

CANADA / JUDGMENT

Red Branch Investments Limited v. Long

2020 BCSC 1924

COURT

Supreme Court of British Columbia

DECIDED

24 November 2020

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2020 BCSC 1924 Red Branch Investments Limited v. Long

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Red Branch Investments Limited v. Long,

2020 BCSC 1924

Date: 20201124

Docket: S187807

Registry: Vancouver

Between:

Red Branch Investments Limited and Gerald Wright

Plaintiffs

And

David P. Long

Defendant

Before: The Honourable Madam Justice Iyer

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs, appearing via teleconference:

O. Ahmed

Counsel for the Defendant, appearing via teleconference:

A. Andrisoia

Place and Date of Trial/Hearing:

Vancouver, B.C.

November 19, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 24, 2020

- [1] THE COURT: I am going to give my decision in this matter. However, I reserve the right to make minor editorial changes in the event that a transcript is ordered. I will not change anything of substance.
- [2] The plaintiffs, Red Branch Investments Limited and Gerald Wright, seek a declaration that the defendant David Long has waived solicitor-client privilege over both (a) communications between himself and his former solicitors; and (b) the contents of his former solicitor's files created on or before September 18, 2017, to the extent that they relate to an action between the same parties in this court in 2015 (reported at 2015 BCSC 2192). I will refer to the former solicitor's files as the "Solicitor Files" and to the 2015 action as the "Royalty Action".

Background

- [3] Mr. Long commenced the Royalty Action in 2012. He claimed that he was entitled to a beneficial interest in a royalty to a potash property in Thailand held by Red Branch. After a 16-day trial, Justice Wong found in favour of Mr. Long. He later awarded special costs against Red Branch and Mr. Wright based on his findings about Mr. Wright's conduct: 2016 BCSC 274. Mr. Wright and Red Branch appealed the judgment in the Royalty Action, but were unsuccessful, 2017 BCCA 256.
- [4] In August 2017, Mr. Long filed an appointment for the assessment of special costs. Red Branch and Mr. Wright requested production of the Solicitor Files to prepare for the special costs hearing. On September 18, 2017, the former solicitors provided what they described as "a USB key with our entire file related to the special costs assessment" and copies of Mr. Long's retainer letters with the former solicitors. The letter also stated: "Please advise the writer when you wish to come to review our paper file and we will arrange to have it available to you. Most of the paper file will appear in the electronic file."
- [5] After reviewing the electronic Solicitor Files, since the order dismissing their appeal had not yet been entered, Mr. Wright and Red Branch sought to reopen the appeal based on fresh evidence obtained from those files. Before the Court of Appeal, they argued that the evidence in the Solicitor Files showed that Mr. Long had misled the court in the Royalty Action. Specifically, they said that the new evidence showed that John Darch, a key witness

in the Royalty Action whose evidence was crucial to Mr. Long's success at trial, was not neutral or independent, as presented to the court, but was actively advising and financially assisting Mr. Long in the litigation. Mr. Wright and Red Branch filed the relevant evidence from the Solicitor Files in an affidavit. Mr. Long did not object to its disclosure. Both parties made submissions to the Court of Appeal based on it.

- [6] The Court of Appeal dismissed the motion to reopen the appeal, but held that the trial court retains jurisdiction to hear a challenge to an entered judgment alleging fraud or perjury by means of a new action. Accordingly, Mr. Wright and Red Branch commenced this action, which is set for a 10-day trial starting on December 7, 2020.
- [7] In his response to civil claim, Mr. Long asserted privilege over the Solicitor Files. The parties filed cross-applications relating to the privilege issue. However, in October 2019, they resolved that dispute, withdrawing both applications and agreeing as follows:
- (a) Mr. Long would not claim privilege over the content of the Solicitor Files that were delivered to Mr. Wright and Red Branch on September 18, 2017;
 - (b) Mr. Long would deliver his list of documents, including those from the Solicitor Files, within a month; and
 - (c) To the extent that Mr. Wright and Red Branch claim that there are other documents in the Solicitor Files that Mr. Long does not list, whether privilege attaches will be decided at a later date.
- [8] Mr. Long delivered his list of documents. It included documents from the Solicitor Files relating to correspondence between Mr. Long and his former solicitors regarding Mr. Darch's involvement in the Royalty Action, Mr. Long's communications with Mr. Darch, and memoranda summarizing meetings and phone calls with Mr. Darch.
- [9] In October 2020, Mr. Wright and Red Branch demanded production of all records of communication between Mr. Darch and Mr. Long's former solicitors and a copy of the "folder of Darch correspondence". This is a term Mr. Long used in an email to his former solicitor dated March 2015, which email was disclosed to Mr. Wright and Red Branch.
- [10] Mr. Long asserted privilege over all communications with his former solicitors other than the material delivered to Mr. Wright and Red Branch for the special costs assessment. He has not confirmed whether there are paper records in the solicitor file that were not provided to Mr. Wright and Red Branch in September 2017, but which they were invited to review.

Discussion

- [11] There is little dispute between the parties about the law governing waiver of privilege. In fact, Mr. Long's primary argument in response to the application is not based on waiver at all. He says that Mr. Wright and Red Branch are not entitled to the documents they seek

because they do not relate to any material fact in the action because of the way their notice of civil claim is pleaded. In the alternative, Mr. Long says that his waiver was restricted to the material actually delivered to Mr. Wright and Red Branch on September 18, 2017 and anything beyond that is privileged.

- [12] Neither of these arguments are persuasive. The notice of civil claim (NOCC) in the present action is not restricted in the way Mr. Long claims. In the statement of facts, the NOCC sets out key statements made by Mr. Long and by Mr. Darch in the Royalty Action. These include Mr. Long's testimony that he never received any assistance, financial or otherwise, from Mr. Darch relating to the Royalty Action and that they never discussed it. Mr. Darch's testimony was that he had no friendship, financial or business interest with any party to the Royalty Action; he had only spoken to Mr. Long once about it and had no interest in its outcome.
- [13] The statement of facts describes the facts discovered from the material uncovered in the Solicitor Files that conflict with Mr. Long and Mr. Darch's testimony as the "New Evidence". Mr. Long says that the cause of action is restricted to the New Evidence, so anything other than that evidence is irrelevant to the plaintiffs' claim.
- [14] However, para. 35 of the statement of facts states the material facts without confining them to the New Evidence:

In particular, and contrary to the Long Trial Evidence and the Darch Trial Evidence,

- (a) Long received assistance on more than one occasion from Darch with respect to the Royalty action;
 - (b) Long had extensive discussions, both orally and by way of correspondence, with Darch respecting the Royalty Action during the course of the Royalty Action;
 - (c) Darch was not a reluctant witness who had no interest in the outcome of the Royalty Action, but, in fact, had volunteered to testify on behalf of Long and provided extensive and detailed litigation advice and strategy to assist Long in succeeding in the Royalty Action against Wright and Red Branch;
 - (d) Darch discussed the litigation with Long on several occasions prior to and after the commencement of the Royalty Action; and
 - (e) Darch provided financial assistance to Long by paying for portions of his legal accounts directly, or indirectly through his company Western Investments, during the course of the Royalty Action.
- [15] The legal basis part of the NOCC asserts fraud, collusion, and/or perjury by Mr. Long in the Royalty Action. It claims that, if the New Evidence had been available to the trial judge, the outcome of the Royalty Action would have been different. However, it does not restrict the cause of action to the new evidence. Mr. Long's first argument fails.

- [16] Mr. Long's alternative argument is that he only waived privilege over the part of the Solicitor Files that his former counsel actually delivered to Mr. Wright and Red Branch in 2017 for the special costs assessment.
- [17] Where a party chooses to pursue special costs, it waives privilege over the whole of its solicitor-client file. *Gichuru v. Smith*, 2014 BCCA 414, at para. 120. Waiver of solicitor-client privilege in one proceeding applies to a second related proceeding where the waiving party is a party. *Le Soleil Hotel & Suites Ltd. v. Le Soleil Management Inc.*, 2007 BCSC 1420.
- [18] Here, the parties to the present action are the same as in the Royalty Action and the relationship between the two proceedings could not be closer. Disclosure of a privileged document waives privilege not only over that document but also over other communications between the solicitor and client on the same subject matter. This is necessary to avoid selective and self-serving disclosure. See *McDermott v. McDermott*, 2013 BCSC 534, at paras. 112 to 115. Even if Mr. Long's intention was only to waive privilege over the electronic copy of the Solicitor Files, in the circumstances of this case, fairness requires disclosure of all communications relevant to the present action.
- [19] Mr. Long also says that he never authorized the original disclosure of the Solicitor Files in 2017. However, there is no evidence that his former solicitors lacked authority to pursue the special costs assessment. Therefore, the privilege was waived: *Cheung v. 518402 B.C. Ltd.*, 1999 CanLII 2654 (BC SC). In any event, Mr. Long did not object to the affidavit containing portions of the Solicitor Files that Mr. Wright and Red Branch submitted to the Court of Appeal when they were seeking to reopen the appeal and he made extensive submissions based on it.

[20] In conclusion, I grant the application as follows:

I make the following declarations:

- (a) Mr. Long has waived privilege over the contents of the files of his former solicitors Clark Wilson LLP and Fraser Litigation Group created on or before September 18, 2017 relating to their representation of Mr. Long in the royalty action;
- (b) Mr. Long has waived privilege over all of his communications with his former solicitors on or before September 18, 2017 relating to their representation of Mr. Long in the royalty action; and
- (c) Mr. Long has waived privilege over all communications between his former solicitors and Mr. Darch or his assistant, Jacquelyn, on or before September 18, 2017 relating to the royalty action.

Mr. Long shall deliver, within 14 days of today's date, an amended list of documents listing:

- (a) all documents within his possession or control from his former solicitors that could be used at trial to prove or disprove a material fact; and

- (b) all documents within his possession or control consisting of:
- (i) all correspondence or other records of communication between Mr. Darch and Mr. Long's former solicitors relating to the royalty action; and
- (ii) if it can be located, a copy of the "folder of Darch correspondence" referred to in Mr. Long's email to Ms. Tribe dated March 15, 2015.

Mr. Wright and Red Branch shall have their costs of this application in the cause.

"Iyer J."

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