavit, he clarified that he sought legal advice from the first firm in 1989 or 1990 and from the second firm in 1994. He has a letter from the first solicitor dated March 19, 1990 and a letter from the second dated May 18, 1994.

(b) Mid-West’s claim that it has not waived privilege

[5] The parties agree that the communications in issue are governed by solicitor-client privilege. However, the defendant argues that the plaintiff has impliedly waived privilege. The plaintiff disagrees.

[6] The defendant argues that Mid-West has impliedly waived privilege in two ways. First, by virtue of the wording of the statutory provision on which Mid-West relies, it must present evidence about the advice it received. As mentioned, to succeed on its application under Part II of the Act, Mid-West must persuade the Court that it filed its application not more than 12 months after it knew or ought to have known “the material facts of a decisive character” (s. 14(1)). The definition of “material facts of a decisive character” imports a consideration of what a reasonable person knowing the facts and “having obtained appropriate advice in respect of them” would have understood. In essence, the statute places the burden on Mid-West to show, based on the facts at its disposal and the advice it received, that it acted in keeping with what a reasonable person would

have understood about the well-foundedness of its cause of action. Accordingly, the defendant asserts that the legal advice Mid-West received is clearly relevant and, to the extent Mid-West relies on the Act to ground its application, it has waived solicitor-client privilege.

[7] Second, the defendant argues that the plaintiff has impliedly waived its privilege, given that Mr. Knight expressly referred to the legal advice he received in his affidavits and, at least indirectly, relied on the content of that advice in pursuing his application under Part II of the Act.

[8] Courts sometimes find that solicitor-client privilege has been impliedly waived where considerations of fairness and consistency so require. In essence, this means that, where a party relies on legal advice to nourish an action or to support a defence, the party opposite should have disclosure of that advice. For example, to defend against a claim of negligence, a party may rely on the legal advice it received in order to show due diligence. If so, the advice must be disclosed to the other party. Otherwise, a party could try to rely on legal advice to justify its conduct without having to disclose what the advice really was. This could be unfair to the other side and, if so, a finding that the privilege has been impliedly waived by the party's conduct may be justified: *Apotex Inc. v. Canada (Minister of Health)*, 2003 FC 1480, [2004] 2 F.C.R. 137, [2003] F.C.J. No. 1921 (T.D.) (QL); aff'd 2004 FCA 280, [2004] F.C.J. No. 1431 (C.A.) (QL).

[9] Regarding the first alleged ground of implied waiver, I cannot conclude that Mid-West's reliance on Part II of the Act can have the consequences suggested by the defendant. True, the burden of proof lies on Mid-West. The facts it knew and the advice it received are relevant to its

application. But that does not mean that it is bound to put in evidence privileged communications. It may choose to do so in order to discharge its burden. Or, it can choose not to rely on them. If it takes the latter course, it may risk failing to meet its burden or, possibly, invite an adverse inference. Obviously, it is premature to say what the consequences, if any, of a decision to insist on maintaining privilege might be. Suffice to say, mere reliance on Part II of the Act should not be interpreted as implied waiver of solicitor-client privilege (although it may amount to waiver of litigation privilege: *St. Vital School Division No. 6 v. Trnka*, [1998] M.J. No. 563 (Q.B.) (QL)).

[10] Regarding the second alleged ground of waiver, I believe that Mid-West has put in issue the advice it received in 1990 and 1994. It has relied on that advice to make the argument that it did not have such “material facts of a decisive character” to commence an action against the defendant until much later. Mr. Knight referred to the content of that advice when he stated in his affidavit that he was “not advised to commence any legal proceeding” or to “initiate an access to information request”. In my view, Mid-West cannot rely on the legal advice it received to advance its position and simultaneously claim privilege over it. To do so would give rise to the kind of unfairness and inconsistency which courts have rightly recognized as grounds for finding an implied waiver of privilege. Therefore, in respect of the advice it received in 1990 and 1994, I find that Mid-West has impliedly waived solicitor-client privilege.

[11] However, I cannot find that the same is true regarding any other advice that Mid-West received during the period covered by the Direction to Attend. The Direction is cast in sweeping

terms and catches solicitor-client communications that go well beyond what Mid-West has put in issue. To that extent, I would excuse Mr. Knight from complying with its terms.

(c) Relevance and Hardship

[12] In my view, the advice Mid-West received in 1990 and 1994 is clearly relevant to its application under Part II. Any other advice it may have received thereafter may be relevant as well but, as discussed above, it remains subject to solicitor-client privilege. The defendant cannot demand its production.

[13] It is unnecessary for me to decide, therefore, whether it would be unduly onerous to require Mid-West to produce all of the legal advice it received. Mid-West does not suggest that producing the letters it received in 1990 and 1994 would impose any hardship.

ORDER

THIS COURT ORDERS that

1. The motion is allowed in part;
2. The plaintiff shall comply with the Direction to Attend dated February 26, 2007 only in relation to the legal advice it received in 1990 and 1994;
3. The plaintiff is relieved from complying with the remainder of the Direction to Attend;
4. Each party shall bear its own costs of the motion; and
5. Counsel shall indicate their availability for a case management teleconference to discuss the timing of the underlying application.

"James W. O'Reilly"

Judge

Annex

Limitation of Actions Act, C.C.S.M., c. L150

Limitations

2.(1) The following actions shall be commenced within and not after the times respectively hereinafter mentioned:

...

(n) any other action for which provision is not specifically made in this Act, within six years after the cause of action arose.

Extension of time in certain cases

14.(1) Notwithstanding any provision of this Act or of any other Act of the Legislature limiting the time for beginning an action, the court, on application, may grant leave to the applicant to begin or continue an action if it is satisfied on evidence adduced by or on behalf of the applicant that not more than 12 months have elapsed between

(a) the date on which the applicant first knew, or, in all the circumstances of the case, ought to have known, of all material facts of a decisive character upon which the action is based; and

(b) the date on which the application was made to the court for leave.

Nature of material facts

20.(3) For the purposes of this Part, any of the material facts relating to a cause of action shall be taken, at any particular time, to have been facts of a decisive character if they were facts which a person of his intelligence,

Loi sur la prescription, C.P.L.M. c. L150

Prescription

2.(1) Les actions suivantes se prescrivent par les délais respectifs indiqués ci-dessous :

[...]

n) une autre action qui ne fait pas explicitement l'objet d'une disposition de la présente loi, se prescrit par six ans, à compter de la naissance de la cause d'action.

Prolongation du délai dans certains cas

14.(1) Par dérogation à toute disposition de la présente loi ou d'une autre loi de la Législature ayant pour effet d'établir une prescription, le tribunal peut, sur demande, autoriser le requérant à intenter ou continuer une action, lorsque le tribunal conclut, sur la foi de la preuve fournie par le requérant ou en son nom, qu'une période maximale de 12 mois s'est écoulée entre les dates suivantes :

a) la date à laquelle le requérant a eu connaissance pour la première fois, ou celle à laquelle il aurait dû avoir connaissance, compte tenu des circonstances, de tous les faits pertinents sur lesquels s'appuie l'action;

b) la date de la présentation de la demande de prolongation au tribunal.

Nature des faits pertinents

20.(3) Pour les besoins de la présente partie, les faits pertinents se rattachant à une cause d'action doivent être considérés comme des faits de nature déterminante, lorsqu'il s'agit de

education and experience, knowing those facts and having obtained appropriate advice in respect of them, would have regarded at that time as determining, in relation to that cause of action, that, apart from any defence based on a provision of this Act or any other Act of the Legislature limiting the time for bringing an action, an action would have a reasonable prospect of succeeding and resulting in an award of damages or remedy sufficient to justify the bringing of the actions.

faits à l'égard desquels une personne possédant le niveau d'intelligence, d'instruction et d'expérience qui lui sont propres, et connaissant ces faits et ayant obtenu des conseils opportuns au sujet de ceux-ci, aurait considérés à ce moment-là comme concluants pour donner lieu de croire raisonnablement à la réussite d'une action et à l'octroi de dommages-intérêts, ou à une réparation dont l'ampleur justifierait les procédures judiciaires qui seraient requises. Toutefois, il n'est tenu compte d'aucune défense pouvant être fondée sur une prescription établie par la présente loi ou par une autre loi de la Législature.

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: T-1791-06

STYLE OF CAUSE: MID-WEST QUILTING CO. LTD. v.
HER MAJESTY IN RIGHT OF CANADA

PLACE OF HEARING: Winnipeg, Manitoba

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**REASONS FOR ORDER
AND ORDER:** O'REILLY J.

DATED: July 10, 2007

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