SUPREME COURT OF YUKON

Citation: *Reynolds v. Energy North Construction Inc. and Whitehorse (City of)*, 2014 YKSC 41

Date: 20140716
S.C. No. 12-A0062
Registry: Whitehorse

BETWEEN:

BUD MICHAEL REYNOLDS and LORI ANNE LEMIEUX

PLAINTIFFS

AND

ENERGY NORTH CONSTRUCTION INC., STAN FORDYCE and GLEN MORGAN

DEFENDANTS

AND

CITY OF WHITEHORSE, CERTIFIED HEATING AND SERVICES LTD., and CORY FRANCE, operating a business under the name of FRANCE CONSTRUCTION

THIRD PARTIES

Before: Mr. Justice R. S. Veale

Appearances:

Richard A. Buchan	Counsel for the Plaintiffs
Anthony Slemko	Counsel for the Defendants
Mary Margaret MacKinnon	Counsel for the Third Party, City of Whitehorse

REASONS FOR JUDGMENT

INTRODUCTION

[1] This is an application by the plaintiffs for the production of a fire investigation report. The report was requested by the insurance adjuster for the defendants and prepared by Robert Eyford. His investigation took place on February 23, 2011, and the report was completed on June 30, 2011 ("Eyford report").

[2] The plaintiffs' house fire occurred on January 19, 2011. They filed their statement of claim on July 30, 2012.

[3] Stan Fordyce and Glen Morgan are the principals of the defendant company, Energy North Construction Inc.

[4] The defendants are opposing the application on the basis that the Eyford report is subject to litigation privilege.

BACKGROUND

[5] As indicated, the plaintiffs' house fire occurred on January 19, 2011, and an insurance adjuster was assigned to investigate the cause, circumstances and consequences of the house fire.

[6] The plaintiffs' insurance adjuster retained an independent fire investigator, Al Weiker, to investigate and report. Mr. Weiker prepared a report indicating that the cause of the fire was the improper installation of cellulose insulation, which made direct contact with the Selkirk Metalbestos chimney in the absence of an insulation shield around the chimney.

[7] The plaintiffs' insurance adjusters wrote the defendants, Energy North Construction Inc. on February 8, 2011 advising of the report of Mr. Weiker. The letter indicated a damage estimate of $200,000.

[8] The plaintiffs' adjuster indicated that the plaintiffs' insurer would be pursuing the recovery of its costs vigorously and advised Energy North Construction Inc. to contact their own liability insurer to assist with opening a claim. The letter ended with:

> We look forward to your prompt response to this correspondence and we are advising you to govern yourself accordingly.

[9] The adjuster for Energy North Construction received notice of the house fire on February 2, 2011 and opened a file on February 28, 2011.

[10] The defendants' insurance adjuster was employed between February and June 2011. She described this time period as "the material time to the initial investigation of the fire loss incident".

[11] The defendants' adjuster stated that on February 22, 2011, the defendants relayed information to the adjuster's employer supporting the position that the defendants were not liable for the house fire. The defendants' adjuster retained Robert Eyford to investigate the house fire on February 23, 2011. She stated the following:

> As the insurer of the party that the Plaintiffs alleged was responsible for the fire, the sole purpose of my retention of Mr. Eyford was in contemplation of litigation being pursued against our insured.
>
> Given the allegations of negligence and information on quantum of damages, which were directly relayed to the Defendants on February 8, 2011, I believed that there was a reasonable prospect of litigation and that the Defendants would need to conduct their own investigation to provide support for their defence in any forthcoming claim.

[12] On February 26, 2011, the plaintiffs' insurance adjuster accompanied Robert Eyford to the scene of the house fire.

[13] As of that date, the plaintiffs' insurance adjuster had made no threat of litigation and no legal counsel had been retained by either party.

THE LAW

[14] As set out in *Hamalainen (Committee of) v. Sippola* (1991), 9 B.C.A.C. 254, and followed in this Court in *Fred v. Westfair Foods Ltd*., 2003 YKSC 39, the onus is on the party claiming privilege to establish on a balance of probabilities that both of the following tests are met:

1. That litigation was in reasonable prospect at the time it was produced, and;
2. That the dominant purpose for the preparation of the report was to obtain legal advice or to conduct or aid in the conduct of litigation.

[15] As to the first test, in *Hamalainen*, Wood J. states that the opinions of the adjusters, particularly where they touch on the very issue to be decided, are evidence to be considered but did not foreclose the issue from further consideration.

[16] Wood J. explained that "in reasonable prospect" means something more than a mere possibility. He explained the phrase to mean:

> "…when a reasonable person, possessed of all pertinent information including that peculiar to one party or the other, would conclude it is unlikely that the claim for loss will be resolved without it".

He went on to say the test would not be particularly difficult to meet.

As to the dominant purpose test, the case law distinguishes dominant purpose from dual purpose i.e. if a report is made shortly after the accident both to find out the cause of the accident and to furnish the information to the solicitor. Such reports are not 'wholly or mainly' for litigation and should be disclosed on discovery and made available at trial: see *Waugh v. British Railways Board*, [1980] A.C. 521, at p. 541.

[17] In adopting that view, Wood J. found there was a continuum which begins with the incident giving rise to the claim, during which the focus shifts to the dominant purpose of furthering the course of litigation. The particular point at which the dominant purpose becomes that of furthering the conduct of the litigation depends on the facts peculiar to each case. There is no absolute rule that a decision to deny liability marks the point at which the conduct of litigation becomes the dominant purpose.

DECISION

[18] On the first test of whether litigation was in reasonable prospect at the time of the Eyford report's production, the adjuster was aware of the size of the claim and that the plaintiffs' adjuster had an expert report that concluded Energy North Construction Inc. was negligent. She also stated that Energy North relayed information to support the position that the defendants were not liable.

[19] Although I find that this is not a complete disclosure of the facts relied upon by the adjuster, I find that a reasonable person in possession of the plaintiffs' expert report could conclude litigation was a reasonable prospect, as it is not a high bar to meet.

[20] As to the dominant purpose test, counsel for the defendants submits that this case is distinguishable from *Fred v. Westfair Foods Ltd.*, because this is an expert report as opposed to an employee investigation of the incident. I am not persuaded by

that distinction because it was very early days in the examination of the house fire when Robert Eyford was retained. It would be surprising if a report not based on some expertise was requested, because of the complexity of determining causes of fires.

[21] In my view, the compelling reason for concluding that the dominant purpose for the preparation of the Eyford report was not just litigation is the fact that the defendants' insurance adjuster refers to the period of February 2, 2011 to June 2011 as "the material time to the initial investigation". The objective purpose in my view was two-fold: first, to determine if the facts as presented by the defendant could be verified, and second, to determine what the opinion of Mr. Eyford would be on those facts following his investigation of the house fire.

[22] I conclude that the defendants have failed to establish that the dominant purpose of the Eyford report was for the conduct of the litigation. I therefore order production of the Eyford report for discovery and trial.

VEALE J.