

SUPREME COURT OF NOVA SCOTIA

Citation: *Southwest Construction Management Limited v. EllisDon Corporation*, 2018 NSSC 162

Date: 20180704

Docket: Hfx. No. 440897

Registry: Halifax

Between:

Southwest Construction Management Limited

Plaintiff/
Defendant by Counterclaim

and

EllisDon Corporation

Defendant/
Plaintiff by Counterclaim

and

Southwest Properties Limited

Third Party

EllisDon Corporation

Plaintiff

and

**Southwest Construction Management Limited, Southwest Properties Limited and
Summer Wind Partners II Limited**

Defendants

Judge:

The Honourable Justice D. Timothy Gabriel

Heard:

By written submissions

**Final written
submissions:**

June 21, 2018

Counsel:

John Shanks for Southwest Construction Management Ltd.,
Southwest Properties Ltd., and Summer Wind Partners II Ltd.
C.C. Robinson, Q.C. and Kevin Gibson for EllisDon Corporation

By the Court:

[1] In *Southwest Construction Management Ltd.v. EllisDon Corporation*, 2018 NSSC 25, I determined that it was necessary for Southwest Construction Management Limited (henceforth “Southwest”) to provide the court with certain documents.

[2] Briefly stated, the reason for this follows. On November 2, 2017, Mr. Jim Spatz, the Chairman and CEO of Southwest, brought with him to his discovery examination a black binder. Similarly, on November 3, 2017, Morgan Allaway, who is the Director of Project Management with respect to the construction, was discovered and brought with him a series of pages and a “sheet”. Both men referred to the materials that they brought to the discovery, during the course of it.

[3] When counsel for EllisDon Corporation (“EllisDon”) requested to be given a copy of these materials, counsel for Southwest, Southwest Properties and Summer Wind Partners (collectively, Southwest) refused. Consequently, EllisDon had moved for an order requiring Southwest to provide copies of these documents to it.

[4] I had directed that all of the documents in issue be provided to the court in order that Southwest’s claims of litigation privilege and solicitor-client privilege with respect to them could be assessed. These documents will be referred to henceforth as the “Spatz binder” and the “Morgan materials”.

[5] Although I have made reference to the background of this matter in my earlier decision (which I will henceforth refer to as “*Southwest #1*”) I will repeat a little more of it for ease of reference. The parties to this proceeding executed an agreement on August 21, 2013, pursuant to which EllisDon was to provide construction management services to Southwest in connection with a project to be developed on Hollis Street called “The Maples”.

[6] The Maples was to be a multi-story apartment building. Delays were encountered during the construction, and Southwest and EllisDon blame each other for those delays. Southwest commenced legal action against EllisDon on July 2, 2017, and EllisDon filed a Defence and Counter-Claim on August 6, 2016. The latter alleges, among other things, that Southwest did not live up to its own obligations under the agreement and that they wrongfully terminated it.

[7] EllisDon has also registered a Builder's Lien against the property. It claims that it was not paid for all of its labour, services and materials supplied in accordance with the agreement.

[8] In relation to EllisDon's motion for production of the Spatz binder and the Allaway materials, Southwest does not contend that these materials are irrelevant to the matters at issue. It simply argues that these documents are privileged and that litigation privilege and/or solicitor-client privilege excuses them from production.

[9] I considered these arguments and concluded, in *Southwest #1* at para. 38:

In order to conduct the analysis required of me, I will require that counsel for Southwest provide the black binder and the "Allaway notes" in a sealed envelope within 30 days...the documents themselves will be generally described and summarized in an affidavit of each of Messrs. Spatz and Allaway, which affidavits will be filed with the Court and (of course) provided to opposing counsel.

[10] In providing that direction, I did not address further the contention by Mr. Allaway in his affidavit of January 9, 2018 (filed one day before the application in *Southwest #1* was heard) which indicated that the "Allaway materials" had been misplaced or discarded and, in Mr. Allaway's contention, could not be found.

[11] On March 28, 2018, I received some correspondence from counsel for Southwest. Included therewith was a copy of the Spatz's "binder", and an affidavit of Mr. Spatz in summary of what was contained therein. Also provided was a supplemental affidavit of Morgan Allaway confirming that he had again reviewed all of his file materials in this matter and had been unable to locate the materials which he had brought with him to his discovery examination.

[12] The required affidavit in summary of what had been contained in Mr. Allaway's materials was not provided. It was not until June 8, 2018, that the court received another supplementary affidavit from Mr. Allaway containing the required information.

Issues

[13] Relevance being a non-contentious issue, I must determine the following:

- (A) Do the claims of either litigation privilege or solicitor/client privilege excuse the non-production of the Spatz binder or the Allaway materials?

- (B) What considerations pertain to the fact that the Allaway materials were misplaced, and presumed discarded, in the face of EllisDon's application?

Analysis

(A) Do the claims of either litigation privilege or solicitor/client privilege excuse the non-production of the Spatz binder or the Allaway materials?

- i. *What is the difference between the two types of privilege?*

[14] In *Mitsui & Co. (Point Aconi) Ltd. v. Jones Power Co.*, 2000 NSCA 96, Justice Roscoe quoted with approval from "In claiming privilege in the discovery process" (1984) *Special Lectures of the Law Society of Upper Canada* 163, as such:

19. Professor Sharpe draws a distinction between the two types of privilege in the following passage commencing at p. 164:

... First, solicitor-client privilege applies only to confidential communications between the client and his solicitor. Litigation privilege, on the other hand, applies to communications of a non-confidential nature between the solicitor and third parties and even includes material of a non-communicative nature. Secondly, solicitor-client privilege exists any time a client seeks legal advice from his solicitor whether or not litigation is involved. Litigation privilege, on the other hand, applies only in the context of litigation itself. Thirdly, and most important, the rationale for solicitor-client privilege is very different from that which underlies litigation privilege. This difference merits close attention. The interest which underlies the protection accorded communications between a client and a solicitor from disclosure is the interest of all citizens to have full and ready access to legal advice. If an individual cannot confide in a solicitor knowing that what is said will not be revealed, it will be difficult, if not impossible, for that individual to obtain proper candid legal advice.

Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client).

[Emphasis added]

ii. The Spatz binder

[15] Tab 1 of this binder is a document entitled “Document List”. It contains copies of some of the various pleadings in this matter. Counting both sides of each page, pages 1, 2, 3, 4 and 5 all contain handwritten additions to these pleadings in what appears to be the same handwriting, presumably that of Mr. Spatz. The writing on page 1 mainly consist of dates, reminders to check dates, scheduled completion dates and the like.

[16] The typewritten portion of page 1 consists, as the name implies, of a list of documents. It lists the pleadings in this proceeding, which are grouped in the binder behind tabs 1, 2, 3, 4 and 5. Tabs 6 and 7 are entitled “EllisDon supplementary affidavit disclosing documents (September 2017)” and “recent correspondence” respectively.

[17] Pages 2, 3 and 4 of tab 1 (again) consist primarily of handwritten notes providing some detail (from Southwest’s perspective) with respect to many of the allegations that EllisDon has made within the context of its pleadings and/or other documents herein, as well as recollections with respect to certain types of interactions between the parties during the course of the project. Page 5 begins with a copy of Southwest’s Notice of Action and it contains more notes in the same handwriting, in a similar vein. Pages 8 and 9 intersperse some questions with respect to some of the percentages noted in para. 10 of Southwest’s Statement of Claim.

[18] There is a distinction between what appears on page 8 and some of the preceding pages. Two dates are “blocked in” and the handwriting at the bottom of the page consists of two questions addressed to “Mick”. This presumably refers to Southwest’s counsel of record, William L. “Mick” Ryan.

[19] Page 9, on the other hand, contains a series of underlinings and four handwritten notations, one of which is a question not apparently directed to anyone in particular, pages 10 and 11 correspond to pages 6 and 7 of the Notice of Action. Pages 12 and 13 are copies of the Notice of Defence and Counterclaim filed by EllisDon. Pages 14, 15, 16, 17, 18 and 19 correspond to pages 3 to 8 to that Notice of Defence and Counterclaim.

[20] Of these latter, pages 14, 15, 16 and 17 have handwriting upon them. They correspond to pages 3 - 6 of the Notice of Defence and Counterclaim filed by EllisDon. There are various underlinings, notes, exclamation points, question marks and other things listed on these documents which offer Mr. Spatz’s reaction to many

of the allegations contained in these paragraphs. These handwritten observations and comments are either superimposed over or juxtaposed with the typewritten paragraphs of the Notice of Defence and Counterclaim. The second last document in tab 1 consists of a Notice of Claim against the Third-Party upon which no notations and/or other alterations have been made. The final document in tab 1, consists of a copy of the Claim of Lien for registration filed by EllisDon in this matter and, again, it contains no notations whatsoever.

[21] Under tab 2 we find copies of the Notice of Defence to Counterclaim filed by Southwest, the Notice of Defence to Third Party Claim filed by Southwest, the Notice of Defence filed by Southwest, a copy of a consent order for consolidation (consolidating the *Builders' Lien Act* matter with the claim and counterclaim of Southwest and EllisDon respectively) and a copy of the order of his court dated March 13, 2017. None of these copies has any notations, emendations, or other marking inscribed upon them. Tab 3 consists of an unsigned affidavit disclosing documents on behalf of EllisDon to which some handwritten comments have been appended.

[22] The last two documents in tab 3 consist of a memo from Brian Strecko to Mr. Spatz dated March 25, 2015, upon which a number of comments (both substantive and some seemingly sarcastic) have been made, as well as various underlinings and retorts. The final document appears to be a memo from Dave Sobey to Brian Strecko dated March 24, 2015. Again, I would characterize the comments that have been handwritten upon this latter document in the same vein.

[23] Tab 4 of the book consists of the affidavit disclosing documents (unsigned) on behalf of Southwest, consisting basically of a Schedule "A" and some estimates of delay loss prepared by PHM June 11, 2015. Tab 5 is empty, tab 6 is an unsigned supplementary affidavit disclosing documents on behalf of EllisDon and the Schedule "A" index thereto.

[24] Tab 7 is an email from Morgan Allaway to Jim Spatz dated October 3, 2017, and a document called a "Seniority Report" containing hire dates from 01/01/2010. Its "run date" is shown to be 27/09/2017. Some handwritten notes have been added which seem to relate to the typed material on the page. The last document in tab 7 (and in the book) consists of a letter from William L. Ryan to Gordon Laing at Southwest Properties Limited, September 25, 2017, in which he asks for further information in order to complete the Statement of Claim. Other than the notes

specifically mentioned, there is no handwriting which appears on documents contained in tabs 4 to 7.

[25] I conclude my review of the Spatz binder with the observation that the overwhelming majority of the notes and/or materials attached thereto have the appearance of having been collected and prepared by Mr. Spatz to assist him with his recollection of certain facts and/or matters that were pertinent to the anticipated subject matter of the questions that he would be asked on discovery examination.

[26] Regardless of the contentions as contained in his affidavits, the binder patently consists of substantive information upon which he relied at discovery with only two exceptions. Other than these two exceptions, all of this material should be disclosed.

[27] The two pages to which privilege would attach, in my view, are found at tab 1, page 6 thereof, which corresponds to page 4 of Southwest's Notice of Action. This page appears to have (as its sole purpose) the notation of certain questions which were to be put by Mr. Spatz to counsel, William L. Ryan. There is nothing in the notes on this page which could or would have been used to assist his testimony at discovery. They were more in the nature of "remember to ask Mick about this". They were simply questions and would not have had any other function.

[28] The other excepted document would be the final one in the binder, which appears as the last page of tab 7. This is a letter from Mr. Ryan to an individual at Southwest properties seeking further information to assist him in gathering information so that he could prepare the Statement of Claim. It contains no substantive information and has no handwriting or other markings superimposed upon it.

[29] These are the only two pages that I would consider to be protected by solicitor-client or any other type of privilege. The remainder must be disclosed and that would include the document inside the plastic folder on the inside cover of the binder entitled "Maple – Delay Loss" revised November 1, 2017.

iii. Allaway materials

[30] I have previously noted that Mr. Allaway provided an affidavit which was dated and filed on January 9, 2018. In the aftermath of my decision in *Southwest #1* he filed two others. The first of these was filed on March 29, 2018. The second was the supplementary affidavit of Morgan Allaway filed on June 8, 2018.

[31] Paras. 6, 7, 8 and 9 of Mr. Allaway's second supplementary affidavit read as follows:

6. I have reviewed the correspondence from the Honorable [sic] Justice Gabriel dated May 8, 2018 in which his Lorship [sp] requests a summary of the notes that I had prepared in anticipation of my discovery examination in the this proceeding.

7. The notes made by me during my preparatory meeting with William Ryan, Q.C. were of dates of significantce [sic] within the proceeding to allow me to have easy access to these dates without having to review large numbers of documents.

8. My notes contained the dates of the following 5 events:

- (a) My Start Date at Southwest,
- (b) Ellisdon Proposal Date,
- (c) Ellisdon Contract Date,
- (d) Ellisdon Site Mobilization Date, and
- (e) Ellisdon Termination on Site Date.

9. I do not believe that my notes contained any other dates or information other than the five dates listed above. I have not seen those notes since my discovery in November 2017.

[32] Obviously, the information referred to above was prepared as an *aide memoire* in anticipation of his discovery examinations. There is nothing about the nature of the information described above which renders either type of privilege applicable. The information, thus described, is clearly not privileged on either of the bases contended, is not protected and should have been disclosed from the outset.

(B) What considerations pertain to the fact that the Allaway materials were misplaced, and presumed discarded, in the face of EllisDon's application?

[33] Clearly, counsel for Southwest was aware of the fact of this application for a long time prior to its assigned date (January 10, 2018). As noted in *Southwest #1*, the probability that a court application would be brought by EllisDon in relation to the Spatz binder and the Allaway materials was disclosed to Southwest's counsel,

William L. (Mick) Ryan, at the discovery examinations held in early November 2017.

[34] For the materials to go missing and for the affidavit disclosing this fact not to be filed until one day before the motion referenced in *Southwest #1* was heard, is unacceptable.

[35] I deliberately decided *Southwest #1* without reference to Mr. Allaway's contention, in his January 9, 2018 affidavit, that his materials had gone missing. My decision was that they should be produced to the court in order to test the claims of privilege being made in relation to them.

[36] At a minimum, there must be cost consequences to Southwest as a result of the loss of these materials under these circumstances.

Costs

[37] EllisDon has been almost entirely successful. It should have its costs on that basis alone.

[38] As to the amount thereof, including an amount to address the fact of the lost Allaway materials, I will invite written submissions from counsel within 30 days.

Gabriel, J.