

CANADA / JUDGMENT

Red Branch Investments Limited v. Long

2021 BCSC 283

COURT

Supreme Court of British Columbia

DECIDED

23 February 2021

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2021 BCSC 283 Red Branch Investments Limited v. Long

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Red Branch Investments Limited v. Long,

2021 BCSC 283

Date: 20210223

Docket: S187807

Registry: Vancouver

Between:

Red Branch Investments Limited and Gerald Wright

Plaintiffs

And:

David P. Long

Defendant

Before: The Honourable Mr. Justice G.C. Weatherill

Reasons for Judgment

Counsel for the Plaintiffs, appearing by teleconference:

J.P. Sullivan

A.R. Way

Counsel for the Defendant, appearing by teleconference:

J.R. Schmidt

Counsel for the Attendee, John Darch, appearing by teleconference:

R. DeFilippi

Place and Dates of Hearing:

Vancouver, B.C.

February 11-12, 2021

Place and Date of Judgment:

Vancouver, B.C.

February 23, 2021

Introduction

- [1] In this action, the plaintiffs seek to set aside a judgment obtained against them in a previous proceeding under the Vancouver Registry Action S122642 (the "Royalty Action") on the basis that the defendants obtained it by fraud, collusion, and/or perjury. Reasons for Judgment in the Royalty Action are indexed at Long v. Red Branch Investments Limited, 2015 BCSC 2192.
- [2] Before me are two related applications which can broadly be described as:
- a) that of the defendant ("Long") filed November 12, 2020 for production of the plaintiffs' solicitor/client communications and litigation files in the Royalty Action ("Privilege Waiver Application"); and
 - b) that of the plaintiffs ("Red Branch/Wright") filed November 23, 2020 for an order setting aside the defendant's appointment to examine for discovery Owais Ahmed (Red Branch/Wright's lead counsel in both the Royalty Action and this action) as agent for the corporate plaintiff, Red Branch ("Ahmed XFD Application").
- [3] By the afternoon of the second day of this two-day hearing, it became clear that there was insufficient time available to hear the Ahmed XFD Application. At the suggestion of the Court, which was concurred with by counsel, that application was adjourned to April 8, 2021, to be heard by me with the benefit of my decision in the Privilege Waiver Application.

Background

- [4] In the Royalty Action, Long, as the plaintiff, sued Red Branch Investments Limited ("Red Branch") and Gerald Wright ("Wright"), alleging that Red Branch/Wright held 50% of a 1/3 royalty from a Thailand potash deposit in trust for him. Another 1/3 royalty interest was held by a long-time business associate of both Wright and Long named John Darch.

- [5] The trial of the Royalty Action took place over 16 days during the period from March to September 2015 before Justice Wong of this Court. On November 27, 2015, Wong J. issued his Reasons for Judgment. He found in favour of Long.
- [6] Mr. Darch testified at trial as part of Long's case. Justice Wong wrote:
- [50] Mr. Darch is a neutral witness, having no bias in favour of either of the parties. He has no financial interest in the outcome of this litigation.
- [7] On February 9, 2016, Wong J. ordered that Long was entitled to special costs of the Royalty Action to be assessed forthwith.
- [8] Red Branch/Wright appealed Wong J.'s judgment. The appeal was dismissed on July 12, 2017: Long v. Red Branch Investments Limited and Gerald Wright, 2017 BCCA 256.
- [9] On September 18, 2017, in support of the assessment of special costs and at the request of counsel for Red Branch/Wright, Long's then-counsel provided Red Branch/Wright with what was purportedly a copy of Long's counsel's entire electronic file ("Solicitor's File") related to the Royalty Action.
- [10] Red Branch/Wright allege in this action that the Solicitor's File revealed for the first time that Darch was not the neutral, unbiased witness he led Wong J. to believe he was. They allege that the Solicitor's File demonstrates that Darch was not only an active participant in the prosecution of the Royalty Action on behalf of Long, but he also provided some of the funding for it ("New Evidence").
- [11] On March 28, 2018, the Court of Appeal dismissed a motion by Red Branch/Wright to re-open the appeal on the basis of the New Evidence. In doing so, the Court of Appeal commented that its decision did not pose an impediment to a fresh action in this Court to set aside the judgment in the Royalty Action on the basis of fraud: Long v. Red Branch Investments Limited, 2018 BCCA 115.
- [12] This action was commenced by Red Branch/Wright on July 13, 2018 seeking such an order. At paragraph 33 of the Notice of Civil Claim, it is alleged that:
33. The New Evidence was not discoverable by the Plaintiffs, through reasonable due diligence or otherwise, prior to the pronouncement of the Order for Judgment in the Royalty Action.
- [13] Long's Response to Civil Claim pleads, inter alia, that:
22. Further, or in the alternative, what is alleged to be "new evidence" could have been discovered by Mr. Wright and Red Branch in the course of cross-examination during the trial of the Royalty Action.
25. Further, or in the alternative, the alleged "New Evidence", would have been discoverable by Mr. Wright and Red Branch through the exercise of reasonable due diligence prior to, and during, the trial of the Royalty Action.

- [14] After filing his Privilege Waiver Application, counsel for Long served on counsel for Red Branch/Wright an appointment to examine for discovery Mr. Ahmed. The appointment was served in anticipation of obtaining the orders sought in the Privilege Waiver Application.
- [15] The trial of this action was scheduled to commence on December 7, 2020 for ten days. In part because the applications currently before me were filed, that trial date proved to be unworkable and the trial was adjourned. A new trial date has not yet been obtained.

The Privilege Waiver Application

Solicitor-Client Privilege

- [16] A central issue in this proceeding is whether and to what extent the New Evidence was discoverable upon the exercise of reasonable due diligence by Red Branch/Wright and their counsel during the Royalty Action: *Palmer v. The Queen*, [1980] 1 S.C.R. 759 at 775.
- [17] The concept of "due diligence" refers to the steps taken or that reasonably should have been taken at the relevant time: *Black's Law Dictionary*, 11th ed, subo verbo "diligence"; *L'Abbé v. Allen-Vanguard*, 2011 ONSC 7575 at paras. 10 and 42.
- [18] Counsel for Long submits that the pleading set out in paragraph 33 of the Notice of Civil Claim manifestly implicates the legal advice given and the instructions received by counsel for Red Branch/Wright in the Royalty Action. He submits that by pleading and putting in issue whether the New Evidence would have been discoverable upon the exercise of reasonable due diligence, Red Branch/Wright have implicated their and their counsel's conduct in defending the Royalty Action. He submits that, by doing so, they have waived privilege over all communications with their counsel in respect of the Royalty Action, and that it would be unfair and contrary to the interests of justice to preclude Long from inquiring into what was known about the New Evidence, by whom, and when. Long's counsel submits that, absent production of these communications, there will be no way for Long to comprehensively test Red Branch/Wright's allegation that the New Evidence was not discoverable by the exercise of reasonable due diligence. He submits that, without this production, Red Branch/Wright will be able to escape scrutiny on the essential issue at trial.
- [19] Specifically, Long submits that the plea at paragraph 33 of the Notice of Civil Claim has put squarely in issue what was known by Red Branch/Wright and/or its counsel in the Royalty Action regarding:
- a) Darch's involvement in or knowledge of the issues raised in the Royalty Action;
 - b) Darch's participation in the Royalty Action by independently procuring documents and other evidence for Long;
 - c) Darch's participation in the Royalty Action as a witness; and
 - d) any financial connection Darch had with Long during the course of the Royalty Action.

[20] Long relies on the following decisions of the courts of this province:

- Harry v. Her Majesty the Queen et al, 2001 BCSC 1566;
- Brown v. Clark Wilson LLP, 2014 BCCA 185;
- Do Process LP v. Infokey Software Inc., 2015 BCCA 52;
- 0782484 B.C. Ltd. v. E-Pro Enterprises Inc., 2017 BCSC 2245 and
- Araya v. Nevsun Resources Ltd., 2019 BCCA 205

for the proposition that solicitor-client privilege is impliedly waived where a party:

- a) puts its understanding of its legal position in issue; or
- b) puts its state of mind in issue in a manner establishing a clear nexus between its state of mind and the privileged communications.

[21] Long submits that these authorities support the proposition that where privileged communications may be highly relevant to the state of mind, fairness and consistency may require waiver if upholding the privilege would confer an unfair litigation advantage on the party claiming privilege.

[22] Red Branch/Wright counter that the approach to the law of waiver of privilege in BC has changed as a result of the BC Court of Appeal's decision in *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, and as reinforced by its decision in *H.M.B. Holdings Limited v. Replay Resorts Inc.*, 2018 BCCA 263. In their submission, implied waiver can no longer be supported merely by a finding that a party's state of mind as to its understanding of its legal position or advice it received is relevant to a material issue: *Soprema* at para. 48.

[23] The question of what the court in *Soprema* did and did not do regarding the law of implied waiver of solicitor-client privilege was addressed by this Court in 0782484 B.C. Ltd. After reviewing the *Soprema* decision in detail, Justice Voith (as he then was) observed:

[34] I have addressed *Soprema* at some length because it is important to recognize what *Soprema* did and what it did not do. *Soprema* did clarify and address a specific issue in respect of which the authorities in British Columbia had been unclear. That issue was the test for implied waiver in cases where the cause of action advanced, as opposed to any conduct on the part of a plaintiff, brings into play the plaintiff's "state of mind" and its reasonable reliance on a representation made to it

[35] *Soprema* did not, however, change the law of solicitor-client privilege, or waiver, or implied waiver more broadly. It did not change the ongoing importance of either fairness or consistency in the analysis of questions of implied waiver.

[24] It is firmly entrenched in our law that solicitor-client privilege, which protects the fundamental civil and legal rights of a citizen to communicate in confidence with their lawyers, will not be lightly abrogated and must be as close to absolute as possible to ensure

public confidence and retain relevance: 0782484 B.C. Ltd. at paras. 36-37. These rights will only yield in certain clearly defined circumstances, and does not involve a balancing of interests on a case-by-case basis: Soprema at para. 50; 0782484 B.C. Ltd. at para. 38. Such communications should only be disclosed where "absolutely necessary", applying "as restrictive a test as may be formulated short of an absolute prohibition in every case": Soprema, at para. 50. Caution must be exercised not to treat implied waiver as ultimately a discretionary call about trial fairness: Soprema at para. 51. Our Court of Appeal in Soprema went on to observe that:

- [53] Where legal advice may have influenced a party's "state of mind" on a material issue, it is inevitable that upholding the privilege will confer a litigation advantage on the party claiming it because the other would be denied access to relevant information about the opposing party's state of mind. One might think that this is an inevitable result of recognizing and upholding claims of solicitor-client privilege because part of the point of privilege is to protect from disclosure communications which are otherwise material and relevant. But it does not follow from this that that litigation advantage is "unfair". I do not think one can properly describe a litigation advantage "unfair" when it results from the recognition and protection of a fundamentally important principle in the legal system. Furthermore, protecting privilege in these circumstances does not raise an issue of inconsistency because the party asserting the privilege is not relying on the advice it received to justify its conduct at the same time as it shields that advice from disclosure.
- [25] Justice Voith made clear in E0782484 B.C. Ltd. at para. 39 that the foregoing comments in Soprema did not obviate the need to consider both fairness and consistency when addressing an implied waiver of privilege. In Soprema at para. 30, our Court of Appeal noted that, for example, fairness and consistency will required a finding of implied waiver where:
- a) a party waives privilege over part of a communication; and
 - b) a party relies on legal advice it received as an element of its claim or defence. Having raised legal advice, for example to justify or explain its conduct, a party cannot in fairness then be permitted to assert privilege to prevent an opposing party from exploring the validity of the claim.
- [26] A claim of waiver of privilege cannot be grounded in the absence of either pleadings, evidence or argument asserting reliance on legal advice: H.M.B. at para. 47.
- [27] In *Michelson v. Borden Ladner Gervais LLP*, 2017 BCSC 1584, this Court stated:
- [18] Soprema establishes three requirements for implied waiver:
- (a) the state of mind of the party asserting the privilege is an element of a claim or defence;
 - (b) the party asserting the privilege is known to have received legal advice relating to that issue; and

- (c) the party asserting the privilege is relying on the legal advice to justify its conduct.
- [28] It is clear that Red Branch/Wright's state of mind is relevant to the question of whether or not it they would have been able to discover the New Evidence with the exercise of reasonable due diligence. The first element is established.
- [29] However, Long has failed to demonstrate either of the second or third elements that he must establish for a finding of an implied waiver of privilege. The New Evidence is comprised entirely of documents (email communications) that were exchanged with and in the possession of Long's counsel in the Royalty Action. None of the documents was provided to Red Branch/Wright or their counsel. There is no evidence that Red Branch/Wright received or is relying upon legal advice relating to the New Evidence, let alone having put legal advice in issue. There is no evidence that Red Branch/Wright or their counsel had any information that could have led them on a train of enquiry that may have led to the existence of the New Evidence.
- [30] At best, Long is on the preverbal "fishing expedition".
- [31] I find that there has been no implied waiver of solicitor-client privilege over the communications between Red Branch/Wright and their counsel in respect of the Royalty Action.

Litigation Privilege

- [32] Counsel for Long also seeks production of Red Branch/Wright's counsel's litigation file in the Royalty Action to the extent that it contains documents that are relevant to the issues in this proceeding.
- [33] He submits that any litigation privilege that may have attached to those documents is fully spent because the Royalty Action is now concluded. He submits that the litigation privilege does not extend to the present action because it is a separate dispute and does not arise from the same juridical source: *Lougheed Estate v. Wilson*, 2009 BCCA 438 at paras. 17-25.
- [34] In support of his position, he points to the Application Response filed by Red Branch/Wright on September 25, 2019 in respect of an application by Long seeking a declaration that solicitor-client privilege had not been waived over the New Evidence because it was disclosed by his former counsel without his knowledge or consent. In their Application Response, Red Branch/Wright advanced the position that the issues in the Royalty Action and this action are "completely distinct", do not share the same essential purpose and that any litigation privilege attaching to the file did not endure.
- [35] Although Long's application was never heard because the issues raised were ultimately resolved, counsel for Long nevertheless submits that Red Branch/Wright are now estopped from taking the contrary position that litigation privilege has endured.

- [36] I agree with counsel for Red Branch/Wright that the position taken in the Application Response was not binding. There is no evidence that Long relied upon that position to his detriment. In any event, in my view, regardless of the strategic position that may have been initially taken, if the application had been heard and decided, the position would have been unsuccessful.
- [37] Although the Royal Action itself has ended, the litigation that gave rise to it remains pending or may reasonably be apprehended. It is manifestly clear that the claim in this action arises from the same juridical source as the Royalty Action. It involves the same parties and arises from the same cause of action or juridical source. Much if not all of the evidence in the action that may well be launched if this action succeeds will be the same. In such circumstances, the underlying purpose of litigation brief privilege, namely the protection essential to the proper operation of the adversarial process, continues: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 38-39, 41.
- [38] I am not persuaded that litigation privilege has ended in respect of Red Branch/Wright's counsel's files on the Royalty Action. Indeed, as this Court stated in a previous determination in this action, "the relationship between the two proceedings could not be closer": *Red Branch Investments Limited v. Long*, 2020 BCSC 1924 at para. 18.
- [39] Indeed, in my view, this action is so closely related to the Royalty Action that the continuation of the litigation privilege attaching to the files of Red Branch/Wright's counsel's files in respect of the Royal Action is warranted.
- [40] All other relief sought by Long in the Privilege Waiver Application was contingent upon a finding that he was entitled to production of documents over which Red Branch/Wright claim privilege. Accordingly, Long has failed to demonstrate entitlement to that other relief.

Conclusion

- [41] Long's application is dismissed in its entirety.
- [42] Red Branch/Wright are entitled to their costs of the application at Scale B.

"G.C. Weatherill J."

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