

CANADA / JUDGMENT

Barbieri v. White

2024 BCCA 225

COURT

British Columbia Court of Appeal

DECIDED

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2024 BCCA 225 Barbieri v. White

COURT OF APPEAL FOR BRITISH COLUMBIA

Citation:

Barbieri v. White,

2024 BCCA 225

Date: 20240619

Docket: CA49263

Between:

Ricardo Joseph Barbieri

on behalf of the Estate of Lily Diane Barbieri

Appellant

(Plaintiff)

And

Teresa Diane White

Respondent

(Defendant)

Before:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

The Honourable Mr. Justice Abrioux

On appeal from: An order of the Supreme Court of British Columbia,
dated July 11, 2023 (Barbieri Estate v. White, 2023 BCSC 1176,
Vancouver Docket S1910903).

Counsel for the Appellant:

C. Dennis, K.C.

T. Ashrafi

Counsel for the Respondent:

M.A. Misner

J. Sandhu

Place and Date of Hearing:

Vancouver, British Columbia

March 28, 2024

Place and Date of Judgment:

Vancouver, British Columbia

June 19, 2024

Written Reasons by:

The Honourable Mr. Justice Abrioux

Concurred in by:

The Honourable Mr. Justice Willcock

The Honourable Madam Justice Fenlon

Summary:

The appellant, Rick Barbieri, appeals the order of the chambers judge dismissing his application for a declaration that certain documents disclosed in the course of adversarial estate litigation were subject to solicitor-client privilege. Held: Appeal allowed in part. The chambers judge found that Rick had expressly and implicitly waived solicitor-client privilege over certain documents by entering into a Consent Order requiring production of Estate Accounting to the respondent, his sister Teresa White. The judge did not err in her analysis concluding that Rick expressly waived privilege over the amount of legal fees by entering into the Consent Order. She did, however, err in finding an implied waiver but this was not material to her conclusion that solicitor-client privilege had been waived. The order is varied only to the extent that Rick may assert solicitor-client privilege over any legal advice contained in the legal invoices.

Reasons for Judgment of the Honourable Mr. Justice Abrioux:

Introduction

- [1] This appeal arises from the order made by a judge in the context of highly adversarial estate litigation. Although the issues which remain to be decided are limited in scope, the acrimonious nature of the litigation, involving as it does the dealings between counsel in the Supreme Court of British Columbia, has resulted in the underlying proceedings having, to use counsel's expression, "ground to a halt" while this appeal was pursued.
- [2] The appellant, Rick Barbieri ("Rick"), is the executor of the deceased's estate (the "Estate") and the respondent, Teresa White ("Teresa"), is a beneficiary of the Estate.
- [3] Central to this appeal are questions of the scope of solicitor-client privilege in the context of the relationship between an executor and a beneficiary and the waiver of that privilege.
- [4] The application that proceeded before the chambers judge was brought by Rick in which he sought:
 - a) a declaration that all of what were defined as the "Privileged Documents", and which included invoices rendered by the appellant's solicitors Kuhn LLP, are privileged and confidential;
 - b) an order preventing Teresa, and her lawyers, from retaining, disseminating, or making any use of the Privileged Documents in any way;
 - c) an order requiring the return of any and all documents or copies of documents comprising any or all of the Privileged Documents, the destruction of all electronic copies of Privileged Documents and all counsel notes and work product relating to the same, and for Teresa's lawyers to provide confirmation of the same; and
 - (d) an order that Teresa's lawyers be disqualified as lawyers for Teresa in this proceeding and in any other proceeding as against either the Estate or Rick.
- [5] Teresa applies to adduce fresh evidence on appeal, being the affidavit of her counsel's legal assistant which relates to further disclosure by Rick and his counsel following the rendering of the judge's reasons.
- [6] The judge dismissed the application. For the reasons that follow, I would allow the appeal to the limited extent of varying the order such that, as referred to in the reasons, solicitor-client privilege may be asserted with respect to any legal advice identified in the invoices rendered by Kuhn LLP which form part of the Privileged Documents, specifically the legal invoices. I would also dismiss the fresh evidence application.

Background

- [7] Lily Diane Barbieri (the "Deceased") died on November 7, 2018. She was predeceased by her husband, and was survived by her daughter, Teresa and her sons, Rick and Steven.
 - [8] The Deceased left a last will, executed on December 14, 2017, in which she directed that Rick and Teresa were to act jointly as executors, and that the residue of her Estate was to be distributed equally among her three children.
 - [9] Probate of the Estate was granted to Rick and Teresa on May 1, 2019 (the "Probate Proceeding").
 - [10] Rick and Teresa were unable to work together. This was due in part to allegations made by Rick that Teresa had written cheques to herself from the estate account and transferred real property belonging to the estate into her name, without his knowledge or consent. There is a significant ongoing dispute between the parties as to whether the Estate has an interest in those assets and what their value is.
 - [11] On July 11, 2019, Rick filed a notice of application in the Probate Proceeding, seeking, among other things, an order that Teresa be removed as executor and trustee of the Estate, and he become the sole executor.
 - [12] Crucial to this appeal is what then occurred. As the judge explained in her reasons for judgment, which are indexed at 2023 BCSC 1176:
 - [5] This application arises in the unusual circumstances where Rick, in his capacity as sole executor of the Estate, previously agreed to account to the beneficiaries of the Estate on a bi-monthly basis. On September 10, 2019, the parties agreed to a consent order in the Probate Proceeding, pursuant to which Teresa was removed as the executor and trustee of the Estate (the "Consent Order"). One of the terms of the Consent Order was that Rick, in his capacity as the sole executor and trustee of the Estate (the "Executor"), would provide Teresa and Steven with an "up-to-date accounting of the Deceased's Estate" on the 15th day of every second month, starting October 15, 2019 (the "Estate Accounting"). Rick did provide the Estate Accounting to Teresa in accordance with the Consent Order, but he now says that both he and his lawyers have inadvertently produced privileged documents over a period spanning from approximately October 2019 to May 2022.
- [Emphasis added.]
- [13] Some time in April 2021, Rick became aware that legal invoices rendered by his lawyers, Kuhn LLP, were disclosed as a part of the Estate Accounting.

- [14] On April 14, 2021, Rick's lawyer emailed Mr. Payne, advising him that privileged information had inadvertently been disclosed and asking him to destroy "all copies of the attachment" sent by Rick's wife the previous day. Mr. Payne did so, and a revised Estate Accounting was sent on April 15, 2021, which did not include the Kuhn LLP invoice that had previously been included, but again contained a cheque relating to that invoice.
- [15] On June 22, 2021, Teresa retained her present counsel, Mr. Marc Misner, to replace Mr. Payne as her lawyer. Thereafter, the Estate Accounting was sent to Mr. Misner.
- [16] On August 15, 2021, Mr. Misner wrote to Rick's lawyer, Mr. Maryniuk, requesting further disclosure in relation to the Estate, noting that "an executor cannot use estate funds to pay for an estate litigation partisan purpose that benefits him personally". Mr. Maryniuk responded on October 1, 2021, advising that the Estate's legal file is presumptively privileged. On October 13, 2021, notwithstanding this correspondence, Rick's wife emailed Mr. Misner the next Estate Accounting, which again contained a copy of a cheque relating to legal fees paid by the Estate to Kuhn LLP.
- [17] An application commenced by Teresa to, among other things, remove Rick as executor came before Justice Blok on August 11, 2022, which was adjourned. He directed that the dispute over the Privileged Documents be determined before any other application be heard. This resulted in the proceeding before the chambers judge which occurred over three days in February and May 2023.

The Judge's Reasons

- [18] The judge identified three issues that needed to be addressed:
- whether, in all of the circumstances, the Privileged Documents are protected by the blanket protection of solicitor-client privilege;
 - if they are, then whether Rick has expressly, or implicitly, waived that privilege; and
 - if he has not, then what the appropriate remedy is in all of the circumstances: at para. 37.
- [19] The judge began by considering if the Privileged Documents were protected by a blanket protection of solicitor-client privilege, noting that it is a "fundamentally important substantive right, the protection of which has a constitutional dimension and must be as near to absolute as possible": at para. 46.
- [20] She explained that in the context of the relationship between an executor and a beneficiary, there are three theories of entitlement of discretionary beneficiaries to information from executors or trustees. The judge found that the joint interest theory was the most applicable, stating that trustees and beneficiaries are said to have a shared or common interest in the administration of the estate, and so documents created to further that common interest should be made accessible to both: at paras. 48-58.

- [21] The judge found that pursuant to the joint interest theory, even if the Consent Order had not existed, had Teresa sought disclosure of the Privileged Documents, she may have been successful, in all of the unique circumstances of this case. These included that Rick, in his capacity as executor, entered into and agreed to the terms of the Consent Order, the terms of which "have a clear meaning" and were binding on him: at para. 68. The fact Rick agreed to provide the Estate Accounting, and then commenced adversarial proceedings against Teresa, did not shield him from this court-ordered obligation to account to the beneficiaries: at para. 68.
- [22] She stated that the application specifically turned on whether Rick had expressly or implicitly waived solicitor-client privilege. She observed that the Privileged Documents were disclosed over a lengthy period of time, both pursuant to the Estate Accounting, and by Rick's lawyer when they provided document disclosure in December 2021 as a result of Teresa's request for a passing of accounts: at paras. 69, 78.
- [23] The judge determined that Rick expressly waived privilege over the Privileged Documents when he agreed to the terms of the Consent Order and that at the time he did so, he was represented by legal counsel. The judge noted that there were no exceptions "carved out" as to what Rick would account for, including legal fees paid: at para. 87.
- [24] She stated that the Consent Order was evidence that Rick had a "clear and unambiguous intention" to account for all of the Estate expenses, and to waive his claim to solicitor-client privilege over the amount of legal fees he was expending from the Estate, on an ongoing basis, after the date of the Consent Order, that is September 2019: at para. 94.
- [25] In conclusion, the judge found:
- That "the Executor has clearly waived solicitor-client privilege over all the Privileged Documents": at para. 120; and
 - Rick as executor had not waived solicitor-client privilege over the legal advice he was receiving as executor nor had there been any waiver of that privilege, if any, if it were contained within the five legal invoices themselves: at para. 100.
- [26] The judge then turned to the appropriate remedy. First, she focussed on the application to disqualify Teresa's lawyers noting the "very serious accusations made by Rick's lawyer as against Mr. Misner": at para. 101.
- [27] Having referred to the factors identified in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, the judge concluded that the test to disqualify Teresa's counsel had not been met in that in all the circumstances:
- given the clear terms of the Consent Order and the ongoing and repeated disclosure, Mr. Misner did not have reasonable grounds to believe he was in possession of a document he was not intended to see;

- the inadvertent disclosure took place over a period of over two-and-a-half years, and allegedly occurred inadvertently by both Rick and by his lawyers. There were numerous opportunities for the executor to discover that ongoing disclosure was occurring of what he now alleges to be Privileged Documents. These opportunities were either missed or ignored; and
- the disclosure was careless, if not reckless, and occurred on the part of many individuals; Rick, and his lawyers were inappropriately blaming Mr. Misner for that which they should take responsibility for.

at paras. 108, 116.

On Appeal

[28] The appellant frames the issues on appeal as being whether the judge erred by deciding:

- (a) the presumption of privilege did not apply over the Privileged Documents;
- (b) privilege was waived over some of the Privileged Documents; and
- (c) no remedies were required to protect any privilege in the Privileged Documents.

Discussion

Standard of Review

[29] The appellant submits that the judge's decision should be reviewed on a standard of correctness as it concerns the issue of whether solicitor-client privilege applies and the application of the test for waiver of privilege: *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at paras. 27-29.

[30] The respondent disagrees, arguing that the issue on appeal is the correct interpretation of the Consent Order, which was determinative of the waiver issue, and this should be reviewed on a standard of palpable and overriding error as interpretation of a consent order is a species of contractual interpretation dealing with issues of mixed fact and law: *Sattva Capital Corp. v. Creston Moly Corp.*, 2014 SCC 53 at para. 50.

[31] As the judge correctly recognized:

[46] Recently, our Court of Appeal made clear that solicitor-client privilege is a "fundamentally important substantive right, the protection of which has a constitutional dimension and must be as near to absolute as possible": [*British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238] at para. 59.

[32] The starting point of the waiver analysis is *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 where, in the context of implied waiver, this Court stated:

[16] The judge's conclusion that the documents in issue are subject to solicitor-client privilege is not in issue on this appeal. We must proceed on the basis that the documents are protected by solicitor-client privilege. The only issue is whether the judge correctly identified and applied the test for implied waiver of privilege. This is a question of law to be evaluated by a standard of correctness.

See also *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at para. 29 [HMB Holdings].

[33] In *Lee*, Justice Hunter explained:

[27] The issue relating to the chambers judgment on solicitor-client privilege may be characterized as whether the chambers judge considered and properly applied the principles applicable to the protection of solicitor-client privileged communications.

[28] In my opinion, this question must be assessed against a standard of correctness: see *Legal Services Society v. British Columbia (Information and Privacy Commissioner)*, 2003 BCCA 278 [LSS 2003], at paras. 35-36; cited approvingly in *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53, [2016] 2 S.C.R. 555 at para. 22.

[29] Similarly the test to determine whether inadvertent disclosure of privileged communications constitutes a waiver of the privilege is a question of law, to be assessed against a standard of correctness. The determination of whether in a given case disclosure amounts to implied waiver is a question for which deference must be accorded, recognizing that these questions must be decided against the overarching principles that protect the ability of clients to engage in confidential communications with their legal advisors.

[Emphasis added.]

[34] The question on appeal is whether there was a waiver of solicitor-client privilege. Identification of the test for waiver and the application of the test are both questions of law, with the applicable standard of review being correctness. However, in so far as the application of the test is concerned, deference is to be accorded to the judge's findings of fact. For example, in this case, the judge's findings regarding the Consent Order, in part, ground her analysis in outlining the factual matrix in reaching her conclusion that privilege was waived.

[35] It follows that the real issue on appeal is whether the judge correctly articulated and applied the legal test regarding waiver of solicitor-client privilege in the circumstances of this case. In considering whether a reviewable error has been established, the judge's findings of fact are entitled to deference.

Blanket Privilege

[36] I will first consider the appellant's challenge to the judge's conclusions regarding blanket privilege.

- [37] The judge observed that Rick relied on this Court's decision in *British Columbia (Attorney General) v. Canadian Constitution Foundation*, 2020 BCCA 238 [CCF] as authority for the proposition that lawyer's invoices are privileged, and that documents recording payments to a lawyer are therefore also protected by solicitor-client privilege: at para. 42.
- [38] She went on to state that the rights of beneficiaries of an estate to information about ongoing administration has been the subject of much jurisprudence and the caselaw makes clear that their entitlement to information is a complicated issue which depends upon a myriad of factors: at para. 43.
- [39] The judge also noted that the relationship of an executor and a beneficiary is unique. It is not one of strangers and, at all times, the executor owes fiduciary obligations to the beneficiaries of the estate. Accordingly, it is reasonable that beneficiaries have some entitlement to information from the executor about the ongoing administration of the estate: at para. 47.
- [40] The judge then proceeded to discuss the theories of entitlement of beneficiaries to information from executors or trustees, while noting that it was not necessary to come to a conclusion on which line of authorities was currently in favour in Canada: at paras. 48-58. She was satisfied, however, "that CCF did not intend to alter the common law with respect to the disclosure of documents from an estate": at para. 60.
- [41] She declined to make a finding as to whether Rick could have asserted solicitor-client privilege over the Privileged Documents had they not been disclosed by way of the Consent Order: at para. 59.
- [42] She did go on to say, however, that had the Consent Order not existed, Teresa may have been successful had she sought disclosure of the Privileged Documents. That was because, in all of the unique circumstances of this case, beneficiaries of the Estate may be entitled to know the total amount of legal fees being expended by the executor. The judge did not make any explicit findings, however, as to whether Teresa would be successful in obtaining that information: at paras. 65-67.
- [43] On appeal, the appellant challenges the judge's approach and analysis. He argues that the judge erred in considering a "balancing of interests" and says in his factum:
63. The chambers judge applied both the joint theory and inherent jurisdiction analysis; however, she made "no comment on whether Teresa would have been successful".
64. To the extent her decision relies on a balancing approach to disclosing privileged documents, it is incorrect. Canadian and UK cases have soundly rejected this approach; privilege "will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis."

[44] The judge's analysis raises legal issues regarding the parameters that apply to solicitor-client privilege in an estate and trust setting. She provides a reasoned analysis to ground her views and in doing so, refers to several Canadian and English authorities, including cases from the Supreme Court of Canada and the House of Lords. The judge's analysis is challenged by the appellant on appeal.

[45] In her analysis on this point, the judge stated:

[44] This is not a case in which I must determine whether it is appropriate that solicitor-client privilege be waived to provide the beneficiaries with information about the administration of the Estate, and these reasons should not be taken to comment on that issue. However, it is useful to set out briefly the legal framework governing such a decision because it contextualizes my finding that in agreeing to the Consent Order the Executor waived his ability to claim the legal fees he was paying from the Estate were subject to privilege.

[Emphasis added.]

[46] Furthermore, what is germane for the purposes of this first ground of appeal, in my view, is the judge's statement at the commencement of her analysis, "Has Rick expressly, or by implication, waived that privilege?":

[69] As I have already noted, this application turns on whether by entering into the Consent Order the Executor waived any claim of solicitor-client privilege over the legal fees the Estate was incurring. Assuming for the purposes of these reasons for judgment that the Privileged Documents were subject to solicitor-client privilege, I will now consider whether Rick expressly or implicitly waived that privilege when he entered into the Consent Order.

[Emphasis added.]

[47] The judge decided the application on the basis of express and implied waiver within the context of the Consent Order. Her analysis of the various considerations which may apply regarding the blanket protection of solicitor-client privilege in an estate or trust context did not form the basis for her decision as to whether privilege had been waived in the circumstances of this case. Accordingly, I am of the view that it is not necessary for us to decide whether she was correct in her obiter dicta blanket protection solicitor-client privilege analysis. This is a question best left for another day where the circumstances require this issue to be considered and decided first by the Supreme Court and then this Court.

Express Waiver

[48] It was the judge's view that the application turned on whether by entering into the Consent Order the executor waived any claim of solicitor-client privilege over the legal fees the Estate was incurring: at para. 69.

[49] She set out the legal framework surrounding an express waiver of privilege:

[70] Privilege may be either expressly or impliedly waived. The burden is on the person alleging there has been a waiver of privilege to establish waiver has occurred: *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420 at para. 22.

[71] An express waiver of privilege may be established where it is shown that the possessor of the privilege:

- a) knew of the existence of the privilege; and
- b) voluntarily evinced an intention to waive that privilege.

See *British Columbia (Attorney General) v. Lee*, 2017 BCCA 219 at para. 53, leave to SCC ref'd, 37735 (14 December 2017) [Lee].

[72] Where privileged communications have been disclosed, an express waiver of privilege may be avoided where it is shown that the disclosure of the privileged communications was inadvertent. In determining whether the disclosure was inadvertent, the court may consider:

- a) whether the disclosure was in fact inadvertent, as opposed to repeated, careless or reckless;
- b) whether an immediate attempt was made to retrieve the documents; and
- c) whether preservation of the privilege in all of the circumstances would cause unfairness to the receiving party.

See *Earth Energy Utility Corp. v. Maxwell*, 2008 CanLII 35673 at paras. 30, 35, 38, [2008] O.J. No. 2800 (Sup. Ct. J.) [Earth Energy]; *Chan v. Dynasty Executive Suites Ltd.*, 2006 CanLII 23950 at paras. 31, 37-40, [2006] O.J. No. 2877 (Sup. Ct. J.).

[50] The judge referred to the Consent Order:

7. Rick shall provide an up-to-date accounting of the Deceased's Estate to Teresa and Steven on the 15th of every second month, with the first such accounting to be provided on October 15, 2019.

and found that Rick expressly waived privilege by agreeing to provide this accounting, saying this "voluntarily expressed a clear and unambiguous intention to waive privilege over the documents, and types of documents, which [Rick] now argues are subject to the blanket presumption of solicitor-client privilege": at paras. 14, 90.

[51] It is of assistance to set out the judge's reasoning and findings on certain of the key issues:

[87] At the time Rick entered into the Consent Order, he was represented by legal counsel. There were no exceptions contained within the terms of the Consent Order as to what he would account for and, specifically, there was no exception carved out that he would not account for all legal fees paid. I note that even if there had been such an exception, if he fulfilled his obligation to account for the Estate on a bi-monthly basis, it would have been a relatively easy exercise to determine what the legal fees paid had been (as they are the only expenses

he is now seeking to claim solicitor-client privilege over, and so the only expenses that would be missing).

- [88] Rick's argument that the Consent Order is insufficient to "abrogate privilege over all estate accounting documents" is disingenuous, and is an after-the-fact attempt to resile from the express agreement he made to provide the Estate Accounting to his siblings, in return for becoming the sole Executor of the Estate.
- [116] The allegedly inadvertent disclosure took place over a period of over two-and-a half years, and allegedly occurred inadvertently by both Rick and by his lawyers. There were numerous opportunities for the Executor to discover that ongoing disclosure was occurring of what he now alleges to be Privileged Documents. These opportunities were either missed or ignored. One of the arguments made is that the affidavit which included the Privileged Documents (being the affidavit of Teresa filed in December 1, 2020 in support of Teresa's 2020 Application to remove Rick as Executor, and Teresa's affidavit filed November 3, 2021 in her application in the Probate Proceeding that Rick pass the Estate accounts) were not reviewed, as the contents of the exhibits were lengthy, or irrelevant, that there was no reason to review those exhibits, and that the Privileged Documents were "buried in the exhibits of Teresa's previously filed affidavits". In my opinion, that is in not a compelling nor acceptable justification for the significant delay in the Executor realizing these types of documents had been disclosed over the past years. The disclosure was careless, if not reckless, and occurred on the part of many individuals: Earth Energy at para. 30.

[Emphasis in original.]

- [52] Rick argues that although the judge quoted the correct test, she erred in its application in that:
- a) the adversarial proceedings had not commenced at the time Rick entered into the Consent Order;
 - b) silence in the Consent Order as to privilege did not amount to a clear and unambiguous intention to waive privilege;
 - c) providing up-to-date accounting left room for interpretation; and
 - d) the repeated disclosure of the Privileged Documents was inadvertent, rather than careless, if not reckless.
- [53] I would first observe that the judge agreed with Rick that the parties were adverse in interest prior to the Consent Order being entered into: at para. 76. There was thus no issue that "[t]he Consent Order itself was to resolve an adversarial dispute": at para. 97.

- [54] In any event, I would not accede to this ground of appeal. There was ample evidence upon which the judge could rely in applying the correct test to conclude that the Consent Order, which provided for the Estate Accounting, amounted to an express waiver as it related to the Privileged Documents, and included the amounts of the legal invoices and the Estate's financial documents.
- [55] It bears emphasizing that until Teresa agreed to be removed as executor, she had the same right as did Rick, her co-executor, to be cognizant of all the Estate trust accounting information that was or came into existence. The Consent Order must be interpreted in this context. It does not constitute an agreement whereby a beneficiary first gains access to information, but rather, a consent order that preserves the former executor's pre-existing right to access the estate's accounts.
- [56] Accordingly, it was entirely open to the judge to conclude that Rick, as the sole remaining executor, waived solicitor-client privilege as to the Estate Accounting as defined by the judge (at para. 5 of the reasons, quoted at para. 11 above) in exchange for resolving the dispute that existed at that time in relation to co-executors, such that Teresa agree to be removed and that he become the sole executor.
- [57] There was also evidence on the record, from which the judge could find, that the amount of repeated disclosure and the period of time over which it occurred after the Consent Order had reached the required level of carelessness, if not recklessness, such that she could properly conclude the disclosure was not inadvertent.
- [58] I would add that, as observed by the judge, 17 days after the Consent Order was entered into, on September 27, 2019, Rick, now the sole executor, commenced the proceedings against Teresa, alleging that she held real property in trust for the Estate and had taken Estate funds for her own benefit. The parties then continued with their adversarial relationship: at paras. 15, 77. I shall return below to the issue of solicitor-client privilege over any legal advice Rick may have received in relation to that adversarial relationship with Teresa, since it was specifically contemplated by the judge in her reasons.

Implied Waiver

- [59] Although I would dismiss the substantive ground of appeal on the basis that the judge was correct in her finding that an express waiver of solicitor-client privilege arose as a result of the Consent Order, I will nonetheless comment on the judge's implied waiver analysis.
- [60] The judge referred to Soprema and HMB Holdings, noting that implicit waiver may be found in circumstances where fairness and consistency do not permit the privilege holder to assert solicitor-client privilege "as a sword" while also using "the privilege to prevent the other party from testing the justification or explanation". She then observed that "a mere assertion of trial fairness and consistency is insufficient to ground implicit waiver" as there is near absolute protection of solicitor-client privilege. Waiver, whether express or implicit, must be clear and unambiguous: at paras. 73-75.

- [61] In addition to her conclusion that the disclosure of the Privileged Documents was not inadvertent and was even "careless, if not reckless", the judge also found that Rick was attempting to use the privilege as a sword by agreeing to the disclosure pursuant to the Consent Order in order to become the sole executor and also as a shield to "shelter behind solicitor-client privilege": at paras. 96-98. Furthermore, at the time he agreed to the Consent Order:
- [97] Rick voluntarily injected into that litigation Teresa's entitlement to know how much Rick was spending, in his capacity as the Executor, on legal fees. In other words, he took the position he would waive solicitor-client privilege to reach a compromise in adversarial litigation and, in doing so, he became the sole Executor of the Estate.
- [62] Rick submits that the judge erred in identifying and applying the law for implied waiver. Relying on *Long v. Red Branch Investments Limited*, 2022 BCCA 293 at para. 26, he argues that the "bright line test" that needs to be met is:
- a) A party must put its state of mind in issue or have obtained legal advice regarding a relevant transaction; and
 - b) The party must voluntarily inject into the litigation legal advice it received or its understanding of the law.

He contends that "voluntarily injecting into the litigation" means there are "pleadings, evidence or argument asserting reliance on legal advice" or their understanding of the law: *HMB Holdings* at paras. 46-47.

- [63] Respectfully, I would agree with Rick that the judge erred in this portion of her analysis. There was no evidence that Rick put his state of mind in issue or asserted reliance on legal advice based on the pleadings, in the evidence itself, or in submissions made to the judge. In particular, there was no evidence, or from which it could be inferred, that Rick was using the privileged information as a sword nor that the rendering of the invoices equated to injecting legal advice as required by the analytical framework which applies to an implied waiver of solicitor-client privilege.
- [64] Rick could also not have voluntarily injected into the litigation legal advice he received, since the legal advice and legal payment information allegedly injected was, for the most part, not yet in existence at the time of the Consent Order in September, 2019. The legal invoices, for example, are all dated well after that timeframe.
- [65] I do not, however, consider these errors to be material to the judge's ultimate conclusions in this case. That is because she had correctly found that there had been an express waiver as a result of the Consent Order. Furthermore, as I shall explain below in relation to a suitable remedy, the judge qualified her finding that Rick had both expressly and implicitly waived privilege over the quantum of legal fees expended from the Estate by stating that he had not done so in regard to the legal advice he had been receiving that may be contained within some of the alleged Privileged Documents: at para. 100.

The Fresh Evidence Application

- [66] Teresa applies to have admitted as fresh evidence an affidavit from Ms. Heidi Dick, her counsel's legal assistant, which relate to matters which occurred after the judge's decision was rendered. She says the evidence was produced either by Rick or his counsel.
- [67] It includes Rick's affidavit, sworn September 11, 2023, which Teresa says in her factum on appeal concerns Rick allegedly "referencing" privileged materials, and relates to "continued careless and reckless conduct in relation to his claims of privilege" and "substantiates the sword and shield argument".
- [68] Also included is a letter from counsel, dated September 25, 2023, provided in response to an order of this Court that Rick specifically identify the 40 documents over which privilege is claimed. Teresa submits (1) the letter is relevant in that it demonstrates that the number of documents Rick alleges to be privileged is different than what was the case at the time of the application before the chambers judge; (2) the letter is incomplete; and (3) that Rick has not identified those portions of the Privileged Documents over which the claim of solicitor-client privilege is asserted.
- [69] I need not repeat the well-known requirements for the admission of fresh evidence as set out in *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775, 1979 CanLII 8, except to observe that the onus is on the applicant to satisfy the criteria: *R. v. A.O.D.*, 2015 BCCA 514 at para. 58. I would also note that "new evidence is generally not admissible absent exceptional circumstances; the evidence must be considered likely to affect the result, and its admission must be clearly in the interests of justice": *M.P.W. v. Victoria (City)*, 2023 BCCA 341 at para. 20.
- [70] I would not admit this evidence. First of all, it provides but further examples of continued disclosure by Rick of information that is alleged to be subject to blanket solicitor-client privilege. Furthermore, in light of my conclusions regarding the judge's analysis of both express and implied waiver, this evidence would not affect the result of this appeal.

Did the chambers judge err by not providing any remedy to protect the privilege of the Privileged Documents?

[71] The order under appeal provides in part:

1. The following relief sought by the Estate is dismissed:
 - a) A declaration that the 40 documents consisting of:
 - i. 5 different invoices rendered by Kuhn LLP;
 - ii. 12 copies of cheques made payable to Kuhn LLP; and
 - iii. 23 other documents which have entries showing payments made by the Estate to Kuhn LLP (the "Alleged Privileged Documents")

that the Estate sent to the Defendant Teresa White are privileged and confidential.

[72] Had the judge found privilege was maintained over the Privileged Documents, she would have declared them privileged, ordered that they be returned, and made an order restraining Teresa and her lawyers from using the Privileged Documents and work product: at para. 117.

[73] Notwithstanding the judge's conclusions that the Consent Order amounted to an express waiver of solicitor-client privilege, there remains the issue as to whether she ought to have ordered a remedy in relation to legal advice concerning the Estate's litigation against Teresa.

[74] The judge was in a difficult position in considering this question since, as she observed:

[11] Counsel for the Executor took the position that the Privileged Documents should not be reviewed by this Court before the application is determined. His position is that it is neither necessary, nor appropriate, for them to be reviewed. While he initially took the position that there was no legal advice contained within the Legal Invoices, he later retracted that position in reply submissions. Nonetheless, he maintained that this application could and should be resolved upon his argument that all of the Privileged Documents, including the Legal Invoices, are presumptively protected by solicitor-client privilege.

[12] I agree that reviewing privileged information is a discretionary decision, and one that should be exercised sparingly. Parties in a dispute such as this are discouraged from asking the court to review the alleged privileged documents, and are encouraged to seek a judicial determination without that occurring: *Keefer Laundry Ltd. v. Pellerin Milnor Corp. et al.*, 2006 BCSC 1180 at paras. 74-75. The court should only review documents alleged to be protected by solicitor-client privilege if evidence, or legal argument, establishes it is necessary to fairly decide the issue: *Canada (Privacy Commissioner) v. Blood Tribe Department of Health*, 2008 SCC 44 at para. 17 [*Blood Tribe Department of Health*].

[13] Notwithstanding that I clearly have, and expressly reserved, the right to review the Privileged Documents (and in particular the Legal Invoices), I find that it is appropriate for this application to be determined based upon the blanket solicitor-client privilege the Executor asserts over the Privileged Documents.

[75] This takes me to the section of the reasons entitled "Conclusion" and in particular:

[119] The application is dismissed.

[120] As noted above, this application proceeded on the basis that the Executor was advancing a blanket privilege over all of the Privileged Documents. No specific argument was advanced that any of the Legal Invoices contained legal advice that would properly be subject to litigation privilege. Accordingly, based upon that assumption, I find the Executor has clearly waived solicitor-client privilege over all of the Privileged Documents.

[121] Moving forward, to comply with the Consent Order, the Estate Accountings should continue, and those accountings should provide clear evidence of the legal fees being paid by the Executor from the Estate. That should include copies of all legal invoices rendered to the Executor; however, if the Executor raises a claim of litigation privilege over specific legal advice contained within the invoices, that is an issue that will have to be addressed.

[Emphasis added.]

[76] The judge's comments and findings on this issue need to be considered within the context of her earlier finding that:

[100] Notwithstanding this determination, while I am satisfied that Rick has both expressly and implicitly waived the quantum of the legal fees he has been expending from the Estate, to be clear, I am not satisfied that he has waived his right to solicitor-client privilege over the legal advice he has been receiving in pursuing litigation in the name of the Estate against Teresa. I am concerned that there may be legal advice contained within the five Legal Invoices that were disclosed, that may not have been properly redacted. While I have found that Rick waived solicitor-client privilege over the quantum of legal fees he expended from the Estate, I do not accept that he waived solicitor-client privilege over the legal advice he was receiving as Executor. I do not find that there has been a waiver of that legal advice, if any is contained within the five Legal Invoices themselves. This issue is dealt with further below.

[Emphasis added.]

[77] Submissions were made as to whether the judge erred in referring to "litigation privilege" in para. 120 of the reasons, since this was never raised as an issue on the application.

[78] It is clear that the application concerned solicitor-client privilege. This is evident from certain paragraphs in the reasons including:

[37] There are three issues that must be addressed on this application:

- a) whether, in all of the circumstances, the Privileged Documents are protected by the blanket protection of solicitor-client privilege;
- b) if they are, then whether Rick has expressly, or implicitly, waived that privilege; and
- c) if he has not, then what the appropriate remedy is in all of the circumstances.

[Emphasis added.]

as well as other paragraphs, including para. 100, which I have just quoted.

- [79] In my view, while the judge did misspeak in referring to "litigation privilege", this was not material to her analysis or conclusions. Reading the reasons contextually and as a whole, she was attempting to convey that litigation advice received by Rick in his capacity as executor, in the context of the broader litigation with Teresa, was subject to solicitor-client privilege and had not been waived.
- [80] The issue then becomes whether the judge ought to have provided a remedy in the form of a declaration and related orders, in respect to past Estate Accountings as she did to those "moving forward".
- [81] Respectfully, in my view, she erred in not doing so. The chambers order should be varied to be consistent with the judge's findings that Rick has not waived solicitor-client privilege over legal advice he has received in relation to the five invoices in question.
- [82] I should add that prior to the hearing of the appeal, Rick advised the Court that he was not challenging the judge's dismissal of the disqualification application. Relying on *Drake Holdings Ltd. v. Chubb Insurance Company of Canada*, 2018 ONSC 4494, he nonetheless seeks an order preventing Teresa's present counsel from attending at any examination for discovery, cross-examination on any affidavit or cross-examination at trial, and that he not participate in the preparation of such examinations by other counsel.
- [83] I would not make that order. In my view, any attempt by Rick to curtail Teresa's access to her current counsel is an indirect challenge to the judge's dismissal of the disqualification application and her findings, to which I refer at para. 27 above.
- [84] We were advised at the hearing of the appeal that Rick has now provided some detail as to legal advice contained in the invoices or other Privileged Documents, and which he claims to be subject to solicitor-client privilege.
- [85] During the hearing of the appeal, it became apparent that one of the issues related to the redaction of documents, which have already been disclosed, including the past invoices.
- [86] In part, this was because Teresa's counsel acknowledged that solicitor-client privilege was retained by Rick in relation to entries on the invoices that disclosed specific legal advice and which may include entries that described the specific task undertaken in relation to the ongoing litigation between the parties.
- [87] Rick's counsel for his part advised that the past invoices could be redacted, and Teresa and her counsel would know what had been redacted since they are in possession of unredacted copies.
- [88] I would hope that the parties and counsel can attempt to have this litigation proceed on its merits rather than continuing in its present unsatisfactory state. If, having reviewed these reasons, they are unable to agree on a procedure and timeframe in which:

- Rick is to identify the precise scope of the required redactions;

- Teresa accepts and/or challenges those redactions; and
- The parties address related matters including, but not limited to, whether the unredacted documents are to be returned to Rick, be subject to an application in the Supreme Court for further rulings, including the scope of the redactions sought and the like;

then I would refer these matters to the Supreme Court to be decided in accordance with these reasons.

Conclusion

[89] The appeal is allowed to the limited extent of varying the chambers order as provided for in these reasons, that is:

This Court orders that any legal advice contained in the five invoices referred to in paragraph 1.(a) (i) of the order under appeal is subject to solicitor-client privilege.

[90] In my view, Teresa was successful on the issue of the Consent Order and the express waiver of solicitor-client privilege. Rick, for his part, was successful in having the chambers order varied to account for the redaction of legal advice contained in the five legal invoices.

[91] There being divided success on appeal, I would make no order as to costs.

"The Honourable Mr. Justice Abrioux"

I AGREE:

"The Honourable Mr. Justice Willcock"

I AGREE:

"The Honourable Madam Justice Fenlon"

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