Date: 19971203
Docket: CA023677
Registry: Vancouver

COURT OF APPEAL FOR BRITISH COLUMBIA

ORAL REASONS FOR JUDGMENT:

Before:

The Honourable Mr. Justice Esson — December 3, 1997
The Honourable Mr. Justice Gibbs
The Honourable Madam Justice Prowse — Vancouver, B.C.

BETWEEN:

ROLAND K.H. SUCHY
and EAGLE'S NEST INNS INC.

PLAINTIFF
(RESPONDENTS)

AND:

ZURICH INSURANCE COMPANY, LE ASSICURAZIONI D'ITALIA, LAURENTIAN PACIFIC INSURANCE COMPANY OF CANADA, GENERAL ACCIDENT ASSURANCE COMPANY OF CANADA, CANADIAN INDEMNITY COMPANY, CORNHILL INSURANCE COMPANY, GUARDIAN INSURANCE COMPANY, GERLING GLOBAL GENERAL INSURANCE, COMMERCIAL UNION ASSURANCE COMPANY, INA INSURANCE COMPANY, PRUDENTIAL ASSURANCE COMPANY, A.E. CRINGLE and MEREDITH ALLAN & ROBINSON LTD.

DEFENDANTS
(APPELLANTS)

F.G. Potts — appearing for the Appellants

R.C. Ritchie Clark and
K. Garcha — appearing for the Respondents

[1] ESSON, J.A.: This is an appeal by the defendants against the dismissal of an application made by them to restrain Mr. Clark from acting on behalf of the plaintiffs. Both in the Court below and in this Court Mr. Clark has appeared as counsel in this matter. No objection has been made to that but, without in any way criticising Mr. Clark in the peculiar circumstances of this case I will record that it is not a desirable way to deal with issues of this kind. However, it has caused no difficulty today and we are indebted to Mr. Clark for his assistance.

[2] The action is one which arises out of a fire in a hotel which was leased to the plaintiff company. The fire took place in 1995. The defendants, other than the defendants Cringle and Meredith Allan, were underwriters under a subscription fire policy. Cringle was an adjuster and Meredith Allan an adjusting firm but those two defendants have been dropped from the action. Accordingly, it is now an issue only between the plaintiffs and underwriters.

[3] The underwriters did not deny coverage and did not, as I understand it, allege wrong doing in respect of the fire. The issue is with respect to the quantum of recovery. There is a substantial amount in dispute with respect to that. In order to explain the issues on this appeal, it is necessary to outline the history of the matter.

[4] At the outset, the insurers retained the law firm of Ferguson Gifford and in particular Mr. G.R. Smith, Q.C. to represent their interests. That retainer occurred in 1985. At that time and up to August 1, 1997, Mr. Clark was a partner of the law firm Ferguson Gifford. The action was commenced in 1986 and Ferguson Gifford appeared on behalf of all of the defendant underwriters.

[5] Mr. Clark had some involvement in the action in the year 1987. That came at a point when the pleadings had been closed. Although the communications that took place, some of which were reduced to writing, have not been fully disclosed because of privilege concerns, enough appears to establish that one of the questions considered was the availability of 18A proceedings in the case. In essence, it would appear that Mr. Clark was asked to and did give an opinion to Mr. Schmidt with respect to that and perhaps other matters.

[6] Mr. Clark's involvement appears to have continued to some extent until October 1987. From then on, it does not appear that he had anything to do with this action although, as I have already said, he remained a partner of the firm until a few months ago.

[7] In 1994, Ferguson Gifford ceased to act for the defendants and the firm of Lindsay Kenney, which now represents them, assumed the conduct of the defence. It appears that a major reason for the file being transferred was the likelihood that Mr. Schmidt would be required to give evidence at the trial. The action proceeded very slowly. We are told that a dozen or more different lawyers have acted for the plaintiffs at different stages. Prior to Mr. Clark becoming involved, they were represented by Mr. McAfee and, by August 1997, the action had reached the stage where the trial was scheduled to begin on September 8th. But, in August the plaintiffs discharged Mr. McAfee as counsel and retained Mr. Clark. The defendants immediately took objection to his acting. After some reflection, Mr. Clark took the position that he was not precluded from acting. The matter then was brought before the pre-trial management judge on September 4. That was the Friday of the Labour Day weekend and so was truly on the eve of trial. The application was brought in a completely informal matter because of the pressure of time and proceeded in a completely informal matter. There was no written notice of motion and no affidavits. However, there is a complete transcript of the submissions before the chambers judge who, at the conclusion of the hearing on September 4, dismissed the application. In his brief oral reasons he said amongst other things:

[9] The Defendants rely on the decision of the Supreme Court of Canada in Martin v. MacDonald Estate [1991] 1 WWR 705. The Plaintiffs rely on the decision of Chief Justice Esson, in his 1992 decision in Manville Canada Incorporated v. Ladner, Downs (1992) 63 BCLR (2d) 102.

[8] Those, it appears, were the only cases cited on that day. I note that the decision in Manville was given by me as a judge of the Supreme Court and that no reference was made to the decision of this Court upholding my decision for reasons given by Chief Justice McEachern. That judgment is reported at (1993) 76 B.C.L.R. (2d) 273.

[9] After referring to those cases, the chambers judge went on to make reference to the long history of the case, the fact that the history had been a very unsatisfactory one prior to Mr. McAfee becoming involved, and that it would, of course, be very unfortunate if Mr. Clark, who was ready to appear as counsel on the scheduled trial date, was not able to do so. The judge then went on to say:

[12] I agree with Mr. Lindsay, counsel for the Defendants, that the Plaintiffs are unrepresented at trial, the prospect of finishing within the three week estimate is dubious.

[13] Various hypothetical possibilities were raised as to the implications of Mr. Clark acting as counsel, including revived memory at trial of now-forgotten confidences imparted to Mr. Clark's former law firm by its clients.

* * *

[17] I conclude that Mr. Clark's brief, documented

involvement in this file while at his former law firm does not meet the gloss placed on the Martin decision by Chief Justice Esson.

[10] Clearly the chambers judge based his decision on my decision in the Manville case. With respect, it was error to adopt the reasoning in that case without fuller regard to what was said by the Supreme Court of Canada in Re Macdonald Estate; particularly the judgment of Mr. Justice Sopinka who spoke for the concurring majority. I do not intend to imply that what I said in Manville was wrong. Indeed, I am of the view that it was not and have the comfort of this Court having agreed with that. However, the factual situation there was entirely different. That was a case where three law firms in different provinces had entered into an arrangement whereby they had an interest in a fourth law firm for the purposes of carrying on certain aspects of international law. Ladner Downs, the British Columbia firm, were acting against Manville in actions in British Columbia. In prior years Manville had been extensively advised by the Ontario partner in the arrangement with respect to litigation of the same general character, which was the enormous number of claims arising out of the asbestos issues.

[11] The decision in substance was that there simply was no realistic risk that confidential information would be used to the prejudice of the client as a result of the international arrangement. This case is entirely different from Manville but is very close to the factual pattern in Re Macdonald Estate. The situation there was that a young lawyer had worked on the Macdonald Estate case while she was an articled student and junior associate with the firm acting for the plaintiff. She then moved from that firm to the firm acting for the defendant. It was recognized by the latter firm that she could not act on the case, she did not, and it was not intended that she would. Nevertheless, the Supreme Court of Canada held that the firm which had then been acting for some years in that complicated litigation could not be permitted to act. The judgments in Re Macdonald Estate are lengthy. However, for present purposes, I need refer only to a few passages. At p.1260, Mr. Justice Sopinka said:

> Typically, these cases require two questions to 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?

[12] At p.1261 he said this:

> The second question is whether the confidential information will be misused. A lawyer who has relevant confidential information cannot act against his client or former client. In such a case the disqualification is automatic. No assurances or undertakings not to use the information will avail. The lawyer cannot compartmentalize his or her mind so as to screen out what has been gleaned from the client and what was acquired elsewhere. Furthermore, there would be a danger that the lawyer would avoid use of information acquired legitimately because it might be perceived to have come from the client. This would prevent the lawyer from adequately representing the new client. Moreover, the former client would feel at a disadvantage. Questions put in cross-examination about personal matters, for example, would create the uneasy feeling that they had their genesis in the previous relationship.

[13] That paragraph in my view, applies directly to the situation here. It is referring to an individual lawyer who has relevant confidential information and who now seeks to act against his former client. It is in that context that Mr. Justice Sopinka said: "In such a case the disqualification is automatic."

[14] Mr. Clark's position is that he does not recall any confidential information which he may have received while with Ferguson Gifford although he concedes that he must have received some because he was involved in the case for some time. I should add that counsel for the defendants, very fairly, has said that he does not dispute that Mr. Clark has no present recollection. However, a lawyer who has had relevant confidential information, even if he does not recall it now, must be within the words used by Mr. Justice Sopinka "a lawyer who has relevant confidential information".

[15] Mr. Clark has submitted that the matter is not so simple, otherwise there would be no need for two questions and that, to give meaning to the two questions, one must avoid construing the first quotation from Mr. Justice Sopinka as really meaning that a lawyer who has confidential information is excluded from acting. The answer to that conundrum, in my view, is that with respect to an individual lawyer who has acted for the former client and who now proposes to act against him, the second question never arises.

[16] The assessment of risk in a relative way arises, as it did in Re Macdonald Estate, in the situation dealt with in the next paragraph of that case where Mr. Justice Sopinka began by saying:

The answer is less clear with respect to the partners or associates in the firm.

[17] That describes the kind of situation which arose in Re Macdonald Estate where the individual lawyer had no intention of acting and the firm had no intention she should act but the question was whether the knowledge she had previously obtained tainted the new firm. It is in relation to that matter that Mr. Justice Sopinka put forward the test which he stated at p.1259-60:

Since, however, it is not susceptible of proof, the test must be such that the public represented by the reasonably informed person would be satisfied that no use of confidential information would occur. That, in my opinion, is the overriding policy that applies and must inform the court in answering the question: Is there a disqualifying conflict of interest? In this regard, it must be stressed that this conclusion is predicated on the fact that the client does not consent to but is objecting to the retainer which gives rise to the alleged conflict.

[18] The only other case to which I will refer is the decision of this Court in Rosin v. MacPhail (1997) 32 B.C.L.R. (3d) 279 in which I gave judgment for the Court. That was a family law case and in many respects the circumstances were different. The problem with which the Court struggled in that case was whether the earlier proceedings were sufficiently related to the later proceedings as to invoke the prohibition in Re Macdonald Estate. In the end we concluded that it did. That issue, of course, does not arise here. The two retainers could not be more closely related. Mr. Clark, having acted on one side of the case, now proposes to act on the other.

[19] Rosin v. MacPhail case is, however, of interest because the time that had gone by from the earlier involvement of the solicitor to the present one was a period of some 12 years. In this case, it is of the order of ten years. Despite that long lapse, the Court concluded that, although the lawyer as here had no present recollection of his past involvement in any detailed way, he should be enjoined from acting. The reasoning is that set out in an unreported decision of my colleague, Madam Justice Prowse, then sitting as a member of the Supreme Court. That again was a case where the gap in time was approximately a decade. The passage which I quoted at p.287 of Rosin v. MacPhail, reads as follows:

Given the fact that these matters date back approximately 10 years, it would be surprising if Mr. Millar could specifically recall if he had received any confidential information about a particular file

relating to Mr. Lecovin's clients, or what that information was. However, the memory is sometimes triggered in unexpected ways, and some lawyers have better memories than others.

At p.286 of Rosin I said:

> In seeking to discharge the burden of establishing that no confidential information was imparted which could be relevant, Mr. Schuck relies heavily on the lapse of ten years between the first retainer and the second. In my view, that lapse is of relatively little significance except insofar as it explains why Mr. Schuck at this stage has little active memory of the details of what passed between him and his former client in the years 1983-1985.

[20] Mr. Clark, as a second line of defence, has submitted that the fact that it is intended that Mr. Schmidt will give evidence somehow relieves him from the burden he might otherwise be under of being prevented from acting. The suggestion is that Mr. Schmidt will not be able to give evidence without the defendants waiving privilege as to some aspects of it. It is not at all clear to me that that will be so but, even if it were, I cannot see that as having any relevance to the issues before us.

[21] In many ways, this is the plainest kind of case there could be. It is a case of an individual lawyer who, having acted for the defendants, now proposes to act for the plaintiffs. We have not been referred to any other case where the pattern is as clear as that.

[22] The order under appeal is, of course, a discretionary one and our power to interfere with it is subject to the usual restrictions relating to orders of that kind. However, in this case, I am of the view that the chambers judge failed to apply the relevant legal principles and that his decision cannot stand. Having said that, I acknowledge that he was required to deal under circumstances of very considerable difficulty, with an application involving serious issues brought on before him without notice, with incomplete reference to authority. and without time to consider his decision.

[23] I would allow the appeal. The order asked for in the appellants' factum is that Mr. Clark be removed as solicitor of record for the plaintiffs and be restrained from acting on behalf of the plaintiffs in this matter. I see no need for the first half of that, that is that he be removed as solicitor of record. The appropriate order in my view is simply that he be restrained from acting on behalf of the plaintiffs. That, of course, by necessary implication includes the aspect of remaining as solicitor of record. I should add that the defendants do not seek to enjoin Mr. Clark's present firm from continuing to act. On that basis I would allow the appeal.

[24] GIBBS, J.A.: I agree. I would just wish to add that nothing that I would say should be taken as an adverse reflection on the integrity of Mr. Clark.

[25] PROWSE, J.A.: I agree with the comments of both of my colleagues.

[26] ESSON, J.A.: The appeal is allowed.

"The Honourable Mr. Justice Esson"

"The Honourable Mr. Justice Gibbs"