COURT OF APPEAL FOR ONTARIO

CITATION: Kaiser (Re), 2012 ONCA 838
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Goudge, Feldman and Blair JJ.A.

In the Matter of the Bankruptcy of Morris Kaiser, of the City of Toronto, in the Province of Ontario

Melvyn L. Solmon and Cameron J. Wetmore, for the appellant Morris Kaiser

Milton A. Davis and Neil S. Rabinovitch for the respondent, Soberman Inc., as Trustee of the Estate of Morris Kaiser, a Bankrupt

Heard: June 27, 2012

On appeal from the order of Justice Frank J.C. Newbould of the Superior Court of Justice, dated December 23, 2011, with reasons reported at 2011 ONSC 7617.

R.A. Blair J.A.:

Issue

[1] May a court require that a bankrupt and/or the bankrupt's solicitor disclose the identity of the person paying the bankrupt's legal fees in proceedings arising out of the bankruptcy? That is the issue raised on this appeal.

Background

[2] Morris Kaiser has been bankrupt for more than three years, and claims to have been impecunious at the time of his bankruptcy. In spite of this, however, he appears to have continued to live a life of some means in Toronto. He has

made a number of trips to various casinos in the United States, gambling many hundreds of thousands of dollars in pursuit of this hobby, and made numerous cash withdrawals on credit cards allegedly paid for by a third party, Mr. Cecil Bergman, and by various companies under Mr. Bergman's control.

[3] This has led Soberman Inc., Mr. Kaiser's Trustee in Bankruptcy, to suspect that Mr. Kaiser was not impecunious at the time of his bankruptcy but, rather, that he is hiding assets from the Trustee and using Mr. Bergman as a "straw man" to do so. Both Mr. Kaiser and Mr. Bergman deny that Mr. Bergman has provided Mr. Kaiser with any funds since the date of his bankruptcy, but this controversy underpins the issue arising on this appeal.

[4] The Trustee applied to the court for the appointment of a receiver over the property of Mr. Bergman and his company, Bergman Capital, on the basis that the property belongs to Mr. Kaiser and therefore to the Trustee as a result of the bankruptcy (the "Receivership Motion"). Shortly thereafter, it also moved for an order requiring Mr. Kaiser, or any person so requested by the Trustee, to disclose the source of "any and all funds" received by Mr. Kaiser since the bankruptcy (the "First Disclosure Motion"). The law firm, Davis Moldaver LLP, represented the Trustee in those proceedings.

[5] The record indicates that Milton Davis of that firm has had considerable experience dealing with Mr. Kaiser because he has represented numerous

disgruntled litigants in proceedings against or involving Mr. Kaiser for over a decade. When the Trustee (with Mr. Davis acting for it) sought to examine Mr. Kaiser pursuant to s. 163(1) of the *Bankruptcy and Insolvency Act*, R.S.C. 1985, c. B-3 (the "BIA"), Mr. Kaiser, in turn, brought a motion to have Davis Moldaver LLP removed as solicitor for the Trustee (the "Removal Motion"). Newbould J. dismissed that motion on August 16, 2011: *Re Bankruptcy of Morris Kaiser*, 2011 ONSC 4877. He observed, at para. 2:

> In my view the motion is completely miscast and it is evident that it has been brought for tactical purposes to try to delay actions by the trustee in seeking to obtain a declaration that a third party, Cecil Bergman, is holding millions of dollars of assets in trust for Mr. Kaiser. It is quite evident that Mr. Kaiser, who has an obligation to the trustee to assist in locating assets belonging to the bankrupt estate, is taking every opportunity to refuse to provide information that could assist the trustee.

[6] Cronk J.A. dismissed an application for leave to appeal from the Removal Motion order, noting that the motion judge's conclusions were "firmly grounded in the evidentiary record": *Re Bankruptcy of Morris Kaiser*, 2011 ONCA 713. A motion to set aside her decision was dismissed and the appeal from the Removal Motion order quashed.

[7] In the meantime, the Trustee's First Disclosure Motion had been adjourned indefinitely. However, after Newbould J. dismissed the Removal Motion he ordered Mr. Kaiser to pay costs to the Trustee in the amount of $50,000, and, not surprisingly, those costs were not paid. As a result, the Trustee moved

separately before Newbould J. for an order compelling Mr. Kaiser *and* his lawyer Mr. Solmon to disclose the identity of the person paying Mr. Solmon's legal fees respecting the Removal Motion (the "Second Disclosure Motion"). The Trustee's request that the amount of the legal fees also be disclosed was not pursued at the hearing. No one doubts that, if successful, the Trustee will follow with a motion for an order requiring that person to pay the outstanding costs.

[8] Mr. Kaiser opposed the Second Disclosure Motion on the basis that the information sought was permanently protected by solicitor-client privilege. The Trustee argued that the identity of the person paying Mr. Kaiser's legal bills is simply a matter of fact that does not attract solicitor-client privilege in the first place.

[9] The motion judge considered the relevant case law and determined that the information sought was presumptively – not permanently – privileged. However, he went on to hold that the presumption could be rebutted if it could be shown that the information did not reveal confidential solicitor-client communications and was not relevant to the merits of the case, and that its revelation would not be prejudicial to Mr. Kaiser.

[10] Ultimately, the motion judge concluded that this burden had been met. He explained, at paras. 11 and 15:

> In this case, I fail to see how the amount of fees paid by the third person to Mr. Solmon could reveal any communication between Mr. Kaiser and Mr. Solmon protected by solicitor-client privilege. The same applies to the release of only the identity of the person who paid.
>
> …
>
> The identity of the person who paid Mr. Solmon's fees is not relevant to the merits of what was before the court, namely, whether Mr. Davis's firm should be removed as solicitor for the trustee. Nor could it be prejudicial to that issue or cause any other legal prejudice to Mr. Kaiser.

[11] Accordingly, the motion judge ordered Mr. Kaiser and Mr. Solmon to disclose to the Trustee the identity of the person who paid Mr. Solmon for his work on the Removal Motion, as well as for the unsuccessful appeals arising from that motion. This order is the subject of the appeal.

Leave to Appeal

[12] As a threshold matter, the Trustee moved to quash Mr. Kaiser's appeal because he had not sought leave as required by s. 193 of the BIA. Just prior to the hearing of the appeal, Mr. Solmon served a notice of motion seeking leave in the event that it was needed. While there was no apparent justification for the late notice, I am satisfied that leave to appeal is required and that, in the circumstances, leave should be granted.

[13] In bankruptcy proceedings an appeal only lies to this Court as of right in the specific circumstances enumerated in paragraphs (a) – (d) of s. 193 of the BIA, namely,

> (a) if the point at issue involves future rights;
>
> (b) if the order or decision is likely to affect other cases of a similar nature in the bankruptcy proceedings;
>
> (c) if the property involved in the appeal exceeds in value ten thousand dollars; or
>
> (d) from the grant of or refusal to grant a discharge if the aggregate unpaid claims of creditors exceed five hundred dollars.

[14] Paragraph (e) of s. 193 provides that an appeal lies to this Court "in any other case by leave of a judge of the Court of Appeal."

[15] An appeal from an order requiring a bankrupt and his solicitor to reveal the identity of the person paying the bankrupt's legal fees does not fit nicely into any of paragraphs (a) – (d). However, the issue raised is an important one for the practice – not dealt with in this context before – and has implications beyond the four corners of this dispute. I would therefore grant leave to appeal pursuant to s. 193(e).

Analysis

[16] Whether a court may order disclosure of the identity of a person paying the legal fees of a bankrupt in proceedings arising out of the bankruptcy depends upon whether that information is protected by solicitor-client privilege. For the

reasons that follow, I am satisfied that, on this record, the identity of the person paying Mr. Kaiser's legal fees on the motion to remove Mr. Davis's firm as solicitors of record is protected by that privilege and ought not to have been ordered disclosed.

[17] As he did in the court below, Mr. Solmon relies heavily on the decision of the Supreme Court of Canada in *Descôteaux v. Mierzwinski*, [1982] 1 S.C.R. 860, for his argument that the information sought to be disclosed is protected by solicitor-client privilege. In that case, Mr. Descôteaux was suspected of lying about his finances in a legal aid application so the police obtained a warrant and seized the allegedly fraudulent application from a legal aid bureau. Both the bureau and Mr. Descôteaux claimed that the document was protected by privilege.

[18] Speaking for the Court, Lamer J. held that, in the context of legal advice, "administrative" information required to obtain that advice – including information about the payment of the lawyer's bill – was completely privileged, subject only to very narrow common law exceptions. In coming to this conclusion, he adopted the "permanently protected from disclosure" condition precedent found in Wigmore's test for the existence of solicitor-client privilege: *Wigmore on Evidence* (McNaughton Rev. 1961), vol. 8, at §2292. Lamer J. summed up the principle, at pp. 892-93:

> [A] lawyer's client is entitled to have all communications made with a view to obtaining legal advice kept confidential. Whether communications are made to the lawyer himself or to employees, *and whether they deal with matters of an administrative nature such as financial means or with the actual nature of the legal problem*, *all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attached to confidentiality.* [Emphasis added.]

[19] Mr. Solmon argues that the motion judge erred in failing to apply the *Descôteaux* test. Mr. Kaiser's ability or inability to pay his fees was a precondition to the creation of the solicitor-client relationship, he says and, relying on *Descôteaux*, at pp. 876-77, he argues that the source of those fees was "as much [a communication] made in order to obtain legal advice as any information communicated" to the lawyer subsequently, and was "[an item] of information that a lawyer requires from a person in order to decide if he [or she] will agree to advise or represent" the client: *Descôteaux*, at pp. 876-77. The information, he submits, is therefore permanently protected from disclosure.

[20] I agree that the foregoing principles would preclude disclosure of the information sought by the Trustee here. However, I do not agree that the "permanent protection from disclosure" test governs any longer.

[21] *Descôteaux* must be read in light of more recent jurisprudence. In *Maranda v. Richer*, 2003 SCC 67, [2003] 3 S.C.R. 193, and in *R. v. Cunningham*, 2010 SCC 10, [2010] 1 S.C.R. 331, the Supreme Court moved away from the

categorical approach articulated in *Descôteaux* and towards a more flexible and contextual approach to the determination of when peripheral information is protected by solicitor-client privilege. The prevailing law now appears to be that administrative information related to the establishment of a solicitor-client relationship – including a lawyer's bill and a client's ability to pay, and by extension, the source of the lawyer's fees – is *presumptively privileged*. The presumption may be rebutted by the party seeking disclosure, however.

[22] *Maranda* involved the seizure under warrant of documents from a lawyer's office relating to fees and disbursements billed to, or paid by, a client who was suspected of money laundering and drug trafficking. The warrant was quashed and the search declared illegal because the information contained in the seized documents was privileged. Writing for eight of nine judges,[1] LeBel J. reaffirmed the importance and the broad scope of solicitor-client privilege and the principles to that effect enunciated in *Descôteaux*. He did not adopt the "permanently protected" test, however. Instead, at paras. 33 and 34, he introduced the concept of a "presumption" of privilege:

> In law, when authorization is sought for a search of a lawyer's office, the fact consisting of the amount of the fees must be regarded, in itself, as information that is, *as a general rule*, protected by solicitor-client privilege. While *that presumption does not create a new category of privileged information, it will provide necessary*

[1] Deschamps J. wrote separate but concurring reasons.

> *guidance concerning the methods by which effect is given to solicitor-client privilege*, which, it will be recalled, is a class privilege. Because of the difficulties inherent in determining the extent to which the information contained in lawyers' bills of account is neutral information, and the importance of the constitutional values that disclosing it would endanger, *recognizing a presumption* that such information falls *prima facie* within the privileged category will better ensure that the objectives of this time-honoured privilege are achieved. *That presumption* is also more consistent with the aim of keeping impairments of solicitor-client privilege to a minimum …
>
> Accordingly, when the Crown believes that disclosure of the information *would not violate the confidentiality of the relationship*, it will be up to the Crown to make that allegation adequately in its application for the issuance of a warrant for search and seizure. *The judge will have to satisfy himself or herself of this*…. [Emphasis added.]

[23] In developing the "presumption of privilege" approach, LeBel J considered, and rejected, the argument that the raw data of lawyers' dockets are not "communications" protected by solicitor-client privilege, but are rather "facts" to which privilege does not attach at all. He explained, at para. 32:

> While this distinction in respect of lawyers' fees may be attractive as a matter of pure logic, it is not an accurate reflection of the nature of the relationship in question. As this Court observed in [*Descôteaux*], there may be widely varying aspects to a professional relationship between solicitor and client. Issues relating to the calculation and payment of fees constitute an important element of that relationship for both parties.… The existence of the fact consisting of the bill of account and its payment arises out of the solicitor-client relationship and of what transpires within it. *That fact is connected to that relationship, and must be regarded, as a general rule, as one of its elements.* [Emphasis added.]

[24] LeBel J. acknowledged in the course of his analysis that at least some information in lawyers' dockets might well be "neutral" information that does not attract solicitor-client privilege. He therefore directed that in future cases where search warrants are sought for lawyers' dockets, the information sought should be treated as presumptively privileged. The onus would be on the Crown to demonstrate that disclosure would not violate the confidentiality of the solicitor-client relationship.

[25] Although the court in *Maranda* did not discuss the identity of the person paying the lawyers' fees, I see no practical distinction between the source of payment and the details of payment for purposes of this analysis. As will become apparent, the identity of the person paying the legal fees may well not be "neutral information" in the context of a particular case and its disclosure may, indeed, violate the confidentiality perimeters of that relationship. It follows that the "fact/communication" distinction the Trustee attempts to draw in this case must be rejected for the same reason as LeBel J. rejected it in *Maranda*.

[26] This Court applied the "presumptive privilege" approach introduced in *Maranda* outside the criminal/search warrant context in *Ontario (Ministry of the Attorney General) v. Ontario (Assistant Information and Privacy Commissioner)*, (2005), 251 D.L.R. (4th) 65. There, the issue was whether the total amount of fees paid by the Attorney General to outside counsel in two high-profile criminal

matters was privileged, and therefore exempt from disclosure under the *Freedom of Information and Protection of Personal Privacy Act*, R.S.O. 1990, c. F. 31. The Information and Privacy Commissioner concluded that this information was not privileged, and ordered the Attorney General to disclose it. The Attorney General disagreed and challenged the production order in court. The Commissioner's order to disclose the information was upheld in the Divisional Court and in this Court on the basis of the *Maranda* analysis. At para. 9 of its reasons, this Court said:

> Assuming that [*Maranda*] … holds that information as to the amount of a lawyer's fees is presumptively sheltered under the client/solicitor privilege in all contexts, *Maranda* also clearly accepts that the presumption can be rebutted. *The presumption will be rebutted if it is determined that disclosure of the amount paid will not violate the confidentiality of the client/solicitor relationship by revealing directly or indirectly any communication protected by the privilege.* [Emphasis added.]

[27] More recently, in *Cunningham* the Supreme Court emphasized that the question of whether or not fee information is protected by solicitor-client privilege should be answered contextually.

[28] The narrow issue in *Cunningham* was whether a court could refuse a request by defence counsel to withdraw from a case on the basis of the client's failure to pay his legal bills. For purposes of this discussion, the important

question was whether it would breach solicitor-client privilege for the lawyer to disclose to the court that the client had not paid.

[29] Writing for a unanimous Court, Rothstein J. held, at para. 30, that this information may be privileged "where payment or non-payment of fees is relevant to the merits of the case, or disclosure of such information may prejudice the client". However, where these conditions are not met, the "sliver" of information that the client is in arrears does not attract privilege in the first place.

[30] From these developments in the jurisprudence I take the law to be that administrative information relating to the solicitor-client relationship – including the identity of the person paying the lawyer's bills – is presumptively privileged. The presumption may be rebutted by evidence showing: (a) that there is no reasonable possibility that disclosure of the requested information will lead, directly or indirectly, to the revelation of confidential solicitor-client communications (*Maranda*, at para. 34 and *Ontario (Assistant Information and Privacy Commissioner)*, at para. 9); or (b) that the requested information is not linked to the merits of the case and its disclosure would not prejudice the client (*Cunningham*, at paras. 30-31).

[31] I note that the "confidential communication" and the "merits/prejudice" lines of reasoning from *Maranda* and *Cunningham*, respectively, do not necessarily define the same body of information. The reason is that not all information a

client tells his lawyer in confidence will be relevant to the merits of the case for which the lawyer is retained: see *Descôteaux*, at p. 877.

[32] That said, even if there are differences between the *Maranda* and the *Cunningham* approaches, those differences do not matter in the present case. From either viewpoint, the record does not support the disclosure of the identity of the person paying Mr. Kaiser's legal bills. I respectfully disagree with the motion judge on this point.

[33] The motion judge properly concluded that the *Maranda/Cunningham* line of jurisprudence governed. However, he erred in its application, in my opinion, primarily because he took too narrow a view both of the potential prejudice and the impact of disclosure on Mr. Kaiser's right to confidentiality.

[34] As I explained above, the thrust of the motion judge's reasoning to order disclosure was two-fold. First, he concluded that "[t]he identity of the person who paid Mr. Solmon's fees is not relevant to the merits of what was before the court, namely, whether Mr. Davis's firm should be removed as solicitor for the trustee." Secondly, he decided that disclosure of that information could not prejudice Mr. Kaiser on the Removal Motion or in the sense that it might have a chilling effect on any future attempts by Mr. Kaiser to obtain funding to pay legal fees. The motion judge was sceptical about why Mr. Kaiser, a bankrupt, would have a need for future legal services in any event.

[35] In my view, this line of reasoning fails to take into account the overall context of the dispute between the Trustee and Mr. Kaiser. Mr. Solmon is not simply retained for the Removal Motion. He is retained to represent Mr. Kaiser in the bankruptcy proceedings generally. In those proceedings, the real dispute is about whether Mr. Kaiser, a bankrupt, is hiding assets from the Trustee through the use of a "straw man". The Removal Motion is but a tangential skirmish in that theatre of battle.

[36] Respectfully, however, the identity of the person paying Mr. Kaiser's legal fees on the Removal Motion is not merely tangential information. It has relevance beyond that motion. Mr. Bergman is the Trustee's primary suspect as the "straw man," if there is one. Should it turn out that Mr. Bergman is the person paying Mr. Solmon's fees on the removal motion, the Trustee will have a significant piece of circumstantial evidence for use in the receivership and related proceedings that there is a "straw man," and, indeed, that Mr. Bergman is he.

[37] In that sense, the information sought to be disclosed impacts directly on the merits of the overall dispute and its revelation might well be prejudicial to Mr. Kaiser in that overall context. Thus, the presumption of privilege cannot be rebutted using the *Cunningham* criteria.

[38] Similarly, the presumption cannot be rebutted based on the *Maranda* criteria because disclosure of the source of Mr. Solmon's fees would reveal

confidential communications between him and his client. The information is provided in the context of Mr. Solmon's need to know how his fees will be paid in order to decide whether to act. In the words of Supreme Court, it is therefore "information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose," and accordingly "enjoys the privileges attached to confidentiality": *Maranda*, at para. 22, citing *Descôteaux*, at p. 893. Of course, this privilege is lost if the party seeking disclosure can demonstrate that the communication was itself criminal or fraudulent or made in furtherance of a crime or fraud: *Descôteaux*, at p. 873. Here, the Trustee did not seek to invoke the crime/fraud exception to force disclosure of the identity of the person who funded the Removal Motion.

[39] The foregoing conclusions are in themselves sufficient to dispose of the appeal.

[40] In addition, however, the motion judge rejected Mr. Kaiser's argument that disclosure of the identity of the person paying his legal fees would have a chilling effect on any further attempts to obtain funding for legal fees. Mr. Kaiser said in his affidavit that he was concerned that if the Trustee learned of the details of his fee arrangement, the Trustee would take steps to prevent him from obtaining legal advice and representation.

[41] The motion judge was of the view that there were few, if any, legitimate reasons that Mr. Kaiser, a bankrupt, would need legal advice in the future. On the contrary, the motion judge obviously thought that whatever legal proceedings Mr. Kaiser might initiate were more likely to be in furtherance of Mr. Kaiser's obstructive strategy of attempting to prevent the Trustee from succeeding on the Receivership Motion.

[42] There was some discussion during oral argument of Mr. Kaiser's potential need for counsel in connection with the First Disclosure Motion referred to earlier in these reasons. On that motion – brought in May 2010 – the Trustee sought an order requiring Mr. Kaiser and Mr. Solmon to disclose the source of "any and all funds" received by Mr. Kaiser since the date of his bankruptcy, as well as ancillary information relating to those funds and their use by Mr. Kaiser and/or members of his family. This motion, although long dormant, is still outstanding and encompasses a request for relief that is much wider than merely the source of funding for the Removal Motion.

[43] As I have said, however, the chilling-effect point is not dispositive in any event. The appeal turns on the analysis, conducted above, that the Trustee has failed to tender evidence sufficient to rebut the presumption of privilege based on the principles outlined in *Maranda*, *Ontario (Assistant Information and Privacy Commissioner)*, and *Cunningham.* On that basis the appeal must be allowed.

[44] Finally, given my conclusion that the appeal must be allowed for the reasons articulated above, there is no basis to order that Mr. Kaiser's lawyer be required to disclose the information as well. I observe, however, that the courts have been very reluctant to put lawyers in the position where they are required to give evidence against their clients except in very rare cases where the proper administration of justice demands it: see *R. v. 1504413 Ontario Ltd.*, 2008 ONCA 253, 90 O.R. (3d) 122, at para. 13; and *R. v. Colbourne* (2001), 157 C.C.C. (3d) 273 (Ont. C.A.), at para. 51. Here, there was another source of the information – Mr. Kaiser – had disclosure been ordered.

Disposition

[45] For the foregoing reasons, I would allow the appeal, set aside the order below and in its place substitute an order dismissing the Trustee's motion for an order directing Mr. Kaiser and Mr. Solmon to disclose the identity of the person who paid Mr. Kaiser's legal fees in connection with the Removal Motion and any appeals there from, with costs.

[46] Counsel may submit brief submissions, not to exceed three pages in length, as to costs within 15 days of the release of this decision.

"R.A. Blair J.A."
"I agree S.T. Goudge J.A."
"I agree K. Feldman J.A."

Released: November 29, 2012