

Federal Court of Appeal



Cour d'appel fédérale

Date: 20140522

Docket: A-71-13

Citation: 2014 FCA 135

**CORAM: DAWSON J.A.
TRUDEL J.A.
NEAR J.A.**

BETWEEN:

**WEBASTO PRODUCT NORTH AMERICA,
INC.**

Appellant

and

**SHASTA EQUITIES LTD. AND LORNE
SHANDRO**

Respondents

Heard at Vancouver, British Columbia, on December 12, 2013.

Judgment delivered at Ottawa, Ontario, on May 22, 2014.

REASONS FOR JUDGMENT BY:

NEAR J.A.

CONCURRED IN BY:

**DAWSON J.A.
TRUDEL J.A.**

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INTRODUCTION

[1] The appellant, Webasto Product North America Inc., appeals from the order of Justice Harrington (the motions judge), dated January 30, 2013, and cited as 2013 FC 101 in which the Court found with respect to one document from an underlying litigation case that it was subject

to solicitor-client privilege and that the remaining documents were subject to litigation privilege. In doing so, the motions judge set aside the November 30, 2012 order of Prothonotary Lafrenière (the prothonotary) which had found that none of the documents were subject to litigation privilege.

[2] For reasons that follow, I would allow the appeal in part.

I. FACTS

[3] The following brief summary suffices for the purpose of this appeal.

[4] The respondents, Shasta Equities Ltd. and Lorne Shandro, own or have an interest in the yacht *Helios I*. It was equipped with a heater manufactured by the appellant, Webasto Product North America Inc.

[5] On the morning of October 13, 2009 a fire broke out on the *Helios I* while it was moored at a marina in Coal Harbour, Vancouver, British Columbia causing damage to surrounding vessels and property. Later that day, Paul Mendham, the respondents' insurance broker, learned of the fire and contacted Timothy McGivney of Aegis Marine Surveyors Ltd. and Chris Reed of Sereca Fire Consulting Ltd. He retained their services for the purposes of attending the scene and investigating the facts related to the cause of the fire. He advised that counsel would be retained shortly and that they were to take instructions from and report to counsel with respect to their investigation.

[6] On that same day, Mr. Mendham retained Kim Wigmore of Whitelaw Twining Law Corporation to conduct the required investigations with respect to the fire. Mr. Mendham was of the view that the owners of the third-party vessels may be advancing claims given the apparent damage to their vessels. In the course of the afternoon, the solicitor for certain third-party vessel owners contacted Mr. Wigmore's office to request a joint inspection of the *Helios I*, to which Mr. Wigmore agreed.

[7] On October 13, 2009, Mr. Wigmore retained Aegis Marine Surveyors Ltd. to conduct an interim survey and draft a report for him. During this survey, Mr. Shandro, other yacht owners, personnel from Vancouver Police and Fire, representatives of the marina, representatives of the Vancouver Port Corporation, and the Canadian Coast Guard were in attendance, as was discussed by the motions judge in his reasons at paragraph 15. Mr. Wigmore also retained the services of Sereca Fire Consulting Ltd. on October 13, 2009, to investigate the events concerning the fire and draft a report for him.

[8] On November 4, 2009, Mr. Wigmore retained Canadian Claims Services Inc. to conduct an interview with Mr. Shandro and draft a report for him.

[9] The appellant seeks production of the various inspection reports and related documents over which the respondents claim litigation privilege and, with respect to one document, solicitor-client privilege. The documents are described as the documents enumerated 3 through 20 and 22 of Schedule 2 of the draft Revised/Third Supplemental Affidavit of Documents (the Disputed Documents).

II. PROCEDURAL HISTORY

[10] On May 18, 2011, several individuals, whose property had been damaged by the fire originating on the *Helios I*, launched an action against the respondents in the Federal Court.

[11] On June 15, 2011, the respondents filed a third-party claim against the appellant alleging that the heater aboard the *Helios I* had “created, caused or exacerbated” the fire. Consequently, the appellant was added as a defendant and third party in the action.

[12] In the course of the proceedings, the respondents claimed litigation privilege over the Disputed Documents. On September 19, 2012, the appellant filed a motion requesting, *inter alia*, the production of all Disputed Documents.

a. Order of the Prothonotary

[13] The prothonotary ordered the production of all Disputed Documents. Applying the two-part test for litigation privilege, he found that the respondents had failed to demonstrate that: 1) litigation was reasonably contemplated upon the creation of the Disputed Documents; and 2) the dominant purpose for creating such documents was to prepare for litigation: Order of the Prothonotary, Prothonotary Lafrenière, November 30, 2012, (Prothonotary Order) at page 5.

[14] With respect to the first criterion, although a prospect of litigation by third-party claimants may have existed, the prothonotary observed that neither the respondents nor their insurer were able to judge to what extent that prospect would materialize until a preliminary investigation into the cause of the fire was conducted: Prothonotary Order at page 5.

[15] With regard to the second criterion, he concluded that there was more than one identifiable purpose for the creation of the Disputed Documents based on Mr. Wigmore's affidavit: Prothonotary Order at page 5. In light of the lack of precision and clarity in the evidence, the documents were found not to have been "wholly or mainly" created with litigation in mind": Prothonotary Order at page 6.

b. Order of the motions judge

[16] The motions judge allowed the appeal and concluded that one document was subject to solicitor-client privilege and all other documents were subject to litigation privilege, save with respect to surveys attached to one of the Disputed Documents since they had been produced before the fire occurred.

[17] He first determined that the issue on appeal was whether certain documents were immune from discovery on the grounds of privilege: Order of Justice Harrington, dated January 30, 2013, 2013 FC 101 (Motions Judge Order) at paragraph 1.

[18] The motions judge held that the prothonotary's order was not discretionary in nature, and thus declined to apply the standard of review applicable to discretionary orders from prothonotaries: Motions Judge Order at paragraph 36. In arriving at this conclusion, he stated that both parties proceeded before him on the basis that the prothonotary's decision was discretionary in nature.

[19] In *obiter*, he added that if the order was discretionary in nature, he would have to determine whether the potential effect of the order was vital to the issue of the case: Motions Judge Order at paragraph 23. The motions judge held that the issue was "not whether production of the documents is vital to the outcome of the case, but rather whether it is vital to our fundamental sense of justice": Motions Judge Order at paragraph 27. I make no finding on the correctness of this statement as it is not necessary to do so.

[20] The motions judge applied the standard of review established in *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235. He first concluded that the prothonotary erred in law by failing to find that one of the documents was subject to solicitor-client privilege: Motions Judge Order at paragraph 37.

[21] All other documents were found to be subject to litigation privilege: Motions Judge Order at paragraph 38. The motions judge held that, by failing to conclude that the parties were already in an adversarial situation before any of the Disputed Documents were created, the prothonotary made a palpable and overriding error in his findings of fact. He concluded that the only purpose of Mr. Wigmore's involvement was to defend the *Helios I* against potential claims: Motions

Judge Order at paragraph 41. The motions judge was led to the conclusion that the dominant purpose for the creation of these documents was to prepare for litigation.

III. ISSUE

[22] These orders have given rise to the following issue: Did the motions judge err by setting aside the prothonotary's decision?

IV. ANALYSIS

a. Standard of Review

[23] The standard of review to be applied by this Court to the decision of the motions judge was laid out in *Z.I. Pompey Industrie v. ECU-Line N.V.*, 2003 SCC 27, [2003] 1 S.C.R. 450 at paragraph 18 as whether there "were no grounds to interfere with the prothonotary's decision or, if grounds existed, if the decision of the motions judge was arrived at on a wrong basis or was plainly wrong".

[24] Before turning to a review of the Disputed Documents and determining whether the motions judge had any grounds to interfere with the prothonotary's decision or proceeded on a wrong basis or was plainly wrong, it is necessary to briefly outline the general principles related to litigation privilege.

b. Litigation Privilege

[25] Litigation privilege requires the party claiming the privilege to establish, for each document, that:

- (a) litigation was ongoing or reasonably contemplated at the time the document was created; and
- (b) the dominant purpose of creating the document was for that litigation.

See *Blank v. Canada (Minister of Justice)*, 2006 SCC 39, [2006] 2 S.C.R. 319 at paragraph 60.

[26] In order to ascertain whether material was prepared for the dominant purpose of litigation, various considerations have been formulated by the courts. In *Jordan et al. v. Towns Marine Electronic Ltd. et al.* (1996), 113 F.T.R. 226 at paragraph 12, Justice Marc Noël held that relevant considerations included:

- 1) the author and the authority upon whose direction a report is prepared;
- 2) the dates on which the reports were produced;
- 3) the date on which the insurers appointed counsel;
- 4) the identity of the parties to whom the reports were addressed; and

5) the content of the reports themselves.

[27] Both criteria for finding litigation privilege, namely, that litigation was ongoing or reasonably contemplated at the time the document was created and that the dominant purpose of creating the document was for litigation must be met in order to conclude that a document is protected under litigation privilege. The grounds establishing privilege need to be demonstrated by the party claiming the privilege in respect of each document.

c. Application to the Case

[28] In my view, it is necessary to conduct a review of the Disputed Documents. Bearing in mind the general legal principles set out above, I now turn to each of the documents. For ease of reference, I have reproduced a list of them here:

No.	Date	Description
3	October 14, 2009	Report from Aegis Marine Surveyors Ltd. to Kim Wigmore
4	October 20, 2009	Report from Sereca Fire Consulting Ltd. to Kim Wigmore
5	November 15, 2009	Report from Canadian Claims Services Inc. to Kim Wigmore with attached Statement by Lorne Shandro
6-20	January 6, 2010	Emails from Aegis Marine Surveyors Ltd. to Ginelle Hocaluk (Whitelaw Twining) with attached photographs
22	March 19, 2011	Report from Canadian Claims Services Inc. to Kim Wigmore

Document 3

[29] The prothonotary concluded that Document 3 was not protected by litigation privilege. Based on the record, he held that litigation was not ongoing nor was it reasonably contemplated at the time the document was created. Before this Court, the question is whether there were grounds for the motions judge to interfere with the prothonotary's decision. Document 3 was the initial report from Aegis Marine Surveyors Ltd. On the day of the fire, the company was first contacted and retained by the insurance broker, Mr. Mendham. He advised Aegis Marine Surveyors Ltd. that later in the day he would be retaining counsel.

[30] Document 3 was issued to Mr. Wigmore on October 14, 2009. Although there may have been a possibility of litigation, as a possibility almost always exists when a loss is caused by fire, neither party was in a position to assess the nature of and the situation surrounding the incident. The parties were investigating the facts and circumstances in relation to the cause and origin of the fire and resulting damage. Further, the report is described as an interim report and its contents are consistent with the conclusion that it was a preliminary examination of what took place the day of the fire. This supports a conclusion that the parties were in the preliminary stage of investigation.

[31] In my view, the record supports the findings of the prothonotary that litigation was not ongoing nor was it reasonably contemplated at the time the document was created. The prothonotary's factual assessment and conclusion should have been left undisturbed.

Document 4

[32] Based on the record before him, the prothonotary concluded that Document 4 was not protected by litigation privilege as litigation was not ongoing nor was it reasonably contemplated at the time it was created. Document 4 is a report from Mr. Reed of Sereca Fire Consulting Ltd. dated October 20, 2009, one week after the fire. Sereca was also initially contacted and retained by the insurance broker, Mr. Mendham, on the day of the fire. The evidence is that Mr. Reed spoke to counsel, Mr. Wigmore, later on the day of the fire and he was advised that solicitors for a number of third-party yacht owners had requested a joint inspection of the *Helios I*. Mr. Reed was instructed to co-operate with the investigation in this regard.

[33] The motions judge concluded that this request for a joint inspection on the day of the fire clearly signified that the parties were in an adversarial position and that the prothonotary had made a factual error in concluding otherwise: Motions Judge Order at paragraph 41. However, in my view, the mere contact by third-party solicitors to co-operate in the initial investigation of the fire scene on the day of the fire does not change a preliminary investigation into an adversarial situation.

[34] The report from Sereca is brief, with more than half of the short report simply consisting of pictures of the scene of the fire. The report speculates as to various possible causes of the fire, concludes that these possible causes warrant further analysis, and notes that Sereca awaits further direction.

[35] As with Document 3, in my view, there were no grounds for the motions judge to interfere with the prothonotary's decision. The record supports the findings of the prothonotary, namely, that litigation was not ongoing nor was it reasonably contemplated at the time the document was created. The prothonotary's factual assessment and conclusions should have been left undisturbed.

Document 5

[36] Document 5 is a report from Canadian Claims Services Inc. to Mr. Wigmore. Attached to the report is a lengthy and detailed statement from Mr. Shandro. Canadian Claims Services was retained directly by counsel, Mr. Wigmore, on November 4, 2009 and the interview with Mr. Shandro took place on November 13, 2009 in Edmonton where Mr. Shandro resided.

[37] The motions judge concluded that Document 5 was protected by solicitor-client privilege: Motions Judge Order at paragraph 37. There is no explanation from him as to how Document 5 would be covered by solicitor-client privilege other than a general statement that, in his view, the parties were in an adversarial relationship from the date of the fire.

[38] Solicitor-client privilege was not claimed by the respondents with respect to Document 5. In my view, the motions judge erred in concluding that Document 5 was protected by solicitor-client privilege when such privilege was not asserted.

[39] Document 5 differs from Documents 3 and 4 in several ways:

- 1) the investigator was directly retained by counsel;
- 2) it was prepared some further time after the date of the fire and subsequent to the receipt of the preliminary reports contained in Documents 3 and 4 when litigation could more clearly be contemplated; and
- 3) the interview is much more detailed and extensive and more in the nature of interviewing a possible witness.

[40] The prothonotary found that there was more than one purpose for the creation of the Disputed Documents, including Document 5. Given these multiple purposes, he concluded that litigation privilege had not been established. In my view, here the motions judge had grounds to interfere with this aspect of the prothonotary's decision. While a document may be prepared for multiple purposes, the dominant purpose of its creation can be in preparation for litigation. In light of this and the additional factors above, Document 5 is protected by litigation privilege given those additional factors above that distinguish it from Documents 3 and 4.

Documents 6-20

[41] Documents 6 through 20 are very brief emails from Aegis Marine Surveyors Ltd. to the Whitelaw Twining law firm with attached photographs, all of which are dated January 6, 2010. The photographs were previously disclosed in the discovery process. The emails provide updates from the surveyors as to damage sustained by the other boats and a statement as to whether

repairs were economically feasible. By January 6, 2010, litigation was reasonably contemplated and the dominant purpose of creating Documents 6 through 20 was to assist in the preparation of litigation. In my view, the record supports the motions judge's finding that based on the contents of the documents, they would be covered by litigation privilege. However, it is worth noting the comments of the motions judge at paragraph 43 of his reasons where he wrote, "[t]he parties are well aware that a fact is not immune from disclosure because it was ascertained by a surveyor, or even a lawyer. When a representative of a party on discovery is asked what his or her information, knowledge or belief is on a certain point, the facts and information must be disclosed irrespective of source."

Document 22

[42] Lastly, Document 22 is a very brief report from Canadian Claims Services Inc. to Mr. Wigmore, dated March 19, 2011. It is simply an update as to the current status of this matter and the company's account status. I agree with the motions judge that it is also covered by litigation privilege for the same reasons outlined above with respect to Documents 6 through 20.

CONCLUSION

[43] For these reasons, I would allow the appeal in part, with costs to the appellant, and set aside the order of the motions judge. Documents 3 and 4 are not privileged and must be disclosed

within 30 days from the date of the judgment which accompanies these reasons. The remaining documents are protected by litigation privilege.

"David G. Near"

J.A.

"I agree
Eleanor R. Dawson J.A."

"I agree
Johanne Trudel J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: A-71-13

**APPEAL FROM AN ORDER OF THE HONOURABLE MR. JUSTICE HARRINGTON
DATED JANUARY 30, 2013, NO. T-877-11**

STYLE OF CAUSE: WEBASTO PRODUCT NORTH
AMERICA, INC. v. SHASTA

PLACE OF HEARING: VANCOUVER, BRITISH
COLUMBIA

DATE OF HEARING: DECEMBER 12, 2013

REASONS FOR JUDGMENT BY: NEAR J.A.

CONCURRED IN BY: DAWSON J.A.
TRUDEL J.A.

DATED: MAY 22, 2014

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