

CANADA / JUDGMENT

Ghag Estate v. Ghag

2021 BCSC 815

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Supreme Court of British Columbia

DECIDED

30 April 2021

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2021 BCSC 815 Ghag Estate v. Ghag

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ghag Estate v. Ghag,

2021 BCSC 815

Date: 20210430

Docket: S212073

Registry: Vancouver

Between:

Veena Charmaine Ghag, Executor of the Estate of Sukhvinder Ghag, Deceased

Plaintiff

And

Brendan Ghag

Defendant

Before: The Honourable Madam Justice Marzari

Reasons for Judgment

Counsel for the Plaintiff, Sukhvinder Ghag

appearing via teleconference:

A. Dosanjh

C.J. Gallant

The Defendant appearing on his own behalf via teleconference:

B. Ghag

Counsel for the Attendee, Amrik Ghag

appearing via teleconference:

G. Holeksa

A. Holeksa, Articled Student

Place and Date of Trial/Hearing:

Vancouver, B.C.

April 9 and 16, 2021

Place and Date of Judgment:

Vancouver, B.C.

April 30, 2021

INTRODUCTION

- [1] On March 8, 2021, I issued an interlocutory injunction prohibiting the defendant, Mr. Brendan Ghag, from disclosing privileged information or documents related to the defence of an action brought by Mr. Ghag's uncle against Mr. Ghag's father in 2017 and that remains extant.
- [2] I made the order ex parte in advance of any action for breach of confidence being filed because I was satisfied, on the basis of the evidence before me, that there was a high probability that Mr. Ghag would disclose privileged information and documents to an opposing party in litigation affecting his father's estate, absent such an order. My concern was not simply with respect to the irreparable harm that may occasion to his father's estate, but also to the administration of justice. Such disclosures, once made, are almost impossible to remedy, and the protection of the various forms of privilege is an issue that falls within this court's inherent jurisdiction to protect its own processes.
- [3] Mr. Ghag applied to set aside the ex parte order, as he was entitled to do, and this application came before me on April 9, 2021.

BACKGROUND

- [4] It is necessary to set out some of the background to this litigation and application in order to understand the order I make here. It is not possible, and I have not attempted, to resolve controverted evidence or to make determinations of fact in the extant proceedings.

- [5] From the evidence and pleadings filed with respect to this matter thus far, I understand that the defendant in this action, Mr. Brendan Ghag (whom I will refer to as Brendan to distinguish him from the other Ghag family members, whom I will also refer to by their first names without meaning any disrespect), has a masters of business administration and a law degree, and was called to the bar of British Columbia in 2017. It does not appear that he is currently practicing law, though he did represent himself in these proceedings.
- [6] His father, Sukhvinder Ghag ("Sukie") was in the pharmacy business, and was diagnosed with terminal brain cancer in July 2016 and passed away from his illness in September 2017.
- [7] Brendan pleads that he helped his father with his business for a decade prior to his death, and that after the diagnosis, he worked with his father in the "restructuring of his assets" by way of an agreement that I gather has since become contentious between himself and his other family members, including his mother and siblings, and perhaps his uncle as well. Brendan states that during this time, he independently retained counsel to protect his own interests as distinct from those of his father in relation to the restructuring of his father's assets.
- [8] There are numerous resolved and ongoing actions involving Brendan and other members of his family regarding his father's estate. This application was made pursuant to proceedings brought by Sukie's wife, Veena Charmaine Ghag ("Charmaine"), in her capacity as the executor of Sukie's estate (I will refer to Charmaine in her capacity as executor of the "Estate" in order to avoid confusion with her involvement in the various proceedings in other capacities). At the time I heard this application, Charmaine had not yet filed a notice of civil claim for this action.
- [9] Brendan's uncle, Amrik Ghag ("Amrik"), is also in the pharmacy business, and pleads that upon hearing of Sukie's diagnosis he requested that Sukie regularize their shared business assets "to properly recognize his ownership of some aspects of the various companies that were part of the pharmacy business." When this did not occur, he commenced Action No. 189435, New Westminster Registry, on March 31, 2017, against Sukie in relation to those assets (the "Amrik Action"). Harper Grey LLP was retained to defend the Amrik Action. Brendan says that he and his father jointly retained Harper Grey, but that is not something I can resolve on the basis of the evidence filed in this application.
- [10] Since Sukie's death, Charmaine has been defending the Amrik Action as the executor of the Estate. She attests that she was also involved in discussions with legal counsel at Harper Grey regarding the defence of the Amrik Action before Sukie's death, together with Brendan, and that both Brendan and herself were privy to privileged information regarding the defence of that action, with Brendan often being the one conveying the advice of lawyers to her and Sukie.
- [11] In addition, in her own capacity, together with her other children, Charmaine brought proceedings in January 2018 to remove Brendan as trustee of the Sukie Ghag Family Trust on the basis of breach of trust (the "Trust Litigation"). Charmaine was successful in that

litigation in this Court and the Court of Appeal. I understand, however, that Brendan is still advancing cross-litigation that pertains to the Sukie Ghag Family Trust and so remains in litigation with Charmaine. I understand there may also be other outstanding litigation between Brendan and his family members.

- [12] Brendan argues that he created documents pre-dating the filing of the Amrik Action in March 2017 directed towards his own interests in relation to Sukie's re-structuring of assets, that he says are not related to Sukie's defence and thus not the subject of any form of privilege. He says that the ex parte order was overly broad in capturing these pre-existing documents, which he wishes to file and rely upon in his litigation with his mother in particular.
- [13] In August 2020, Brendan sent a series of emails to Amrik suggesting that he would be prepared to share information and "ammo" that would lead to success for Amrik in the Amrik Action in exchange for a settlement to Brendan's benefit. One of these emails tends to suggest that the restructuring of Sukie's assets prior to Sukie's death was "a story" Brendan himself "made up to beat the lawsuit you started with my dad" and that Charmaine now believes it is "actually real, which is very frustrating." Amrik, through his counsel, argues that this, and other communications, suggest some claims of privilege in relation to the defence of the Amrik Action may be vitiated by fraud.
- [14] Brendan has also sent emails to Charmaine stating that he is prepared to provide such documents to Amrik, if she does not settle the litigation between them in a favourable manner. Brendan sent a series of such emails in the weeks prior to the ex parte application being made, and attached a Dropbox link where he advised family members that he would begin uploading documents in the absence of a settlement of his litigation with his mother and siblings. On March 5, 2021, he advised his family by way of email that he would be applying to intervene in the Amrik Action the week of March 8, 2021, which I gather he did.

RULING ON APPLICATION TO SET ASIDE EX PARTE ORDER

- [15] Before me on the April 9, 2021 application, Brendan argued that the ex parte order should be set aside on the basis of material non-disclosure, and in particular, on the basis that it had not been disclosed that the legal retainer in relation to Sukie's interests in the Amrik Action was joint with him, and that this meant that no privilege could apply to documents that were created by himself or by counsel for the purposes of defending the litigation. He also argued that Charmaine overstated her involvement in Sukie's legal defence in the ex parte application, and further that the email account that contained some of the privileged information and documents regarding this litigation was actually also available to other members of the family as well.

- [16] In support of his application, Brendan filed an affidavit that contained solicitor-client communications with counsel defending the Amrik Action, and documents subject to settlement privilege in the Amrik Action. I note that the retainer he attaches to his affidavit indicates that he did retain Harper Grey, but not in his personal capacity. The issue of the nature of that retainer is beyond what I can resolve on this application.
- [17] Brendan also argued that he had suffered "damages" as a result of the injunction, because the order has prevented him from attaching certain documents that pre-date the legal retainer to defend the Amrik Action in March 2017 to affidavits that he filed in other legal proceedings.
- [18] Amrik, through counsel, also filed a response to Brendon's application in support of setting aside the ex parte order on the basis that he, as the plaintiff in the action against Sukie (and now the Estate), had an interest in obtaining all non-privileged documents Brendan seeks to disclose to him, as well as documents where privilege may be vitiated by fraud. He raised a number of both procedural and substantive issues that he also suggested constituted material non-disclosure that required setting aside the ex parte order.
- [19] After reviewing the new materials filed and hearing from Brendan, counsel for Amrik, and counsel for the Estate, I found that there was no material non-disclosure going to the foundation of the order that would vitiate the order. Fundamentally, I remained concerned that absent the order, Brendan would have, and may still, disclose privileged information and documents. In fact, the basis for the injunctive relief granted was strengthened by Brendan's conduct and his application, which advanced arguments that demonstrated a profound lack of understanding of the nature of privilege. Brendan pled that no privilege can attach to advice obtained through a joint retainer, attached privileged communications in an unsealed affidavit in support of this application, and disclosed in argument that the ex parte order prevented him from attaching documents to his affidavits in the Amrik Action and the Trust Litigation that he otherwise would have attached.
- [20] Brendan did not adduce examples of the type of documents that he says are captured by the original ex parte order but are not protected by privilege because they predate the filing of the Amrik Action. Counsel for the Estate in this proceeding remains concerned that these documents made prior to March 2017 may fall under litigation privilege in relation to the contemplated defence of the Amrik Action, and I consider that to be a realistic possibility based on the sealed and unsealed evidence before me. It is also possible, based on the submissions before me, that the documents relate to Sukie's legal estate planning, and may also engage privilege on that basis that Brendan is not entitled to waive.
- [21] Overall, I found that it was still necessary to maintain a court order that would prevent the disclosure of privileged documents, and that the fundamental basis upon which I made the ex parte order was not materially affected by the further information and submissions of Brendan or Amrik.

[22] However, I was convinced that it would be appropriate to vary the order in a number of ways, including:

1. Adding an order that the Estate's Notice of Civil Claim was to be filed by April 16, 2021;
2. Providing a better description of the documents and information captured by privilege (I was not satisfied that simply referring to privileged information and documents would be sufficient in light of Brendan's demonstrated narrow understanding of this requirement); and
3. Providing a process by which documents that fell under the terms of the order could be reviewed to allow them to be disclosed with the consent of the Estate, or by order of the Court.

[23] The parties agreed to work toward language to capture these terms and to submit them to me for review on April 16, 2021. The hearing was adjourned to that date to review the draft terms, at which point both the Estate and Amrik presented forms of order that they were not able to agree upon, and sought my final determination of the terms. The proposed draft orders are very similar in terms of how they describe presumptively privileged information, however Brendan had a number of objections to the language proposed by the Estate, and was more agreeable to the language proposed by Amrik.

[24] The key issues in dispute on April 16 remained as follows:

1. Should the order presume that documents that fall under broad categories of privilege are privileged, or should the order be more equivocal in that regard, and how broadly should that privilege and the prohibition be defined;
2. Should there be a date before which it is understood that documents could not be captured by privilege, and if so, should that be the date of the joint retainer between Brendan and his father (March 27, 2017), or the date on which his father was determined to be terminally ill, which sparked Amrik's request and Sukie's business restructuring and estate planning work (July 1, 2016);
3. How should the process for obtaining consent or leave of the Court to disclose documents be structured; and
4. Should there be an undertaking for damages required of the Estate as a condition of this interlocutory injunction.

Breadth of Order, Cut-off Date and Process

[25] I am of the view that, in these circumstances, the order must cast a fairly wide net with respect to potentially privileged documents related to the Amrik Action, and then provide for an expeditious process to resolve disputes regarding specific documents that Brendan says are not protected by the common categories of privilege.

- [26] With respect to whether documents related to the Amrik Action, prepared by Brendan for other proceedings, would be captured, I understand that the Estate included the term "other legal proceedings" at paragraph 2(c) of its draft order because it was seeking to capture documents and information that may have been prepared in relation to mediation or arbitration as well as litigation related to the lis in the Amrik Action. Brendan says, however, that this definition is too broad because there are now a number of proceedings where he is adverse in interest to various family members, including his mother who is the executor of the Estate, and for which he has since prepared numerous documents. He also argues that he prepared documents related to the estate planning and litigation defence planning he did (with or without the involvement of his father or counsel) that may be relevant to those proceedings, and that, to the extent that he sought to protect his own interests as distinct from his father's in that planning, or where they predated the formal retainer, he should be free to use and disclose those documents in the Amrik Action and in related litigation.
- [27] Ideally, Brendan should not have to go through a cumbersome process of seeking leave to rely on or to disclose documents that do not reference or incorporate information or documents that arose out of any estate planning retainer or litigation defence planning in relation to the Amrik Action. However, it appears that these documents and information are entangled with Brendan's position in all of the proceedings involving his family, and I am unable to determine a proper delineation as to when such documents will attract the protection of privilege that Brendan alone can waive, and when they will not, on the evidence before me other than as follows:
1. Documents that have already been filed in these proceedings, or related proceedings, including the Amrik Action, and the Trust Litigation, or other proceedings involving Brendan and the Estate, without objection on the basis of privilege (excluding of course the affidavits that have been ordered sealed); and
 2. Documents that predate July 1, 2016.
- [28] All other documents or information that fall within the general description of privileged information in the order will have to go through the prescribed process, subject to any further variations to this order made by this Court if greater clarity is brought to the specific documents that may be at issue.
- [29] That process shall be as set out in the order as follows:
1. The order of this Court dated March 8, 2021, is varied and substituted with this order;
 2. Subject to paras. 3 and 4 of this order, the defendant, Brendan Ghag, is hereby restrained from disclosing, transmitting or conveying to others, except to the legal counsel the Executor of the Estate of Sukhvinder Ghag, deceased (the "Estate") in Action No. 189435, New Westminster Registry (the "Action"), or to counsel for the Estate in these proceedings, information or documents relating to the Action that are protected by privilege, including the following documents or information that are presumed to be protected by privilege:

- i. Correspondence and other forms or records of communications between Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or the Estate, or their agents on the one hand, and their professional or legal advisors in the Action on the other hand, for the dominant purpose of obtaining or providing legal advice, or for the dominant purpose of obtaining or providing legal assistance with respect to pending or contemplated litigation;
 - ii. Correspondence and other forms or records of communications between Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or the Estate, or their professional or legal advisors in the Action on the one hand, and third parties on the other hand, in relation to the Action, made for the dominant purpose of obtaining information to assist in the provision of legal advice or legal assistance to Sukhvinder Ghag or his Estate with respect to pending or contemplated litigation;
 - iii. Correspondence and other forms or records of communications relating to the Action, created, prepared or received by the Estate, Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or their agents, for the dominant purpose of providing legal advice or legal assistance to Sukhvinder Ghag or the Estate, including with respect to pending, extant or contemplated litigation, mediation or arbitration in relation to the Action;
 - iv. Without prejudice communications written for the purpose of, and passing in the course of, bona fide negotiations between the Estate, Sukhvinder Ghag or Brendan Ghag or their solicitors in the Action on the one hand, and Amrik Ghag or his solicitors in the Action on the other hand, for the settlement of litigation and anticipated litigation; and
 - v. Notes, correspondence, minutes of evidence, information or memoranda being the work product of the legal advisors of the Estate or Sukhvinder Ghag in the Action which were prepared or obtained as part of legal counsel's brief.
3. The following documents are exempted from the above prohibition:
- i. Documents that have already been filed in these proceedings, or any of the related proceedings involving Brendan Ghag and the Estate, without objection on the basis of privilege, are excluded from the prohibition at para. 2 of this order (excluding sealed affidavits and documents); and
 - ii. Documents that predate July 1, 2016.
4. If Brendan Ghag wishes to disclose a document or information that falls within para. 2, before disclosing, transmitting, or conveying the document or information to others, Brendan Ghag must either:
- i. Obtain written consent of the Estate's legal counsel; or
 - ii. Apply to court for a determination that he may disclose, transmit, or convey to others the documents or information in issue, by:

- (1) Providing a description of the information in an affidavit and/or attaching the documents to an affidavit;
- (2) Serving that affidavit on counsel for the Estate in the Action, or in these proceedings, together with an application for the disclosure of the documents or information; and
- (3) Applying for and obtaining a sealing order over that affidavit and application prior to the materials being filed.

iii. All such proceedings are to proceed in camera unless otherwise ordered.

- [30] I have provided for the consent of and service on counsel for the Estate in either this proceeding or in the Action, as issues of privilege may properly arise or be resolved in either proceeding. Although not requested, I am concerned that there may be no counsel currently retained for the Estate in the Amrik Action, and the review of requests and applications in these proceedings should not wait for appointment of counsel for the Estate in the Amrik Action. However, I note that Charmaine is involved in these proceedings only as executor of the Estate, which is how she is also involved in the Amrik Action. Charmaine is also involved in other litigation, I gather in some cases as herself, and in others as the trustee of the Sukie Ghag Family Trust. She does not have the right to privileged information of the Estate, or to waive such privilege, in those other proceedings, and some thought will have to go into whether she requires separate representation in her role as executor as distinct from her other roles.
- [31] I have also provided that these applications be in camera, so that it is possible for the parties and the Court to discuss the content of the documents or information at issue without risking the waiver of privilege. However, I am cognizant that Amrik may wish to make applications or take positions with respect to the potential waiver of privilege in relation to how it pertains to the Amrik Action, and this Court may lift the requirement for a closed hearing by order. I am also prepared to hear such applications outside the context of an application by Brendan.

The Undertaking

- [32] Finally, I have determined that no undertaking for damages is required or appropriate in this case. Counsel for Amrik correctly pointed out that an undertaking for damages is generally a requirement for the issuance of an interlocutory injunction unless expressly waived by the court. He argued that the lack of such an undertaking was fatal to the initial order and constituted a material non-disclosure. Brendan argued that he may already have suffered damages because he was restrained by the order from filing documents he prepared in relation to the protection of his interests in at least two other legal proceedings. The Estate argues that it is hard to imagine a scenario in which compliance with an order preventing the disclosure of privileged information could give rise to a claim for damages.

- [33] As I noted above, this order, while made in response to an application for interlocutory relief, was made for the purpose of ensuring that privileged information was not disclosed. Protection of privilege is the obligation of all participants in the justice system, and some aspects of that privilege are now understood to attract quasi-constitutional protection: see *Alberta (Information and Privacy Commissioner) v. University of Calgary*, 2016 SCC 53 at para. 41. The order therefore engages this Court's interests in protecting its own processes, as well as the private interests of the plaintiff. Ideally, the plaintiff's claim for breach of confidence will never be made out, because the order was sought pre-emptively to prevent such an occurrence.
- [34] Waiver of the requirement for undertakings is common for interlocutory orders made for the purposes of ensuring compliance with statutes and bylaws (see *British Columbia (Attorney General) v. Wale* (1986), 9 B.C.L.R. (2d) 333 (C.A.) at 349; *Abbotsford (City) v. Shantz*, 2013 BCSC 2612 at para. 49), and that principle should apply to orders made to protect privilege a *fortiori*. In my view, compliance with the process laid out above, and the obligations to maintain the confidentiality of privileged information more generally, is not something that can or should attract a claim or an award in damages.

Additional Terms

- [35] I remain seized of any applications to vary this order, and I will try to make myself available to review any applications necessitated by this order. If I am not available another judge of this Court may hear the application.
- [36] Ordinarily the Estate would be entitled to its costs on this application as it has been substantially successful. The Estate submitted a draft order indicating that it is content with all parties bearing their own costs, and I consider that to be appropriate.

THE ORDER

- [37] In summary, I make the order in the following terms:
1. The order of this Court dated March 8, 2021, is varied and substituted with this order;
 2. Subject to paras. 3 and 4 of this order, the defendant, Brendan Ghag, is hereby restrained from disclosing, transmitting or conveying to others, except to the legal counsel for the Executor of the Estate of Sukhvinder Ghag, deceased (the "Estate") in Action No. 189435, New Westminster Registry (the "Action"), or to counsel for the Estate in these proceedings, information or documents relating to the Action that are protected by privilege, including the following documents or information that are presumed to be protected by privilege:

- i. Correspondence and other forms or records of communications between Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or the Estate, or their agents on the one hand, and their professional or legal advisors in the Action on the other hand, for the dominant purpose of obtaining or providing legal advice, or for the dominant purpose of obtaining or providing legal assistance with respect to pending or contemplated litigation;
 - ii. Correspondence and other forms or records of communications between Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or the Estate, or their professional or legal advisors in the Action on the one hand, and third parties on the other hand, in relation to the Action, made for the dominant purpose of obtaining information to assist in the provision of legal advice or legal assistance to Sukhvinder Ghag or his Estate with respect to pending or contemplated litigation;
 - iii. Correspondence and other forms or records of communications relating to the Action, created, prepared or received by the Estate, Brendan Ghag, Sukhvinder Ghag, Veena Charmaine Ghag, or their agents, for the dominant purpose of providing legal advice or legal assistance to Sukhvinder Ghag or the Estate, including with respect to pending, extant or contemplated litigation, mediation or arbitration in relation to the Action;
 - iv. Without prejudice communications written for the purpose of, and passing in the course of, bona fide negotiations between the Estate, Sukhvinder Ghag or Brendan Ghag or their solicitors in the Action on the one hand, and Amrik Ghag or his solicitors in the Action on the other hand, for the settlement of litigation and anticipated litigation; and
 - v. Notes, correspondence, minutes of evidence, information or memoranda being the work product of the legal advisors of the Estate or Sukhvinder Ghag in the Action which were prepared or obtained as part of legal counsel's brief.
3. The following documents are exempted from the above prohibition at para. 2 of this order:
- i. Documents that have already been filed in these proceedings, or any of the related proceedings involving Brendan Ghag and the Estate, without objection on the basis of privilege (excluding sealed affidavits and documents); and
 - ii. Documents that predate July 1, 2016.
4. If Brendan Ghag wishes to disclose a document or information that falls within para. 2 of this order, before disclosing, transmitting, or conveying the document or information to others, Brendan Ghag must either:
- i. Obtain written consent of the Estate's legal counsel in the Action or these proceedings; or
 - ii. Apply to court for a determination that he may disclose, transmit, or convey to others the documents or information in issue, by:
 - (1) Providing a description of the information in an affidavit and/or attaching the documents to an affidavit;

- (2) Serving that affidavit on counsel for the Estate in the Action, or in these proceedings, together with an application for the disclosure of the documents or information; and
 - (3) Applying for and obtaining a sealing order over that affidavit and application prior to the materials being filed.
- iii. All such proceedings are to proceed in camera unless otherwise ordered;
- 5. Madam Justice Marzari is seized of all applications to vary this order and, subject to availability, for disclosure of records under this order;
 - 6. The plaintiff shall file her Notice of Civil Claim in this action on or before April 16, 2021;
 - 7. There shall be no undertaking as to damages; and
 - 8. There shall be no costs of this application.

"Marzari J."

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