

2020 ONSC 5896
Ontario Superior Court of Justice (Divisional Court)

Gale v. Halton Condominium Corporation No. 61

2020 CarswellOnt 14030, 2020 ONSC 5896

**Jack Gale (Applicant / Respondent in Appeal) and Halton
Condominium Corporation No. 61 (Respondent / Appellant)**

Fitzpatrick J., Favreau J., and O'Brien J.

Heard: September 21, 2020

Judgment: September 30, 2020

Docket: Toronto 711/19

Proceedings: Affirmed, 2019 ONCAT 46 (Ont. C.A.T.)

Counsel: M. Mackey, for Applicant / Respondent in Appeal

A. Casalivuo, for Respondent / Appellant

Subject: Property

Headnote

Real property

Table of Authorities

Cases considered by O'Brien J.:

Livent Inc. v. Drabinsky (2003), 2003 CarswellOnt 1657, 33 C.P.C. (5th) 246 (Ont. S.C.J. [Commercial List]) — considered
2293611 *Ontario Inc. v. JSegal Holdings Ltd.* (2016), 2016 ONSC 7577, 2016 CarswellOnt 20014 (Ont. S.C.J.) —
considered

Statutes considered:

Condominium Act, 1998, S.O. 1998, c. 19

Generally — referred to

s. 1.46(2) [en. 2015, c. 28, Sched. 1, s. 6] — considered

s. 55(3) — considered

s. 55(4) — considered

s. 55(4)(b) — considered

s. 55(6) — considered

Regulations considered:

Condominium Act, 1998, S.O. 1998, c. 19

General, O. Reg. 48/01

s. 13.3(1) [en. O. Reg. 180/17] — considered

Fitzpatrick J., Favreau J., and O'Brien J.:

Overview

1 This is an appeal from a decision of the Condominium Authority Tribunal, in which the Tribunal ordered the Appellant condominium corporation to produce copies of redacted legal invoices to the Respondent, Mr. Gale. The only issue on this appeal is whether the Tribunal committed a legal error when it ordered the production of records. For the reasons that follow, I conclude that the Tribunal did not err in law.

2 Mr. Gale is a unit owner of Halton Condominium Corporation No. 61 ("HCC61"), a condominium building with 205 units. Mr. Gale made a request for records to HCC61, specifically requesting copies of all legal bills from January 2018 to February 2019 referencing his unit. Mr. Gale made this request after HCC61 wrote a letter dated October 10, 2018 to all owners in the building concerning legal expenses it had incurred. In the letter, the board of HCC61 drew specific attention to what it described as a "small group of owners" who it said had increased the building's legal fees and diverted funds needed for other projects. The Tribunal Adjudicator found that, given the size of the building, it was reasonable to assume many if not most of the unit owners knew the members who caused the expenses to be incurred. Mr. Gale assumed he was in the "small group." The letter included the following statements:

The Board has become concerned about, and has attempted to manage, the increase in legal costs that HCC #61 has incurred since November 1, 2017 in order to respond to requests for records. Despite the Board's efforts to operate HCC #61 in a transparent manner, there remains one small group of Owners who have taken it upon themselves to try to micromanage and undermine the efforts of the elected Board by abusing their right to records.

...

Since November 1, 2017, we have received 28 such requests from this one small group, all of which have been answered by the Board . . .

Each request received by the Board is reviewed in detail to determine if the requested information must be provided. This requires input from our legal counsel as well as the Directors; the latter are volunteers who do not have the legal expertise required to make this determination.

In addition, responding to these requests creates additional work for the Property Manager. This takes the Property Manager away from her time to perform her regular required duties and her ability to respond to the concerns of other Owners in a prompt manner.

The additional legal costs incurred have an impact on HCC #61's budget and your monthly condo fees, as well as our ability to carry out overdue renovations to certain areas of the building.

To date, the legal costs incurred in responding to requests for records from this small group of Owners have amounted to \$17,698.71 since November 1, 2017. This figure does not include the lost productivity of property management to address these requests. Nonetheless, this small group of Owners has diverted crucial funds that could have been directed to other projects at HCC #61.

The Board strives to be transparent with all Owners, which is reflected by the many bulletins, notices and correspondence regarding the overall operation of the building. Owners are entitled to make relevant requests concerning the overall operations. However, the Board strongly objects to requests that are fishing expeditions or Owners who engage in activities to try to undermine the Board's efforts to govern HCC #61. Both of these cause HCC #61 to incur unnecessary costs at a time when we need to be conserving our funds for required building expenses.

3 HCC61 denied Mr. Gale's request for records on the basis of common law solicitor-client and litigation privilege. It also relied on the exception to the requirement to disclose records found in subsection 55(4)(b) of the *Condominium Act, 1998*, S.O. 1998 c. 19 (the "*Act*"), which addresses records related to actual or contemplated litigation. Finally, it took the position that Mr. Gale was not requesting the records for reasons related to his interests as an owner as required by s. 13.3(1) of Ontario Regulation 48/01 (the "*Regulation*").

4 The Tribunal concluded that HCC61 was required to disclose the requested records. The Adjudicator's decision turned on her finding that, even if solicitor-client privilege or litigation privilege applied to the records, HCC61 had waived that privilege by the publication of the October 10, 2018 letter to owners. The Adjudicator concluded that "[h]aving disclosed some information about the legal advice sought and the total amount paid for this advice, HCC61 cannot in fairness shelter behind either the litigation privilege or the solicitor-client privilege to deny Mr. Gale the records he seeks." The Adjudicator reached the same conclusion regarding the exception under s. 55(4)(b) of the *Act*. That is, she found that even if the exception for records related to actual or contemplated litigation applied to the records, HCC61 was required to produce the documents based on common law principles of waiver. The Adjudicator also found that Mr. Gale did not request the records for reasons unrelated to his interests as an owner. She ordered HCC61 to produce the legal invoices pertaining to Mr. Gale's unit during the relevant time frame, but with any reference to the substance of legal advice redacted.

Analysis

5 I conclude that the Adjudicator did not err in law when she determined that HCC61 had waived any privilege that applied to the legal invoices.

6 Pursuant to s. 1.46(2) of the *Act*, this Court's jurisdiction is limited to an appeal from the Tribunal on questions of law. It reads:

1.46(2) A party to a proceeding before the Tribunal may appeal the order to the Divisional Court on a question of law in accordance with the rules of court.

7 It is important to note that the dispute between the parties in this case is not over whether the invoices at issue were privileged. The Respondent accepts that legal bills can be subject to solicitor-client privilege or litigation privilege, which is consistent with the law. Rather, the dispute between the parties focuses on the Adjudicator's application of the principles of waiver.

8 The Adjudicator correctly set out the test for waiver of legal privilege. She stated that solicitor-client privilege resides in the client and may only be waived by the client. She further stated that waiver of part of a communication may be held to be waiver of the entire communication. In that context, she noted that it is not necessary for the client to have intended to waive the privilege if fairness and consistency require that the waiver apply. Although counsel for HCC61 cited *Livent Inc. v. Drabinsky* [2003 CarswellOnt 1657 (Ont. S.C.J. [Commercial List])], 2003 CanLII 1927 for the proposition that partial waiver of a privileged document does not necessarily waive the whole of the document, the Adjudicator's statement of the law is consistent with that case. In *Livent*, at para. 8, the court adopted the following passage from *Wigmore on Evidence* Vol. 8, McNaughton rev. 1961 to emphasize the importance of fairness and consistency in the waiver analysis:

A privileged person would seldom be found to waive, if his intention not to abandon could alone control the situation. There is always also the objective consideration that when his conduct touches a certain point of disclosure, fairness requires that his privilege shall cease whether he intended that result or not. He cannot be allowed, after disclosing as much as he pleases, to withhold the remainder. He may elect to withhold or disclose, but after a certain point his election must remain final.

9 Having correctly set out the test for waiver, there is no basis to interfere with the Adjudicator's application of the test to the situation before her. A determination of whether particular facts satisfy a legal test is a question of mixed fact and law, not susceptible to review by this Court: *2293611 Ontario Inc. v. JSegal Holdings Ltd.*, 2016 ONSC 7577 (Ont. S.C.J.), at para. 39.

10 The Appellant argues that the Adjudicator erred in finding that it had waived its privilege over the legal bills because the letter did nothing more than provide financial information it already had an obligation to disclose. The letter contains far more information than the amount of legal fees incurred by the Appellant. It targeted a specific group of individuals, suggesting that they acted unreasonably and were leading the Appellant to incur unnecessary legal expense. Given the scope of the information contained in the letter, the Adjudicator did not make any legal errors in concluding that the Appellant had waived privilege over the individual bills documenting the legal expenses incurred in responding to the document requests. By permitting the

redaction of legal advice contained in the bills, the Adjudicator protected the Appellant's privilege over legal advice while requiring disclosure of the information she found had been waived by publication of the letter.

11 I also conclude the Adjudicator applied the correct legal test with respect to the exception for disclosure set out in the *Act*. The Adjudicator first referenced the relevant provisions. She noted the express disclosure obligation placed on condominium corporations by the statute in s. 55(3). That subsection obliges condominium corporations to permit an owner "to obtain copies of records of the corporation in accordance with the regulations, except those records described in subsection (4)." She then set out the exception in s. 55(4), which states that the "right to examine or obtain copies of records under subsection (3) does not apply to, . . . (b) records relating to actual or contemplated litigation, as determined by the regulations . . ." Finally, she referenced s. 55(6), which permits a condominium corporation to disclose records described in clause (4)(b).

12 The Appellant argues that s. 55(6) modifies the common law of waiver and that it permits a condominium corporation to choose to disclose information protected by s. 55(4)(b) without any risk of waiving the protection over other relevant information or records. I do not accept HCC61's submission that s. 55(6) of the *Act* granted it the discretion to waive the protection of s. 55(4)(b) over selected information, nor that the Adjudicator was required to defer to that exercise of discretion. Instead, I conclude that s. 55(6) of the *Act* should be read as consistent with common law principles of waiver. This includes the principle that when some disclosure of a protected document has occurred, fairness and consistency may require that the remainder of a communication be disclosed. Subsection 55(6) reads:

Waiver

(6) Despite subsections (3) and (4), a corporation may disclose a record described in clause 4(b) but shall not disclose . . . [reference to other types of records, such as records relating to employees]

13 The heading of s. 55(6) is "waiver." It states that the corporation "may disclose" records described in clause 4(b), which are those protected because of being related to actual or contemplated litigation. This amounts to a restatement of the principle that a client is entitled to waive privilege. It should not be read as at the same time displacing the common law principle that fairness and consistency may require full disclosure of a document that has been partially disclosed. Otherwise, the statute would be permitting partial disclosure of records in an unfair manner. As stated by the Adjudicator, condominium corporations would be entitled to selectively disclose privileged documents to the detriment of owners — for example, to cast aspersions on owners without providing the owner with access to the record to provide a defence. Given that the statute is structured such that disclosure is required subject only to limited exceptions, and that the statute is otherwise consistent with the common law understanding of waiver, much clearer language would be required if the legislature's intention were to displace accompanying principles of fairness. Moreover, contrary to the submission of HCC61, the deference shown to the business judgment of condominium corporations does not apply to the requirement to disclose documents, which is a specific statutory obligation of condominium corporations and corresponding statutory entitlement of owners.

14 The Adjudicator, then, was correct in the legal test of waiver she applied under subsections 55(4) and 55(6). There is no basis to interfere in her conclusion with respect to waiver under the *Act*.

15 Finally, HCC61 has not identified any basis to interfere with the Adjudicator's application of s. 13.3(1) of the Regulation to the circumstances of this case. Subsection 13.3(1) provides in part that the right to examine or obtain a copy of a record under s. 55(3) of the *Act* does not apply unless the request is solely related to the person's interest as owner. HCC61 has not identified any error in the test the Adjudicator applied when she concluded that Mr. Gale's request was related to his interest as owner. Her application of the test to the facts is a question of mixed fact and law. Again, it is not susceptible to review by this Court.

Disposition

16 HCC61 has not met its onus to identify any basis for this Court to interfere in the decision of the Tribunal. Therefore, the appeal is dismissed. In accordance with the agreement between the parties, HCC61 shall pay costs of the appeal to Mr. Gale in the amount of \$10,000.

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