Federal Court  Cour fédérale

Date: 20230908

Docket: T-576-23

Citation: 2023 FC 1215

Toronto, Ontario, September 8, 2023

PRESENT: Associate Judge Trent Horne

BETWEEN:

CRB CONSULTING INC.

Plaintiff /
Defendant by Counterclaim

and

MASSAGE ADDICT INCORPORATED AND
2798639 ONTARIO INC.
O/A MASSAGEADDICT APPLEWOOD

Defendants /
Plaintiffs by Counterclaim

ORDER AND REASONS

I. Overview

[1] The defendants have brought a motion for security for costs. The supporting affidavit was sworn by a private investigator, who was cross-examined. During that cross-examination, the defendants refused to produce the investigator's file notes, and a report from the investigator to counsel for the defendants, on the basis of litigation privilege.

[2] This is a motion within a motion. The plaintiff moves for production of the file notes and report on the basis that privilege has been waived. I cannot conclude that there has been an express waiver of privilege over these documents, or that waiver should be implied on the basis of fairness. The motion will be dismissed.

II. Background

[3] In this action for patent infringement, the plaintiff claims rights in Canadian patent 2,636,116 ("116 Patent") that generally relates to a method and apparatus for providing compensation for therapeutic treatments. The plaintiff alleges that the 116 Patent has been infringed (directly and by inducement) by Massage Addict Incorporated, a franchisor of clinics offering various therapeutic services, and a numbered company that is a franchisee.

[4] Pleadings have closed. The defendants have brought a motion for security for costs, asserting there is reason to believe the that plaintiff has insufficient assets in Canada available to pay the costs of the defendants if ordered to do so (subrule 416(1)(b) of the *Federal Courts Rules*, SOR/98-106 ("Rules")).

[5] The defendants' motion is supported by an affidavit of a private investigator, Stephen Rodger. Mr Rodger's affidavit attaches a corporate profile report for the plaintiff, and speaks to various searches he conducted and assets the plaintiff appears to own. Mr Rodger was cross-examined.

[6] In advance of the cross-examination (which was conducted via videoconference), Mr Rodger was served with a direction to attend. He was directed bring with him "any search

reports and other documents retrieved or generated in the scope of your engagement in respect of your affidavit sworn on May 16, 2023 regardless of whether relied upon therein."

[7] At the beginning of the cross-examination, Mr Rodger was asked the usual introductory questions, such as confirming his signature on the affidavit, receipt of the direction to attend, and that there was no one else in the room with him. When asked if he had any other documents to hand, he answered "just my file notes." In an exchange between the lawyers, counsel for the defendants advised that the file notes were for a report that Mr Rodger prepared in connection with this litigation, and that this report has not been disclosed. Requests for production of the file notes and the report were refused on the basis that they are protected by litigation privilege. Those refusals are the subject of this motion.

[8] Rule 94 addresses production of documents on an examination. The Rule sets out a positive obligation to produce certain documents for inspection at an examination, but specifically excepts documents for which privilege is claimed.

III. Litigation Privilege

[9] The nature and purpose of litigation privilege was addressed by the Supreme Court of Canada in *Blank v Canada (Minister of Justice)*, [2006] 2 SCR 319, 2006 SCC 39 ("*Blank*"). There, the Court concluded that the purpose of litigation privilege is to create a "zone of privacy" in relation to pending or apprehended litigation. Once the litigation has ended, the privilege to which it gave rise has lost its specific and concrete purpose — and therefore its justification (paragraph 34).

[10] The Supreme Court also considered the nature and scope of litigation privilege in *Lizotte v Aviva Insurance Company of Canada*, [2016] 2 SCR 521, 2016 SCC 52, ("*Lizotte*"). Litigation privilege protects against the compulsory disclosure of communications and documents whose dominant purpose is preparation for litigation. It is a class privilege that exempts the communications and documents that fall within its scope from compulsory disclosure, except where one of the limited exceptions to non-disclosure applies. Given its importance, this privilege cannot be abrogated by inference and cannot be lifted absent a clear, explicit and unequivocal provision to that effect (paragraphs 1, 4 and 5).

[11] In *Lizotte*, the Court articulated a two-part test for the existence of litigation privilege:

> [33] In my opinion, litigation privilege is a class privilege. Once the conditions for its application are met, that is, once there is a document created for "the dominant purpose of litigation" (*Blank*, at para. 59) and the litigation in question or related litigation is pending "or may reasonably be apprehended" (para. 38), there is a "prima facie presumption of inadmissibility" in the sense intended by Lamer C.J. in *R. v. Gruenke*, 1991 CanLII 40 (SCC), [1991] 3 S.C.R. 263:
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> > The parties have tended to distinguish between two categories: a "blanket", prima facie, common law, or "class" privilege on the one hand, and a "case by case" privilege on the other. The first four terms are used to refer to a privilege which was recognized at common law and one for which there is a prima facie presumption of inadmissibility (once it has been established that the relationship fits within the class) unless the party urging admission can show why the communications should not be privileged (i.e., why they should be admitted into evidence as an exception to the general rule). [Emphasis deleted; p. 286]

[12] The plaintiff did not contest the defendants' claim that the file notes and report are protected by litigation privilege. I am satisfied that the file notes and report are protected by

litigation privilege. It is self-evident that the documents were created for the dominant purpose of litigation, and that litigation is pending.

IV. Waiver

[13] The onus of establishing waiver of privilege rests with the party asserting the waiver (*Smith v Jones*, [1999] 1 SCR 455, at para 46).

[14] I am not satisfied that there has been express waiver over the litigation privilege that attaches to the file notes and the report. Neither are included or relied on in the defendants' materials on the security for costs motion. While the files notes were open on Mr Rodger's computer at the beginning of his cross-examination, he closed the document immediately after the colloquy among counsel as to whether those notes should be produced. There is no indication that the witness referred to or relied on these notes to answer questions during the cross-examination.

[15] The plaintiff places significant weight on a decision of Justice McLachlin (as she then was) in *S&K Processors Ltd v Campbell Ave Herring Producers Ltd*, 1983 CanLII 407 (BCSC). At paragraph 6, the Court concluded that waiver of privilege may also occur in the absence of an intention to waive, where fairness and consistency so require.

[16] The issue in a "fairness and consistency" analysis is whether the partial disclosure of privileged information can result in unfairness to the other side. Where unfairness can be shown to result from the partial disclosure, the disclosing party may be considered to have waived the privilege altogether even where it had no intention of doing so (*Merck & Co Inc v Apotex Inc*, 2009 FCA 27 at para 13).

[17] It is useful to recall at the outset that this is a cross-examination on an affidavit in support of a motion, not a discovery. The leading case on the scope of cross-examination is *Merck Frosst Canada Inc v Canada (Minister of Health)* [1997] FCJ 1847 at para 4, aff'd *Merck & Co v Canada (Minister of Health)*, [1999] FCJ No 1536 (CA). The Court summarized the following principles regarding how cross-examination on an affidavit differs from an examination for discovery:

i. The person examined is a witness, not a party;
ii. Answers given are evidence, not admissions;
iii. Absence of knowledge is an acceptable answer; the witness cannot be required to inform himself;
iv. Production of documents can only be required on the same basis as for any other witness, *i.e.* if the witness has custody or control of the document, and
v. The rules of relevance are more limited.

[18] On the pending security for costs motion, an issue is whether there is reason to believe that the plaintiff has insufficient assets in Canada available to pay the costs of the defendants if ordered to do so. What assets the plaintiff has (or does not have) is information that is entirely within its knowledge.

[19] The plaintiff's responding motion materials on the security for costs motion have not been filed, but there is no indication that the plaintiff was in any way encumbered from disclosing or describing its assets as part of the defence to the security for costs motion. I do not agree that any unfairness or disadvantage will result as a consequence of maintaining litigation privilege over the file notes and report. If the plaintiff feels that Mr Rodger's evidence omitted

something, or was inaccurate, it had every opportunity to set the record straight by filing evidence before Mr Rodger's cross-examination. I therefore cannot accept the plaintiff's argument that the file notes and report should be disclosed to enable it to test the defendants' evidence, and to ensure that the Court is not misled when adjudicating the security for costs motion.

[20] The plaintiff places emphasis on an Equifax report that Mr Rodger obtained, but was not disclosed in his affidavit. The plaintiff learned of the existence of the Equifax report during the cross-examination. The fact that this document was revealed to the plaintiff during the cross-examination does not create an unfairness. A request for production of the Equifax was made, and I understand a copy has since been produced to the plaintiff. To the extent Mr Rodger conducted other searches, or obtained any additional reports, this could have been addressed in his cross-examination. Counsel for the plaintiff did ask Mr Rodger (question 45) "so aside from a few patents, you don't know if [the plaintiff] owns any other assets, right?"

[21] The plaintiff's motion also requests that I inspect the file notes and report to determine whether privilege has been waived. I am not satisfied that I need to review the documents to make a determination of waiver based on fairness, particularly when the plaintiff has complete knowledge as to its assets, and had that knowledge before submitting its responding evidence on the security for costs motion and cross-examining Mr Rodger.

V. Costs

[22] At the conclusion of the hearing, I advised the parties that the motion would be dismissed so that submissions on costs could be made. Both parties requested that the determination of costs of this motion be deferred to the motion for security for costs, which will be ordered.

ORDER in T-576-23

THIS COURT ORDERS that:

1. The plaintiff's motion is dismissed.

2. Costs of this motion will be determined following the adjudication of the defendants' motion for security for costs.

"Trent Horne"
Associate Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

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