CITATION: Ellis Packaging Limited v. Ellis, 2025 ONSC 1314
COURT FILE NO.: CV-23-0070808-00CL
DATE: 20250227

2025 ONSC 1314 (CanLII)

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: Ellis Packaging Limited, (f/k/a 1000256165 Ontario Inc.) and Max Solutions Inc., Plaintiffs

AND:

Peter William Ellis, Sharon Ellis, Cathleen Ellis, Brad Ellis, David Ellis and Peter William Ellis, Sharon Ellis and I. Blair MacKenzie in their capacities as Trustees of The Ellis Family Trust 2020, Defendants

BEFORE: Cavanagh J.

COUNSEL: *Crawford Smith and Amethyst Haighton*, for the Plaintiffs

Mitchell Fournie and Ryan Taylor, for the Defendants

HEARD: December 16, 2024

ENDORSEMENT

Introduction

[1] On this motion, the defendants Peter William Ellis ("Bill Ellis"), Sharon Ellis, Cathleen Ellis, Brad Ellis, David Ellis and the trustees of The Ellis Family Trust 2020 seek an order removing Stikeman Elliott LLP ("Stikeman") as counsel for the plaintiffs. They also seek an order requiring the plaintiffs to destroy all documents in their possession that contain the defendants' solicitor-client privileged documents.

[2] The defendants contend that Stikeman improperly handled and reviewed the defendants' solicitor-client privileged communications and that the plaintiffs have not rebutted the presumption of prejudice that arises. The defendants submit that the only appropriate remedy is the disqualification of Stikeman as counsel for the plaintiffs.

[3] For the following reasons, the defendants' motion is dismissed.

Background Facts

[4] Since 1983, the Ellis family had owned and operated a group of companies (the "Ellis Group") that engaged in the manufacture of folding and paperboard packaging. As of 2021, the Ellis Group included (a) Ellis Packaging Limited ("Ellis Packaging"), (b) Ellis Paper Box Inc., and (c) Ellis Packaging West Inc.

[5] On September 29, 2022, Max Solutions Inc. ("Max Solutions"), through 1000256165 Ontario Inc. (identified in the SPA as the "Purchaser"), acquired the shares of the Ellis Group from the defendants (identified in the SPA as the "Sellers") under the terms of a Share Purchase Agreement ("SPA"). The Purchaser was formed by Max Solutions for this transaction.

[6] Prior to this acquisition, the shares of the Ellis Group were beneficially owned (through holding companies) by Bill Ellis, Sharon Ellis, The Ellis Family Trust 2020, along with Bill and Sharon's children: David, Cathleen, and Brad. The trustees of The Ellis Family Trust 2020 are Sharon Ellis, Bill Ellis and I. Blair Mackenzie (the Ellis Group and family's accountant).

[7] After closing, the Purchaser amalgamated with the companies in the Ellis Group, continued as "Ellis Packaging Limited", and continued to own the assets of the business.

[8] The allegedly privileged emails were exchanged between John Morley, the defendants, and Mark Mickleborough of Mickleborough Lawyers. When these emails were sent and received, Mr. Morley was the VP of Finance of Ellis Packaging. He had held this position since 2010 and he remained in the position following closing.

[9] Approximately one year after completion of the sale transaction, Max Solutions and Ellis Packaging brought an action seeking damages against the sellers for breach of contract and fraudulent misrepresentation in connection with certain representations and warranties in the SPA. Stikeman Elliott LLP represents the plaintiffs as counsel. Mitchell Fournie of the firm Crawley MacKewn Brush LLP ("CMB") represents the defendants.

[10] In November 2023, Mr. Morley coordinated the process of gathering the plaintiffs' documents for the purposes of making documentary discovery in the litigation. With Stikeman's assistance, the plaintiffs delivered a ShareFile link with their documentary production accompanied by an unsigned draft affidavit of documents. Stikeman provided the first ShareFile link to the plaintiffs on July 19, 2024, and then to defendants' counsel on July 22, 2024. Among the documents accessible through the ShareFile link were the Mickleborough/Morley emails.

[11] On August 6, 2024, the defendants served a notice of motion seeking to permanently stay the plaintiffs' action. In the notice of motion, the defendants noted that the production set included emails that were subject to solicitor-client privilege.

[12] Upon receipt of the notice of motion, Stikeman immediately stopped reviewing all emails and by August 12, 2024 the firm had removed access to the entire production set and all other documents received from the plaintiffs pending the outcome of this motion. Stikeman confirmed that the plaintiffs had not reviewed and would not have access to the production set or source documents. The relevant email server is decommissioned and currently inaccessible.

[13] The defendants move for relief pursuant to an amended notice of motion dated November 4, 2024.

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Analysis

[14] The defendants submit that the proper analysis to be followed to determine the issues raised on this motion is established by *Celanese Canada Inc. v. Murray Demolition Corp*., 2006 SCC 36 and *Continental Currency Exchange Canada Inc. v. Sprott*, 2023 ONCA 61. This analysis includes three stages:

a. The moving party must establish that the opposing party (and, in this case, its counsel) obtained access to its privileged information;

b. Second, the responding party has an onus to rebut the presumption of prejudice flowing from receipt of the privileged information; and

c. Third, if prejudice cannot be rebutted, the moving party must establish the appropriate remedy.

[15] The plaintiffs' first submission in response to this motion the defendants motion fails at the first stage of the analysis because Mr. Mickleborough jointly represented the defendants as sellers and the companies in the Ellis Group throughout his retainer, and, therefore, the privilege in the emails and other documents at issue on this motion is jointly held.

Was there a solicitor-client relationship between Mickleborough Law and the companies in the Ellis Group?

[16] I first address whether there was a solicitor-client relationship between Mr. Mickleborough and the companies in the Ellis Group when the allegedly privileged emails and other documents were sent and received.

[17] In *Trillium Motor World ltd. v. General Motors of Canada Limited*, 2015 ONSC 3852, the trial judge, at paras. 411-413, set out the principles that apply to determination of whether a solicitor and client relationship exists:

> The solicitor-client relationship is based on general concepts of contract and the specific contract of a retainer: *Filipovic v. Upshall* (2000), 2000 CanLII 26971 (ON CA), 133 O.A.C. 151 at para. 5 (C.A.). Whether a solicitor-client relationship exists is a question of fact. There is no need for a person to formally retain a lawyer by way of letter or other document. Nor is it necessary that an account be rendered or a bill paid. Rather, a court must look to a number of factors to ascertain whether such a relationship exists.
>
> [412] Justice Hawco helpfully identified twelve relevant indicia in *Jeffers v. Calico Compression Systems*, 2002 ABQB 72, 314 A.R. 294 [*Jeffers*]. Both parties agree that these indicia are accurate and apply to this case. They are as follows:
>
> (i) a contract or retainer;

(ii) a file opened by the lawyer;

(iii) meetings between the lawyer and the party;

(iv) correspondence between the lawyer and the party;

(v) a bill rendered by the lawyer to the party;

(vi) a bill paid by the party;

(vii) instructions given by the party to the lawyer;

(viii) the lawyer acting on the instructions given;

(ix) statements made by the lawyer that the lawyer is acting for the party;

(x) a reasonable expectation by the party about the lawyer's role;

(xi) legal advice given; and

(xii) any legal documents created for the party.

[413] Not all indicia need to be present. Rather, as Hawco J. explains at para. 8,

> …the question appears to be whether a reasonable person in the position of a party with knowledge of all the facts would reasonably form the belief that the lawyer was acting for a particular party.
>
> Further, the twelve indicia are not exhaustive. Depending on the facts of the case, other indicia may be relevant.

[18] The defendants submit that the Mickleborough Lawyers acted exclusively for them, the sellers. In support of this submission, the defendants rely on affidavit evidence given by Bill Ellis.

[19] Bill Ellis' affidavit evidence is that following receipt of an initial draft of a term sheet provided by Max Solutions to the Ellis family, his family and the trustees of The Ellis Family Trust 2020 retained Mark Mickleborough of Mickleborough Lawyers to provide them with legal advice related to the sale of their shares. Bill Ellis deposes that from mid-February 2022 to the eventual closing of the SPA on September 29, 2022, Mr. Mickleborough acted as the sellers' lawyer and provided them with legal advice related to the sale of their shares. He deposes that during this time, he and some other members of his family used their Ellis Packaging email accounts to communicate with Mr. Mickleborough and each other in relation to the sale. He deposes that they have used these email addresses for over 25 years, and they were their primary email addresses for business related communication at the time.

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[20] Bill Ellis deposes that all of his family members' communications with Mr. Mickleborough were for the purpose of requesting and receiving legal advice related to the sale of their shares. Bill Ellis deposes that Mr. Mickleborough had not acted for any of the sellers or their companies prior to being retained in February 2022 for the purpose of representing them on the sale of their shares.

[21] In correspondence from Mr. Rose of Stikeman to Mr. Fournie dated August 12, 2024 (appended as an exhibit to Mr. Rose's affidavit), after the defendants' notice of motion was served, Mr. Rose advised of his clients' position that the communications in question on this motion were between the target companies and their legal counsel on the basis that the companies in the Ellis Group and the sellers jointly retained Mr. Mickleborough.

[22] When he was cross-examined on his affidavit, Bill Ellis gave the following evidence:

> 44. Q. And as I understand it, Mr. Mark Mickleborough represented the Sellers in the transaction?
>
> A. Yes, he did.
>
> 45. And amongst other things, I take it he negotiated the Share Purchase Agreement?
>
> A. Certainly a large part of that, yes.
>
> 46. Q. And prior to the Share Purchase Agreement, he also negotiated and advised in connection with a Confidentiality Agreement; correct?
>
> A. Yes.
>
> 47. Q. And I'm going to pull up on the screen a copy of that Confidentiality Agreement. And this is a nine-page document, and we can just scroll through it briefly so that you have an opportunity to take a look at it. And you'll see, if we pause in this page, this document is executed by you; correct?
>
> A. Yes.
>
> 48. Q. And you have signed on behalf of Ellis Packaging Limited and Ellis Paper Box and Ellis Packaging West; correct?
>
> A. Yes.
>
> 49. And I take it, sir, that Mr. Mickleborough provided advice to Ellis Packaging Limited, Ellis Paper Box, and Ellis Packaging West on the form of this Confidentiality Agreement?
>
> A. I believe that's correct.

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50. Q. Okay. And that's because he was retained both to provide advice to you as seller and to the company; correct?

A. Yes.

51. Q. And that role of his continued throughout his engagement; correct?

A. Yes, that's correct.

...

53. Q. The next document is a Term Sheet that was entered into subsequent to the Confidentiality Agreement, I believe, and we'll just pull that up on the screen. And we can scan through it, sir, so that you're familiar with it. But this is a Term Sheet again executed by you on behalf of the Ellis Group; correct?

A. That's correct.

54. Q. And you're signing that document as an authorized signing officer of the members of the Ellis Group; correct?

A. Correct.

55. And just like the Confidentiality Agreement, you received advice in relation to this from Mr. Mickleborough?

A. That's correct.

56. And he was providing advice both to you as a seller and the companies of the Ellis Group?

A. Yes.

57. Q. And that continued throughout his entire representation right up to the closing of the transaction; correct?

A. Yes.

[23] The Confidentiality Agreement and the Term Sheet were marked as exhibits to Bill Ellis' cross-examination.

[24] The Confidentiality Agreement provides for restrictions on the use of Ellis Packaging's confidential information as well as non-solicitation provisions. The Term Sheet included provisions imposing obligations on the companies in the Ellis Group (defined in the Term Sheet as the "Company") including that it shall enter into 3 separate leases on closing on specified terms. The Term Sheet imposed exclusivity and confidentiality obligations on the Ellis Group companies,

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and required the Ellis Group companies to continue to operate in the ordinary course of business, consistent with past practice, and subject to specified limitations.

[25] The defendants refer to the Confidentiality Agreement and the Term Sheet and submit that Bill Ellis' execution of these documents as a signing officer of the companies in the Ellis Group does not support a finding that Mr. Mickleborough acted on a joint retainer with the sellers and the companies as clients. The defendants submit that where solicitors are instructed to perform work in which the good or ill of the company is not the prime object, then those solicitors are retained not by the company but by the individual who instructs them. The defendants submit that both documents were ancillary to and executed in furtherance of the sellers selling their shares, noting that none of the Ellis Group companies were parties to the SPA.

[26] In support of this submission, the defendants rely on *Salmond, Linge, Re*, 1983 CarswellBC 90. In *Salmond*, the motion judge was called on to decide whether an individual, who was the "voice" of a company, retained a firm of solicitors himself or for the company. This issue arose in the context of a taxation of the solicitors' bill. The company was to be a member of a limited partnership to be formed to raise capital for a real estate development and the solicitors were retained to advise and provide such legal services as were required to get the project underway. The motion judge found that the legal work involved was to be done in consequence of a decision by the individual to promote a partnership to raise capital for the development venture and that the legal work was not directed primarily to the preservation or enhancement of the company or its assets. The motion judge found that had the venture come to fruition, the company would have received some benefit as an investor from the legal work, but this benefit would have been only indirectly and coincidentally the result of that work. The motion judge found that it was the individual, and not the company, that retained the solicitors.

[27] The decision in *Salmond* was made on the particular facts of that case. Unlike in *Salmond* where, from the report of the decision, there was no legal document signed by the company, the executed Confidentiality Agreement and Term Sheet contain provisions conferring rights and imposing obligations on the Ellis Group companies. On the evidence before me, I am unable to find that the benefits received by the Ellis Group companies from legal services provided by Mr. Mickleborough only indirectly and coincidentally resulted from that work.

[28] The evidence given by Bill Ellis on his cross-examination that Mr. Mickleborough was retained by and provided legal advice to the Sellers and to the companies of the Ellis Group was clear and unqualified.

[29] At the hearing of this motion, the defendants, after relying on *Salmond*, submitted that Bill Ellis' evidence given on cross-examination that Mr. Mickleborough represented both the Sellers and the target of the share transaction, the Ellis Group, throughout his entire representation up to the closing of the transaction, was ill-considered, imprecise and incorrect, and should not be accepted.

[30] I do not accept this submission. Given Mr. Rose's August 12, 2024 letter that was sent to Mr. Fournie and appended as an exhibit to Mr. Rose's affidavit, when Bill Ellis was cross-

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examined, the question of whether the Ellis Group companies had retained Mr. Mickleborough jointly with the sellers had clearly been raised and was a central basis for the plaintiffs' opposition to this motion. There is no reasonable evidentiary basis for me to find that Bill Ellis was taken by surprise by the questions asked of him about Mr. Mickleborough's retainer by the Ellis Group companies, or that his answers were not properly considered before he gave them.

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[31] Whether a solicitor-client relationship existed between the companies in the Ellis Group and Mr. Mickleborough is a question of fact. Bill Ellis retained Mr. Mickleborough, and he would reasonably be expected to know whether he retained Mr. Mickleborough to represent both the defendants as sellers and the companies in the Ellis Group. There was no evidence tendered, including from Mr. Mickleborough, that conflicts with the evidence given by Bill Ellis on his cross-examination.

[32] When I consider the evidentiary record before me, I am satisfied that a reasonable person with knowledge of the facts in evidence, including Bill Ellis' affidavit evidence, the evidence given by Bill Ellis on cross-examination, the SPA, the Confidentiality Agreement, and the Term Sheet, would reasonably form the belief that Mr. Mickleborough was, throughout his engagement, acting on a joint retainer for both the defendants as sellers and for the companies in the Ellis Group. I so find.

[33] When parties consult a solicitor on matters towards which they each have an interest, the communications are not privileged as between such parties. Each party is expected to share in and be privy to all communications passing between each of them and their solicitor. See *R. v. D.*, 1982 CanLII 3324 (ON CA), at para. 56.

Does Ellis Packaging (the amalgamated company) continue to hold the privilege in the emails in question?

[34] In *Dente et al. v. Delta Plus Group Inc. et al.*, 2023 ONSC 3376, there was a completed share purchase agreement and an issue arose as to whether electronic records of the company whose shares were sold were privileged after closing in the hands of the company. The motion judge found that there was no joint privilege by the sellers of the shares and the company with the lawyer who negotiated and prepared the SPA and acted on the sale and, therefore, there was no privilege to be passed on to the purchaser of the shares of the company. The motion judge, at para. 60, confirmed that "[s]olicitor-client privilege that is held by an original owner passes to a successor-in-title to the business, and is then held by the subsequent owner".

[35] In *Dente*, the motion judge, at para. 61, noted that it is possible for the seller of shares of a company to retain ownership of records over which a joint privilege is claimed:

> Generally, after the sale of a corporation, all documents and materials the corporation owns remains with the corporation. When an owner of the company shares the services of counsel with their company prior to closing, there is a joint privilege. The owner can insert a clause in the share purchase agreement that would leave the former owner in sole possession of the privilege upon closing. When they fail to do so, the prior owner cannot claim privilege over documents as against the

new owner, who now owns the documents: *NEP Canada ULC v. MEC OP LLC*, 2013 ABQB 540, at paras 36, 44.

[36] The SPA does not contain such a provision.

[37] In *NEP Canada ULC v. MEC OP LLC*, 2013 ABQB 540, the application judge was called on to decide a question concerning allegedly privileged records in the context of a completed share purchase agreement. After the purchase of the shares, the purchaser amalgamated with the company whose shares were purchased and the amalgamated company continued to do business under the name of the purchaser. In the course of closing, the seller of the shares transferred a significant amount of electronic data to the company to allow for ongoing operations. After closing, the seller asserted privilege over a number of these records. The issue on the application was whether the seller can claim privilege over electronic records which are in the possession or control of the amalgamated company. The application judge found that the seller and the company whose shares were being sold sought and received legal advice from lawyers and shared information between themselves in the common interest of negotiating the SPA and its closing. The application judge, at para. 44, held that the seller and the amalgamated company held a common privilege over the contested records and, accordingly, the seller cannot claim privilege over these records as against the amalgamated company.

[38] I conclude, on the authority of *Dente* and *NEP*, that the amalgamated company continues to hold the privilege in the emails in question on this motion, jointly with the defendants. The privilege asserted by the defendants does not operate to prevent Ellis Packaging Limited, the amalgamated company, from having access to the documents at issue on this motion.

[39] These conclusions are sufficient to dispose of the defendants' motion.

[40] It is not necessary for me to decide whether, if I had found that there was no solicitor-client relationship between Mr. Mickleborough and the companies in the Ellis Group, (i) the defendants waived privilege over the emails in question, or (ii) the inclusion of Mr. Morley on the emails in question means that the communications were not sent and received on a confidential basis, such that no privilege arises. It is also not necessary for me to make determinations concerning the second and third stages of the *Celanese* analysis.

Disposition

[41] For these reasons, the defendants' motion is dismissed.

[42] If the parties are unable to resolve costs, they may make written submissions in accordance with a timetable (and reasonable page limits) to be agreed upon by counsel and approved by me.

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Cavanagh J.

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Date: February 27, 2025

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