

CANADA / JUDGMENT

Sidhu v. Hiebert

2023 BCSC 436

COURT

Supreme Court of British Columbia

DECIDED

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2023 BCSC 436 Sidhu v. Hiebert

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Sidhu v. Hiebert,

2023 BCSC 436

Date: 20230224

Docket: M082472

Registry: Vancouver

Between:

Arshdeep Singh Sidhu

Plaintiff

And

Jan Abram Hiebert, Balwinder Kaur Sidhu, Rajvinder Singh Sidhu,

Surinder Singh Rattan, Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc., Abbotsford Nissan Ltd.

Defendants

And

Insurance Corporation of British Columbia, Jan Abram Hiebert,

Balwinder Kaur Sidhu, Rajvinder Singh Sidhu, Surinder Singh Rattan,

Nissan Canada Inc., Nissan Motor Co., Ltd.,

Nissan North America, Inc. and Abbotsford Nissan Ltd.

Third Parties

Before: The Honourable Madam Justice Forth

Oral Reasons for Judgment

Counsel for the Plaintiff:

M.J. Slater, K.C.

S. Jaworski

Counsel for the Defendants and Third Parties, Balwinder Kaur Sidhu and Rajvinder Singh Sidhu (the "Sidhu defendants"):

D.R. Eyford, K.C.

S.K. Padmanabhan

D. Lambert

Counsel for the Defendants and Third Parties, Nissan Canada Inc., Nissan Motor Co., Ltd., Nissan North America, Inc., and Abbotsford Nissan Ltd. (the "Nissan defendants" or "Nissan"):

M. Parrish

T. Posyniak

Counsel for the Third Party, Insurance Corporation of British Columbia:

D.D. Nugent

Place and Dates of Hearing:

Vancouver, B.C.

February 16 and 22, 2023

Place and Date of Judgment:

Vancouver, B.C.

February 24, 2023

Introduction

[1] This matter proceeded to trial in June 2021 and concluded on September 27, 2021, with reasons pronounced on June 17, 2022, indexed at 2022 BCSC 1024 (the "Reasons"). The plaintiff is a ventilator-dependent quadriplegic resulting from a motor vehicle accident that occurred on March 30, 2008.

- [2] The Nissan defendants were sued for their role in the design, manufacture, distribution, and sale of the Nissan vehicle that the plaintiff was a passenger in at the time of the accident. In July 2020, Nissan entered into a "BC Ferries" type of settlement agreement with the plaintiff. Nissan obtained a bar order governing the parties' respective rights and obligations at the trial of this action: see reasons indexed at 2020 BCSC 1548 (the "Bar Reasons"). The plaintiff had disclosed the minutes of settlement dated July 28, 2020 (the "Minutes of Settlement") and a Schedule "A" entitled Settlement Agreement and Covenant not to Sue, with the amount of the settlement redacted (the "Settlement Agreement").
- [3] In the Bar Reasons at para. 8, it is noted that the parties agree to disclose the settlement amount after judgment has been rendered. This is reflected in the Minutes of Settlement at para. 4(b) which states:

The Plaintiff shall instruct his solicitor to take steps to:

[]

- (b) advise the Court and Trial Judge of the Settlement between the Plaintiff and Nissan with the exception of the amount of the Settlement Monies which amount will be disclosed to the Court and the Remaining Defendants after the Court has rendered Judgment in the Action;
- [4] The Sidhu defendants seek an order that the plaintiff produce the unredacted Settlement Agreement, along with other documents relating to the mechanism in which the settlement monies were transferred to the plaintiff, and documents pertaining to the plaintiff's eligibility for certain government benefits. Should the settlement amount be disclosed, Nissan seeks an order to make the settlement amount confidential through a sealing order.

Issue One: Disclosure of the Settlement Amount to the Parties

- [5] The first issue is whether the plaintiff should be obligated to disclose the amount of settlement at this time to ICBC and the Sidhu defendants (the "non-settling defendants").
- [6] At trial, the parties agreed on certain deferred issues to be dealt with after the Court had rendered its judgment. The deferred items, as set out in the Reasons, are as follows:
- [560] The parties agree that there are issues that will either be dealt with by agreement of the parties or a subsequent hearing after these Reasons have been pronounced. The deferred issues are:
- a. future pecuniary damages - the parties will present fresh economic evidence, if necessary, regarding the net value of a future cost of care award taking into account the Court's assessment of those damages and the Court's finding with respect to the plaintiff's life expectancy;

- b. Choice in Supports for Independent Living ("CISL") and Provincial Respiratory Outreach Programs ("PROP") payments - the deductibility of CISL and PROP funding from the plaintiff's future care award;
- c. personal living expense deductions in the "lost years" - the amount of any "lost years" deduction from an award of loss of future earning capacity;
- d. entitlement to and quantum of tax gross-up and fund management fees - including any application for a structured judgment; and
- e. costs.

(the "Deferred Items")

[7] In the Reasons, I added the following to the list of Deferred Items:

[561] I will add to the Deferred Items whether the plaintiff will be entitled to receive any disability payments in the future or whether, as a result of the monies he will receive, he will no longer be eligible for any future benefits: see *Shongu v. Jing*, 2016 BCSC 901 at paras. 203-206.

Position of the Parties

[8] The parties, including Nissan, all agree that at some point in time the settlement amount must be disclosed in order to prevent the plaintiff from being over-compensated, referred to as the "rule against double recovery": *Ashcroft v. Dhaliwal*, 2008 BCCA 352 at para. 30; *Henry v. British Columbia (Attorney General)*, 2017 BCCA 420 at para. 30.

The Non-Settling Parties' Position

[9] The non-settling defendants argue that the settlement amount should now be disclosed since it has a direct effect on the interests of the non-settling defendants, as well as on the rights and responsibilities of third parties, such as Choice in Supports for Independent Living ("CSIL"), the Provincial Respirator Outreach Program ("PROP"), and the province of British Columbia in regards to pensions for persons with disabilities (the "Disability Pension").

[10] The non-settling defendants submit that the Reasons have been issued and liability determined. The only outstanding issue--the precise quantum of the damages--has yet to be determined. The non-settling defendants explain that the settlement amount should be disclosed prior to the hearing of the Deferred Items because "the settlement amount can't be disentangled from the deferred issues" or it is "inextricably woven into the Determination of the Deferred Issues". They claim that delaying the disclosure of the settlement amount puts the disposition of the Deferred Items at risk.

The Plaintiff's Position

- [11] The plaintiff initially opposed the disclosure of the settlement amount, taking the position that the settlement amount could be disentangled from the Deferred Items, and that disclosure of the settlement amount should follow not only a determination of liability, but also a determination of damages. However, in oral submissions, the plaintiff conceded that disclosing the settlement amount at this time would not prejudice the plaintiff.

Nissan's Position

- [12] In oral submissions, Nissan did not oppose the disclosure of the settlement amount, subject to a bar on the disclosure to the public that I will discuss further in these reasons.

Analysis

- [13] I accept that the principles as enunciated by the Supreme Court of Canada in *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37 that prevent the disclosure of a settlement amount prior to trial no longer apply.
- [14] I note there was evidence at the trial that CSIL continued to contribute to the plaintiff's care costs after the Settlement Agreement with Nissan was entered into. This was confirmed in this hearing in the evidence of Roderick MacDonald, the regional manager in Fraser Health responsible for CSIL. His evidence was that a CSIL client remains eligible for CSIL funding until they are able to access directly or indirectly the funds of their settlement and use it for care costs. Mr. MacDonald confirmed that as of the trial, the plaintiff was still receiving funding from CSIL. In the past 12 months, the plaintiff has received more funding from CSIL.
- [15] PROP provided all of the ventilation supplies to the plaintiff. It was unclear at trial what impact the settlement monies would have on the continuation of PROP supports.
- [16] I accept that there are no longer any compelling policy reasons to maintain privilege over the settlement amount. I agree that in order to conduct a just determination of the outstanding issues relating to the PROP, CSIL, and the Disability Pension issues, disclosure of the settlement amount should be made prior to the parties returning before me. I see no prejudice to the plaintiff in having to make that disclosure now, and I find that it is in the interests of justice to do so. As a result, I grant the order sought by the non-settling defendants that the plaintiff produce an unredacted copy of the Settlement Agreement.

Issue Two: Disclosure of Relevant Documents

- [17] The Sidhu defendants further seek the disclosure of information beyond the settlement amount. Specifically, in their notice of application at paragraph 1(a), they seek an order that the plaintiff produce:

- (i) an unredacted copy of his settlement agreement with the Nissan Defendants and any ancillary or related agreements or understandings between those parties,
- (ii) account statements, cheques, wire transfers, and payments relating to the receipt and distribution of the settlement amount,
- (iii) applications and approvals; correspondence and memoranda; agreements, annuities, trusts, and trust declarations; and other documents relating to the plaintiff's eligibility for and receipt of funding through Choice in Supports for Independent Living ("CSIL"),
- (iv) applications and approvals; correspondence and memoranda; agreements, annuities, trusts, and trust declarations; and other documents relating to the plaintiff's eligibility for and receipt of funding through the Provincial Respiratory Outreach Programs ("PROP"),
- (v) applications and approvals; correspondence and memoranda; agreements, annuities, trusts, and trust declarations; and other documents relating to the plaintiff's eligibility for and receipt of a disability pension from funding made available by the province of British Columbia for persons with disabilities (the "Disability Pension") [...]

Position of the Parties

The Non-Settling Parties' Position

- [18] The non-settling parties submit that in order to address a final determination of the Deferred Items, information in relation to the payment and availability of benefits to the plaintiff from CSIL, PROP, and the Disability Pension is required. They say that at the continuation of the trial on the Deferred Items, the non-settling defendants will argue that these benefits are to be deducted from the plaintiff's damages award. For example, as explained by Mr. MacDonald, CSIL funding may be dependant on future cost of care funding an individual is already receiving from an award or settlement. Postponing the disclosure of this information could unnecessarily delay determining the Deferred Items.
- [19] Counsel for the Sidhu defendants clarified that they are only seeking documents exchanged between the plaintiff and CSIL, PROP, and the Disability Pension, not other third parties.

The Plaintiff's Position

- [20] The plaintiff submits that documents relating to CSIL, PROP, and the Disability Pension are not relevant to the Deferred Items, the calculation of future care costs, or any other calculation of damages and, as such, should not be disclosed at this time. Rather, the plaintiff says that the appropriate time for the disclosure is after the determination of all damages. At that time, the settlement amount will be deducted from the award for damages, and that collateral benefits can be determined. The plaintiff also expressed concern that the order sought by the Sidhu defendants could extend to the disclosure of communication between plaintiff's counsel and third parties beyond CSIL, PROP, and the Disability Pension.

Nissan's Position

- [21] Nissan says they have performed their obligations to the plaintiff as set out in the Settlement Agreement. They accept that the date the settlement amount was made may be relevant to the assessment of damages and do not oppose the disclosure. Nissan further submits that, beyond the Settlement Agreement, there are no ancillary or related agreements between Nissan and the plaintiff.
- [22] Nissan objects in the application response to the production of any documents, such as "account statements, cheques, wire transfers, and payments relating to the receipt and distribution of the settlement amount" under para. 1(a)(ii) of the Sidhu defendants' notice of application. Nissan argues that there is no basis in law for the disclosure of these documents and only the settlement amount after judgment needs to be disclosed. Nissan takes no position on the disclosure of documents listed at paragraphs 1(a)(iii)-(v) of the Sidhu defendants' notice of application.

Analysis

- [23] With respect to these documents, I am of the view that when and how the settlement monies were paid is relevant to the Deferred Items. It is further relevant if they were paid directly to the plaintiff, or through some type of structured settlement, trust, or annuity. In my view, how the settlement monies were paid is part of the terms of the settlement agreement which must be disclosed: *Singh v. Mann*, 2021 ONSC 8249 at para. 31.
- [24] As explained by Mr. MacDonald, the funding that CSIL provides may be determined by the structure of the settlement or award a person receives in respect to their cost of future care. CSIL will continue to provide funding until a settlement is finalized and funds for future care costs are received. This makes the structure of the settlement relevant to the determination of the plaintiff's future care costs and the collateral benefits. The parties will be able to make submissions on future care costs and collateral benefits at the continuation of the trial on the Deferred Items, however, the disclosure of the documents sought by the non-settling defendants prior to this continuation allows the situation to be assessed in its present reality, rather than in the hypothetical.
- [25] The plaintiff cites the established principle that the plaintiff has "property of their award" as reason not to disclose the documents: *Townsend v. Kroppmanns*, 2004 SCC 10 at para 21. I am not persuaded that allowing this disclosure amounts to dictating what the plaintiff does with his settlement. The plaintiff's future use of his award is not being hampered, nor directed by the Court.
- [26] As a result, I grant the order sought in the notice of application of the Sidhu defendants at paragraphs 1(a)(i)-(v). The only variation is that the date for production will be 4:00 p.m. on March 6, 2023.

- [27] Nothing in these reasons obliges the plaintiff to disclose communications between plaintiff's counsel and entities other than CSIL, PROP, and the Disability Pension.

Issue Three: Confidentiality of the Settlement Amount to the Public

- [28] Nissan seeks an order that the settlement amount and any document referencing the settlement amount be kept confidential from the public. Nissan seeks an order that the amount of the settlement be treated as a "Confidential Document" as defined in the order in SCBC Vancouver Registry Action No. S152491 dated September 24, 2015, and incorporated in the Litigation Management Order made on February 6, 2017 (the "Confidentiality Order").
- [29] Nissan further seeks orders that the settlement amount will not be disclosed publicly, nor will any party seek to file any document containing the settlement amount with the Court Registry pursuant to the Confidentiality Order, and further, that it not be stated in any written judgment of the Court.
- [30] Nissan submits that disclosing the settlement amount to the public poses a serious risk for two important public interests recognized by the Courts. At para. 15 of their application response, they state:
- a. First, the overriding public interest in favour of the settlement disputes and the avoidance of litigation, which is the rationale for litigation settlement privilege that the Supreme Court of Canada has repeatedly recognized the importance of in the effective administration of justice: *Sable Offshore Energy Inc. v. Ameron International Corp.*, 2013 SCC 37. Settlement communications are presumptively privileged. Courts have repeatedly affirmed the principle that settlement privilege has a "social value of superordinate importance capable of justifying a sealing order that limits the open court principle": *Hollinger Inc. (Re)*, 2011 ONCA 579, at paras. 19-23, leave to appeal to SCC refused [2011] SCCA No. 473; *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*, 2022 ONSC 5878.
 - b. Second, the general commercial interest in preserving private confidential financial information, which includes settlements and other agreements bound by confidentiality terms, has been recognized in numerous recent cases. "[I]f the exposure of confidential information would cause a breach of a confidentially agreement, there is a general commercial interest of preserving confidential information": *Shell Canada Limited v. The Queen*, 2022 TCC 39 at para. 18, citing *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 41; *Sierra Club of Canada v. Canada (Minister of Finance)*, 2022 SCC 41 at para. 55; see also *Royal Bank of Canada v. Distinct Infrastructure Group Inc.*, 2022 ONSC 5878 at para. 20. "The public interest in promoting settlements and preserving commercially sensitive confidential information is clear and unassailable."

- [31] Nissan relies on the Supreme Court of Canada's decision in *Union Carbide Canada Inc. v. Bombardier Inc.*, 2014 SCC 35 at para. 66, in which the Court acknowledged that, even if the terms of the settlement agreement may be disclosed to the court for the purpose of enforcement, they may also still be confidential as between the parties and the public.
- [32] Nissan points to the provision in the Settlement Agreement that contains an express and broad confidentiality clause clearly evidencing the intention to keep the terms and amount confidential, except with the prior written consent of the other parties, court order, or by operation of law.
- [33] Nissan refers to the test set out in *Sherman Estate v. Donovan*, 2021 SCC 25 at para. 38 for the granting of a sealing order. It maintains that the three conditions are met in this case on the basis that:
- the disclosure of the settlement amount to the public poses a serious risk to the recognized public interest in maintaining confidentiality over settlements in order to foster and encourage settlement;
 - treating the settlement amount as a Confidential Document is necessary in that there is no other way to meet the disclosure requirements without the settlement amount being disclosed privately; and
 - treating the settlement amount as a Confidential Document is a measured and proportionate mechanism which balances the public interest of preventing double recovery while protecting the public interest in maintaining confidentiality over settlement agreements and amounts.
- [34] Nissan points out that the public interest in knowing the settlement amount does not outweigh the public interest in preserving the privilege and confidentiality of settlement. Nissan relies on the comment in *Schuringa v. Trent Lakes (Municipality)*, 2016 ONSC 7882 at para. 52: "[], to the extent that there is a public interest in knowing the amount of the settlement, it is very modest. []".
- [35] The plaintiff and the non-settling defendants take no position on the sealing order sought by Nissan except to point to authorities that support the open court principles.

Analysis

- [36] I am not persuaded that, in light of the circumstances of this case, the settlement amount should be disclosed to the public. There is an overriding interest in the financial privacy of the settlement which is not overcome by the right of public access to this information. Given that I have found that Nissan was not at fault for the plaintiff's injuries, the public interest in knowing the amount of the settlement is minimal. I am of the view that the salutary benefits of encouraging settlement and maintaining their confidentiality, particularly in complex multi-party proceedings, outweighs the public interest in an open and accessible court in these specific circumstances. I find that Nissan has satisfied the test as reformulated in

Sherman Estate.

- [37] I am not persuaded that the mechanism suggested by Nissan, that prohibits the filing of any document that contains the settlement amount, will work. In order for the Court to have the necessary information, I will direct that any affidavits filed that contain any reference to the settlement amount shall be sealed, such that they are not available to the public in the court file. Once those affidavits are identified a sealing order, in the proper format, can be issued at the hearing on the Deferred Items.
- [38] I will not set out the settlement amount in any future reasons.
- [39] Nissan also suggests the inclusion of a "comeback clause" that would allow the parties to seek leave to vary or set aside the Confidentiality Order. In these circumstances, I find it appropriate to make such an order.

Orders

[40] I make the following orders:

- a. No later than 4:00 p.m. on March 6, 2023, the plaintiff shall amend and serve his list of documents to include the documents set out in the notice of application of the Sidhu defendants at paras. 1(a)(i)-(v), and make the originals of those documents available for inspection and copying;
 - b. The amount of the settlement made between the plaintiff and Nissan (the "Settlement Amount") pursuant to the Minutes of Settlement and Settlement Agreement and Covenant Not to Sue, dated July 28, 2020 (collectively, the "Settlement Agreement") shall be treated as a "Confidential Document" as defined in the order in SCBC Action No. 152491 dated September 24, 2015, which was incorporated into the Litigation Management Order dated February 6, 2017 (the "Confidentiality Order");
 - c. The Settlement Amount shall be disclosed to ICBC, the Sidhu defendants, and the Court for the purpose of the assessment of damages;
 - d. The parties will not disclose, and will not seek to disclose, the Settlement Amount publicly;
 - e. Any affidavit that is filed in the Court registry that references the Settlement Amount, or that could disclose the Settlement Amount, will be subject to a sealing order; and
 - f. The parties have leave to seek to vary or set aside the Confidentiality Order as it relates to the disclosure of the Settlement Amount to the public.
- [41] ICBC and the Sidhu defendants are entitled to their costs of this application from the plaintiff.

"Forth J."

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