SUPREME COURT OF YUKON
COUR SUPRÊME DU YUKON
OCT 17 2011
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SUPREME COURT OF YUKON

Citation: Harvey v. 5505 Yukon Limited, 2011 YKSC 76

Date: 20111017
S.C. No. 08-A0004
Registry: Whitehorse

Between:

SHARMAN HARVEY Administrator of the Estate of ROBERT RICHARD HARVEY, Deceased

Plaintiff

And

5505 YUKON LIMITED, ROY A. SLADE, and CHRISTINE DOKE

Defendants

Before: Mr. Justice R.S. Veale

Appearances:

James D. Vilvang, Q.C.	Counsel for the Plaintiff
Andrew J. Hladyshevsky, Q.C.	Counsel for the Defendants
Jim W. Bazant	Counsel for Gareth Howells

REASONS FOR JUDGMENT
(Examination of Gareth Howells)

INTRODUCTION

[1] Sharman Harvey brings an application to examine Gareth Howells ("Howells") in his capacity as lawyer for 5505 Yukon Limited ("the company") pursuant to Rule 28 of the *Rules of Court.*

[2] The plaintiff claims the insurance proceeds arising out of a Unanimous Shareholder Agreement of the company on the death of Robert Richard Harvey ("Harvey").

[3] The defendants oppose the application on the grounds that the proposed questions are subject to solicitor-client privilege of the company. None of the questions related to matters arising after the death of Harvey.

Background

[4] The company was incorporated pursuant to the laws of Yukon on August 6, 1985.

[5] The plaintiff is the administratrix of the estate of Harvey. At the time of his death on February 24, 2007, Harvey was the owner of approximately 44.25% of the shares of the company. The other current shareholders are Roy A. Slade ("Slade") who owned approximately 44.25% of the shares and Christine Doke ("Doke") who owns the balance of approximately 12.5% of the shares. At the time of Harvey's death, Harvey, Slade and Doke were also directors of the company.

[6] Harvey entered into a Unanimous Shareholder Agreement dated June 17, 1997 ("the USA"), with the company and its other shareholders on that date; namely, Gabriel Aucoin, Bruce MacLean and Slade. Doke became a shareholder at a later date.

[7] At all material times during the drafting of the USA, Gareth Howells was counsel for the company. Howells consistently made it clear that he was acting for the company and not the individual shareholders. By letter dated May 28, 1997 to the shareholders, Howells advised them to obtain independent legal advice "if you think necessary."

[8] Slade stated in examination for discovery that he was not aware of any shareholder obtaining independent legal advice. He said:

> I think it was always suggested by [Howells] that we could or should get independent advice, but we always operated under the premise that what was good for one was good for all.

[9] Slade also stated that the shareholders were advised by Howells to incorporate individual holding companies.

[10] With respect to confidentiality, Slade was clear that he did not expect that information given to Howells by a shareholder would have been kept confidential from any other shareholder. He recalled that the four shareholders and Howells met together and discussed everything in relation to the USA.

[11] In 2003, again with Howells, the shareholders entered into a memorandum dated November 6, 2003, as part of a process to simplify the corporate arrangement. This culminated in the execution of an Amalgamation Agreement dated January 1, 2006, prepared by Howells on the instruction of the shareholders.

[12] Slade stated that up to the date of Harvey's death on February 24, 2007, there were no documents or correspondence between Slade, Howells and Harvey that would have been confidential and/or privileged for individual shareholders.

[13] At the request of counsel for the plaintiff, Howells has produced a number of documents, some of which are subject to claims of privilege.

[14] Counsel for the plaintiff and counsel for the defendants attended at Howells' office on or about June 24, 2009 to interview Howells. Howells declined to be interviewed.

[15] I find as a fact that none of the communication between the shareholders and Howells was made with the expectation of confidentiality.

ISSUES

[16] The following issues must be determined:

Issue 1: Should the examination of Howells under Rule 28 be permitted, subject to claims of privilege?

Issue 2: Does the claim of solicitor-client privilege apply to this lawyer's representation of the company and prohibit his examination under Rule 28?

ANALYSIS

[17] Rules 28 provides for the pre-trial examination of a witness as follows:

> (1) (a) Where a person, not a party to an action, may have material evidence relating to a matter in question in the action, on application, the court may order that the person be examined on oath, or affirmation on the matters in question in the action and may, either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.
>
> (b) An order under subrule (a) shall not be made unless the court is satisfied that,
>
> (i) the applicant has been unable to obtain the information from other persons whom the applicant is entitled to examine for discovery, or from the person the party seeks to examine,
>
> (ii) it would be unfair to require the applicant to proceed to trial without having the opportunity of examining the person, and
>
> (iii) the examination will not
>
> (A) unduly delay the commencement of the trial of the action,
>
> (B) entail unreasonable expense for other parties, or
>
> (C) result in unfairness to the person the applicant seeks to examine.

[18] I am satisfied that all the requirements of Rule 28(1)(b) have been met in this case.

Solicitor-Client Privilege

[19] This is not a case about litigation privilege, as the parties agree that the documents and communication after the death of Harvey are privileged.

[20] The Wigmore test sets out four fundamental conditions required for the establishment of a privilege against disclosure:

1. The communications must originate in a confidence that they will not be disclosed;
2. This element of confidentiality must be essential to the full and satisfactory maintenance of the relation between the parties;
3. The relation must be one which in the opinion of the community ought to be sedulously fostered;
4. The injury that would inure to the relation by the disclosure of the communications must be greater than the benefit thereby gained for the correct disposal of litigation.

[21] In this case, the privilege is that of the company and not the privilege of the individual shareholders. The company is not a public company with many shareholders. It is a private corporation, and the three individuals, Harvey, Slade and Doke, are the remaining shareholders of the company. In effect, the shareholders, who once worked harmoniously, are now in a dispute, and the two remaining active shareholders do not wish to disclose documents and communications that the lawyer for the company had prepared with all the shareholders regarding the USA and the Amalgamation Agreement.

[22] As the outset, I am not satisfied that the first Wigmore condition, requiring that the communications originated in a confidence that they would not be disclosed, has been satisfied. Mr. Slade was clear that he had no expectation of confidentiality, as between shareholders, in the discussions of the shareholders with Howells.

[23] However, that does not dispose of the matter as there is still a question of the company's privilege and, arguably, one shareholder cannot waive company privilege.

[24] Although the relationship may have aspects of a joint retainer, the bulk of the evidence indicates that Howells was retained by the company, not the individual shareholders. I note that the relationships between Howells and the shareholders were not entirely clear-cut, given that each shareholder also appears to have retained Howells to incorporate their individual holding companies. However, for these reasons, I will assume that Howells represented the company at all material times, and no shareholder understood that Howells was representing them in their personal capacity in regard to the USA and the Amalgamation Agreement.

[25] The case of *FCMI Financial Corp v. Curtis International Ltd.,* [2003] O.T.C. 1020 (S.C.), is one of the few cases that deal with privilege between a company and its shareholders. In *FCMI*, minority shareholders brought an oppression action against the company and applied for disclosure of accounting and other corporate documents to assist their expert to assess the fair value of the shares. The question was whether there had been an implied waiver of privilege because it was accepted that a shareholder has no proprietary interest in the assets or property of the corporation and no general right to have access to legal advice provided to the corporation: See *Discovery Enterprises Inc. v. Ebco Industries Ltd.* (1998), 41 B.C.L.R. (2d) 207 (C.A.).

[26] Again, the facts of this case are quite distinct, as the shareholders were also directors of the company. As directors, they would be entitled to all documents and communications of the company.

[27] I recognize that the Supreme Court of Canada has emphasized that "solicitor-client privilege must be as close to absolute as possible to ensure public confidence and retain relevance.": See *R. v. McClure*, [2001] 1 S.C.R. 445. However, even if this is a case, like *FCMI,* where a waiver of privilege must be found before the evidence can be provided to the plaintiff, I find that there has been such a waiver.

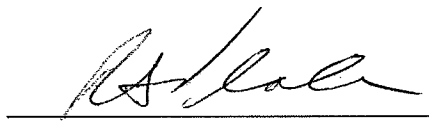
[28] In *FCMI*, Swinton J. declined to disclose the legal advice on the ground that the plaintiffs did not show there would be procedural unfairness if the legal opinions were not produced. In this case, the plaintiff would be deprived of crucial evidence about the agreements without Howell's evidence.

[29] In my view, on the issue of waiver, *FCMI* is distinguishable from the facts of the case at bar. Howells was acting for the company but in circumstances where all the shareholders were present, unlike FCMI where the corporation was in a dispute with its minority shareholders. Howells was acting for the company and the shareholders had no expectation of confidentiality. In these circumstances, I find that there was an implied waiver of privilege by all the shareholders and equally by the company, the legal entity created and directed by the shareholders. The only basis upon which the USA and other documents could proceed was on an implied understanding or premise expressed by Slade that there was no expectation of confidentiality or privilege between the parties, and that "what was good for one was good for all."

[30] I conclude that fairness at trial will only be guaranteed if Howells answers the questions that I have indicated are appropriate. I have already concluded that the first essential Wigmore condition for privilege, the expectation of confidentiality, has not been established. However, even if the corporate privilege existed, there is certainly an implied waiver on the facts of this case.

CONCLUSION

[31] I order Howells to answer the questions I have approved. I have also agreed to review the specific documents for which privileged is claimed and advise whether there is a valid claim for privilege for specific documents not yet disclosed. I leave the matter of costs to be addressed by the trial judge.



VEALE J.