
CANADA / JUDGMENT

Weir-Jones v. Taylor

2013 BCSC 1633

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Supreme Court of British Columbia

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2013 BCSC 1633 Weir-Jones v. Taylor

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Weir-Jones v. Taylor,

2013 BCSC 1633

Date: 20130905

Docket: S108103

Registry: Vancouver

Between:

Andrew Weir-Jones

Plaintiff

And

Susan Taylor and David Taylor

Defendants

Before: The Honourable Madam Justice Fitzpatrick

Reasons for Judgment

Counsel for the Plaintiff:

A.K. Khanna

K. Mckey

Counsel for the Defendant, Susan Taylor

A.I. Nathanson

K. Kaukinen, A/S

Place and Date of Trial/Hearing:

Vancouver, B.C.

July 2, 2013

Place and Date of Judgment:

Vancouver, B.C.

September 5, 2013

Introduction

- [1] The plaintiff, Andrew Weir-Jones, applies for an extension of time to file a jury notice since the requisite notice to elect a trial by jury was not filed in time. The defendant, Susan Taylor, opposes the application.
- [2] In support of his application, Mr. Weir-Jones filed his own affidavit and an affidavit from his solicitor, Rose Keith, confirming her instructions to elect a jury trial and explaining why the notice was not filed in time. In light of Ms. Keith's evidence, Ms. Taylor now applies for an order for production of Ms. Keith's file and an order that Ms. Keith be cross-examined on her affidavit, on the basis that Mr. Weir-Jones has waived privilege.

Background Facts

- [3] Ms. Keith has represented Mr. Weir-Jones in respect of this matter since late 2009.
- [4] Mr. Weir-Jones filed a Notice of Civil Claim approximately two and a half years ago in December 2010. He claims damages for sexual assault against Ms. Taylor and for breach of fiduciary duty against both Ms. Taylor and her former husband and co-defendant, David Taylor, arising from events almost 25 years earlier. He alleges that he was sexually assaulted by Ms. Taylor when he was 14 years old and Ms. Taylor was 32 years old. He contends that Ms. Taylor's conduct caused him serious negative repercussions, including causing him to embark upon a course of criminal behavior, which ultimately resulted in a criminal record and time in prison.
- [5] Ms. Taylor denies all the allegations. I was advised that Mr. Taylor has recently settled with Mr. Weir-Jones and that this action will be discontinued as against him.
- [6] Beginning in October 2011, Ms. Keith's office broached the subject of trial time estimates and dates for the trial. Initially, Ms. Keith suggested that five days would be sufficient, which all counsel acknowledged on this application was not feasible even if heard by a judge alone, let alone a judge and jury. Counsel for Ms. Taylor in turn suggested that 12-15 days was a more accurate time estimate. After a tentative 13-day trial was arranged for April 2013, all counsel,

including Ms. Keith, later agreed that 15 days should be reserved. Further efforts in March 2012 were made to secure a trial date without success. Eventually, in September 2012, those efforts resulted in a 15-day trial being scheduled to commence in May 2014.

- [7] At no time during this ongoing discussion between all counsel regarding the trial time estimate and trial dates did Ms. Keith make any mention that Mr. Weir-Jones would be electing a trial by jury.
- [8] On November 1, 2012, Ms. Keith filed a Notice of Trial for 15 days, commencing May 26, 2014. The Notice was served on counsel for Mr. and Ms. Taylor, respectively, on or about that date.
- [9] Rule 12-6(3) of the Supreme Court Civil Rules (the "Rules") requires that any notice electing a jury trial be filed and served "within 21 days after service of the notice of trial". It is agreed that the expiry date for filing and serving the jury notice in this case was on November 22, 2012.
- [10] On February 28, 2013, Ms. Keith contacted counsel for Mr. and Ms. Taylor and advised that her office had inadvertently failed to file the jury notice. This is the first time that either defence counsel had any inkling that Mr. Weir-Jones was seeking to have the matter heard by a jury. Ms. Keith asked counsel to consent to an order extending the time to do so. No consents were forthcoming.
- [11] On March 14, 2013, Mr. Weir-Jones filed an application to obtain an extension within which to file the jury notice. The factual basis for the application was stated to be "the negligence of [his] counsel".
- [12] In support of the application for an extension, Ms. Keith filed her sworn affidavit. She stated in her affidavit:
3. I was retained by the Plaintiff in this matter in December 2009. From the beginning of my retainer the Plaintiff has expressed a desire to have the trial of this matter heard by a jury and all of my preparation and work on this file have been done with the intent that if the matter proceeds to trial, a jury will be determining the outcome. The Plaintiff has never wavered [sic] from his expressed intent to have this matter heard by a jury and I have at all times been intending in accordance with those instructions to have this matter determined by a jury.
16. There has at all times been an intent by me to have this matter heard by a jury. My instructions at all times from my client have been to have this matter determined by a jury. The failure to file the Notice Requiring Trial by Jury within the time period required by the rules has been a result of my inadvertence.
- [13] In her affidavit, Ms. Keith provides an explanation for the failure to file the jury notice within the time stipulated in the Rules. She explains that "[f]ollowing the close of pleadings", when the time estimate was agreed upon, she "instructed [her] assistant to obtain a 15 day

trial date and to file a Notice Requiring Trial by Jury once the Notice of Trial had been filed". When that occurred, Ms. Keith's legal assistant was on extended disability leave and she had a temporary legal assistant. Ms. Keith says that she "confirmed those instructions to the temporary legal assistant".

- [14] Ms. Keith deposes that on February 27, 2013, while "reviewing the status of files", she discovered that the jury notice had not been filed. She immediately advised her assistant to write to counsel requesting their consent to the late filing of the jury notice, and correspondence was forwarded to counsel the next day.
- [15] Ms. Taylor responded to this application by taking the position that there had been a waiver of privilege. Ms. Taylor's counsel requested that he be permitted to review Ms. Keith's file. Ms. Keith refused. As a result, on May 2, 2013, Ms. Taylor filed an application seeking a declaration that privilege has been waived over Ms. Keith's file, that her file be produced, and that Ms. Keith be cross-examined on her affidavit.
- [16] In response, on May 13, 2013, Mr. Weir-Jones filed an Amended Notice of Application for the extension, again relying solely on Ms. Keith's affidavit. The factual basis for the application was then said to be based on the "negligence and inadvertence of [his] counsel", and also:

It has at all times, and in particular during the time within which the Notice Requiring Trial by Jury, been the Plaintiff's intent to have this matter heard by a jury. The Plaintiff's instructions have remained throughout to issue a Notice Requiring Trial by Jury.

- [17] Ms. Taylor's response to this Amended Notice of Application was, in part, that there was still no evidentiary basis for the application because there was no evidence from Mr. Weir-Jones.
- [18] On June 17, 2013, Ms. Keith delivered an Application Response to Ms. Taylor's application. The material in response included a new affidavit from Mr. Weir-Jones sworn June 17, 2013. Although this affidavit was ostensibly in support of Mr. Weir-Jones's opposition to the waiver of privilege application, it is well acknowledged that he intended to rely on this further affidavit in support of the application for an extension of time to file the jury notice.
- [19] Mr. Weir-Jones's affidavit is extremely succinct, stating:
1. My instructions to my counsel, Rose Keith, were to file a notice requiring trial by jury in this matter.
 2. My instructions and intent have remained throughout to have a notice requiring trial by jury filed and served in this matter.
- [20] Counsel for Ms. Taylor objects to Mr. Weir-Jones's affidavit on the basis that it was really being offered in support of his Amended Notice of Application to extend the time to file the jury notice, and is not proper reply evidence.

Discussion

- [21] Given that Ms. Taylor's application for production of Ms. Keith's file and to cross-examine her would, if successful, obviate the need to proceed at this time with the extension application, I will address the waiver of privilege issue in the first instance.
- [22] Prior to doing so, however, in order to put the waiver of privilege application in context, it is instructive to review the principles to be applied on any extension application.
- (a) What is the test to be applied to extend the time for filing a jury notice?
- [23] Pursuant to Rule 12-6(3), a party may require that a trial of an action be heard by a jury by filing and serving a jury notice within 21 days of service of the Notice of Trial. In order to file a jury notice beyond that time, pursuant to Rule 22-4(2), leave of the court must be obtained.
- [24] Rule 22-4(2) confers a general discretion to extend any period of time provided for in the Rules. Accordingly, the court has the discretion to extend the time for the filing of a jury notice in appropriate circumstances: *Ngai v. Cho et al*, 2001 BCSC 333 at para. 13, leave to appeal denied (12 June 2001), Vancouver CA028451 (B.C.C.A.).
- [25] The leading authority on the point is *Hoare v. Firestone Can. Inc.* (1989), 42 B.C.L.R. (2d) 237 (C.A.). In that case, while the court recognized the importance of the right to elect a jury trial, it also recognized that such a right is circumscribed by the requirement that the election be made in a timely manner, in accordance with the Rules. It said at 241:

the election is intended to be made once only, at a particular stage, and for good reason. If the trial may be before judge and jury, rather than judge alone, that is generally an important consideration for both parties in preparation of the case and perhaps, indeed, in the selection of counsel. It is, I think, for these reasons that the rules require the election to be made, once for all, soon after the action is set down, instead of leaving the parties free to elect thereafter on the basis of later developments.

[Emphasis added.]

- [26] In *Hoare*, Taylor J.A. stated that a party seeking to elect a jury trial after the expiry of the time limit must satisfy the court either that the wish, or intention, to do so existed during the period so limited, or that it was prompted by a fundamental change in circumstances. Mr. Weir-Jones relies on the former ground, as no change in circumstances is asserted here.
- [27] Following *Hoare*, the court in *Iskum v Badali*, 2009 BCSC 1669 reiterated the importance of the timely filing of a jury notice:

- [35] The mode of trial is very relevant to how the parties will prepare for trial and is also relevant to settlement discussions before trial. The Rules of Court as a whole recognize that it is not efficient to conduct civil trials by ambush. Civil trials are more efficient and settlement is more likely if parties have advance notice of not just the case they have to meet, but the mode of trial. The 30-day notice period in Rule 39(26) is there to provide parties with some certainty as to the mode of trial with a goal of efficient resolution of disputes.
- [28] In *Ngai*, the court was faced with the not unusual situation where blame for not filing the notice in time was laid at the feet of the lawyer for the party seeking the extension. *Neilsen J.* (as she then was), following *Hoare*, found that simply proving negligence and lack of prejudice was not sufficient. Assuming no fundamental change of circumstances, the requisite intention or wish to elect a jury trial must be found during the 21-day period following the delivery of the notice of trial:
- [23] I accordingly find that it is not enough for the plaintiff to establish that his solicitor was negligent, and that the other parties have suffered no prejudice from the late delivery of the notice. He must also prove either that he wished or intended to elect a jury trial during the 21-day period following delivery of the Notice of Trial, or that there has been a fundamental change in circumstances which justifies the issuance of a Notice Requiring Trial by Jury after the expiry of that period. The plaintiff does not allege any fundamental change in circumstances. He must therefore demonstrate that between February 2 and 23, 1999, he intended to elect a jury trial.
- [Emphasis added]
- [29] This requirement of intention is generally referred to as a "threshold" issue, failing which other issues, such as the reason for the lack of filing (including, for example, even that the party did not know of the right to elect a jury trial) or prejudice to the opposing party, have no relevance: *Coulson v. Sra*, 2001 BCSC 914 at paras. 12, 18; *Demontigny v. Tadros*, 2005 BCSC 156 at paras. 14, 19; *Moll v. Parmar*, 2012 BCSC 1373 at paras. 34-36. Accordingly, there is a distinct difference between whether the intention to elect a jury was present and the reason why that intention was not realized by filing the notice in time.
- [30] The main battleground in applications for an extension of time to file a jury notice is usually the adequacy of the evidence on the application on the major issues: firstly, as to intention, and secondly, as to other relevant factors such as the reason for the lack of filing and prejudice.
- [31] In *Litt v. Grewal*, 2011 BCSC 1071, after noting the importance of the right to a jury and that the right must be claimed within strict limits, Master Caldwell stated that the discretion to extend the time should only be exercised "on the basis of the clearest and best evidence": para. 22.
- [32] In earlier cases, the court was often not satisfied with only an affidavit in support from counsel's legal assistant.

- [33] In *Ehmig v. Lee*, [1994] B.C.J. No. 364 (S.C.), a legal assistant swore an affidavit simply stating that the jury notice had "inadvertently not been filed" and that she was "informed by the Plaintiff and do verily believe that it has been his contention from the very beginning of this action that this trial be tried by Judge and jury". After noting that there was no affidavit from counsel or the plaintiff, Master Donaldson dismissed the application, stating, "[t]here is not sufficient evidence that it was the intention of the plaintiff that the matter be heard before a jury".
- [34] Similarly, in *Tsang v. Vermerris*, [1996] B.C.J. No. 314 (S.C.), the court found that an affidavit from a legal assistant as to her negligence was not sufficient evidence to establish the requisite intent: paras. 17-19, 23-24.
- [35] In *Ngai*, again, the only evidence before the court was the affidavit of a legal assistant deposing that counsel had advised that the applicant had always intended to file a jury notice: para. 9. The opposing party objected to this evidence regarding intention on the basis that it was double hearsay and that there was no satisfactory evidence as to why the notice was not filed in time. Neilson J. found that such evidence was insufficient to establish the requisite intention: paras. 25-32.
- [36] In *On v. Venittelli*, 2006 BCSC 1987 at para. 28, the court relied on a legal assistant's affidavit on the issue of intention, although there appears to have been other evidence on the other issues.
- [37] There appears to have been a change in practice since those early cases, in that more recent cases now typically provide evidence directly from either counsel or the party, or both. In *Narang v. Bhatthal et al*, 2006 BCSC 513, the court found that an affidavit from ICBC's counsel was sufficient to show the requisite intention over the relevant time frame: para. 29. Similarly, in *Moll*, the court found that an affidavit from the party's counsel was sufficient to not only establish the requisite intention but also the reasons why the notice was not filed: paras. 23-26, 36.
- [38] The party in *Litt* had filed an affidavit that her lawyer had not advised her of the right to a jury trial, but the Master nevertheless found that the solicitor's failure to file an affidavit as to the alleged negligence was fatal: para. 23.
- [39] In summary, there must be clear and convincing evidence of the intention to file a jury notice within the 21-day period. There must also be satisfactory evidence as to the reason for failure to file the notice, any prejudice to the parties, and any other relevant factor.
- [40] I have been advised by counsel that they have been unable to find any case where waiver of solicitor-client privilege has been alleged on an application for an extension in circumstances where it is further alleged that the failure to file the notice arose from the negligence or inadvertence of counsel.
- (b) Has solicitor client privilege been waived?

(i) Is Ms. Keith's affidavit on a "matter of substance"?

[41] Ms. Taylor first argues that a party implicitly waives privilege "when a solicitor 'enters the fray' by providing affidavit evidence that goes to a matter of substance in the client's litigation", citing *Mayer v. Mayer*, 2012 BCCA 77 at para. 179; *Murao v. Blackcomb Skiing Enterprises Limited Partnership et al*, 2003 BCSC 558 at para. 83; *Casino Tropical Plants Ltd. v. Rentokil Tropical Plant Services Ltd.* (1998), 55 B.C.L.R. (3d) 233 (S.C.) at para. 16; and *Cheung v. 518402 B.C. Ltd.*, [1999] B.C.J. No. 2415 (S.C.).

[42] A matter of substance is defined "by the material facts set out in the pleadings and by the law that governs a party's claim", and the matter must be an issue which has been "formally joined": *Mayer* at paras. 180, 192. Further, in *Mayer*, the court stated:

[188] The question of whether privilege has been implicitly waived requires identification of matters of substance by reference to the material facts and the law that governs the client's claim or defence, as well as an examination of considerations of fairness and consistency, and any litigation advantage that may arise from the enforcement of the privilege. That assessment takes place in the context of the legal standards that govern the rule of solicitor-client privilege.

[43] In *Mayer*, the court overturned the chamber judge's findings that counsel's affidavit was on a matter of substance arising from an application to amend the pleadings. That affidavit related to the issue of his client's good faith and whether his client could meet the statutory requirement of good faith in seeking certain relief. The court found that the affidavit was not on a matter of substance because it was unnecessary evidence on such an application (para. 184), the client's state of mind was not in issue (para. 194), and good faith was not a pre-condition to bringing a proceeding under the legislation (para. 207). *Nielson J.A.*, at para. 209, stated that "while good faith may become an issue at the stage of remedy it is not a matter of substance at the pleading stage of an oppression claim".

[44] Mr. Weir-Jones argues that Ms. Keith's affidavit is not on a matter of substance, presumably on the basis that it involves a preliminary and interlocutory matter and is not directed at the main issues of sexual assault and breach of fiduciary duty. However, the authorities, including *Mayer*, make clear that a matter of substance is not restricted to the merits of the action: in *Casino Tropical Plants*, the affidavit was sworn in support of a garnishing order; in *Cheung*, the affidavit was sworn in support of an application to add a party and amend the pleadings; in *Iozzo v. Weir*, 2004 ABQB 259, the affidavit was sworn in support of an application to withdraw an admission.

[45] In the context of an interlocutory application, a "matter of substance" includes matters of procedure and, within that context, the requirements to be met on issues to be decided. I conclude that Ms. Keith's affidavit is on a matter of substance, namely, the issue of intention and why the notice was not filed in time.

(ii) Was there an intention to waive?

- [46] It is uncontroversial that solicitor-client privilege plays a fundamental role in our legal system: *Blank v. Canada (Minister of Justice)*, 2006 SCC 39 at paras. 24-26.
- [47] In *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 at 220-221 (S.C.), McLachlin J. (as she then was) addressed the circumstances under which waiver of privilege might be established:

Waiver of privilege is ordinarily established where it is shown that the possessor of the privilege (1) knows of the existence of the privilege, and (2) voluntarily evinces an intention to waive that privilege. However, waiver may also occur in the absence of an intention to waive, where fairness and consistency so require. Thus waiver of privilege as to part of a communication will be held to be waiver as to the entire communication. Similarly, where a litigant relies on legal advice as an element of his claim or defence, the privilege which would otherwise attach to that advice is lost *Rogers v. Hunter* [1982] 2 W.W.R. 189, 34 B.C.L.R. 206 (S.C.).

In the cases where fairness has been held to require implied waiver, there is always some manifestation of a voluntary intention to waive the privilege at least to a limited extent.

- [48] The test of whether a party has voluntarily waived privilege is an objective test: *Maier v. Fischer et al*, 2004 BCSC 196 at para. 23.
- [49] Mr. Weir-Jones argues that there was no express waiver of privilege because the filing of his and his counsel's affidavits was not "voluntary". He relies on the reasoning in *S. & K. Processors Ltd.* at 221-222, where the court held that the plaintiffs were not entitled to production of all documents and communications relating to the preparation of an expert's report, since production of the report was compelled by the Evidence Act. The court held that no waiver had occurred, as there was no voluntary intention to waive solicitor-client privilege, nor did fairness dictate that there was a loss of privilege beyond what the Act allowed.
- [50] Mr. Weir-Jones argues that similarly, in an application to extend the time for filing the jury notice, the law "requires" disclosure of the instructions given to counsel. He says that the only way that an application to extend the timing for filing the notice can be successful is if there is evidence of the client's intention and instructions given to counsel, without which the application will fail. Finally, he says that filing such affidavit evidence on this type of application is not voluntary so as to waive privilege.
- [51] I am unable to accept the submission that the filing of these affidavits of both Mr. Weir-Jones (on the issue of intention) and Ms. Keith (on the issues of intention and the reason for the non-filing) was not voluntary. There is no issue that Ms. Keith's authority to file her affidavit in the first instance was granted by Mr. Weir-Jones, and I can therefore conclude that it was filed with Mr. Weir-Jones's full knowledge: *Cheung* at paras. 20-21. Certainly, Mr. Weir-Jones would have had the benefit of legal advice concerning his affidavit and its possible effect on privilege before he swore it.

- [52] There is also evidence that in the alternative, there is at least an "implied" waiver.
- [53] The law is clear that when a party relies on legal advice as an element of his claim, or where the party asserts that a mistake arose by reason of the negligence or inadvertence of his counsel, "fairness and consistency" dictate that privilege is lost: *S. & K. Processors Ltd.* at 220; *Casino Tropical Plants* at paras. 6-9. In *Casino Tropical Plants*, Warren J. stated:
- [6] In *Souter*, *supra*, the Court of Appeal held that where a party to litigation blames his counsel for a material mistake in an affidavit the client has sworn and claims privilege, the client is using the privilege as a sword rather than a shield, contrary to the centuries old purpose of the confidentiality.
- [7] Master Barber in *York*, *supra*, was dealing with an application for the production of documents, particularly the notes of a former solicitor who drafted a will which the plaintiff said did not reflect her instructions to her lawyer at the time. At p. 45 the learned Master quotes from *Evidence in the Litigation Process*, vol. 2, Schiff Carswell, 1993, at p. 1469:

He may also do it [waive the privilege] by conduct that the court will see as an implied waiver. For example, if he offers his own or the lawyer's testimony at the trial setting out part of an otherwise privileged communication on a particular matter, the privilege is waived respecting the rest of the communication. The rationale here is fairness: the court will not allow a party to introduce evidence supporting his case without allowing the opponent the opportunity to know and test the whole.

- [8] Later, at pp. 45-46 the Master referred to Sopinka and Lederman *The Law of Evidence in Canada* at p. 664:

An obvious scenario of waiver is if the holder of the privilege makes a voluntary disclosure or consents to disclosure of any material part of a communication. Similarly, if a client testifies on his or her own behalf and gives evidence of a professional, confidential communication, he or she will have waived the privilege shielding all of the communications relating to the particular subject-matter. Moreover, if the privilege is waived, then production of all documents relating to the acts contained in the communication will be ordered.

- [9] In *Stuart Olson Construction Inc. v. Sawridge Plaza Corp.*, *supra*, Dea J. stated at p. 188:

Where a deponent is produced to give evidence on a motion, that deponent can be cross-examined on all matters relevant to the motion. Where the deponent produced is someone who possesses otherwise privileged information relevant to the issues on the motion, that information loses its status of being privileged, or the privilege is "waived". [citations omitted].

- [54] The "sword versus shield" analogy has been applied in other cases. In *Pacific Concessions, Inc. v. Weir and Weir*, 2004 BCSC 1682 at para. 30, Kirkpatrick J. (as she then was) stated that having found express and implied waiver of privilege, "[i]t would not be in the interests of fairness or consistency to allow [a party] to rely on some confidential communications with his solicitor to advance his position, while withholding others that may be highly relevant to the issues at trial."
- [55] To similar effect are the comments of the court in *Iozzo*, which case involved an application to withdraw an admission made in the statement of defence. Similar to the present case, the application was supported in part by an affidavit of counsel, who deposed he did not provide a draft of the statement of defence to the defendants and made the admission in error. Slatter J. (as he then was) found that waiver had occurred:
- [20] In this case the individual Defendants allege that they made an admission in error. Since the admission was made on their behalf by their counsel, this must involve a loss of the privilege over any communications between their solicitor and themselves, and over any instructions given by them to their solicitor, that led up to the making of the admission. As the Court held in *Souter v. 375561 B.C. Ltd.* (1995), 130 D.L.R. (4th) 81 (B.C.C.A.) at pg. 85:

It does not require extended discussion to conclude that when a party identifies his solicitor as responsible for a material mistake in an affidavit sworn by that party and claims solicitor-client privilege in respect of his knowledge and that of the solicitor, he is using the confidentiality protected by privilege as a sword rather than as a shield.

In my view the same principle applies when the alleged error is in a pleading. In *Land v. Kaufman* (1991), 1 C.P.C. (3d) 234 (Ont. Ct. J.) the plaintiff applied to withdraw admissions in her pleading, relying on an affidavit of her solicitor deposing that she had made a mistake. The Court held at pg. 239:

In my view, it would cause injustice and unfairness to allow the solicitor for one side to plead that he or she misunderstood the client's instructions and then be permitted to hide behind solicitor/client privilege when the other side seeks to explore whether there is any merit to that claim of misunderstanding.

To the same effect is *H.H. v. R.L.* (1997), 51 Alta. L.R. (3d) 177.

- [56] It is evident from the above authorities that no "voluntariness" of waiver issue arose. In all those cases, the parties chose to file the affidavits in question – to obtain the garnishing order (*Casino Tropical Plants*), to support applications to add a party and amend the pleading (*Cheung*), to withdraw an admission (*Iozzo*), or for summary judgment or summary trial (*Cheung*; *Pacific Concessions, Inc.*).

- [57] *Davis v. District of Sechelt*, 2000 BCSC 202 involved, as on this application, a missed procedural limitation period, in that the appropriate notice had not been given in time. The plaintiff was attempting to establish a reasonable excuse for failing to give the required notice, and in doing so, sought to rely on her former counsel's affidavit disclosing advice to her: para. 11. Privilege was held to have been waived: paras. 25-26.
- [58] I do not agree that the filing of these affidavits was involuntary. The decision in *S. & K. Processors Ltd.* is distinguishable, in that the matter was addressed by legislation as to the effect of the waiver of privilege (and I would parenthetically note that since that decision, the law has quite clearly changed to allow a full inspection of the expert's files in the event an expert report is served: Rule 11-6(8)(b)).
- [59] Even though this matter arose allegedly by reason of the inadvertence or negligence of Ms. Keith's office, it remains the case that any relief that may be sought by Mr. Weir-Jones has to be brought on proper evidence. It remains his choice as to whether he seeks that relief or not. I do not accept Mr. Weir-Jones's contention that acceding to Ms. Taylor's request would result in a waiver occurring every time that such an application is brought. It remains the case that intention may be established by the party himself, and there are a myriad of factors that might be considered if the requisite intention is shown. I acknowledge, however, that if the allegation is that counsel is responsible for the notice not being filed, then it will be necessary to introduce evidence as to whether there were instructions to file and the reason why the filing did not happen.
- [60] Having decided to seek the relief from the court on the basis that his intention was communicated to Ms. Keith's offices but not acted upon, he has clearly put that entire matter in issue by his and Ms. Keith's affidavits. Moreover, to the extent that he alleges that there is a valid reason why the notice was not filed, he has similarly put that matter in issue again through Ms. Keith's affidavit. On both issues, in addition to his own evidence as to intention, he chose to rely on Ms. Keith's evidence confirming his intention to file a jury notice within the time frame and also providing the reason why it was not done.
- [61] To allow Mr. Weir-Jones to shield any examination of the entire evidence on these issues would allow him to rely on his and Ms. Keith's own perception of how far they wish to go in providing this evidence and no further. This was expressly rejected in the many cases cited above and should, for the same reasons, be rejected here. The comments in *Iozzo* are apposite:
- [21] When a party relies on legal advice in an action, and especially where his or her former counsel files an affidavit in support, the litigant is not entitled to decide unilaterally how much of the privilege will be lost. Mere reliance on legal advice does not negate the entire privilege, and does not give the other side access to all communications between the solicitor and the client. However, privilege is lost over any communication that has a relevant and material connection to the issue being brought forward.

- [23] Where a party indicates that an admission was made in error, and the error was the doing of counsel, then in my view privilege is lost over all communications relevant to any of the parts of this test.
- [26] the Defendants cannot limit the scope of the cross-examination by selectively referring to a number of communications, and asserting privilege over all the others. Once privilege over a subject matter or topic is lost, it is lost with respect to all communications on that topic, not just the ones that the Defendants select for disclosure.
- [62] Mr. Weir-Jones advanced a subsidiary argument that it was inappropriate to allow this application to be based on the allegation that Ms. Keith had offered false evidence or had misstated facts in her affidavit. Ms. Keith is subject to the Law Society of British Columbia's Code of Professional Conduct for British Columbia, which provides:

5.1-2 When acting as an advocate, a lawyer must not:

- (e) knowingly attempt to deceive a tribunal or influence the course of justice by offering false evidence, misstating facts or law, presenting or relying upon a false or deceptive affidavit, suppressing what ought to be disclosed or otherwise assisting in any fraud, crime or illegal conduct
- [63] Accordingly, Mr. Weir-Jones says that if there are any concerns in respect of Ms. Keith, then the appropriate remedy is to file a complaint with the Law Society. Further, it is contended that only if there is a "reasonable basis" to suspect that a lawyer is lying should the court reject such evidence.
- [64] With respect, I do not accept this argument. There is no indication on this application that Ms. Keith has done anything other than uphold her professional obligations in this action. But that hardly means that her evidence, to the extent that a party seeks to rely on it, cannot be tested in this Court. The functions of the Law Society in disciplining lawyers and the function of the court in allowing a proper airing of the evidence cannot be equated with each other.
- [65] It is no answer to say, "Trust me, I'm a lawyer". Unfortunately, lawyers have been known to lie under oath, and I would emphasize again that there is no suggestion whatsoever that Ms. Keith has done so. Leaving aside that serious matter, Ms. Keith may be mistaken in her evidence or she may have chosen not to include in her affidavit what Ms. Taylor and the Court might consider to be other relevant evidence. In that respect, a cross-examination of her and a review of the relevant portions of her file will disclose what may be other or more accurate evidence germane to the issues on the extension application.
- [66] In these circumstances, fairness and consistency dictate that there has been a waiver of solicitor and client privilege with respect to Ms. Keith's files. Ms. Taylor, in opposing the application for the extension, is entitled to full disclosure of all the evidence relevant to the issue.

(iii) What is the extent of the waiver of privilege?

- [67] Ms. Taylor seeks a declaration that privilege has been waived over the entire contents of Ms. Keith's file.
- [68] In *Descôteaux et al. v. Mierzwinski*, [1982] 1 S.C.R. 860 at 875, the Court confirmed that solicitor-client privilege should only be interfered with to the extent absolutely necessary in order to achieve a just result. See also *Pacific Concessions, Inc.* at para. 13.
- [69] The court in *Iozzo* made clear (as quoted above) that a finding of waiver does not necessarily result in a complete waiver of the solicitor's entire file. The waiver of privilege extends to all communications and documents that have a "relevant and material connection to the issue being brought forward": para. 21.
- [70] In *Murao*, the waiver was restricted to only communications relevant to certain issues: para. 91. In *Davis*, however, the court was of the view that given the pervasiveness of the "reasonable excuse" issue in relation to the plaintiff's knowledge and actions before the action was brought, waiver over the entire file was appropriate: paras. 27-28.
- [71] Ms. Taylor argues that up to the point the jury notice application was delivered, the waiver was a complete one. This is said to arise from the evidence adduced on the application, particularly Ms. Keith's statement that Mr. Weir-Jones' intention has existed "[f]rom the beginning of my retainer" and has "never wavered". She further says that her intent (noted as not obviously relevant to the issue) has "at all times" been to have this action tried by a jury. It is said that those have been her instructions "at all times". Ms. Keith further states that "all of my preparation and work on this file have been done with the intent that ... a jury will be determining the outcome".
- [72] Ms. Taylor says that this evidence from Ms. Keith has put the entirety of her work product in issue, including matters that would otherwise be the subject of litigation privilege.
- [73] While Ms. Taylor argued that some of Ms. Keith's statements related to prejudice on the part of Mr. Weir-Jones, I do not interpret them in that way. Prejudice to Mr. Weir-Jones is necessarily obvious if he is denied a jury trial when he had an ongoing intention to elect one. Ms. Keith does not allege in her affidavit that she has prepared the case in a different manner to the point that effort or cost would be wasted if there is no jury trial. Finally, in any event, when the cases speak of prejudice, they typically address potential prejudice suffered by the opposing party in receiving late notice of that mode of trial.
- [74] On this point, I consider that some lesser measure would be adequate to address the waiver issue and to provide fair access by Ms. Taylor to Ms. Keith's file. This is a fairly discrete issue, and I am sure that Ms. Keith will be able to review the entirety of her file to recover any documents that relate to both the intention to have a jury trial and the reasons why the notice was not filed in time.

Conclusion

- [75] Ms. Taylor's application is allowed. There is a declaration that Mr. Weir-Jones has waived solicitor-client privilege over Ms. Keith's file to the extent that there are documents relevant to the issues arising on the application to extend the time for the filing of the jury notice. Those issues will necessarily include the matter of intention (whether that be of Mr. Weir-Jones or Ms. Keith), the matter of why the jury notice was not filed in time, and any other factors that arise on the evidence presented on the application for an extension.
- [76] There will be an order that Ms. Keith provide copies of such documents within 10 days of these reasons. Such production is sufficient with redactions of portions of documentation which may relate to other matters. If Ms. Keith is unsure whether privilege attaches to a particular document or part of a document, or if the parties disagree on a particular document or part of a document, the parties are entitled to apply to the court for a ruling: Murao at para. 93.
- [77] Ms. Taylor also requests an order that Ms. Keith be cross-examined. It remains a matter of discretion to order such an examination pursuant to Rule 22-1(4)(a). Such an examination was ordered in many of the cases cited above: Casino Tropical Plants; Davis; Iozzo; Pacific Concessions, Inc.
- [78] In my view, such an examination is appropriate in the circumstances and can take place after document disclosure. In order to facilitate such an examination, I consider that specific directions similar to those given by the court in Iozzo at para. 29 may be helpful. Accordingly, Ms. Taylor is entitled to examine Ms. Keith on matters that go beyond the "four corners" of her affidavit. Her counsel may examine Ms. Keith on all facts relating to the issues arising on the application to extend the time to file the jury notice, namely, the intention to file a jury notice, the reasons why the notice was not filed in time, and any other factors that arose on the evidence presented.
- [79] I understand that it remains a possibility that Ms. Taylor may wish to examine Mr. Weir-Jones on his affidavit. That matter is not before me, and I do not, by these reasons, make any determination in that regard.
- [80] In light of my decision, there is no need to address the appropriateness of the reply evidence in the form of Mr. Weir-Jones's affidavit.
- [81] Costs of this application are awarded to Ms. Taylor against Mr. Weir-Jones in any event of the cause. Mr. Weir-Jones' application to extend the time for the filing of the jury notice is adjourned generally pending the document disclosure and examination of Ms. Keith. Afterwards, the parties may reset that application on a date agreeable to both.

"Fitzpatrick J."

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