

CITATION: The Corporation of the United Counties of Prescott Russell v. David Laflamme Construction
2016 ONSC 1059
COURT FILE NO.: 10-48888
DATE: 2016/02/12

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:)
)
THE CORPORATION OF THE UNITED) Allan O’Brien and Lauren Rakowski,
COUNTIES OF PRESCOTT-RUSSELL) (agents for Vice and Hunter LLP, Lawyers
) for the Plaintiff)
Plaintiff)
)
- and -)
)
DAVID S. LAFLAMME)
CONSTRUCTION INC. CORNWALL) James M. Brown,
GRAVEL COMPANY LTD. AND) for the Defendant WSP Canada Inc
WATERPROOF CONCRETE (CANADA))
LTD AND WSP CANADA INC.)
)
Defendants)
) **HEARD:** December 11, 2015

REASONS FOR DECISION

R. SMITH J.

OVERVIEW

[1] The Corporation of the United Counties of Prescott-Russell (“Prescott-Russell”) seeks an order compelling WSP Canada Inc. (“WSP”) to provide answers to refusals at the cross-examination of Julia Marson.

[2] Prescott-Russell seeks a copy of the Risk Management Report (“RMR”) prepared by Ms. Marson and sent to senior management in October of 2013. A copy of this same RMR was subsequently sent to WSP’s insurer. Prescott-Russell also asked a number of other questions related to the RMR and the Risk Management Policy including whether WSP’s insurer requested that it be kept informed, and

confirmation that it closed its file. The questions are set out on the refusals and undertakings chart attached to the motion.

[3] WSP submits that the Risk Management Report prepared by Ms. Marson is protected by litigation privilege and common law privilege and therefore need not be produced.

[4] Prescott-Russell argues that the information contained in the Risk Management Report is relevant to WSP's limitation defence and the discoverability issue as Prescott-Russell is bringing a motion to add WSP as a Defendant in this action.

FACTS

[5] I have used parts of the plaintiff's and defendant's materials when outlining the uncontested facts.

[6] WSP was retained by Prescott-Russell as an engineering consultant throughout the relevant period. WSP approved the specifications for the repairs to the J. Henri Séquin Bridge.

[7] WSP's specifications included the use of a waterproof admixture known as "Everdure Caltite".

[8] David S. Laflamme construction Inc. ("Laflamme") obtained the contract to rebuild the bridge. Laflamme completed the work in 2005, but by May of 2006 the bridge showed evidence of deterioration.

[9] WSP advised Prescott-Russell that Laflamme's poor workmanship was the cause of the deterioration. Laflamme redid the deteriorated areas of the bridge in 2007 using the same admixture.

[10] In the fall of 2008, Prescott-Russell discovered that the repairs had failed and the concrete had deteriorated once again.

[11] WSP maintained their opinion to Prescott-Russell that poor workmanship caused the deterioration, but Laflamme refused to redo the work or assume responsibility. Laflamme alleged that the cause of the deterioration was the concrete specified by WSP. WSP assured Prescott-Russell that this allegation was without merit.

[12] Throughout the spring of 2006 there were various communications between Prescott-Russell, WSP and Laflamme regarding the deficiencies. Laflamme maintained that the deficiencies were caused by the admixture Everdure Caltite, which had been specified by WSP.

[13] A representative of Prescott-Russell stated that he was aware since June 21, 2006, that Laflamme blamed WSP for the deterioration of the first repairs to the bridge.

[14] Laflamme also blamed WSP for the deterioration of the second repairs to the bridge and Prescott-Russell was aware of this since October 29, 2009.

[15] Prescott-Russell commenced action against Laflamme on July 2, 2010 for damages for the defective repairs to the bridge. In its defence filed on December 14, 2010 Laflamme alleged that the use of the admixture caused the defects in the repairs it had performed.

[16] A Third Party claim was commenced against Cumberland Ready Mix Ltd (“Cumberland”) by the defendant Waterproof Concrete (“Waterproof”). In its defence filed on September 11, 2011 Cumberland alleged that Everdure Caltite was not an approved admixture for the project.

[17] Prescott-Russell claims it learned of the material facts to support a potential claim against WSP in 2014. In November of 2014, it drafted an amended Statement of Claim to add WSP as a defendant.

ANALYSIS

Issue #1 - Is the Information Sought Relevant?

[18] WSP submits that the information sought is not relevant as it alleges that Prescott-Russell already had sufficient evidence to include WSP as a defendant without obtaining the RMR.

[19] The unique facts in this case are that WSP continued to act as the engineering consultant to Prescott-Russell, who continued to rely on their advice that the admixture specified by them to be included in the concrete mix was appropriate.

[20] Prescott-Russell alleges that WSP acted in a conflict of interest by reassuring it that WSP had not made any error and in these circumstances it could not have discovered its claim against WSP, as it was reasonable for it to rely on WSP’s professional opinion.

[21] Section 5(1) of the *Limitations Act*, S.O. 2002, c. 24, Sched. B. states as follows:

5(1) A claim is discovered on the earlier of

(a) The day on which the person with the claim first knew,

(i) That the injury, loss or damage had occurred,

(ii) That the injury, loss or damage was caused by or contributed to by an act or omission,

(iii) That the act or omission was that of the person against who the claim is made, and

(iv) That, having regard to the nature of the injury, loss or damage, a proceeding would be an appropriate means to seek to remedy it; and

(b) The day on which a reasonable person with the abilities and in the circumstances of the person with the claim ought to have known of the matter referred to is clause (a).

[22] I find that the RMR prepared by WSP is relevant to the discoverability issue and when Prescott-Russell discovered or ought to have discovered the material facts on which to base its claim against WSP. WSP acted as Prescott-Russell's professional advisor and as in *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONSC 151 (C.A.) where Epstein J. held that it would be unreasonable for the client to have distrusted their professional advisor.

DISPOSITION OF ISSUE #1

[23] The information requested in the questions posed by Prescott-Russell is relevant to the issues of discoverability and also to the issue of whether WSP breached its professional duties to Prescott-Russell by acting in a conflict of interest.

Issue #2 - Is the Risk Management Report Protected by Litigation Privilege?

[24] The parties agree that documents prepared for the dominant purpose of litigation are protected by litigation privilege. In *Mercaldo v. Poole*, 1986 CarswellOnt 456, [1986] O.J. No. 1103, 13 C.P.C. (2d) 129, 1 A.C.W.S. (3d) 359 at para 6, the Court held that a "notice of claim" to an errors and omissions insurer is not necessarily privileged and that a mere possibility of litigation will not suffice.

[25] In this case the RMR was prepared as part of WSP's new Risk Management Policy and constituted a review of all projects on which there was a risk of litigation. The RMR was not prepared for the dominant purpose of this litigation. As such, I find it is not protected by litigation privilege.

DISPOSITION OF ISSUE #2

[26] The RMR submitted by Ms. Marson was not prepared for the dominant purpose of litigation and is therefore not subject to litigation privilege.

Issue #3 - Is the Risk Management Report Protected by Common Law Privilege.

[27] In *Slavutych v. Baker*, 1975 CarswellAlta 39 (S.C.C), [1976] 1 S.C.R. 254, the Supreme Court of Canada endorsed the doctrine of common law privilege and identified four criteria as outlined by Wigmore J. which had to be met. Those criteria are as follows:

- (1) The communication originated in a confidence that they would not be disclosed;
- (2) This element of confidentiality is essential to the full and satisfactory maintenance of the relation between the parties;
- (3) The relation is one which in the opinion of the community ought to be sedulously fostered; and
- (4) The disclosure of the communications would cause injury to the relation that would be greater than the benefit gained for the correct disposition of the litigation.

[28] In this case the RMR was prepared by Ms. Marson and sent to the senior management of WSP, who then subsequently sent the report on to their insurer. The report did not originate in confidence but was to be shared with senior management. It was an internal report to management and was not created for the dominant purpose of litigation in this case.

[29] The relationship between an employee and senior management of a professional firm is one where confidentiality is important when the risk of litigation is being discussed, but it is not a situation where privilege can be asserted. The RMR was prepared for senior management of the engineering firm where

litigation was not the dominant purpose. Ms. Marson reviewed all projects and assessed the risk that WSP might become involved in litigation on the projects in which they had been involved.

[30] The RMR was ultimately sent to WSP's insurers. However, the relationship between an insured and insurer is also not one that the courts have deemed necessary to be privileged, unlike communications between a lawyer and a client.

[31] I also find the relationship between an employee and senior management of a professional firm and the relationship between insurer and insured is not a relationship that in the opinion of the community should become privileged, where any such communication or reports were not prepared for the dominant purpose of litigation.

[32] I also find that in these circumstances, the benefits of the correct disposition of the litigation, to be obtained by the production of the information requested, outweigh any possible injury to the relationship.

DISPOSITION OF ISSUE #3

[33] For the above reasons I find that the information requested by Prescott-Russell is not protected by common law privilege.

DISPOSITION OF THE MOTION

[34] For the above reasons WSP is therefore ordered to produce the RMR prepared by Ms. Marson in October 2013 and to answer question and undertakings #24, #242, #263, #266, #294, and #302, within 10 days.

COSTS

[35] Each party shall have 10 days to make submissions on costs.

Justice Robert J. Smith

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Plaintiff

– and –

DAVID S. LAFLAMME CONSTRUCTION INC.
CORNWALL GRAVEL COMPANY LTD. AND
WATERPROOF CONCRETE (CANADA) LTD AND
WSP CANADA INC.

Defendants

REASONS FOR DECISION

Justice Robert J. Smith

Released: February 12, 2016