

IN THE MATTER OF THE *INSURANCE ACT*, R.S.O. 1990,
c. I. 8, section 275 and *REGULATION 283/95*

AND IN THE MATTER OF THE *ARBITRATION ACT*,
S.O. 1991, c. 17;

AND IN THE MATTER OF AN ARBITRATION

BETWEEN:

JEVCO INSURANCE COMPANY

Applicant

- and -

ROYAL & SUNALLIANCE INSURANCE COMPANY

Respondent

DECISION ON A PRELIMINARY ISSUE

COUNSEL:

Chris T. Blom for the Applicant

Derek Greenside for the Respondent

PRELIMINARY ISSUE:

1. Is the letter sent by Jevco's in-house counsel and the responding legal opinion provided by Miller Thomson protected by solicitor-client privilege, or has privilege over these documents been waived ?

RESULT:

Jevco has put its “state of mind” in issue in this proceeding, and has therefore impliedly waived the solicitor-client privilege that attached to the documents. Counsel for Jevco is directed to provide copies of the documents to counsel for Royal forthwith.

BACKGROUND:

Jevco Insurance Company (“Jevco”) seeks indemnification from Royal and SunAlliance (“Royal”) for accident benefits it has paid out to Amy Hansen, arising from injuries she sustained in a motorcycle accident on July 2, 1996. Ms. Hansen had initially settled her claim with Jevco on July 31, 1998, approximately two years after the accident. Three years later, on July 3, 2001, counsel retained by Ms. Hansen advised Jevco that his client was rescinding the settlement reached.

Jevco ultimately agreed that the settlement documentation executed in 1998 did not properly give rise to a full and final settlement of Ms. Hansen’s claims under the *Statutory Accident Benefits Schedule*, and re-opened the claim.

Jevco subsequently commenced an arbitration against Royal, seeking indemnification pursuant to the Loss Transfer provisions in section 275 of the *Insurance Act*. I was advised that Royal does not dispute that its driver would be found to be 100% liable for the accident in question. However, it alleges that Jevco acted improperly in deciding to re-open Ms. Hansen’s claim after the 1998 settlement, and resists payment of the amounts sought on that basis. Counsel have agreed that the two issues in dispute in the arbitration are – was the July 1998 settlement reached with Ms. Hansen binding and enforceable? If it is not, was Jevco negligent in re-opening the claim, and does it owe a duty of care to Royal in these circumstances?

Counsel for Royal requested production of all relevant documentation in Jevco’s possession relating to the settlement reached. Various documents were produced, and a

dispute arose over the production of two documents - a letter from in-house counsel at Jevco seeking a legal opinion from the law firm of Miller Thomson on the enforceability of the initial settlement of Ms. Hansen's claim, and the subsequent legal opinion provided by that firm. Counsel for Jevco resisted production of these documents, asserting that they were protected by solicitor-client privilege. In the course of discussion on the issue, he acknowledged that Jevco had agreed to resile from its position that the initial settlement reached with Ms. Hansen was binding on the basis of the legal opinion received.

Counsel for Royal contended that he was entitled to production of the letters. In a subsequent pre-hearing call, it was agreed that counsel would file written submissions on the issue, with case law supporting their positions.

PARTIES' ARGUMENTS:

Counsel for Royal does not dispute that the legal opinion rendered is protected by solicitor-client privilege, but takes the position that the privilege has been waived by implication. He contends that if Jevco accepted Ms. Hansen's rescission of the settlement on the basis of the opinion it received, it has put its state of mind in issue and fairness dictates that the documents which inform its state of mind be disclosed. Mr. Greenside filed various cases touching on the implied waiver of privilege, some of which stand for the proposition that when a party raises the issue of its state of mind and admits that it acted on the basis of legal advice it received, it waives the protection of solicitor – client privilege.

Counsel for Jevco contended that the rule protecting communications between a solicitor and his or her client is an absolute one, and should only be detracted from in clearly-defined circumstances. He noted that the privilege belongs to the client, rather than the solicitor, and that it can therefore only be waived by the client. He acknowledged that privilege can impliedly be waived when a party seeking to uphold its privilege puts the issue of its state of mind into the proceedings, and in so doing points to legal advice it has

received as a reason for its conduct, but submitted that a mere statement that legal advice had been received and relied upon, without any information about the nature or substance of the advice is not sufficient to waive the privilege.

Mr. Blom also contends that Jevco's state of mind is not in issue in this proceeding. He submitted that Jevco's reasons for agreeing to re-open Ms. Hansen's claim do not form the substance of the claim and are not in issue in the arbitration.

ANALYSIS & FINDINGS:

The rule protecting solicitor-client communications from disclosure is well-established. Courts have repeatedly upheld the right of a party to communicate with his or her legal advisor in confidence, with the expectation that these communications will not be disclosed. However, the rule is not absolute, and it is clear that privilege may be waived by the protected party at his or her instance. The courts have also found that solicitor – client privilege may be waived in the absence of an intention to do so, “where fairness and consistency so require”. This has been termed “waiver by implication”. In the oft-cited text “Evidence in Trials in Common Law”, Vol. VIII, p. 635 (McNaughton, 1961) Professor Wigmore explains the concept as follows:

What constitutes a waiver by implication?

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e. not only the element of implied intention, but also the element of fairness and consistency. A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or to disclose, but after a certain point his election must remain final.

The notion that concepts of fairness can be imported into the analysis and may result in the waiver of solicitor-client privilege has gained ground with judges and masters in recent years. (See *S & K Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* [1983] 45 B.C.L.R. 218; *Verney v. Great-West Life Assurance Co.*, [1998] O.J. No. 932, *Con-Drain Co. v. Borden & Elliott* [1999] O.J. No. 2368 (Gen. Div.); *Bank Leu AG v. Gaming Lottery Corp.* [1999] O.J. No. 3949, aff'd by Div. Ct. [2000] O.J. No. 1137)

In the *Bank Leu AG, supra*, case Justice Ground considered various questions relating to the scope of solicitor – client privilege, in the context of a motion for production of privileged documents. He stated that in determining whether privilege should be deemed to have been waived, the court should “balance the interest of full disclosure for purposes of a fair trial against the preservation of solicitor client...privilege”. He goes on to state –

Privilege will be deemed to have been waived where the interests of fairness and consistency so dictate or when a communication between a solicitor and client is legitimately brought into issue in an action. When a party places its state of mind in issue and has received legal advice to help form that state of mind, privilege will be deemed to be waived with respect to such legal advice.

Most of the cases cited by the parties in which requests for disclosure of privileged material were made focused on whether the solicitors involved were negligent in providing legal advice. The judges and masters ruling on the disclosure issues found that privileged communications between solicitor and client had been impliedly waived on the basis that the plaintiff had put its state of mind in issue. Jevco argues in the instant case that these decisions are distinguishable from the situation here, as its state of mind is not in issue in this proceeding. In its factum, counsel for Jevco states that “the issues of how or why Jevco agreed to re-open Ms. Hansen’s accident benefits file does not form part of the substance of this claim” and is not in issue in the arbitration.

I agree that this case differs from many of the court decisions cited above, in that the focus of the loss transfer arbitration is not on whether the legal advice provided to Jevco by its solicitors is correct. However, I find it difficult to accept Jevco’s position that the

opinion provided by Miller Thomson does not form part of the substance of the claim. As I understand it, Royal has admitted both that the Loss Transfer provisions apply, and that its driver would be 100% liable for the accident. Consequently, the only live question in the arbitration is whether Jevco acted properly in agreeing to reopen the settlement.

Put simply, if it is ultimately determined that Jevco acted reasonably in agreeing to reopen Ms. Hansen's claim, Royal will be obligated to indemnify Jevco for all reasonable payments made; if it did not, Jevco will be precluded from pursuing Royal for indemnification. Royal's only defence in the arbitration is the allegation that Jevco's decision to reopen the claim was improper. Mr. Blom has advised that his client made that decision as a result of the legal opinion his firm rendered on the issue. In my view, that is analogous to the plaintiffs in the other cases cited "putting their state of mind in issue". In accordance with Professor Wigmore's comments set out above and followed in the cases noted, I find that fairness dictates that Jevco's privilege is deemed to have been waived over the documents in question.

Accordingly, Jevco is directed to produce the two letters identified above to counsel for Royal forthwith.

A further pre-hearing teleconference is scheduled to take place on July 15, at 9:00 a.m. I look forward to speaking with counsel then, and to discussing how to move this matter forward.

DATED at TORONTO, ONTARIO this _____ DAY OF MAY, 2011.

Shari L. Novick
Arbitrator