COURT OF APPEAL FOR ONTARIO

CITATION: D'Mello v. The Law Society of Upper Canada, 2014 ONCA 912
DATE: 20141222
DOCKET: C58892

Weiler, Feldman and Benotto JJ.A.

BETWEEN

Roy D'Mello

Plaintiff (Appellant)

and

The Law Society of Upper Canada and Stephen Alexander McClyment

Defendants (Respondents)

Roy D'Mello, acting in person

Brian MacLeod Rogers, for the respondents

Heard: December 9, 2014

On appeal from the order of Justice Dale F. Fitzpatrick of the Superior Court of Justice, dated March 17, 2014 and the costs order dated May 12, 2014.

Weiler J.A.:

A. OVERVIEW

[1] The appellant is a lawyer whose practice involved acting for parties on real estate transactions.

[2] As a result of complaints received from financial institutions in connection with mortgage frauds by a company called Canadian Conveyancing – a company

for whose clients the appellant had agreed to act – the respondent Law Society of Upper Canada (the “Law Society”) initiated discipline proceedings against the appellant and assigned the respondent Stephen McClyment to investigate. During the course of the investigation, Mr. McClyment sent emails to two institutions that were victims of the fraud. The appellant alleges these emails were defamatory, and brought a defamation action against the respondents.

[3] The respondents successfully brought a summary judgment motion to dismiss the action, relying primarily on the defence of absolute privilege. The appellant appeals the dismissal of his action on the basis that absolute privilege does not apply. He also seeks to appeal the costs order.

B. FACTS

[4] The material facts were not in dispute. The appellant operated his practice from his home office. To generate more business, he entered into an agreement with the company Canadian Conveyancing whereby he agreed to provide representation to lenders and clients the company would refer to him. The appellant gave the company his personal information and changed his office designation with the Law Society to an office location and phone number under the company’s control.

[5] The appellant never received any referrals and continued practising out of his home office. Canadian Conveyancing opened law firm accounts with the

Bank of Montreal in the appellant's name and processed several fraudulent real estate transactions with multiple financial institutions. The victim institutions lost a combined total of about $2.5 million as a result.

[6] Some of the victim institutions complained to the Law Society, which launched an investigation on October 14, 2009. The Law Society then authorized disciplinary proceedings against the appellant on June 17, 2010.[1] At the direction of the Law Society's discipline counsel, Mr. McClyment sent emails to two of the victim institutions, Royal Bank of Canada and Scotiabank, on June 28, 2010, seeking their respective files for the discipline proceedings. Part of the emails stated:

> [A]s an update I wish to confirm that the LSUC is prosecuting Dmello [*sic*] for professional [mis]conduct for the fact that he recklessly gave out his personal and professional ID to "Canadian Conveyancing" and also voluntarily changed his office location on the LSUC records without ever intending to practice at this location thereby causing a considerable loss to a number of lenders.

[7] As a result of the emails, the appellant sued the Law Society for defamation, alleging malice. For purposes of the motion, these allegations were presumed to be true. The Law Society defended by claiming the common law defence of absolute privilege, a complete defence even for malice, and brought a

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[1] In March 2013, the Law Society decided not to go forward with the part of proceedings alleging professional misconduct on the basis that the appellant failed to be on his guard against becoming the tool or dupe of unscrupulous persons and thereby facilitating mortgage fraud. Certain other proceedings, however, remained extant.

motion for summary judgment. The motion judge agreed that absolute privilege applied and dismissed the action. He awarded costs of $5,000 against the appellant. In doing so, he noted that although the respondents were successful, the motion was complicated by a lack of Canadian legal precedent, and the appellant's "action would not likely have been brought had Mr. McClyment been more careful with his language" in the two emails.

[8] The appellant contends that there are two reasons why the defence of absolute privilege does not apply and thus why the motion judge erred in dismissing his action. First, he submits that the common law defence of absolute privilege has been superseded by the enactment of s. 9 of the *Law Society Act*, R.S.O. 1990, c. L.8 (the "Act"), which requires that the person performing a duty under the Act be acting in good faith. Second, he submits that, in the circumstances of this case, absolute privilege does not apply.

[9] The appellant also contends the motion judge erred in awarding any costs against him because the factors the motion judge noted, as well as the disparity between the resources of the litigants, justified no costs.

[10] For the reasons that follow, I would reject all three arguments and dismiss the appeal.

C. THE COMMON LAW HAS NOT BEEN SUPERSEDED BY SECTION 9 OF THE ACT.

[11] Section 9 of the Act provides as follows:

> 9. No action or other proceedings for damages shall be instituted against the Treasurer or any bencher, official of the Society or person appointed in Convocation for any act done in good faith in the performance or intended performance of any duty or in the exercise or in the intended exercise of any power under this Act, a regulation, a by-law or a rule of practice and procedure, or for any neglect or default in the performance or exercise in good faith of any such duty or power.

[12] The appellant submits that when an action in defamation is brought against the Law Society, the common law defence of absolute privilege does not apply because s. 9 supersedes the common law. He submits that the purpose of s. 9 is to restrict the right of the Law Society to defend itself in an action for defamation by imposing a requirement that the Law Society be acting in good faith. The Law Society's position is that s. 9 does not oust or otherwise affect the defence of absolute privilege at common law.

[13] I agree with the Law Society's position. The construction of statutes presumes that legislatures do not intend to interfere with the common law except insofar as the statute clearly and unambiguously does so. The effect of the presumption is to enhance the stability of the law by favouring certainty and fair notice over vague and inadvertent change that could otherwise result. See *Sullivan on the Construction of Statutes*, 6th ed., (Markham, Ont.: LexisNexis,

2014), at pp. 504, 538-39; and *Evans v. Gonder*, 2010 ONCA 172, 54 E.T.R. (3d) 193, at para. 40.

[14] The common law presumption is applicable to this case, a case that is similar to *Schut v. Magee*, 2003 BCCA 417, 15 B.C.L.R. (4th) 250. There, the British Columbia Court of Appeal dealt with the question of whether the common law doctrine of absolute privilege in defamation actions was superseded by the defence of qualified privilege in actions for damages under the *Medical Practitioners Act*, R.S.B.C. 1996, c. 285. The court upheld the decision of the chambers judge, who held that the relevant provision in that statute was not a complete code and did not oust the common law by implication. The court acknowledged the contrary majority decision of the Alberta Court of Appeal in *Dechant v. Stevens*, 2001 ABCA 39, 281 A.R. 1, additional reasons at 2001 ABCA 81, 277 A.R. 333, leave to appeal to S.C.C. refused, 2001 CarswellAlta 1211, 1212, which held that a somewhat similar statutory provision ousted the common law. However, the British Columbia Court of Appeal distinguished the Alberta case based on the specific wording in s. 112(2) of Alberta's *Legal Professions Act*, S.A. 1990, c. L-9.1, concerning actions in defamation.[2] I agree with the conclusion of the British Columbia Court of Appeal.

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[2] Section 112(2) provides: "No action for defamation may be founded on a communication regarding the conduct of a member or student-at-law if the communication is published to or by a person within any of the classes of persons enumerated in subsection (1) in good faith and in the course of any proceedings under this Act or the rules relating to that conduct."

[15] Inasmuch as there is no express indication from the legislature that s. 9 of the Act is meant to be an exhaustive code, or meant to preclude resort to the common law in actions for defamation, the legislation should be read as supplementing the common law in two respects. First, with respect to *any action or proceeding for damages*, including an action for negligence or abuse of process, s. 9 extends the common law immunity from prosecution for those performing quasi-judicial functions to officials of the Law Society conducting an investigation while acting in good faith. Thus, s. 9 is a rights-granting measure and not, as the appellant contends here, a rights-limiting measure. Insofar as defamation actions are concerned, it does not detract from the common law defence of absolute privilege in respect of an action for defamation in any way.

[16] Second, s. 9 also supplements the common law in actions where defamation is alleged. The common law defence of absolute privilege applies only if the alleged defamatory statement is related to the investigation. If Mr. McClyment had made a defamatory statement that was unrelated to the investigation, that statement would not be protected by absolute privilege at common law. But it could still potentially be protected by s. 9 if it was done in good faith.

[17] The appellant submits that it is in the public interest to protect persons whom officials of the Law Society have defamed with malice, and, accordingly, absolute privilege should not be available to these officials. There must be a

balancing of the interests of the individual defamed with those of the Law Society.

[18] The appellant's submission overlooks the broader context of the legislation: the protection of members of the public in their dealings with lawyers. An official of the Law Society who is investigating a complaint about a lawyer is engaged in furthering the public interest in ensuring that lawyers maintain high standards of conduct and do not abuse their position. If such persons were not granted absolute privilege in defamation actions, their mere allegation of malice on the part of the lawyer being investigated could subject them and the Law Society to costly and lengthy litigation requiring them to justify why an investigation into a complaint was warranted. Such an approach would be inconsistent with the overarching goal of protecting the public through the responsive and timely investigation of complaints.

[19] To summarize, the position put forward by the Law Society and accepted by the motion judge is correct. It accords with the principle of statutory construction that legislation is presumed not to change the common law unless it clearly and expressly does so. In this case, the legislation supplements the common law both when regard is had to the wide variety of damages actions to which s. 9 applies and its specific application in a defamation action where the circumstances are such that the requirements for absolute privilege are not met. The application of the presumption harmonizes the common law and the

legislation. Finally, and most important, the application of the presumption is consistent with the overarching goal of the legislation as a whole, namely, the protection of the public in a timely manner.

D. ABSOLUTE PRIVILEGE PROTECTS THE COMMUNICATIONS IN ISSUE IN THE CIRCUMSTANCES

[20] The appellant submits the circumstances for absolute privilege do not exist in this case because Mr. McClyment was giving information to the complainants as opposed to receiving information from a complainant. *Teskey v. Toronto Transit Commission*, 2003 CanLII 35190 (Ont. S.C.), holds that absolute privilege should be applied strictly, and must be necessary to the administration of justice on the facts of the case. Mr. McClyment's "update" to the two banks was not "necessary". Section 49.12(1)[3] of the Act requires that the information an investigator receives during the course of an investigation be kept confidential. The appellant asserts Mr. McClyment breached this requirement and was thus acting outside the scope of his duties. He was acting without legal justification. See e.g. *Roncarelli v. Duplessis*, [1959] S.C.R. 121. The circumstances for absolute privilege do not exist.

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[3] Section 49.12(1) reads: "A bencher, officer, employee, agent or representative of the Society shall not disclose any information that comes to his or her knowledge as a result of an audit, investigation, review, search, seizure or proceeding under this Part."

[21] The appellant advanced the same arguments before the motion judge, who correctly rejected them. I agree with the motion judge that the privilege extends to communications made by, as well as to, investigators. See *Taylor v. Serious Fraud Office & Others*, [1999] 2 A.C. 177 (H.L.); *Hung v. Gardiner*, 2003 BCCA 257, 13 B.C.L.R. (4th) 298, at para. 37; and *Hamouth v. Smart Video Technologies Inc.*, 2005 BCCA 172.

[22] Although the words used to give the update must be presumed to be libellous, they provided the context or grounds for the request and, in that sense, were required in connection with a proceeding under the Act. In making this determination, the purpose of the communication as a whole must be considered as opposed to each phrase without context and in isolation. As found by the motion judge, the communications from Mr. McClyment were for the purpose of preparing evidence for discipline proceedings that existed at the time.

[23] I also agree with the motion judge that in this case, Mr. McClyment was acting in his capacity as an investigator for the Law Society and was not acting outside the scope of his duties. Giving the information to the two banks was within the statutory exception found in s. 49.12(2)(b) of the Act as being required

in connection with a proceeding under the Act,[4] and within s. 7(3)(d) of the *Personal Information Protection and Electronic Documents Act*, S.C. 2000, c. 5.[5]

[24] The circumstances of the communication here are protected by absolute privilege.

E. THE MOTION JUDGE DID NOT ERR IN THE EXERCISE OF HIS DISCRETION TO AWARD COSTS

[25] The appellant submits that, instead of awarding the $5000 in costs he did, the motion judge ought not to have awarded any costs, having regard to his findings that the case was complex, there was a paucity of judicial authority on the issue, and if Mr. McClyment had better chosen his words the action would likely not have been brought. The appellant also argues that, in addition to the above, the obvious disparity between the respective resources of the parties

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[4] Section 49.12(2) provides: "Subsection (1) does not prohibit, … (b) disclosure required in connection with a proceeding under this Act".

[5] Section 7 provides exceptions to the requirement that personal information be collected, used or disclosed only with consent of the individual. Section 7(3)(d) provides:

> 7(3) For the purpose of clause 4.3 of Schedule 1, and despite the note that accompanies that clause, an organization may disclose personal information without the knowledge or consent of the individual only if the disclosure is
>
> …
>
> (*d*) made on the initiative of the organization to an investigative body, a government institution or a part of a government institution and the organization
>
> (i) has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a province or a foreign jurisdiction that has been, is being or is about to be committed, or
>
> (ii) suspects that the information relates to national security, the defence of Canada or the conduct of international affairs;
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> …

further precludes a costs award against him. If successful, the appellant was seeking costs of $23,334.50, and the respondent $37,862.80.

[26] I am of the opinion that the motion judge properly took all relevant factors into account and made no error in principle in his award of costs.

F. CONCLUSION AND COSTS OF THE APPEAL

[27] For the reasons given, I would dismiss the appeal.

[28] The respondent seeks approximately $12,000 for costs of the appeal. Having regard to the costs award of the motion judge, I would fix costs in the amount of $5,000 inclusive of disbursements and all applicable taxes.

Released: DEC 22, 2014

(KMW) "Karen M. Weiler J.A."

"I agree K. Feldman J.A."

"I agree M.L. Benotto J.A."