See paras. 23-33

Case Name:

Dwyer v. Mann

Between
Lori Ann Dwyer, Plaintiff, and
Douglas Mann Sr., Douglas Mann Jr., Isabel Mann, Amerispec Inspection Service, Cheryl Rienzo-Merger, Richard Derhodge and Re/Max Niagara Realty Limited, Defendants

[2011] O.J. No. 1551

2011 ONSC 2163

2011 CarswellOnt 2236

200 A.C.W.S. (3d) 940

Court File No. 50934/09

Ontario Superior Court of Justice
St. Catharines, Ontario

J. Cavarzan J.

Heard: April 4, 2011.
Judgment: April 6, 2011.

(34 paras.)

Civil litigation -- Civil procedure -- Parties -- Representation of -- Disqualification or removal of counsel -- Motion by plaintiff for order removing law firm as solicitors for Mann defendants dismissed -- Plaintiff commenced action against in relation to property she purchased from Mann defendants which was subsequently found defective -- After parties examined for discovery, plaintiff's solicitor commenced employment with law firm representing defendants -- Law firm removed file from office and lawyers agreed not to discuss file and provided signed undertakings -- As law firm acted in timely manner to put in place effective safeguards, which would prevent use confidential information possessed by plaintiff's former solicitor, defendants should not be deprived of counsel of choice.

Legal profession -- Barristers and solicitors -- Retention of counsel -- Representation -- Application for removal of counsel -- Disqualification or removal -- Motion by plaintiff for order removing law firm as solicitors for Mann defendants dismissed -- Plaintiff commenced action against in relation to property she purchased from Mann defendants which was subsequently found defective -- After parties examined for discovery, plaintiff's solicitor commenced employment with law firm representing defendants -- Law firm removed file from office and lawyers agreed not to discuss file and provided signed undertakings -- As law firm acted in timely manner to put in place effective safeguards, which would prevent use confidential information possessed by plaintiff's former solicitor, defendants should not be deprived of counsel of choice.

Professional responsibility -- Self-governing professions -- Professions -- Legal -- Barristers and solicitors -- Motion by plaintiff for order removing law firm as solicitors for Mann defendants dismissed -- Plaintiff commenced action against in relation to property she purchased from Mann defendants which was subsequently found defective -- After parties examined for discovery, plaintiff's solicitor commenced employment with law firm representing defendants -- Law firm removed file from office and lawyers agreed not to discuss file and provided signed undertakings -- As law firm acted in timely manner to put in place effective safeguards, which would prevent use confidential information possessed by plaintiff's former solicitor, defendants should not be deprived of counsel of choice.

Motion by the plaintiff for an order removing the law firm as solicitors for the Mann defendants. The plaintiff purchased a residential property from the Mann defendants. After the purchase, the property was found to have structural and electrical defects which rendered it uninhabitable. The action had proceeded to the point where examinations for discovery of all the parties were completed by February 2010. In May 2010, the solicitor who had been representing the plaintiff, and who had sole carriage of the file, left his law firm and commenced employment with the law firm which represented the defendants. Recognizing the potential conflict of interest, the law firm took steps to ensure that no information concerning the case passed by the plaintiff's solicitor to anyone else at the firm. The plaintiff then advised the defendant's law firm that notwithstanding the actions the law firm was willing to take, she did not consent to the continued involvement of the law firm. Thereafter, the law firm provided signed undertakings stating that the plaintiff's former solicitor would not disclose confidential information to the defendant's solicitors, the file was physically removed from the law firm's premises, and the lawyers signed an agreement not to discuss the matter with the plaintiff's former solicitor.

HELD: Motion dismissed. The defendants' law firm established that it was in the interests of justice that it continue to act in the matter. Neither party acted in other than good faith throughout. Additionally, the law firm acted in a timely manner to put in place effective safeguards, which including physically removing the file from the office and having employees sign an agreement which included the potential sanction of dismissal for breaching the agreement. As a reasonable observer would be satisfied that no use would be made of the confidential information possessed by

the plaintiff's former solicitor, the defendants should not be deprived of their counsel of choice.

Court Summary:

Issues dealt with as identified by the Judge releasing the decision:

Did defendants' law firm take reasonable measures to ensure the confidentiality of information and instructions given by the plaintiff to her trial counsel when he joined the defendants' law firm?

Counsel:

Monique Atherton, for the Plaintiff/Moving Party.

Michael S. Stratton, for the Defendants, Douglas Mann Sr., Douglas Mann Jr. and Isabel Mann.

REASONS FOR DECISION

1 **J. CAVARZAN J.**:-- The plaintiff seeks an order removing the law firm of Lancaster, Brooks & Welch LLP (the Lancaster, Brooks firm) as solicitors for the defendants Douglas Mann Sr., Douglas Mann Jr. and Isabel Mann (the Mann defendants).

BACKGROUND

2 A residential property purchased by the plaintiff from the Mann family was found subsequently to have structural and electrical defects which rendered it uninhabitable. Sullivan, Mahoney LLP was retained by the plaintiff to pursue, on her behalf, her claim for damages. Christopher Bittle, an associate at that firm, had carriage of the matter. An action was commenced on January 29, 2009.

3 Michael Stratton, an associate and member of the litigation group at Lancaster, Brooks, was retained to represent the Mann defendants in the action.

4 The action has proceeded to the point that examinations for discovery of all parties were completed by February 5, 2010. Mr. Bittle had sole carriage of the matter from May 2008, including negotiating a settlement with one of the other defendants, until his departure from Sullivan, Mahoney on May 21, 2010.

5 Mr. Bittle commenced employment with Lancaster, Brooks on May 25, 2010 as a litigation associate at that firm's St. Catharines office. At that time, the litigation group at Lancaster, Brooks consisted of eight lawyers in its St. Catharines office and one in its Welland office.

6 Well in advance of Mr. Bittle's change of employment, and having recognized the potential

conflict of interest, Lancaster, Brooks took steps to ensure that no information would be passed concerning this case by Mr. Bittle to anyone in the Lancaster, Brooks firm.

7 On April 16, 2010, Bruce S. Wormald, a partner at Lancaster, Brooks, wrote to Rodney Bush, a partner at Sullivan, Mahoney, advising that Lancaster, Brooks was prepared to take steps to ensure that Mr. Bittle would have no connection with this litigation file. Mr. Bush responded that the plaintiff was not willing to consent to the continued involvement of the Lancaster, Brooks firm in this matter (letter of May 3, 2010).

8 Subsequently, Mr. Wormald again wrote to Mr. Bush (on May 21, 2010) advising of the steps taken to ensure that no confidential information possessed by Mr. Bittle would be discussed with the lawyers at his firm nor disclosed to them. He enclosed copies of written undertakings signed by Mr. Stratton and Mr. Wormald and to be signed by Mr. Bittle and his assistant.

9 The file was physically removed from the firm's premises and lodged in Mr. Stratton's residence. Work on the litigation file is to be done at Mr. Stratton's home. An agreement between "all lawyers and employees of Lancaster, Brooks & Welch LLP and Christopher Bittle" was signed in which all signatories agreed not to discuss with Mr. Bittle anything having to do with the representation of the Mann defendants. All signatories agreed that breach of the agreement could result in sanctions up to and including dismissal.

10 On July 28, 2010, Mr. Bush wrote to Mr. Wormald advising that they had once again discussed the matter with the plaintiff whose position remained unchanged. He cited, as concerns, the serious nature of the plaintiff's allegations, the recent settlement with one of the defendants, the advanced stage of the litigation, the relationship between the Mann family and Lancaster, Brooks (one of the sons of the family is a lawyer in that firm), "and most importantly, the very serious prejudice that could result from the disclosure of confidential information and instructions previously provided to Mr. Bittle." Mr. Bush stated that there are no measures that can be adopted sufficient to protect the plaintiff's interests.

11 Lancaster, Brooks disagrees. The Mann defendants, and in particular Douglas Mann Sr. who is in ill health and was examined for discovery at his own home, wish to continue to be represented by Lancaster, Brooks.

12 Mr. Wormald, in his final letter to Mr. Bush on August 20, 2010, stated that:

> Bearing in mind the steps we have taken, and bearing in mind the issues herein, particularly, as you have noted, the advanced state of the litigation, it is this firm's intention to continue to act on behalf of the defendants.

THE LAW

13 Both sides cited the seminal decision by the Supreme Court of Canada in *MacDonald Estate v.*

Martin, [1990] 3 S.C.R. 1235 and the *Rules of Professional Conduct* adopted by The Law Society of Upper Canada (LSUC) as a result.

14 Referring to situations in which a client is objecting to a retainer which gives rise to an alleged conflict, Sopinka J. stated as follows at para. 45 in the *Macdonald Estate* case:

> Typically, these cases require two questions to be answered: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of the client?

15 Mr. Stratton conceded that the first question should be answered in the affirmative. With respect to the second question, however, he maintains, in view of the measures put in place by his firm, that there is no risk that the confidential information will be used to the prejudice of the client.

16 Indeed, Sopinka J., at para. 49 in the *MacDonald Estate* case recognized that:

> Moreover, I am not convinced that a reasonable member of the public would necessarily conclude that confidences are likely to be disclosed in every case despite institutional efforts to prevent it. There is, however, a strong inference that lawyers who work together share confidences. In answering this question, the court should therefore draw the inference, unless satisfied on the basis of clear and convincing evidence, that all reasonable measures have been taken to ensure that no disclosure will occur by the "tainted" lawyer to the member or members of the firm who are engaged against the former client. Such reasonable measures would include institutional mechanisms such as Chinese Walls and cones of silence.

17 Sopinka J. urged the governing bodies of the legal profession to study the issue and "determine whether there are institutional guarantees that will satisfy the need to maintain confidence in the integrity of the profession" (para. 49).

18 He concluded that "undertakings and conclusory statements in affidavits without more are not acceptable."

19 He had earlier (para. 13) identified three competing values:

(1) the concern to maintain the high standards of the legal profession and the integrity of our system of justice;
(2) the countervailing value that a litigant should not be deprived of his or her choice of counsel without good cause; and
(3) the desirability of permitting reasonable mobility in the legal profession.

20 Counsel for the parties agreed that each of the cases cited in their Briefs of Authorities depended on their own facts. Plaintiff's counsel stressed the appearance of unfairness and her client's reluctance to consent even when presented with the measures taken by Lancaster, Brooks to ensure that no confidential information will be disclosed to the lawyer representing the defendants.

21 Lancaster, Brooks relies on the steps initiated, before Mr. Bittle joined the firm, to build a cocoon around him so that he could not taint counsel representing the defendants. The competing value of honouring the choice of counsel by the Mann defendants is invoked. Incidentally, I do not regard the fact that a son of the Mann parents practices law with Lancaster, Brooks as a factor to be weighed in the balance, other than as consideration which adds to the comfort of the Mann defendants in their choice of a law firm to represent their interests.

22 The LSUC has adopted the following as part of its *Rules of Professional Conduct*:

> Rule 2(4) Where the transferring lawyer actually possesses relevant information respecting the former client that is confidential and that, if disclosed to a member of the new law firm, may prejudice the former client, the new law firm shall cease its representation of its client in that matter unless
>
> (a) the former client consents to the new law firm's continued representation of its client, or
> (b) the new law firm establishes that it is in the interests of justice that it act in the matter, having regard to all relevant circumstances, including,
>
> (i) the adequacy and timing of the measures taken to ensure that no disclosure to any member of the new law firm of the former client's confidential information will occur,
> (ii) the extent of prejudice to any party,
> (iii) the good faith of the parties,
> (iv) the availability of suitable alternative counsel, and
> (v) issues affecting the public interest.

23 Regarding the matter of timing and adequacy, as discussed more fully below, the Lancaster, Brooks firm acted in a timely manner to put in place effective safeguards.

24 Regarding the extent of the prejudice to any party, it seems clear that the Mann defendants have more than the usual reasons for wanting to retain their initial choice of representation. One of their sons is an associate in the Lancaster, Brooks firm. Douglas Mann Sr., who is seriously ill, may be particularly affected should the Mann defendants be required to retain different representation.

25 The plaintiff, of course, remains concerned that her situation may have been compromised by

Mr. Bittle's departure to the Lancaster, Brooks firm.

26 There is no suggestion in the material, nor in the submissions by counsel, that either party has acted in the matter in other than good faith throughout.

27 Mr. Stratton has fairly conceded that alternative litigation counsel are readily available in St. Catharines and in the Niagara area. The issues in the action are fairly straightforward in that the plaintiff alleges that the defendants knowingly and deliberately withheld from the plaintiff information about the defects in the house.

28 In my view, Lancaster, Brooks has established that it is in the interests of justice that it continue to act in the matter. Unlike the situation in *Quon v. Gable Planning Services Ltd.*, [2000] A.J. No. 197 in which "the deciding factor [was] the rather cavalier attitude displayed by Duncan & Craig to the conflict of interest situation which arose when Mr. Zimmerman transferred to that law firm" (para. 35), Lancaster, Brooks was proactive. It anticipated the potential conflict and put in place effective measures.

29 Although little weight is accorded to undertakings not to disclose, the firm went further by physically removing the litigation file from the office altogether. The agreement signed by all employees of the firm, including the potential sanction of dismissal for breaching the agreement, is effective, in my view, in covering virtually all bases. It brings home to every individual in the organization first, that a real concern exists, and second, the critical importance of treading carefully.

30 It is difficult to imagine what more could be done to protect the confidentiality of the plaintiff's information.

31 In the commentary to Rule 2 of the LSUC's *Rules of Professional Conduct*, 12 guidelines adopted from the Canadian Bar Association's Task Force report entitled *Conflict of Interest Disqualification* are set out. They are intended as a checklist of relevant factors to be considered. They are appended to these reasons as a schedule.

32 It appears to me that the first nine, at least, of the twelve guidelines are satisfied by the timely and reasonable measures taken by Lancaster, Brooks.

33 Given the facts in this case, I believe that a reasonably informed observer would be satisfied that no use would be made of the confidential information possessed by Mr. Bittle. Giving effect, in the circumstances, to the countervailing value that the Mann defendants should not be deprived of their choice of counsel without good cause, does not undermine the high standards of the legal profession and the integrity of our system of justice.

RESULT

34 This motion is dismissed. If necessary, counsel may exchange and send to the court brief written submissions on the matter of costs of the motion within 10 days of the release of these reasons.

J. CAVARZAN J.

* * * * *

SCHEDULE

GUIDELINES

1. The screened lawyer should have no involvement in the new law firm's representation of its client. *[Amended - June 2007]*
2. The screened lawyer should not discuss the current matter or any information relating to the representation of the former client (the two may be identical) with anyone else in the new law firm.
3. No member of the new law firm should discuss the current matter or the previous representation with the screened lawyer.
4. The current matter should be discussed only within the limited group that is working on the matter.
5. The files of the current client, including computer files, should be physically segregated from the new law firm's regular filing system, specifically identified, and accessible only to those lawyers and support staff in the new law firm who are working on the matter or who require access for other specifically identified and approved reasons.
6. No member of the new law firm should show the screened lawyer any documents relating to the current representation.
7. The measures taken by the new law firm to screen the transferring lawyer should be stated in a written policy explained to all lawyers and support staff within the firm, supported by an admonition that violation of the policy will result in sanctions, up to and including dismissal.
8. Undertakings should be provided by the appropriate law firm members setting out that they have adhered to and will continue to adhere to all elements of the screen.
9. The former client, or if the former client is represented in that matter by a lawyer, that lawyer, should be advised (a) that the screened lawyer is now with the new law firm, which represents the current client, and (b) of the measures adopted by the new law firm to ensure that there will be no disclosure of confidential information.
10. The screened lawyer's office or work station and that of the lawyer's support staff should be located away from the offices or work stations of lawyers and support staff working on the matter.
11. The screened lawyer should use associates and support staff different from those working on the current matter.

12. In the case of law firms with multiple offices, consideration should be given to referring conduct of the matter to counsel in another office. *[Amended - June 2007]*