

CANADA / JUDGMENT

Gladiuk v. Gladiuk

2024 BCSC 1726

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Supreme Court of British Columbia

DECIDED

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2024 BCSC 1726 Gladiuk v. Gladiuk

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Gladiuk v. Gladiuk,

2024 BCSC 1726

Date: 20240918

Docket: E62373

Registry: New Westminster

Between:

Peggy Lynn Gladiuk

Claimant

And

Bruce Aaron Gladiuk and Bruce Gladiuk Contracting Ltd.,

Jane Doe, in her capacity as the Executrix of the Estate of John Gladiuk and

Tania June Gladiuk

Respondents

Before: The Honourable Justice Gibb-Carsley

Reasons for Judgment

Counsel for the Claimant:

A. James

Counsel for Respondent, Tania June Gladiuk:

S. Coblin

Place and Date Hearing:

New Westminster, B.C.

July 30, 2024

Place and Date of Judgment:

New Westminster, B.C.

September 18, 2024

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I. Introduction

- [1] In this family law proceeding, many of the parties share the same surname. As such, after introducing them by their full names, I will refer to them by their first names, meaning no disrespect.
- [2] One of the respondents, Tania June Gladiuk, brings this application seeking a declaration that the claimant, Peggy Lynn Gladiuk, has waived privilege over any and all documents and communications relating to legal advice that Peggy received from her lawyer in respect of information concerning the ownership interests in the former family home of Peggy and the respondent, Bruce Gladiuk, located at 2826 240 Street, Langley, BC (the "Property"). If the declaration is granted that Peggy has waived privilege, Tania seeks production of those documents.
- [3] During the marriage, title to the Property was held as joint tenants by Bruce and his father, John Gladiuk. John is now deceased. Tania is John's daughter and Bruce's sister. Her involvement in the proceedings arises because, before his death, John transferred his title in the Property to Tania.

- [4] The nature of the ownership of the Property, and thus Peggy's interest in the Property for the purposes of the division of family assets, is disputed in the family law proceeding as well as a separate petition initiated by John before his death, to among other things partition the Property. Peggy asserts that the Property was the family home and, as such, she is presumptively entitled to 50% of the entirety of the Property. Peggy also contends that, although John was on title to the Property, he held the Property in trust for her and Bruce.
- [5] Bruce, John and Tania also assert that while Bruce and John held the Property as joint tenants before John transferred title to Tania, John actually held a 70% ownership interest of the Property and Bruce held the remaining 30%.
- [6] In her family law claim, Peggy asserts that John always held the Property in trust for her and Bruce and that John's transfer of his interest in the Property to Tania amounts to a fraudulent conveyance.
- [7] While the ultimate determination of the ownership and entitlement interests to the Property are the subject of the broader proceedings, the issue now before the Court is narrow and relates to Tania's attempt to obtain disclosure of privileged communications between Peggy and her lawyer. More specifically, in response to John's application to partition the Property, Peggy provided an affidavit in which she referenced discussions with her lawyer regarding why she did not initially name John as a respondent in her notice of family claim and that she intended to amend her notice of family claim to include John and Tania as respondents. Tania asserts that by Peggy referencing her communications with her lawyer about this issue, Peggy has waived solicitor-client privilege.
- [8] Tania argues that Peggy has put her state of mind in issue with respect to her understanding of the ownership interests in the Property. Tania contends that Peggy is improperly and unfairly using her privileged communications with her lawyer to justify why she did not take steps earlier in the litigation to name John as a respondent or reference the potential of the trust claim. In short, Tania asserts that Peggy is using privilege as a sword as opposed to a shield, which is generally impermissible.
- [9] As I will describe below, I disagree with Tania's position and dismiss the application.
- [10] Solicitor-client privilege is of such importance to the proper functioning of the administration of justice that it is virtually impenetrable. In certain circumstances it can be waived, either voluntarily or impliedly. However, in the facts of this case, I find that there is no nexus between the legal advice communicated between Peggy and her lawyer and the material issues to be litigated between the parties. The extent, if any, of the ownership interests of Peggy, Bruce, John and Tania exist independently of any legal advice given to Peggy as referenced in her affidavit. Ultimately, a trier of fact will need to determine those interests. The communications between Peggy and her lawyer concerning how she should plead her family law claim are not relevant to that determination. Further, in my view, Peggy is not seeking to rely on her legal advice to gain an advantage in the litigation. As such, it cannot be said that she is attempting to rely upon the legal advice given to her as a benefit

while shielding the respondents from knowing the extent or details of those communications.

- [11] A trier of fact will ultimately need to determine Peggy's state of mind during the purchase of the Property and the twenty years she and Bruce resided at the Property. In other words, while the communications with her lawyer may have recounted and discussed her understanding of the facts related to the nature of the ownership interests in the Property over time, any legal advice provided in those communications was not a basis for that understanding. There is no advantage to Peggy or unfairness or prejudice created by her communicating in confidence with her lawyer to determine a litigation strategy and those communications remaining protected by privilege.

II. Background

- [12] The parties began living in a marriage-like relationship on October 14, 2000, and were married on October 19, 2002.
- [13] The Property was purchased in September 2000. Title to the Property was registered in the names of Bruce and John as joint tenants.
- [14] Peggy and Bruce lived in the Property from the date it was purchased until they separated on March 22, 2021.
- [15] On April 23, 2021, Peggy filed a notice of family claim commencing the family law proceedings (the "Initial NOFC"). In the Initial NOFC, Peggy advanced a claim for equal division of the family property and family debt. The Property was listed as the only real property in which Peggy had an interest. In the Initial NOFC, Peggy did not name John as a respondent or allege that John was holding an interest in the Property in trust for her and for Bruce. Further, in the Initial NOFC, Peggy did not limit her claim to her interest in only Bruce's interest in the Property.
- [16] After filing the Initial NOFC, Peggy registered a certificate of pending litigation on title to the Property (the "CPL").
- [17] In October 2021, after learning of the CPL, John filed a petition seeking, among other things, the following orders: (1) that the CPL be removed from the title of the Property; (2) for the sale of the Property; and (3) a determination and declaration of the parties' respective equitable interests in the Property; and (4) that John was entitled to occupational rent from October 11, 2000, to the date of sale of the Property (the "Petition Proceeding").
- [18] In response to the Petition Proceeding, on November 29, 2021, Peggy filed an affidavit in which she explained why she did not include John as a respondent in the Initial NOFC and why she planned to amend the Initial NOFC to include John as a respondent. Specifically, Peggy states at paras. 35 and 36 of her affidavit filed on November 29, 2021 (the "Affidavit"):

35 In discussion with my previous counsel, I did not consider advancing a claim against John in trust for the Property as it was always clear to me that John had no right to the property.

36 Based on the Petition filed by John, I believe it is necessary to include John in the family law litigation and have instructed my counsel, Darnell Smith, to make an application to seek to add John as a party to the Family Law Litigation and advance claims in trust.

(the "Statements").

[19] As I understand Tania's argument, it is primarily the reference Peggy makes to discussions with her previous counsel regarding whether to make a claim against John that Tania says puts Peggy's state of mind in issue that has impliedly waived solicitor-client privilege.

[20] Despite filing the Petition Proceeding, on February 2, 2022, John severed the joint tenancy and transferred his interest in the Property to Tania, for \$1.00.

[21] As referenced above, John died unexpectedly four days later on February 6, 2022.

[22] On April 29, 2022, Justice Crossin ordered that the Initial NOFC could be amended to add as respondents, "Tania and Jane Doe, in her capacity as the executrix of the Estate of John Gladiuk". The amendments added Peggy's claims that John held the Property in trust for Peggy and Bruce and, thus the Property was alleged to be family property. The amended notice of family claim also raises claims related to the transfer of the Property, specifically that John's transfer of his interest in the Property to Tania amounts to a fraudulent conveyance that was made for the purposes of hindering Peggy's entitlement to family property. Peggy filed the amended notice of family claim on August 2, 2022 (the "Amended NOFC").

[23] Justice Crossin also ordered that, on consent, the Petition Proceeding would be heard at the same time as the family law proceeding.

III. Parties' Positions

[24] Tania contends that Peggy put her state of mind in issue as to whether or not she had a trust claim against John's interest in the Property by referencing communications she had with her lawyer as to why she did not assert the claim against John in the Initial NOFC. Further, Tania says that Peggy's state of mind as to the ownership interests of the Property was also put in issue in the Statements because Peggy refers to discussions that led to her deciding to file the Amended NOFC naming John's estate as a respondent, asserting a trust claim against him and claiming that John's transfer of the Property to Tania was a fraudulent conveyance.

[25] Tania argues that Peggy has made the legal advice she received a substantive issue by taking the position, expressly or impliedly, that she relied on the advice received as an excuse or justification for the delay in bringing a trust claim against John's interest in the Property. Tania argues that Peggy's advanced positions are inconsistent with the maintenance of privilege and that fairness and consistency require disclosure of the solicitor's files.

Specifically, Tania argues that she cannot effectively defend Peggy's allegation that the Property was being held in trust without knowing if Peggy received legal advice in relation to John's property interest and the merits of her claim against it or whether Peggy intentionally chose not to advance that claim in the Initial NOFC because she knew it did not exist.

- [26] Peggy contends that she has not put her state of mind in issue in the proceedings in a way that is essential for a determination of the issues between the parties. She asserts that there is no waiver of privilege and that no issues arise regarding fairness and consistency in the circumstances of this case.

IV. Legal Principles

- [27] Solicitor-client privilege protects communications between a client and a lawyer made in confidence for the purpose of seeking or providing legal advice: *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795 at para. 79. The solicitor-client relationship is established when a prospective client has their first dealings with the lawyer's office to obtain legal advice: *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 876-878, 1982 CanLII 22.
- [28] Courts have repeatedly recognized that solicitor-client privilege is fundamental to our legal system and the substantive rule of law, and, as such, must be treated as close to absolute as possible: *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at para. 50, citing *R. v. McClure*, 2001 SCC 14; see also *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 24-26. Justice Adair succinctly set out the importance of solicitor-client privilege in *Levy v. British Columbia (Public Safety and Solicitor General)*, 2020 BCSC 1910:
- [11] Solicitor-client privilege is based on the needs of the administration of justice. It reflects the fact that clients seeking legal advice must be able to speak candidly with their lawyers without fear that what they say will be disclosed without their consent. The privilege thus is essential to the functioning of the solicitor-client relationship, and to the administration of justice. The Supreme Court of Canada has consistently held that communications protected by solicitor-client privilege should be disclosed only where absolutely necessary.
- [29] The party asserting solicitor-client privilege has the onus of proving it: *Hainan Dehong Real Estate Development Corporation v. WestBay Partners*, 2022 BCSC 24 [WestBay Partners] at para. 9. As solicitor-client privilege provides a protection that is fundamental to our legal system, it "will only yield in certain clearly defined circumstances": *Soprema* at para. 50, citing *McClure* at para. 35. As such, in determining whether there has been an implied waiver of solicitor-client privilege, courts must not rely on "discretion exercised on a case by case basis or balancing of interests": *WestBay Partners* at para. 14, citing *Soprema* at para. 30.
- [30] In *WestBay Partners*, Justice Matthews outlines the specific circumstances in which solicitor-client privilege can be waived:

- [12] Solicitor-client privilege will yield where there is voluntary and intentional waiver, or where it is deemed to be waived because the party has voluntarily taken a position that is inconsistent with maintenance of the privilege, and fairness and consistency require the evidence to be produced: *S. & K. Processors Ltd. v. Campbell Ave. Herring Producers Ltd.*, 1983 CanLII 407 (BC SC), [1983] B.C.J. No. 1499, 45 B.C.L.R. 218 (S.C.) at para. 6; *Brown v. Clark Wilson LLP*, 2014 BCCA 185 at paras. 23-32; *Do Process LP v. Infokey Software Inc.*, 2015 BCCA 52 at para. 23; *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118 at para. 47-48 citing *S. & K. Processors* at para. 6 and *United States v. Meng*, 2020 BCSC 1461.
- [13] Where a party voluntarily puts its state of mind in issue, and legal advice is relevant to the state of mind, implied waiver can be found: *Do Process* at para. 24-27; *Soprema Inc. v. Woolridge Mahon LLP*, 2016 BCCA 471 at para. 49. However, a "mere allegation as to a state of affairs on which a party may have received legal advice does not warrant setting aside solicitor-client privilege": *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp. - Canada*, 2004 BCCA 512 at para. 19. There must be a clear nexus between the party's state of mind and the privileged communications and, normally, a pleading of reliance on legal advice or a pleading of the absence of legal advice: *Soprema* at paras. 6, 49.
- [14] In determining implied waiver, because the privilege is as close to absolute as possible and only yields in clearly defined circumstances, it is not a matter of discretion exercised on a case by case basis or balancing of interests: *Soprema* at para. 30.
- [31] Courts must be cautious when considering whether privilege has been waived, and particularly where it is said to have been impliedly waived: *Ohlhauser v Kasian*, 2021 BCSC 892 at paras. 49-51.
- [32] In *Soprema* at para. 28, our Court of Appeal, on a review of the case law, notes "that the cases which actually find [implied] waiver typically involve a party voluntarily making its own understanding of the law, or its reliance on legal advice it received, a material issue". The Court of Appeal further notes at para. 29 that in other cases, where the legal advice or a party's understanding of its legal position is not material or relevant to the issues between the parties, waiver is not implied.
- [33] In *Gray v. 1534 Harwood Street (St. Pierre) Ltd.*, 2024 BCSC 742, Justice Gomery describes the test for implied waiver as follows:
- [36] A party may impliedly waive privilege by a pleading that voluntarily puts its understanding of its legal position in issue on a point that is material to the lawsuit, or relies on legal advice to justify its conduct; *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471 at paras. 22 and 54.
- [34] Importantly, given the facts of the case at bar, the Court in *Soprema* describes that a party will impliedly waive privilege only if it has voluntarily put in issue its understanding of its legal position or if the parties reliance on legal advice is material to the lawsuit. Additionally, the Court describes a distinct category of waiver cases that hinge on a different

issue: Soprema at para. 29. In those types of cases, the understanding of a legal position is not material or relevant to the issue joined between the parties. Instead, the material issue is the "fact or truth" of the state of affairs and any legal advice received is irrelevant to issues between the parties.

- [35] The consideration of the nature of the communication accords with our Court of Appeal's conclusion that a "voluntarily injection" requires more than a party simply stating their understanding of the law; instead, it normally requires pleading reliance on legal advice or its absence. In other words, it requires that the party admits it relied on the legal advice and the party chooses to use the legal advice as a substantive element of their claim or defence: *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263 at paras. 42-43, 46.
- [36] In *Soprema*, our Court of Appeal addresses the important distinction between a party receiving legal advice and receiving legal advice that may influence the party's state of mind. If the legal advice influences the state of mind of a party and then privilege is claimed, it is inevitable that upholding the privilege will confer a litigation advantage to the party asserting privilege because the opposing party would be denied access to relevant information as to the party's state of mind. However, the Court recognizes that the unfairness or prejudice that waiving privilege is designed to avoid, occurs only when the party is relying on the advice to justify its conduct while at the same time shielding it from disclosure: *Soprema* at para. 53.
- [37] It is with these legal principles in mind that I turn to my analysis.

V. Analysis

- [38] The core issue before the Court is whether the Statements made by Peggy in the Affidavit amount to an implied waiver of solicitor-client privilege.
- [39] As a starting point, I accept that protecting communications between a lawyer and client is crucial for the proper administration of justice. Clients must feel free to candidly discuss legal issues with their lawyer without the concern that those communications will be disclosed: *United States v. Meng*, 2020 BCSC 1461 at para. 23. While not absolute, solicitor-client privilege is nearly impenetrable: *R. v. McClure*, 2001 SCC 14 at paras. 34-35.
- [40] Both parties relied heavily on *Soprema* in support of their positions. I accept that *Soprema* sets out the governing legal principles regarding whether Peggy has waived privilege by including the Statements in the Affidavit.
- [41] In this regard, however, a consideration of the facts in *Soprema* is useful in explaining why I conclude that Peggy has not impliedly waived privilege. In *Soprema*, the action concerned whether the defendant, Wolrige Mahon LLP had negligently misrepresented certain facts to Soprema. Wolrige was an auditor. Soprema claimed that Wolrige made false representations concerning the accuracy of certain financial statements on which Soprema relied in deciding whether to exercise an option to purchase shares. The privileged documents

sought by Wolrige were legal opinions obtained by Soprema at or during the time Wolrige made its representations to Soprema. Wolrige argued that Soprema was required to disclose the legal opinions because those opinions would be relevant to Soprema's state of mind at the time the representations were made to determine whether or not Soprema relied on the alleged misrepresentation to its detriment and whether that reliance was objectively reasonable: Soprema at para. 17. In other words, because the case turned on the reasonableness of Soprema's reliance on Wolrige's representations, and because it was a claim of negligent misrepresentation, the legal advice and Soprema's reliance on that advice could be relevant. Ultimately, our Court of Appeal upheld solicitor-client privilege because Soprema did not seek to rely on the legal opinions to establish the reasonableness of its reliance on the representations.

[42] In describing how solicitor-client communications between a client and lawyer in a negligent misrepresentation claim has a nexus between the state of mind of the party alleging the misrepresentations and legal advice, our Court of Appeal in Soprema held:

[18] It follows that a claim of negligent misrepresentation necessarily puts in issue a plaintiff's "state of mind" both in respect of whether there was reliance in fact and, if so, whether that reliance was reasonable. It may often be that a party has received legal advice before entering the transaction, either about the transaction generally or, more specifically, about what it subsequently claims is the misrepresentation.

[Emphasis added.]

[43] In my view, the solicitor-client communications that Tania seeks are not relevant to a material issue in the litigation. The advice referenced in the Statements clearly occurred after Peggy entered into any agreement with Bruce or with John. Further, the solicitor-client communications are not a basis for Peggy forming a state of mind as to the nature of the ownership interests of the Property. In other words, Peggy's reliance on the legal advice is not a substantive element of her claim. Instead, the communications appear to be related to a litigation strategy for Peggy regarding how she would frame her family law claim. Put another way, her communications with her counsel made 20 years after she had first been living at the Property fails to have a nexus to Peggy's state of mind during the marriage or discussions regarding the ownership structure of the family home as between Peggy, Bruce and John.

[44] Peggy's discussions with her counsel regarding her notice of family law claim would be of a routine nature in which a client discusses the facts of the case with her lawyer seeking advice how to best resolve legal issues. Surely, such discussions without more must remain privileged to protect the fundamental civil and legal rights of citizens to communicate in confidence with their lawyers: *Doman Forest Products Ltd. v. GMAC Commercial Credit Corp.* - Canada, 2004 BCCA 512 at para. 12. In this regard, I note that a party merely disclosing that they received legal advice does not waive privilege: *Merritt v. Canada (Attorney General)*, 2020 BCSC 1887 at para. 39.

- [45] Ultimately, a trier of fact will need to determine based on the evidence adduced, whether John held his interest in the Property in trust for Peggy and Bruce. The communications or legal advice that led to how Peggy would file the Initial NOFC or the Amended NOFC does not alter the facts, nor does it assist Peggy or Tania. Put bluntly, the legal advice regarding Peggy's understanding of her entitlement to the Property does not change the true nature of the ownership of the Property. It provides no litigation advantage to Peggy that requires redress by waiving privilege. In other words, Peggy is not relying upon the fact that she obtained legal advice as a basis for her position that John did not hold a trust claim.
- [46] In respect of Tania's assertion that the Statements are a justification for Peggy not including John in the Initial NOFC, I accept that the Statements were included in the Affidavit as a justification and to explain, in part, why Peggy opposed the Petition Proceeding. However, in my view, it is an unnecessary justification. Justice Crossin granted the application to amend the notice of family claim and there has been no suggestion of any sort of limitation issues or laches argument that Tania has been prejudiced by the delay to file the Amended NOFC. In other words, the Statements are generally a gratuitous explanation as to why the Initial NOFC was filed without naming John and asserting the trust claim and setting out that Peggy planned to file the Amended NOFC. I find there is no litigation advantage conferred on Peggy through her reference to her discussions of the litigation strategy with her counsel in the Affidavit that creates a situation of unfairness for Tania or the other respondents.
- [47] I find the various steps taken by Peggy in filing her pleadings in these proceedings entirely unsurprising. Peggy filed the Initial NOFC naming only Bruce as a respondent and claiming equal interest in the Property. She explains in her affidavit, that this was because she believed that the Property was family property to be divided between her and Bruce equally and that John had no interest. However, when John commenced the Petition Proceeding, and subsequently transferred his legal interest to Tania in the Property, the circumstances changed. In reaction, Peggy filed the Amended NOFC to account for the developments. Further, I fail to find any unfairness to Tania or the other respondents as a result of the steps taken by Peggy.
- [48] As set out above, the true nature of the ownership interests will be an issue for trial. Indeed, the expected issues to be resolved at the family trial and the hearing of the Petition Proceeding are as follows:
- a) What, if any, part of the Property is not family property for the purposes of division of family assets under the Family Law Act, S.B.C. 2011, c. 25;
 - b) Whether John possessed an intention to delay or hinder Peggy's claim for a share of the Property by severing joint tenancy and making the transfer; and
 - c) Whether Tania holds her interest in the Property on resulting and/or constructive trust for the estate of John.

- [49] To reiterate, I conclude that Peggy's state of mind in relation to the communications with her lawyer regarding how to plead her notice of family claim is irrelevant to the ultimate determination of those issues. Moreover, Tania and the respondents are not prejudiced by Peggy maintaining the privilege as no unfair litigation advantage is gained by Peggy in asserting the privilege.
- [50] Peggy is not relying on legal advice as a basis for her understanding of the ownership interests in the Property between Peggy, Bruce and John. Those facts will exist independently of any legal advice provided by Peggy's lawyer and Peggy has not pleaded reliance on legal advice as part of her claim. At most, the Statements explain why Peggy did not initially list John as a respondent in the Initial NOFC. Again, fairness and consistency considerations only apply where the privilege holder has attempted to use and at the same time shelter behind privileged documents: *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118. I find that Peggy is not using the reference to her communications with her lawyer in a manner that unfairly advances her arguments or enhances her legal position.

VI. Conclusion

- [51] Based on the foregoing, I am satisfied that Peggy has not impliedly waived privilege over her communications with her counsel as alleged by Tania. As such, I dismiss Tania's application in its entirety.

VII. Costs

- [52] Peggy has been entirely successful in resisting Tania's application. As such, she is entitled to her costs of the application, in any event of the cause. If there are any issues of costs of which I am unaware, the parties have leave to make arrangements before me to address those issues through Supreme Court Scheduling.
- [53] I thank counsel for their well-argued submissions.

"Gibb-Carsley J."

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