

CANADA / JUDGMENT

Ross v. Bragg

2020 BCSC 337

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Supreme Court of British Columbia

DECIDED

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2020 BCSC 337 Ross v. Bragg

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Ross v. Bragg,

2020 BCSC 337

Date: 20200309

Docket: S152748

Registry: Vancouver

Between:

Craig Ross and CR Design and Build Corp.

Plaintiffs

And

Kal Bragg, Morag Kerr, Jonathan Martin, Ann Chiasson,

Sea to Sky Developments Ltd., Sea to Sky Real Estate

Squamish Ltd. and 411043 B.C. Ltd.

Defendants

Before: Master Elwood

(In Chambers)

Reasons for Judgment

Counsel for the Plaintiffs:

S.G. Denholm

Counsel for the Defendants, Kal Bragg and Morag Kerr:

L. Morrison

Place and Date of Hearing:

Vancouver, B.C.

February 12, 2020

Place and Date of Judgment:

Vancouver, B.C.

March 9, 2020

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I. INTRODUCTION

- [1] The plaintiffs apply for production of a number of documents over which certain of the defendants assert common interest privilege and an exchange of text messages over which those defendants assert settlement privilege.
- [2] The plaintiffs argue that common interest privilege is not a stand-alone ground of privilege, but rather a defence to an allegation that an underlying privilege was waived by disclosure to a third party. In this case, they argue, no underlying privilege has been claimed or could be claimed for the documents over which the defendants assert common interest privilege. Further, the plaintiffs argue that the defendants have failed to establish settlement privilege over the text messages.

II. BACKGROUND

- [3] This action arises from a development opportunity in Squamish. The plaintiffs, Craig Ross and his company, CR Design and Build Corp. ("CR Design"), are in the business of project management, development and construction in the Sea to Sky Corridor. The defendant, Kal Bragg, was employed by CR Design and, in that capacity, entered into a number of joint ventures with Mr. Ross. The defendant Morag Kerr is Mr. Bragg's spouse (together, the "Bragg Defendants").
- [4] In 2013, Mr. Ross informed Mr. Bragg of a development opportunity in Squamish involving lands owned or controlled by Ann Chaisson and a number of companies she owns, Sea to Sky Developments Ltd., 411043 B.C. Ltd. and Sea to Sky Real Estate Squamish Ltd. (collectively, the "Chaisson Defendants").
- [5] The plaintiffs allege that Mr. Bragg breached the terms of his employment contract and fiduciary duties by pursuing the Squamish opportunity for his own personal benefit. The plaintiffs further allege that the Chaisson Defendants and the defendant, Jonathan Martin, acted in concert with Mr. Bragg and entered into agreements with him to develop the Squamish opportunity with knowledge that he was acting in breach of his duties.
- [6] The three sets of defendants deny any agreement between them or any obligation to Mr. Bragg with respect to the Squamish opportunity, other than Mr. Bragg having lent some funds to the Chaisson Defendants. Mr. Bragg counterclaims against CR Design alleging that he was wrongfully dismissed.
- [7] The documents at issue on this application are documents listed in part 4 of the amended list of documents of the Bragg Defendants for which privilege from production is claimed. They are:
- a) Text messages between Mr. Ross and Mr. Bragg (BRA00789);
 - b) Redacted portions of minutes of a meeting between Ms. Chaisson, Mr. Bragg and Mr. Martin (BRA01321);
 - c) E-mails between Ms. Chaisson and counsel for the numbered company, 411, including bills from counsel for 411 (BRA01324, 1761, 1765, 1769, 1790, 1794, 1798 and 1823);
 - d) An email between the defendants and counsel for 411 (BRA01772);
 - e) E-mails between the defendants, their counsel and counsel for 411, with attachments (BRA01774, 1779, 1786 and 1788); and
 - f) Communications between counsel for 411 and counsel for BCR Properties, an arm's length third party (BRA01830 and 1837).

[8] The Bragg Defendants have revised the grounds on which privilege is claimed in their amended list of documents, such that the two categories of asserted privilege which remain in issue with respect to these documents are:

a) Common interest privilege, which is described in the amended list of documents as follows:

C. Confidential communications between parties to the litigation or a commercial transaction, their solicitors, and their agents and each other made for the dominant purpose of conducting or aiding in the conduct of pending or contemplated litigation or commercial transaction where the parties have a common interest with respect to that litigation or commercial transaction;

b) Settlement privilege, which is described as:

E. Documents consisting of correspondence and communications relating to the settlement or compromise of anticipated or actual litigation with the intention that they would not be disclosed in the event that negotiations failed, whether or not indicated as "without prejudice".

[9] In the amended list of documents, the Bragg Defendants claim common interest privilege over all of the documents at issue, with the exception of (a), text messages between Mr. Ross and Mr. Bragg, over which they assert settlement privilege.

III. ANALYSIS

[10] The onus of establishing that a document is privileged from production rests on the party who asserts the privilege. The party asserting the privilege must provide evidence that supports and explains the claim of privilege. Rule 7-1(20) authorizes the court to review the documents in issue for the purpose of deciding the validity of the claim; however, this is generally only done when the asserting party cannot provide the necessary evidence without revealing the privileged information itself: *Keefer Laundry v. Pellerin Milnor Corp.*, 2006 BCSC 1180, at para. 58, 74-75.

A. Text Messages - Settlement Privilege

[11] Settlement privilege "wraps a protective veil around the efforts parties make to settle their disputes by ensuring that communications made in the course of these negotiations are inadmissible": *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37, at para. 2.

[12] In *Sharbern Holdings Inc. v. Vancouver Airport Centre Ltd.*, 2008 BCSC 442, Madam Justice Wedge adopted the following criteria for settlement privilege from Sopinka, Lederman and Bryant, *The Law of Evidence in Canada*, 2d. ed., at para. 14.207:

a) A litigious dispute must be in existence or within contemplation;

b) The communication must be made with the express or implied intention that it would not be disclosed to the court in the event negotiations failed; and

c) The purpose of the communication must be to attempt to effect a settlement.

[13] The document at issue in this case is a string of text messages between Mr. Bragg and Mr. Ross on September 9 and 10, 2014. In an affidavit, Mr. Bragg states that the business relationship with Mr. Ross broke down in August of 2014, following a contentious meeting between Mr. Bragg, Mr. Ross, Ms. Chaisson and members of the District of Squamish Council. Mr. Bragg deposes that:

In these text messages, Mr. Ross and I discuss settlement of a number of issues that are now issues in this litigation and set up a meeting to have further settlement discussions. At the time, I anticipated that these issues would result in litigation if our negotiations failed.

I intended for these text messages to be confidential if negotiations failed.

[14] In their response to civil claim, the Bragg Defendants allege that Mr. Ross conducted himself in the meeting with District Council in a manner that was detrimental to the Squamish development opportunity, and that as a result, Ms. Chaisson refused to allow Mr. Bragg to invest in the opportunity and the relationship between Mr. Ross and the defendants broke down.

[15] Mr. Ross does not dispute Mr. Bragg's characterization of the text messages (Mr. Ross would know, he was party to the exchange). Instead, he argues that settlement privilege is a rule of evidence that primarily prevents the admissibility of settlement negotiations and only prevents disclosure to non-parties to the negotiations.

[16] I do not agree. Settlement privilege also protects documents and communications made in the course of negotiations from production to the other parties to the negotiations. As stated by Chief Justice McEachern in *Middelkamp v. Fraser Valley Real Estate Board* (1992), 71 B.C.L.R. (2d) 276 (C.A.):

[20] In my judgment this privilege protects documents and communications created for such purposes both from production to other parties to the negotiations and to strangers, and extends as well to admissibility, and whether or not a settlement is reached. This is because, as I have said, a party communicating a proposal related to settlement, or responding to one, usually has no control over what the other side may do with such documents. Without such protection, the public interest in encouraging settlements will not be served. (emphasis added)

[17] Mr. Ross further argues that Mr. Bragg's subjective intent for these text messages to be confidential if negotiations failed is insufficient to establish the privilege. While Mr. Bragg's intention is not determinative, his evidence in context is sufficient, in my view, to demonstrate that the exchange of texts occurred with the implied, if not express, intention that the information would not be disclosed in the event the parties failed to resolve the issues and the dispute ended up in litigation.

- [18] In my view, document BRA00789, the text messages between Mr. Bragg and Mr. Ross, meets the test for settlement privilege.

B. Communications From 411's Counsel - Common Interest Privilege

- [19] In *Western Potash Corporation v. Amarillo*, 2020 BCSC 17, Madam Justice Fitzpatrick adopted the following definition of common interest privilege from *Ziegler Estate v. Green Acres (Pine Lake) Ltd.*, 2008 ABQB 552:
- [53] According to Thanki at 277, common interest privilege arises 'where one party (party A) voluntarily discloses a document which is privileged in its hands to another party (party B) who has a common interest in the subject matter of the communication or in litigation in connection with which the document was brought into being.' In the result, the document is privileged in the hands of party B. Unlike joint interest privilege, the common interest does not need to exist at the time the document is created; so long as the common interest exists at the time the document is disclosed, common interest privilege may be invoked. Thanki notes that, where joint interest privilege arises, it is usually not necessary to rely on common interest privilege; common interest privilege is 'residual in nature.'
- [20] In *Maximum Ventures Inc. v. De Graaf*, 2017 BCCA 510, the Court of Appeal explained that common interest privilege may arise in answer to a plea of waiver of legal advice privilege:
- [14] Recent jurisprudence has generally placed an increased emphasis on the protection from disclosure of solicitor-client communications, including those shared in furtherance of a common commercial interest. In the instant case the McEwan draft was produced within the recognized solicitor-client privileged relationship. The common interest privilege issues arise in response to a plea of waiver of that privilege. The common interest privilege is an extension of the privilege attached to that relationship. The issue turns on whether the disclosures were intended to be in confidence and the third parties involved had a sufficient common interest with the client to support extension of the privilege to disclosure to them. In my view, the ambit of the common interest privilege is aptly summarized in the Sopinka on evidence 2d ed., Supp. of 2004 @ p. 133 which cites the case of *Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4th) 747, 2003 FCT 214 quoted by the chambers judge at para. 31 of his reasons. Where legal opinions are shared by parties with mutual interests in commercial transactions, there is a sufficient interest in common to extend the common interest privilege to disclosure of opinions obtained by one of them to the others within the group, even in circumstances where no litigation is in existence or contemplated. (emphasis added)
- [21] Common interest privilege may also be asserted to maintain litigation privilege when a document that was prepared for the dominate purpose of litigation is disclosed to another party with a common interest in the litigation. The common interest exception has been found to apply where, for example:

When the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not they are both parties: *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); and When two defendants in a motor vehicle action having a common interest in demonstrating that the plaintiff was contributorily negligent share an expert engineering report: *Wade v. Ray*, [1997] B.B.J. No. 2877 (S.C.).

- [22] I agree with counsel for Mr. Ross that common interest privilege is not a stand-alone privilege. Common interest privilege either extends an existing privilege to the receiving party or avoids a plea of waiver against the disclosing party. It follows that a valid underlying privilege must exist before a common interest with the party to whom the information or documents are disclosed can give rise to any privilege.
- [23] In response to the plaintiffs' submissions, Mr. Bragg argues that the documents at issue are subject to legal advice privilege in the hands of 411, which extends to him because he had a common interest with 411.
- [24] Mr. Bragg deposes that he had two roles with respect to the Squamish development. First, Mr. Bragg and Mr. Martin advanced a loan to 411 that was secured against title to land that was part of the Squamish development. Second, Mr. Bragg was contracted by 411 to be the development manager for the Squamish development. Mr. Bragg states that he was interested in the success of the Squamish development so that he could collect on the loan and because the success of the project was inherent in his responsibilities as development manager.
- [25] Mr. Bragg describes the documents referred to in paragraph 7(c) above as communications between Ms. Chaisson and counsel for 411 relating to the Squamish development. Mr. Bragg was not copied on the communications; however, he says he was provided with copies in his role as development manager. Mr. Bragg deposes that, based on his review of the documents, he believes the purpose of the communications was the provision of legal advice or services to 411.
- [26] Mr. Bragg's belief is not enough to establish a privilege; the issue must be decided based on the objective evidence of the purpose and content of the communications: *Western Potash*, at para. 80.
- [27] To be protected by legal advice privilege, a document must meet the following criteria from *Solosky v. Canada*, [1980] 1 S.C.R. 821:
- a) a communication between lawyer and client;
 - b) that entails the seeking or giving of legal advice; and
 - c) that is intended to be confidential by the parties.

- [28] Generally speaking, legal advice privilege does not attach to communications with third parties: *Western Potash Corporation*, at para. 63. This general principle was explained in detail by Madam Justice Griffin in *Greater Vancouver Water District v. Bilfinger Berger AG*, 2015 BCSC 532:
- [27] In short, there are three principles which can be distilled from these authorities:
- a) Communications with a third party are not protected by solicitor-client privilege merely because they assist the solicitor in formulating legal advice to the client.
 - b) Where the third party serves as a line of communication between the solicitor and client the communications will be protected by solicitor-client privilege; that is, either:
 - i. where the third party is simply carrying the information between the solicitor and client, or acting as "agent of transmission", or
 - ii. where the third party's expertise is required to interpret the information provided by the client so that the solicitor can understand it;
 - c) There are other situations where the function of the third party is "essential to" or "integral to" the solicitor-client relationship, such that privilege attaches to the communications with the third party. For example:
 - i. if the third party is authorized by the client to seek legal advice from the solicitor on behalf of the client, standing in the shoes of the client, then the third party's function is essential to the solicitor-client relationship and the communications will be privileged; but
 - ii. if the third party is simply authorized to gather information from outside sources and pass it to the solicitor so that the solicitor might advise the client, then the third party's function is not essential but is merely incidental to the giving of legal advice, and will not be protected from privilege. Arguably this is just an example of category (a) above.
- [29] There is no evidence that Mr. Bragg was acting as an agent of 411 for the purposes of these communications. Mr. Bragg describes himself as an independent contractor. There is no evidence that he served as a line of communication between 411 and its lawyers, that the lawyers relied on his expertise or that he was "essential to" or "integral to" the solicitor-client relationship, only that he was provided with copies of the documents.
- [30] Nonetheless, common interest privilege may justify withholding production of the documents from Mr. Bragg, but only if the original documents were subject to legal advice privilege, they were provided by 411 to Mr. Bragg in confidence and Mr. Bragg had a common interest with 411 in the subject matter of the legal advice.

- [31] Notably, neither 411 nor Ms. Chaisson listed these documents, asserted privilege over the documents or filed an application response or evidence in support of the position of the Bragg Defendants. While this does not necessarily negate the existence of a privilege, it does speak to the lack of objective evidence that the documents were provided to Mr. Bragg in confidence or that 411 perceives a common interest with Mr. Bragg in maintaining a privilege against their production.
- [32] Counsel for the Bragg Defendants provided the court with copies of the documents in question. It would have been preferable, in my view, if Mr. Bragg or another knowledgeable person had described the purpose and content of the documents to the extent possible without revealing the allegedly privileged information. However, plaintiffs' counsel did not object to my reviewing the documents for the purpose of deciding the validity of Mr. Bragg's claim of privilege.
- [33] Document BRA01324 is a letter from a lawyer at Miller Thomson to 411, reporting on a real estate transaction and attaching the closing documents. Neither the reporting letter nor the closing documents contain any legal advice.
- [34] Non-privileged facts and documents do not become privileged because they are sent to or from a lawyer. As Madam Justice Gray stated in *Keefer Laundry*:
- [61] A lawyer is not a safety-deposit box. Merely sending documents that were created outside the solicitor-client relationship and not for the purpose of obtaining legal advice to a lawyer will not make those documents privileged. Nor will privilege extend to physical objects or "neutral" facts that exist independently of clients' communications. (*R. v. Murray* (2000), 2000 CanLII 22378 (ON SC), 48 O.R. (3d) 544, 186 D.L.R. (4th) 125.)
- [35] The reporting letter and closing documents must be produced.
- [36] The reporting letter also encloses Miller Thomson's invoice for legal services to 411. The account may be subject to a claim of privilege by 411 because it describes legal services. However, there is no evidence that Mr. Bragg has a common interest in the legal advice given to 411 on the real estate transaction. A general interest in the success of the development is not enough, in my view, to justify the extension of a privilege that 411 itself has not claimed.
- [37] Documents BRA01761, 1765, 1769, 1790, 1792, 1794, 1798 and 1823 are also accounts from Miller Thompson for legal services provided to 411. For the reasons just discussed, these documents must also be produced.
- [38] I should note that the relevance of the Miller Thomson accounts is unclear to me. However, Mr. Bragg included the documents in Part 4 of his list of documents. He must be of the view that the documents could be used to prove or disprove material facts.

- [39] Document BRA01772 is an e-mail from 411's lawyer to Ms. Chaisson and Mr. Bragg, pre-dating the reporting letter referred to above. The e-mail attaches documents with some advice on their execution. The e-mail may be subject to a claim of privilege by 411 or Ms. Chaisson. However, once again, there is insufficient evidence to find that Mr. Bragg has a common interest in that advice. In my view, the e-mail and attachments must be produced.
- [40] Document BRA01774 is an e-mail chain between Mr. Bragg, Mr. Martin, Ms. Chaisson, a lawyer named Ian Reith and a paralegal at Miller Thomson, concerning the terms of a mortgage. Mr. Bragg deposes that Mr. Reith was acting for 411, and that Mr. Bragg and Mr. Martin were involved in these e-mails in their role as lenders to 411. In these circumstances, Mr. Bragg and 411 were opposite contracting parties. There was no common interest in the terms of the mortgage. The document must be produced.
- [41] Document BRA01779 is similar to 1774. It must be produced.
- [42] Document BRA01786 is a "certificate of current company details" of a Japanese company. It is not subject to any privilege, and must be produced. Document BRA01788 appears to be the Japanese version of this document. It must also be produced.
- [43] Mr. Bragg describes BRA01830 and 1837 as e-mail chains between counsel for 411 and counsel for BCR Properties that were forwarded to Mr. Bragg in his capacity as project manager. The e-mails relate to a purchase by 411 of land from BCR Properties for the purposes of the Squamish development. They consist of negotiations between 411 and BCR Properties. The negotiation documents are not subject to any privilege. BCR Properties is an arm's length third party, and these were not settlement negotiations. There is no evidence that counsel provided the negotiation documents to Mr. Bragg for the purpose of giving legal advice to 411 on the negotiations. In my view, the documents were provided to Mr. Bragg for the purpose of keeping him apprised of non-privileged facts. They must be produced.

C. Redacted Meeting Notes

- [44] Mr. Bragg describes the meeting notes at issue in paragraph 7(b) above, as follows:

Redacted meeting notes

12. I have reviewed the unredacted version of document numbered 1321 listed in Schedule B to the Bragg defendants' List of Documents. The document consists of minutes of a meeting dated April 21, 2015 between Ms. Chiasson, Mr. Martin, and myself. The main purpose of the meeting was to discuss the Squamish Development. The portions of the minutes relating to the Squamish Development are not redacted.
13. I had been served with the plaintiffs' Notice of Civil Claim on or about April 1, 2015. During the April 21, 2015 meeting, Mr. Chiasson, Mr. Martin, and I discussed matters relating to responding to the plaintiffs' Notice of Civil Claim and cooperating in our defence of the litigation. The redacted portions of the meeting minutes relate to these discussions.

- [45] In my view, this evidence is sufficient to find a common interest privilege in the redacted information, based on litigation privilege. Litigation was in actual contemplation at the time of the April 21, 2015 meeting. Although Mr. Bragg does not say that litigation was the "dominant purpose" of the redacted discussion, I think that is a fair conclusion to draw from his evidence. The meeting had more than one purpose. By limiting the redaction to the discussion of "matters relating to responding to the plaintiffs' Notice of Civil Claim and co-operating in our defence of the litigation", I am satisfied that Mr. Bragg gave effect to the dominant purpose test.
- [46] Although the defendants may not be aligned on all issues in their pleadings, I am also satisfied that they share a sufficient common interest in "co-operating" on their defence against the plaintiffs' claims to justify the assertion of privilege by the Bragg Defendants over the redacted discussion.

IV. CONCLUSION

- [47] The following documents in part 4 of the amended list of documents of the Bragg Defendants are not privileged: BRA01324, 1761, 1765, 1769, 1790, 1792, 1794, 1798, 1823, 1772, 1774, 1779, 1786, 1788, 1830 and 1837 (the "Non-Privileged Documents").
- [48] Within seven days of these reasons, the Bragg Defendants must (a) deliver a further amended list of documents listing the Non-Privileged Documents in part 1 of the list; and (b) deliver to counsel for the plaintiffs electronic copies of the Non-Privileged Documents.
- [49] The balance of the relief sought in paragraphs 2 and 3 of the plaintiffs' notice of application is dismissed.
- [50] As success was divided on this application, the parties will bear their own costs.

"Master Elwood"

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