

Indexed as:
Bank Leu AG v. Gaming Lottery Corp.

Between
Bank Leu AG, appellant, and
Gaming Lottery Corporation, et al, defendants
And by crossclaim
Gaming Lottery Corporation, plaintiff by crossclaim, and
Helix Capital Corporation et al, defendants to the crossclaim
And by third party claim
Gaming Lottery Corporation, defendant/claimant/appellant, and
Gary L. Moore, Stephen E. Dadson, Coglan Wizinsky Dadson &
Longpré, Sandy Anderson, North Shore Credit Union, James
Ericksteen, Charles Anthony Ferracone, James W. Farrell, Jill
Hall, Robert W. Hladun, Hladun & Company, Max Josef Strauss,
Khadjavi Strauss, Claus Koerner, Paul M. Stein, and Cassels
Brock and Blackwell, third parties/respondents

[2000] O.J. No. 1137

132 O.A.C. 127

95 A.C.W.S. (3d) 826

Court File No. 796/99

Ontario Superior Court of Justice
Divisional Court - Toronto, Ontario

O'Driscoll, Marchand, and Aitken JJ.

Heard: January 27, 2000.
Oral judgment: April 3, 2000.

(11 paras.)

Practice -- Discovery -- What documents must be produced -- Privileged documents, attorney-client communications -- Privileged documents, waiver.

Appeal by Gaming Lottery from an order requiring that documents reflecting communications between Gaming and its solicitors in respect of an investigation by the Securities Exchange Commission be disclosed. Bank Leu Ag brought an action against Gaming with respect to the issuance by Gaming of share certificates that had not been paid for or issued and which were pledged with Bank Leu as security for loans made by Bank Leu. Gaming alleged that the shares were supposed to be held in escrow and not reach any third party. It issued a third party claim against its solicitors alleging that the solicitors failed to warn Gaming of the risks involved in the stock program. Gaming listed documents in its affidavit of documents for which it claimed solicitor and client privilege or litigation privilege. The solicitors brought a motion to require production of the documents listed.

HELD: Appeal dismissed. Gaming put into issue its knowledge of matters on which it alleged breach of duty by its solicitors. It was deemed to have waived privilege as to all communications and advice received by Gaming in relation to the matters.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, s. 19.

Ontario Rules of Civil Procedure, Rule 62.02(4).

Counsel:

Robby Bernstein, for the Gaming Lottery Corporation.

David Moore, for the respondents Paul M. Stein and Cassels Brock and Blackwell.

The judgment of the Court was delivered by

O'DRISCOLL J. (orally):-

I. Nature of the Proceedings

1 This appeal comes to us pursuant to leave granted by Hartt J. on November 26, 1999, under the provisions of s. 19 of the Courts of Justice Act and Rule 62.02(4) of the Rules of Civil Procedure, from the interlocutory order of Ground J., dated October 26, 1999. The order of Ground J. resulted from an application by Cassels Brock and Stein, the moving parties, third party defendants/respondents, hereinafter "Cassels Brock", for:

1. An Order authorizing the Moving Parties to produce the documents listed in Schedule "B" of the Affidavit of Documents of the Moving Parties sworn on November 20, 1999;
2. An order that Gaming Lottery Corporation ("GLC") produce the documents listed in Schedule "B" to its Affidavit of Documents herein to the Moving Parties and to other interested parties in the proceedings;
3. An order that the Moving Parties be permitted to ask and that GLC be required to answer all relevant questions relating to or arising out of any

documents produced pursuant to or as a result of the relief sought in subparagraphs (1) and (2) above upon the continuation of the examination of discovery of GLC;

2 Ground J. heard the motion on August 24 and 25, 1999 and reserved judgment. On October 26, 1999, he released nine (9) pages of written reasons accompanying his formal order. At the conclusion of those reasons, he said at [19], p. 24 of the Appeal Book:

[19] In the result, the questions listed above which raise the issues on this motion are answered as follows:

- (a) Whether litigation privilege applies in the case of an investigation by a regulatory authority such as the SEC or the Ontario Securities Commission. Yes.
- (b) Where a client alleges breach of a solicitor's duty to the client in connection with a particular transaction, whether the client will be deemed to have waived privilege as to all communications relevant to the issues involved in that particular transaction, including communications between the client and other counsel. Yes.
- (c) Whether the waiver applies to documents which would indicate the client's state of mind and knowledge of the issues involved, including information and advice from other counsel. Yes.
- (d) Whether the waiver of privilege also relates to documents relevant to the issues of causation as between the alleged breach of duty and the loss claimed, including documents in other transactions, which would establish that the client would have gone ahead with the transaction in any event. Yes.
- (e) Is there any distinction on the above issues based upon whether a document was prepared by or forwarded to inside counsel or outside counsel? No.
- (f) Are documents reflecting other contacts between GLC and Cassels Brock/Stein which had nothing to do with Reg S stock roll programs relevant to the issues in this action? No.

[20] Accordingly an order will issue that:

- (i) documents reflecting communications between GLC and its U.S. counsel after December 8, 1994 when GLC became aware of an investigation being commenced by the SEC with respect to Reg S stock roll programs be disclosed.
- (ii) documents reflecting communications with inhouse counsel of GLC after December 8, 1994 when GLC became aware of the investigation being commenced by the SEC be disclosed.

- (iii) Documents reflecting other contacts between Cassels Brock/Stein and GLC with respect to other legal matters unrelated to the subject transaction of to Reg S stock roll programs need not be disclosed.

II. Background

3 This matter arises out of an action brought by Bank Leu AG against Gaming Lottery Corporation (GLC) with respect to the issue by GLC of a Certificate of Shares which had not been paid for or issued, and which certificate was pledged with Bank Leu as security for loans made by Bank Leu. The share certificate was issued by GLC as part of, as Ground J. said, "a rather peculiar transaction" incorrectly called a Reg S stock program. Bank Leu claims to be the holder in due course of a share certificate representing 2.5 million common shares of GLC. Bank Leu has sued GLC to allow it to realize on the shares in order to recover their value in satisfaction of the above mentioned debt.

4 It is GLC's position that although the shares, on their face, are allegedly fully paid issued shares, they have never been paid for and were supposed to be held in safe keeping or escrow and not reach any third party for value.

5 GLC issued a third party claim against Cassels Brock and Stein (a partner in Cassels Brock), solicitors, who were acting for GLC at the time, alleging that Cassels Brock failed to warn GLC of the risks involved in the Reg S stock programs. Cassels Brock denied any liability for breach of the duty to warn with respect to Reg S stock roll programs. It is Cassels Brock's position that GLC was well aware of the risks involved. Further, Cassels Brock takes the position that GLC was well warned by its U.S. counsel about the risks involved in the transaction, but ignored such warnings at the time when Cassels Brock were Canadian counsel to GLC.

6 The appellant, GLC, in its affidavit of documents, lists certain documents for which solicitor/client privilege and/or litigation privilege are claimed. In response to the claim of privilege, Cassels Brock brought their motion before Ground J. and, as set out above, the motion sought an order directing the production of the documents listed in the appellant's affidavit for which privilege was claimed. Cassels Brock argued that the documents are not subject to privilege in view of the third party claim initiated by GLC against the respondents, their former solicitors.

III. Reasons of Mr. Justice Ground

7 He concluded that the documents prepared in relation to the SEC investigation of GLC and documents prepared by GLC's inhouse counsel are subject to privilege. The main issue before Ground J. was whether privilege had been waived, either expressly or impliedly by GLC. Ground J. found that the case law supports the proposition that where a client puts in issue his or her or its state of mind or knowledge with respect to matters on which he or she alleges breach of duty by its solicitors, the client will be deemed to have waived privilege as to all communications and advice received by him or her relating to such matters. Ground J. referred to *Woodglan & Co. v. Owens* (1995), 24 O.R. (3d) 261 and *United Services Funds (Trustee of) v. Tory, Tory, DesLauriers & Binnington*, [1996] O.J. No. 4264. Ground J. concluded that by alleging breach of duty by the respondents, GLC is deemed to have waived privilege with respect to all documents relating to advice or information provided to GLC with respect to the risks inherent in entering into the subject transaction of Reg S stock roll programs.

8 Ground J. also found that documents relating to the issue of what advice GLC did receive as to the risks of Reg S stock roll programs after the time of the alleged failure by Cassels Brock to warn of the risks are relevant to the issues of causation and quantum of damages. Any privilege with respect to such documents is indeed waived. This ruling applies to the documents and communications between GLC and its U.S. counsel. In addition to those findings, Ground J. held that any documents relating to other contracts between the respondents and GLC must remain privileged.

IV. Appellant's Factum:

8a

53. On February 2, 1995 White and Case sent a copy of the White and Case Letter by facsimile directly to Stein. The fax cover sheet contained the following message: -

The attached message is a Privileged and Confidential Attorney-Client communication. It is being sent to you as Canadian Counsel for Laser Friendly Inc. [GLC] so that you may be aware of the advice we have given to our mutual client. Please call if you have any questions or would like to discuss any of our advice.

54. Pages 2 and 3 of the White and Case letter contain information and advice from White and Case to GLC about the Stock Roll Program and the Helix transaction in particular, which Stein would like to use to substantiate Stein's claim that GLC would not have heeded a warning from Stein against GLC participating in the Stock Roll Program, given GLC's alleged continued participation in the Program after receiving the White and Case letter.

V. Respondent's Factum:

8b

16. Jones & Day, the Cleveland law firm whose services were originally arranged for by Stein, was replaced in mid December by White & Case. Thereafter, Stein/Cassels Brock received a copy of the February 1, 1995 White & Case letter (Production 105, Respondent's Schedule B documents). There was no issue or objection to the fact that the contents of the letter was provided to Stein/Cassels Brock, who continued to act as corporate counsel for GLC for at least another year.
17. The record also indicates by the time Production 105 was written, White & Case had unsuccessfully attempted to negotiate for a change in the wording of the Helix certificates.

VI. Authorities

8c

"Evidence in Trials at Common Law" by John Henry Wigmore, Vol. VIII: p. 635
(McNaughton rev. 1961)

[2327] What constitutes a waiver by implication?

Judicial decision gives no clear answer to this question. In deciding it, regard must be had to the double elements that are predicated in every waiver, i.e., not only the element of implied intention, but also the element of fairness and consistency. 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 to disclose, but after a certain point his election must remain final. As a fair canon of decision, the following distinctions may be suggested:

- (6) When the client alleges a breach of duty to him by the attorney, the privilege is waived as to all communications relevant to that issue.

(Footnotes omitted)

[The Court did not number these paragraphs. Quicklaw has assigned the numbers 8a, 8b, 8c.]

9 Counsel for the appellant has taken us through several authorities which in his submission back up his submissions that Ground J. is in error. Those authorities are as follows:

- (1) Solosky v. The Queen (1980), 105 D.L.R. (3d) 745 (S.C.C.)
- (2) R. v. Derby Magistrates' Court, Ex. Parte B, [1995] 4 All E.R. (HL)
- (3) Paragon Finance plc. v. Freshfields (A Firm), [1999] 1 W.L.R. 1183 (C.A.)
- (4) Lillcrap v. Nalder and Son, [1993] 1 All E.R. 724 (C.A.)
- (5) Froates v. Spears, [1999] O.J. No. 77

VII. Conclusions

10 Ground J. heard the matter for two (2) days, reserved judgment and then gave full written reasons. After hearing full argument from counsel for GLC, we are all of the view that Ground J. made no error in fact or in law. With respect, we agree with his reasons and with the conclusions he reached. It follows that the appeal must be dismissed.

11 After consulting with my colleagues, I have endorsed the back of the Appellant's Appeal Book as follows:

This appeal is dismissed for the oral reasons given for the court by O'Driscoll J. The order of Mr. Justice Ground is affirmed.

Costs, fixed at \$7,500 (an amount agreed upon by both counsel) are payable

forthwith by the appellant GLC to Cassels Brock & Blackwell/Stein.

O'DRISCOLL J.
MARCHAND J.
AITKEN J.