IN THE SUPREME COURT OF THE YUKON TERRITORY

Citation: *Fred* v. *Westfair Foods Ltd., et al.,* 2003 YKSC 39

Date: 20030813
Docket: S.C. 01-A0225
Registry: Whitehorse

Between:

ALBERT FRED

Plaintiff

And:

WESTFAIR FOODS LTD.,
FIRST COMMERCIAL MANAGEMENT INC. and
89804 CANADA LIMITED

Defendants

Appearances:

Daniel S. Shier	Counsel for the Plaintiff
Debra L. Fendrick	Counsel for the Defendant, Westfair Foods Ltd.
Grant Macdonald, Q.C.	Counsel for the Defendant, First Commercial Management Inc. and 89804 Canada Limited

Before: Mr. Justice Veale

REASONS FOR JUDGMENT

Introduction

[1] Mr. Fred was injured in a slip and fall at the Extra Foods store in Whitehorse on October 15, 2000. Several documents were created on the direction of Westfair Foods Ltd. (Westfair) on the day of the accident. Westfair claims that the documents are

privileged. Mr. Fred applies for production of the documents under Rule 26(10) of the Supreme Court Rules.

Issues

[2] There are two issues to consider:

1. Was litigation in reasonable prospect at the time the documents were produced?

   and

2. What was the dominant purpose for the production of the documents?

The Facts

[3] Mr. Fred is an 81-year-old man who had a slip and fall accident on October 15, 2000 at the premises operated by Westfair. He was 78 years old at the time.

[4] He apparently walked through glass doors at the grocery store. He did not request an ambulance, but one was called in any event. Mr. Fred was taken to the Whitehorse General Hospital where he was examined. An Ambulatory Care Form was prepared. It does not appear that he was hospitalized overnight.

[5] The Ambulatory Care Form indicated that Mr. Fred suffered lacerations to his right hand and right thumb, as well as his left knee and foot. The affidavits provided by Westfair in support of its claim for privilege made no reference to the injuries of Mr. Fred or the circumstances of the accident.

[6] The grocery store is operated by Westfair and subleased, by way of a franchise agreement, to Sourdough Markets Ltd. (Sourdough).

[7] Jim Oster was a shareholder of Sourdough. Sourdough did not purchase any independent insurance for inventory or asset coverage or third party liability.

[8] Mr. Oster understood that Westfair provided the insurance coverage by way of charge-back to Sourdough.

[9] Mr. Oster followed Westfair policies strictly because any breach could lead to termination of the franchise agreement.

[10] Westfair provided Mr. Oster with instructions outlining details required for a variety of product and bodily injury claims. Franchise operators were advised not to call customers, but rather to put the onus on the customer to follow up, in which case they were to call Joan Bloomfield.

[11] Ms. Bloomfield is the claims administrator for Westfair, which she says is a self-insured company.

[12] Ms. Bloomfield states that all managers and assistant managers are instructed to complete an Incident Involving Customer form for any incident where a customer allegedly suffers injury or damage to personal property on the store premises.

[13] The two-page form used is called Incident Involving Customer Form Including Private Label Claims. It includes numerous details about the incident location, weather, details of injury, damage to clothing and list of witnesses and statements. The form requires a prompt inspection of the area and a picture or drawing of the area.

[14] Jim Oster instructed Mark Wykes to complete the form on October 15, 2000, the day of the accident and provide statements from Danielle Dixon and Larissa Wygle. Mark Wykes also prepared his own statement and took a Polaroid photograph of the glass doors in question.

[15] Ms. Bloomfield received the completed form on October 25, 2000 and reviewed it to confirm that it contained information “to help assess Westfair’s liability and quantum to assist Westfair and any lawyer retained on its behalf to defend the claim brought against Westfair arising out of the incident.”

[16] Ms. Bloomfield further deposed:

> 7. Westfair operates numerous grocery outlets across Canada and has done so for many years. Due to the nature of its business, Westfair faces numerous legal claims for personal injuries in any given year in all jurisdictions, including the Yukon.
> 8. As a result, Westfair has come to expect legal action in any case where there is a claim of injury.
> 9. As a result of this experience, Westfair has developed the policy of requiring immediate incident reports. It is important that Westfair has this system in place to document incidents when they happen and gather facts and information so that Westfair can properly defend legal actions.
> 10. The predominant purpose of the Customer Incident Form is for use in litigation. It may be used for secondary purposes, but the primary purpose is for use in litigation.
> 11. As the insurance claims administrator, I present seminars to store managers regarding legal claims. I stress the importance of properly and fully completing the forms. I emphasize that in every case involving injury, Westfair must contemplate litigation occurring and that the Incident to Customer forms are being prepared primarily for use in any such litigation.

[17] The first contact from Mr. Fred was by way of letter from his lawyer to Westfair, which was delivered on November 9, 2000. It stated:

> We act for Mr. Fred with respect to his claim for personal injury damages in the above-captioned slip and fall. Please note that a claim will be made against Westfair Foods Ltd. and we put you on notice thereof.

[18] Westfair has claimed privilege for the following documents:

a) Incident Involving Customer form dated October 15, 2000, prepared by Mr. Wykes;

b) Polaroid photograph of glass doors involved in the accident, taken by Mr. Wykes on October 15, 2000, the date of the accident;

c) Handwritten statement of Danielle Dixon dated October 15, 2000 and taken by Mr. Wykes;

d) Handwritten statement of Larissa Wygle dated October 15, 2000 and taken by Mr. Wykes; and

e) Handwritten statement of Mark Wykes dated October 15, 2000.

The Law

[19] It is important, at the outset, to distinguish between two types of privilege. One is called “solicitor-client privilege” and the other “litigation privilege”. Litigation privilege is sometimes referred to as “work product privilege”, but that term is an American concept or doctrine that has a different basis in allowing for production and should not be confused with the Canadian concept of litigation privilege.

[20] Solicitor-client privilege is the privilege extending to communications made by a client to a lawyer to obtain legal advice (see Robert J. Sharpe, [1981] *Canadian Bar Review*, Vol. 59 at pp. 832-33). Its purpose is to guarantee confidence to clients to tell all to their lawyer without fear that the lawyer would reveal, or be compelled to reveal, the clients’ information. It is only in this circumstance that a client will receive full and frank legal advice. The privilege belongs to the client.

[21] Litigation privilege, although related to solicitor-client privilege, is confined to the litigation process and includes both client and third-party communications. As pointed out by Allan C. Hutchinson, *Legal Ethics and Professional Responsibility*, chapter 7, the

extent of litigation privilege is often contested because a broad interpretation allows lawyers and clients “to sweep up all relevant facts and opinions and claim confidentiality for them.”

[22] The British Columbia Court of Appeal, in *Voth Bros. Construction (1974) Ltd.* v. *North Vancouver School District No. 44*, [1981] B.C.J. No. 582, adopted the rule for litigation privilege from Barwick C.J. of the Australian High Court in *Grant* v. *Downs* (1976), 135 C.L.R. 674. Two factual determinations must be made for each document:

a) Was litigation in reasonable prospect at the time it was produced?

and

b) What was the dominant purpose for its production?

[23] The onus is on the party claiming privilege to establish on a balance of probabilities that both tests are met in connection with each of the documents falling within the claim. To succeed, the party claiming privilege must establish that the dominant purpose for the preparation of the document was to obtain legal advice or to conduct or aid in the conduct of litigation.

[24] The House of Lords adopted the dominant purpose test in *Waugh* v. *British Railways Board*, [1980] A.C. 521 (H of L). In that case, the plaintiff’s husband died from a collision of two locomotives. The practice of the board, when an accident occurred, was to prepare a brief report on the day of the accident, followed by a joint internal report incorporating statements of witnesses. In due course, a report was made to the Department of the Environment. The joint internal report had a heading stating that it was sent to the board’s solicitor for the purpose of enabling him to advise the board.

[25] In establishing the dominant purpose test for production of documents in litigation, Lord Edmund Davies, at page 541, quoted, with approval, statements of Lord Denning from his Court of Appeal dissent as follows:

> … If material comes into being for a dual purpose — one to find out the cause of the accident — the other to furnish information to the solicitor — it should be disclosed, because it is not then "wholly or mainly" for litigation. On this basis all the reports and inquiries into accidents — which are made shortly after the accident — should be disclosed on discovery and made available in evidence at the trial.
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> . . .
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> The main purpose of this inquiry and report was to ascertain the cause of the accident and to prevent further accidents or similar occurrences. Its nearby purpose was to put before the departmental inspectorate. Its far-off purpose was to put before the solicitors of the board, should a claim be made and litigation ensue.

[26] The dominant purpose test in *Voth Bros. Construction* was further developed in *Hamalainen (Committee of)* v. *Sippola*, [1991] B.C.J. No. 3614, *(B.C.C.A.)*. In that case, Hamalainen was injured in an accident on November 28, 1986. His wife reported the injury to the Insurance Corporation of British Columbia (ICBC) on December 1, 1986. Between that date and February 19, 1987, two adjusters prepared 10 reports. On February 19, 1987, one of the adjusters, Geoff Nuthall, wrote to Mrs. Hamalainen, concluding that ICBC was of the opinion that they were not liable. Nuthall reported to Carlo Viola at ICBC. Viola deposed that there was a reasonable prospect for litigation because of the serious injuries and the fact that liability would be in issue. Nuthall deposed that he was of the view that litigation was a probable result from the time he commenced his investigation.

[27] Interestingly, a lawyer wrote Nuthall on December 31, 1986, advising that he was instructed to act for Mrs. Hamalainen. Both Viola and Nuthall relied on this for their belief

that litigation would result. However, by letter dated January 7, 1987, the same lawyer apologized for his earlier letter and advised that he had no instructions to act and that they should continue to deal with Mrs. Hamalainen.

[28] The court first dealt with the argument that absent any doubt about the credibility of the deponents, the court should give effect to them. Wood J., for the court, at page 5, did not accept this argument because the court is not bound to accept the opinion of either deponent on the very issue to be decided. Wood J. also stated that it was a "significant error of law" to assume that because litigation seemed likely, the reports must have been prepared for the principal purpose of assisting in litigation.

[29] Wood J. then quoted from *Shaughnessy Golf and Country Club* v. *Unigard Services Ltd., et al.* (1986), 1 B.C.L.R. (2d) 309 at page 321:

> The fact that litigation is a reasonable prospect after a casualty, and the fact that that prospect is one of the predominant reasons for the creation of the reports is now not enough. Unless such purpose is, in respect of the particular document, the dominant purpose for creating the document, it is not privileged.

[30] The court concluded that although litigation was a reasonable prospect, the defendant failed to meet the onus to establish that the dominant purpose of the documents was for use in the litigation.

ISSUE 1: WAS LITIGATION IN REASONABLE PROSPECT AT THE TIME DOCUMENTS WERE PRODUCED?

[31] Wood J. provided the following test on the meaning of "in reasonable prospect" in *Hamalainen*:

> In my view litigation can properly be said to be in reasonable prospect when a reasonable person, possessed of all the pertinent information including that peculiar to one party or the other, would conclude that it

> is unlikely that the claim for loss will be resolved without it. The test is not one that will be difficult to meet.

[32] Wood J. went on to say that the test was met based on the circumstances of the accident and the nature of Mr. Hamalainen's injuries. In the case at bar, Westfair made no reference to Mr. Fred's injuries or the circumstances of the incident.

[33] Westfair relies upon two cases in support of its position that these documents were prepared when litigation was in reasonable prospect.

[34] In *Pedersen* v. *Westfair Foods Ltd. (c.o.b. The Real Canadian Superstore)*, [1993] B.C.J. No. 1753, Master Horn indicated that the slip or stumble at the store occurred on November 27, 1990. The plaintiff received a fractured hip and was hospitalized. She first consulted a solicitor on May 1, 1991 and the writ was issued on June 30, 1992. The defendant engaged a solicitor after service of the writ and entered an appearance on July 10, 1992.

[35] In *Pedersen*, the facts of following company policy were similar to the case at bar, except that Ms. Bloomfield had telephone contact with the plaintiff, whereby she learned that the plaintiff had broken her hip. In December 1990, Ms. Bloomfield sought further information from store employees and upon receipt of their information instructed a firm of independent adjusters to investigate. Both the store's food manager and the adjusters filed affidavits indicating the purpose of the investigation was to aid Westfair, and potentially its counsel, in defending the claim.

[36] Master Horn distinguished *Hamalainen*, as a case where the insurer created documents which may have had a number of potential uses, only one of which was the defence of a claim (para. 6).

[37] Master Horn found that Westfair had no duties to perform in relation to *Pedersen*, "and had only one object in view, mainly, to investigate the circumstances of an incident in which a customer had injured herself."

[38] Master Horn also emphasized the line of business that Westfair was in and its past experience leading it to set up an instant reporting and investigation system. He acknowledged that Westfair might wish details of the incident without any apprehension of a lawsuit being initiated. However, he concluded at paragraph 7:

> … Nevertheless, given the type of operation which the defendant conducts and its experience in relation to claims in the past, very little would be needed to persuade me that the defendant's primary objective was to protect itself against potential litigation. In this case, given that a woman had fallen down and had injured herself severely enough to be taken away by ambulance to hospital, the state of mind of the manager and of his employees and the state of mind of the claims administrator in Winnipeg is easy to deduce and their statements as to their state of mind can be easily accepted.

[39] *Hamalainen* and *Pedersen* both have a factor that is not present in the case at bar. In both cases, the in-house claims administrator actually talked to the injured person and had some understanding of their injuries, which were very serious. In the case at bar, there is no evidence that Ms. Bloomfield or other staff had contact with Mr. Fred about his injuries after his hospital attendance. Thus, the evidence before me does not establish that Westfair anticipated litigation based on the nature of the injuries to Mr. Fred and the circumstances of the accident. Rather, the evidence is that "Westfair has come to expect legal action in any case where there is a claim of injury." The result of such an expectation or policy, if accepted, would be that all documents prepared by Westfair would be "in reasonable prospect" of litigation, regardless of the facts.

[40] Westfair also relies upon *Stobbe* v. *Westfair Foods Ltd. (c.o.b. Superstore)*, [1998] A.J. No. 319 (Q.B.). In that case, Master Funduk denied the application for production of an incident report on affidavit evidence similar to the case at bar. In *Stobbe*, the claims administrator stated that " … in every case we must contemplate litigation and that the forms are being prepared primarily for use in such litigation."

[41] Master Funduk also found the test set out by Wood J. to find litigation "in reasonable prospect" was not the law of Alberta. Thus, he found that "the test is the intent of the author or his superiors when he created the document." He therefore accepted the unimpeached evidence of Ms. Bloomfield. As *Hamalainen* is the law of the Yukon, I cannot give much weight to the *Stobbe* case. This court also rejected *Stobbe* in *Deer* v. *Westfair Foods Ltd. (c.o.b. Extra Foods)*, [1998] Y.J. No. 129 (S.C.Y.T.) for other reasons.

[42] I conclude, based on the *Hamalainen* test of "in reasonable prospect," that Westfair has failed to establish that litigation was in reasonable prospect in this case for the following reasons:

1. The documents were prepared on the day of the accident as a matter of policy or expectation of litigation, rather than on the facts of the Albert Fred incident.
2. There was no claim by Mr. Fred or counsel on his behalf until November 9, 2000.
3. There is no evidence of knowledge of the injury on the part of Westfair or its employees.
4. There had been no discussion with Mr. Fred by the claims administrator.

5. The fact that “Westfair has come to expect legal action in any case where there is a claim of injury” does not provide any objective evidence as to why litigation was in reasonable prospect in this incident.

ISSUE 2: WHAT WAS THE DOMINANT PURPOSE FOR THE PRODUCTION OF THE DOCUMENTS?

[43] The onus is on Westfair to establish on a balance of probabilities that the dominant purpose for the preparation of the document was to use its contents to obtain legal advice or to conduct or aid in the conduct of litigation.

[44] Wood J., in *Hamalainen*, was not of the view that there was any absolute rule that the decision to deny liability would mark the point where the conduct of litigation becomes the dominant purpose. However, he did say, on page 7, that:

> Even in cases where litigation is in reasonable prospect from the time a claim first arises, there is bound to be a preliminary period during which the parties are attempting to discover the cause of the accident on which it is based. At some point in the information gathering process the focus of such an inquiry will shift such that its dominant purpose will become that of preparing the party for whom it was conducted for the anticipated litigation. In other words, there is a continuum which begins with the incident giving rise to the claim and during which the focus of the inquiry changes. At what point the dominant purpose becomes that of furthering the course of litigation will necessarily fall to be determined by the facts peculiar to each case.

[45] From this analysis, the dominant purpose is clearly a question of fact to be determined in each case. In the case at bar, the claims administrator made a number of assertions:

1. that Westfair expects legal action in any case where there is a “claim of injury;”
2. that Westfair has developed a policy of requiring immediate incident reports;
3. that this policy is required to document incidents and gather facts and information so that Westfair “can properly defend legal actions”; and

4. the predominant purpose of the Customer Incident form is for use in litigation.

[46] This is not a case like *Deer* v. *Westfair Foods Ltd.*, where the court found a substantial purpose was to engage in a public relations discussion with the plaintiff. In that case, preparation for litigation was not the dominant purpose and the court ordered production of the documents.

[47] From the analysis of Wood J. in *Hamalainen,* the task is to determine at what point in time the dominant purpose underlying the production of each document was demonstrated to support the claim of privilege. Wood J. agreed that the dominant purpose for reports and witness statements was probably for use in litigation after the date on which liability was formally denied. Thus, he ordered statements taken prior to that date to be produced.

[48] In the case at bar, there is no evidence of a claim, informal or otherwise, at the time the reports were prepared. There is no evidence of a denial of a claim.

[49] I am not prepared to say that all reports and statements made shortly after an accident should be disclosed. However, the purpose of the investigation was partly to determine the cause of the accident or, in the words of Ms. Bloomfield, “to help assess Westfair’s liability and quantum to assist Westfair and any lawyer retained on its behalf to defend the claim brought against Westfair arising out of the incident.” This expresses a two-fold purpose, i.e. the assessment of liability and quantum by Westfair and to assist a lawyer when retained.

[50] The policy implicit in the submission of Westfair is that a statement of its expectation of litigation and intention to use the documents in litigation is all that is required to establish privilege. The assumption that the likelihood or expectation of

litigation somehow enhances the dominant purpose of the preparation of documents was expressly rejected in *Hamalainen.* I find that Westfair, to use the words of Lord Denning, had a “nearby purpose” to assess its liability and quantum and a “far-off purpose” to put the documents before a lawyer if and when retained.

[51] I conclude that Westfair, on these facts, has not met the onus of establishing that on August 15, 2000, the dominant purpose for production of the statements, photograph and report was for the purpose of litigation. I order the production to the plaintiff of the five documents set out in paragraph 18 above.

[52] Counsel may speak to costs if necessary.

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VEALE J.