IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *AC&D Insurance Services Ltd. v. Simmons,*
2016 BCSC 452

Date: 20160315
Docket: S152065
Registry: Vancouver

2016 BCSC 452 (CanLII)

Between:

AC&D Insurance Services Ltd.

Plaintiff

And

Paul Simmons, Wanda Woods, Arthur Douglas Fredell, Michael Snetsinger and Central Agencies Ltd.

Defendants

Before: The Honourable Mr. Justice Pearlman

Reasons for Judgment

Counsel for the Plaintiff:	Tim Delaney
Counsel for the Defendants, Simmons and Woods:	Alex Bayley
Place and Date of Hearing:	Vancouver, B.C. August 11, 2015
Place and Date of Judgment:	Vancouver, B.C. March 15, 2016

INTRODUCTION

[1] The defendants Paul Simmons and Wanda Woods apply for:

(a) a declaration that the plaintiff's counsel, Mr. Timothy Delaney, and his law firm, Lindsay Kenney LLP ("the law firm") are in a conflict of interest;

(b) that Mr. Timothy Delaney and the law firm be removed as counsel of record for the plaintiff on the basis that they are in a conflict of interest;

(c) that Mr. Timothy Delaney and the law firm and any lawyer associated with the law firm are prohibited from acting for the plaintiff or against the defendants Paul Simmons and Wanda Woods in relation to the subject matter of this action; and

(d) costs.

2016 BCSC 452 (CanLII)

[2] The law firm formerly acted for the plaintiff AC&D Insurance Services Ltd. ("AC&D"), Paul Simmons and Wanda Woods on their joint purchase of a book of insurance business, but had ceased to act for Mr. Simmons and Ms. Woods before this action was commenced.

[3] In deciding whether the law firm should be removed from the record as counsel for the plaintiff as result of a conflict of interest arising from its former representation of the applicants, it will be necessary to determine the following issues:

(a) Did the law firm acquire confidential information as a result of its former retainer relevant to this matter?

(b) Would a reasonable member of the public, possessed of all the relevant facts, think there was a risk of the disclosure of confidential information in the circumstances of this case?

(c) Even if the law firm received no confidential information from the applicants, has the law firm breached its duty of loyalty by taking an adversarial position against the applicants with respect to the legal work which the law firm performed for the applicants, or a matter central to the previous retainer?

(d) Do the circumstances warrant disqualification of the law firm as counsel for the plaintiff in this action?

FACTS

[4] The plaintiff owns and operates an insurance agency and brokerage in North Vancouver, British Columbia.

[5] AC&D claims damages against the defendants Simmons and Woods for breach of the agency-producer contracts by which it appointed them to sell insurance products.

[6] On or about January 1, 2004, Mr. Simmons entered into an agency-producer contract with AC&D by which the plaintiff agreed to remunerate him by commissions paid on the sale of insurance products. Under the agency-producer contract, upon termination of the agreement, Mr. Simmons would retain any clients he had brought with him to the plaintiff. Clients who were not existing customers of the plaintiff and who Mr. Simmons developed during the term of the agency-producer contract were defined as "Producer's Clients" and were owned equally by Mr. Simmons and the plaintiff. Upon termination of the agency-producer contract, Mr. Simmons had the option to retain the Producer's Clients by purchasing AC&D's share of the Producer's Clients for an amount equal to one-half of the agreed value of the business generated by the Producer's Clients. In the event the parties were unable to agree, the purchase price would be determined by the decision of an evaluator.

[7] On or about March 1, 2007, Ms. Woods entered into an agency-producer contract with AC&D on substantially the same terms.

[8] By an agreement dated for reference December 1, 2010, Mr. Simmons, Ms. Woods and AC&D entered into an asset purchase agreement for the purchase of a specialized sport book of insurance from SSEI Insurance Agency (BC) Ltd. (the "SSEI Purchase Agreement").

[9] By the SSEI Purchase Agreement, AC&D, Mr. Simmons and Ms. Woods agreed that AC&D would own 50% of the specialized sport book of insurance and that Mr. Simmons and Ms. Woods would each own 25%.

2016 BCSC 452 (CanLII)

[10] The law firm acted for AC&D, Mr. Simmons and Ms. Woods on the SSEI Purchase Agreement.

[11] On or about June 26, 2013, Mr. Simmons and Ms. Woods gave notice of termination of their agency-producer contracts and elected to exercise their options to purchase the plaintiffs interest in the "Producer's Clients", which included the specialized sport book of business.

[12] On July 12, 2013, AC&D, Mr. Simmons and Ms. Woods agreed to the appointment of Renate Mueller as a joint evaluator to determine the price to be paid by the applicants for the purchase of the Producer's Clients.

[13] Although the evaluator delivered a report on July 26, 2013 providing values for the Producer's Clients, the parties, despite protracted negotiations, failed to agree on the terms by which the applicants would pay the plaintiff for their options to purchase the Producer's Clients.

[14] The law firm represented AC&D throughout the negotiations for the purchase of the Producer's Clients. Mr. Simmons and Ms. Woods were represented by their own counsel.

[15] In this action, the plaintiff claims that Mr. Simmons and Ms. Wood have each breached their agency-producer contracts by refusing or failing to pay the purchase price for the Producer's Clients and by failing to pay or account for their share of commissions due to AC&D from sales to Producer's Clients made from July 2013 to the date of termination of the of agency-producer contracts. For their part, the applicants contend that the plaintiff is in breach of contract by failing or refusing to agree on the option price and failing to execute an agreement for the purchase and sale of the Producer's Clients.

2016 BCSC 452 (CanLII)

2016 BCSC 452 (CanLII)

POSITIONS OF THE PARTIES

The Applicants' Position

[16] The applicants submit that the law firm's representation of the plaintiff in this action is substantially related to its former representation of them on the SSEI Purchase Agreement. Further, the applicants say the law firm may be in possession of confidential information as a result of its former representation of them, and that it may be able to use that information to their prejudice in this litigation.

[17] The applicants also submit that whether or not there is a risk of disclosure of confidential information, the law firm has a duty not to act against them in a substantially related matter. Mr. Simmons and Ms. Woods argue that the option price for the Producer's Clients will be hotly contested, and that the value of the specialized sports book acquired under the SSEI Purchase Agreement forms a significant component of the option price. The applicants maintain that the law firm now takes an adversarial position against them regarding the specialized sport book, a matter central to the former retainer.

[18] Accordingly, Mr. Simmons and Ms. Woods say that the law firm is in a conflict of interest and must cease to act as counsel for AC&D in this action.

The Plaintiff's Position

[19] The plaintiff acknowledges the law firm jointly represented AC&D, Mr. Simmons and Ms. Woods on the SSEI Purchase Agreement, but says that in the course of that retainer the law firm received no confidential information from the applicants relevant to this action.

[20] AC&D also contends that the applicants have failed to demonstrate that the law firm's previous retainer is sufficiently related to the present action to give rise to a disqualifying conflict of interest. According to the plaintiff, the law firm is not taking an adversarial position against the applicants regarding the work it performed on the SSEI Purchase Agreement. In these proceedings, the plaintiff claims damages for

the applicants' alleged breach of their agency-producer contracts. No party contests the terms of the SSEI Purchase Agreement. The specialized sport book of business is simply one of the assets comprising the Producer's Clients, for which the applicants must pay AC&D under the terms of their agency-producer contracts.

2016 BCSC 452 (CanLII)

[21] In short, the plaintiff submits that in circumstances where the law firm did not acquire confidential information concerning the applicants through its former retainer on the SSEI Purchase Agreement, and where it is not taking an adversarial position against the applicants regarding any legal work it performed concerning the purchase of the specialized sport book, the Court ought not to interfere with AC&D's right to representation by counsel of its choice.

DISCUSSION AND ANALYSIS

Disqualifying Conflict of Interest: Applicable Legal Principles

[22] In *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235, the Court addressed the applicable test for determining whether a law firm was disqualified by conflict of interest from acting against a former client.

[23] In defining the appropriate standard to be applied determining whether the plaintiff's law firm was disqualified from continuing to act, the Court identified three competing values. They were the maintenance of the high standards of the legal profession and the integrity of our system of justice; the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and the desirability of permitting reasonable mobility in the legal profession: *MacDonald Estate* at 1243.

[24] Those competing values must be weighed at the time when the motion to disqualify is brought: *Crewe Estate v. Mide-Wilson*, 2009 BCSC 975 at para. 78.

[25] In *MacDonald Estate* at 1244, Sopinka J., writing for the majority of the Court, emphasized the importance of maintaining fundamental professional standards and

the preservation of the confidentiality of information passing between solicitor and client.

[26] Where the issue relates to the use of confidential information, two questions must be answered:

> (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand?
>
> (2) Is there a risk that it will be used to the prejudice of the client? (*MacDonald Estate* at 1260)

2016 BCSC 452 (CanLII)

[27] In *LS Entertainment Group Inc. et al v. Wong et al*, 2000 BCSC 1789, Bennett J. (as she then was), succinctly summarized the test for whether a lawyer may act against a former client, at para. 38:

> [38] In summary, the application of the *MacDonald Estate* test for a disqualifying conflict of interest requires a consideration of the following issues:
>
> (a) Was there a previous solicitor-client relationship between the applicants and the respondents that was sufficiently related to the retainer from which it is sought to remove the solicitor?
>
> (b) If there was a "sufficiently related relationship", has the respondent met the burden of satisfying the court that no confidential information was passed that could be relevant to the present action?
>
> (c) Is there a risk that the confidential information will be misused?

[28] Once the client shows that a previous relationship existed which is sufficiently related to the retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant: *MacDonald Estate* at 1260.

[29] As the Court noted, this is a difficult burden to discharge. First the court must be satisfied that a reasonably informed member of the public would conclude that no confidential information had passed. Further, the solicitor must meet the burden without revealing the specifics of the privileged communication.

[30] The following provision of the *Code of Professional Conduct* of the Law Society of British Columbia relating to the non-disclosure of confidential information is relevant to the circumstances of this case:

> **3.4-10** Unless the former client consents, a lawyer must not act against a former client in:
>
> (a) the same matter,
>
> (b) any related matter, or
>
> (c) any other matter, if the lawyer has relevant confidential information arising from the representation of the former client that may reasonably affect the former client.

2016 BCSC 452 (CanLII)

[31] Although they do not bind the Court, the provisions of the *Code of Professional Conduct* "provide some indication of what a reasonable person is entitled to expect from their lawyer": *Crewe Estate* at para. 89.

[32] Each case must be considered having regard to its particular factual context.

[33] The overriding policy consideration is that "the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate* at 1259-1260. However, if a lawyer is to be disqualified based on a conflict of interest arising from the receipt of confidential information from the former client, that confidential information must have "a cogent and compelling" connection to the current retainer in which the lawyer acts against the former client: *Merrick v. Rubinoff*, 2013 BCSC 2352, at para. 15. Accordingly, the court will take a cautious approach to disqualification applications and should interfere with a party's right to representation by counsel of their choice only in clear cases: *Crewe Estate*, at para. 22; *Merrick*, at para. 14.

[34] Even where the former client cannot demonstrate a risk of disclosure of confidential information, the current and former retainers may still be "sufficiently related" to give rise to a disqualifying conflict of interest.

[35] In *Bhandal v. Khalsa Diwan Society of Victoria*, 2013 BCSC 1425, Mr. Justice Johnston, citing the decision of Cromwell J.A. (as he then was) in *Brookville Carriers Flatbed GP Inc. v. Blackjack Transport Ltd.*, 2008 NSCA 22, held at paras. 32, 33:

> [32] These passages show the importance of determining whether the matter on which the lawyer acted for the former client is "related" to the current matter from which the former client seeks to disqualify the lawyer. The court in *Brookville* said that the current and former retainers would be sufficiently related if:
>
> > 1) "the new retainer involves the lawyer taking an adversarial position against the former client with respect to the legal work which the lawyer performed for the former client or a matter central to the earlier retainer" (para. 17); or
> >
> > 2) if "it is reasonably possible that the lawyer acquired confidential information pursuant to the first retainer that could be relevant to the current matter" (para. 50).
>
> [33] The first consideration does not depend on the lawyer having in the past received confidential information from the former client. The court in *Brookville* held that where a lawyer acts against a former client and none of the former client's confidential information is put at risk by the new retainer, the lawyer still owes a duty of loyalty to the former client, a duty the court said was based on the need to protect and to promote public confidence in the legal profession.

2016 BCSC 452 (CanLII)

[36] At para. 35, the court explained that the relationship between matters in which a lawyer acts or has acted affects the burden of proving whether a client has imparted disqualifying confidential information to the lawyer. Once the former client shows the previous relationship is sufficiently related to the current retainer, the court should infer that confidential information was imparted unless the lawyer satisfies the court that no relevant information was imparted: *MacDonald Estate* at 1260.

[37] In *Bhandal* at para. 36, the court went on to explain :

> The relationship between retainers is also important where confidential information is not a concern. In *Brookville,* the court said at para. 55:
>
> > ... As I have attempted to explain, the approach to the question of whether two matters are related is entirely different in a *MacDonald Estate* situation than it is in the case of an alleged disqualifying conflict of interest where confidential information is not at risk. The purpose of assessing the relationship between the two retainers in *MacDonald Estate* is to determine whether an inference should be drawn that confidential information obtained in the course of the first retainer is relevant to the second. When, as here, confidential information is not at risk, the relationship between the two retainers is considered in order to identify whether the second retainer involves the lawyer attacking the legal work done during the first retainer or amounts, in effect, to the lawyer changing sides on a matter central to the earlier retainer. The concept of

> relatedness for this purpose is much narrower and has an entirely different focus than the concept as applied in the *MacDonald Estate* analysis.
>
> [Emphasis added.]

[38] With these principles in mind, I turn to the particular circumstances of this case.

2016 BCSC 452 (CanLII)

Application of Principles to Facts of this Case

a. *Did the law firm acquire confidential information relating to the applicants as a result of its former retainer?*

[39] In late February 2011, the law firm received instructions through Mr. Joe Stonehouse, one of the directors of the plaintiff, that AC&D, Mr. Simmons and Ms. Woods would purchase the specialized sport book of insurance of SSEI Sports Insurance Agency Ltd. The law firm represented the plaintiff and the applicants jointly on the SSEI Purchase Agreement, by which AC&D acquired a 50% interest, and the applicants each received a 25% interest, in the specialized sport book of insurance.

[40] Ms. Erin Easingwood, the solicitor with the law firm acting on the SSEI Purchase Agreement, received most of her instructions from Mr. Stonehouse. When the transaction completed, the law firm rendered its account to the plaintiff.

[41] Ms. Easingwood began working on the transaction in April 2011, and only met with the applicants once, when they executed the SSEI Purchase Agreement on February 17, 2012.

[42] Mr. Simmons estimates that during the law firm's representation, he sent about 18 e-mails to Ms. Easingwood. The seven e-mails to Ms. Easingwood that Mr. Simmons attached to his affidavit affirmed August 7, 2015 include his brief comments on drafts of the SSEI Purchase Agreement that the law firm also sent to Mr. Stonehouse; acknowledgements of the receipt of correspondence from the law firm; and arrangements for execution of the agreement. On any matters relating to the substance of the transaction, Ms. Easingwood and Mr. Simmons each copied

their e-mail correspondence to Mr. Stonehouse. Ms. Wanda Woods sent no e-mails to Ms. Easingwood.

[43] Ms. Easingwood's evidence that the applicants' "financial circumstances" were never discussed with her during the retainer for the SSEI Purchase Agreement is not contested.

[44] Further, the law firm provided no advice to the plaintiff or the applicants concerning the purchase price of the specialized sport book of insurance. Ms. Easingwood has deposed that she was instructed by Mr. Stonehouse to revise the SSEI Purchase Agreement to reflect the agreement already discussed between the parties, and to provide suggestions concerning the mechanisms and logistics for payment of the purchase price to the vendor.

[45] The applicants have not identified any information they imparted to the law firm that was to be kept confidential from AC&D.

[46] Upon completion of the SSEI Purchase transaction, the law firm's joint representation of the plaintiff and the applicants ceased. Thereafter, the law firm acted only for AC&D.

[47] Here, where the law firm represented the plaintiff and the applicants jointly on the SSEI Purchase Agreement, there is no evidence that either Mr. Simmons or Ms. Woods communicated any information to Ms. Easingwood that was to be kept confidential from the plaintiff.

[48] Mr. Simmons has expressed concern that the law firm, through its former retainer, acquired confidential information concerning the applicants' "negotiation style, business approach and financial circumstances" that might be used against them in this action. Neither Mr. Simmons nor Ms. Woods have asserted that they communicated any information concerning their financial circumstances to the law firm. I accept Ms. Easingwood's uncontroverted evidence that she had no discussions concerning the applicants' financial circumstances during the course of

2016 BCSC 452 (CanLII)

her retainer. I find the law firm acquired no knowledge of the applicants' financial circumstances that might be used to their disadvantage in this action.

[49] In light of her limited communications with the applicants, it is unlikely that Ms. Easingwood acquired any information concerning Mr. Simmons' negotiation style or business approach that could be used to the applicants' prejudice. Further, as counsel for the plaintiff submits, as a result of Mr. Simmons' employment with AC&D from 2004 until 2013, AC&D would have acquired a great deal of information concerning Mr. Simmons' "negotiation style, business approach and financial circumstances" that was not confidential.

[50] While in litigation an understanding of an opponent's strengths and weaknesses gained through a solicitor and client relationship may be significant in determining whether current and former matters are "sufficiently related", particular caution is required when considering knowledge of a former client's "personal characteristics and habits of thinking": *Merrick* at paras. 17, 18 and 19; *Milverton Capital Corp. v. Thermotech Technologies Inc.*, 2002 BCSC 773 at paras. 80 and 81.

[51] Information concerning the former client's personal characteristics and habits of thinking, or corporate philosophy, will only support a disqualification for alleged conflict of interest where that information is capable of being used against the former client in some tangible manner: *CNR v. McKercher LLP*, [2013] 2 S.C.R. 649 At para. 54; *Merrick* at paras. 19,20.

[52] I am not persuaded that I should infer the law firm acquired any confidential information concerning the defendants relevant to this matter. I find that the law firm did not acquire any knowledge of the applicants' personal characteristics, negotiation style, or business approach that is capable of use against them in any tangible manner.

b. *Would a reasonable member of the public possessed of all the relevant facts, think there was a risk of disclosure of confidential information in the circumstances of this case?*

2016 BCSC 452 (CanLII)

[53] For the reasons discussed in the previous section of this judgment, the answer is "no".

> c. *Has the law firm breached its duty of loyalty by taking an adversarial position against the applicants with respect to the legal work which the law firm performed for the applicants, or a matter central to the previous retainer?*

[54] Even where the disclosure of confidential information is not at risk, former and new retainers will be "sufficiently related" to give rise to a disqualifying conflict of interest where on the new retainer the lawyer takes an adversarial position against the former client with respect to legal work performed for that client, or a matter central to the former retainer: *Bhandal* at para. 32.

[55] Here, the law firm does not attack the work it performed on the SSEI Purchase Agreement. No one contests the validity or the terms of the SSEI Purchase Agreement. This action arises from the applicants' termination of their agency-producer contracts and the plaintiff's claims for payments allegedly due from the applicants for the purchase of AC&D's interest in the Producer's Clients pursuant to the agency-producer contracts.

[56] The specialized sport book of insurance acquired by the parties through the SSEI transaction is one of the assets constituting the Producer's Clients. However, the law firm was not engaged, in the earlier retainer, to negotiate the value of that asset. The law firm is not taking an adversarial position against the applicants regarding any work it performed for them.

[57] The joint purchase of the specialized sport book of insurance by the plaintiff and the claimants was undoubtedly the focus of the law firm's earlier retainer. The plaintiff does not seek to unravel that transaction. The dispute here concerns the amount to be paid under the agency-producer contracts for the acquisition of AC& D's interest in not only the specialized sport book of insurance, but also every other asset comprising the Producer's Clients. In my view, the law firm is not taking an adversarial position on any matter that was central to its previous retainer.

2016 BCSC 452 (CanLII)

d. Do the circumstances warrant disqualification?

[58] I conclude that the applicants have not established any basis for the disqualification of the law firm. In my view, no reasonable person, informed of the relevant facts would be concerned that there is either a risk of disclosure of confidential information to the applicants' disadvantage, or that the law firm is attacking either the work it performed under its former retainer, or any matter central to that retainer. In these circumstances, the law firm's continued representation of the plaintiff does not compromise the integrity of the justice system.

[59] Accordingly, the application of the defendants Simmons and Woods is dismissed, with costs to the plaintiff in any event of the cause.

"PEARLMAN J."

2016 BCSC 452 (CanLII)