

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Pacific Sands Beach Resort Ltd. v.
Co- Operators General Insurance,*
2025 BCSC 858

Date: 20250407
Docket: S216496
Registry: Vancouver

Between:

**Pacific Sands Beach Resort Ltd.
and Pacific Sands Resorts (2007) Ltd.**

Plaintiffs

And:

Co-Operators General Insurance Company

Defendant

Before: The Honourable Justice J. Walker

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiffs Pacific Sands
Beach Resort Ltd.:

L. Tsang

Counsel for the Defendant:

D. Shepherd

Place and Date of Hearing:

Vancouver, B.C.
March 27-28, 2025

Place and Date of Judgment:

Vancouver, B.C.
April 7, 2025

[1] **THE COURT:** These are my oral reasons resulting to the plaintiffs' application for orders that the defendant amend and serve its list of documents, that certain attachments to documents already disclosed be provided, and that the documents listed and claimed to be privileged be provided. The central issue is whether the defendant has waived solicitor/client privilege over the documents sought.

Background

[2] This action involves claims by the plaintiffs against the defendant for breach of the terms of a policy of insurance and breach of the defendant's duty to conduct itself with good faith and fair dealing in investigating, assessing, or determining the plaintiffs' claim for coverage under a policy of insurance.

[3] The plaintiffs own a property in Tofino, British Columbia, known as the Pacific Sands Beach Resort and had an insurance policy with the defendant whereby the defendant agreed to insure the plaintiffs from December 9, 2016, to December 9, 2017, and indemnify the plaintiffs against direct loss or damage and resulting damage to the property and the resort in the course of construction, installation, reconstruction, or repair and for additional costs and expenses incurred by the plaintiffs as a consequence of damage to their property delaying construction.

[4] The plaintiffs claim to have suffered loss that was insurable under the policy, and the defendants have denied coverage for the plaintiffs' claim.

[5] On July 8, 2021, the plaintiffs filed the notice of civil claim in this action claiming that the defendant breached the policy by refusing coverage and in its duty to act in good faith and deal fairly with the plaintiffs.

[6] There has been extensive communications between the plaintiffs and the defendant relating to the assessment of the claim. This occurred both before and after the notice of civil claim was filed.

[7] The defendant prepared its list of documents, which was amended several times, and the plaintiffs challenged the defendant's assertions that certain documents were privileged. In part due to the plaintiffs' diligence, several amended lists of documents have been provided.

[8] On October 24, 2023, the defendant provided a revised list of documents which they called the "Revised 4th Amended List." In this list, the defendant moved 454 documents previously contained in Part 4 of their list documents to Part 1. Part 4 lists the documents claimed to be privileged. Part 1 are the documents that "could be used by any party at trial to prove or disprove a material fact".

[9] In the letter accompanying the "Revised 4th Amended List", former counsel for the defendant acknowledged that the defendant was explicitly waiving their privilege claim over those 454 documents. In part, the letter stated:

We have spent a significant amount of time addressing your further requests and the issues you raised with respect to our list of documents. In the end, while our view is that we could maintain privilege over many of the documents which we ultimately moved to part 1, we opted to take an extremely liberal approach to production in order to avoid an unnecessarily lengthy and extensive production application. With this done, our hope is that your clients will see that Co-Operators has, from day one, acted in good faith with respect to its investigation and adjustment of your client's claim and in particular has undertaken extensive time and effort to identify what is and what is not covered under your client's policy of insurance. In short, we hope that this liberal approach to production will put to rest any misconceptions on the part of your clients that there has been any bad faith conduct on the part of the defendant.

[10] Sometime in November 2023, the defendant provided the most recent list of documents, the "Further Revised 4th Amended List." The defendant claims that 588 documents are privileged. Mostly solicitor client, but other claims of privilege are made, such as litigation privilege and work product privilege.

[11] In the letter enclosing the "Further Revised 4th Amended List", counsel confirmed her previous advice that it had intentionally moved 454 documents from Part 4 over which solicitor client litigation, solicitor's brief, and work-product privilege were previously claimed to Part 1.

[12] As a result, the plaintiffs argue that the defendant's explicit waiver of solicitor/client privilege over the documents provided means that the defendant explicitly or implicitly waived privilege over the subject matter of the disclosed privileged communications. Thus, they are seeking disclosure of all withheld documents relating to the subject matter of the waiver, which the plaintiffs characterize as "the plaintiffs' claim for coverage under the policy of insurance".

[13] The defendant acknowledges that its client explicitly waived solicitor/client privilege and other previously claimed privileges over the 454 documents moved from Part 1 to Part 2 of their list but maintains that the defendant has not waived privilege over the remaining documents listed in Part 4.

[14] On this application, I was taken through a sample of the documents provided on October 24, 2023. There is no question that the letters and emails provided would have been protected by solicitor/client privilege and that the defendant chose to waive that privilege.

[15] In addition to the 588 documents set out in Part 4 of the list of documents, the plaintiffs also seek production of any other documents contained in the former solicitor's file relating to the plaintiffs' claim for coverage under the policy of insurance.

[16] The plaintiffs also seek attachments to emails provided as part of the re-categorization and disclosure made on October 23, 2023. The plaintiffs identified 11 documents disclosed to them that referred to attached documents yet those attachments were not provided.

[17] Before me present counsel for the defendant advised that most, if not all those attachments will be provided voluntarily and in a timely way subject to being able to locate them.

[18] There is no question that the defendant explicitly waived privilege over documents for which legitimate privilege claims may have been able to be

maintained. The defendant agrees the disclosure of the privileged communications were not inadvertent. It was intentional, deliberate, and voluntary.

[19] It is the impact of this partial intentional waiver that drives the analysis before me. It is agreed that if I find solicitor/client privilege has been waived, then waiver has been established with respect to the other claimed privileges.

The Law

[20] The importance of solicitor/client privilege cannot be understated. The privilege is essential to the functioning of the solicitor/client relationship and to the administration of justice. Solicitor/client privilege, though not absolute, is nearly impenetrable. The rare circumstances in which it may be set aside are clearly defined and do not involve a balancing of interests on a case-by-case basis: *United States v. Meng*, 2020 BCSC 1461, at paras. 23 and 26; *Soprema Inc. v. Wolrige Mahon LLP*, 2016 BCCA 471, at paras. 50 and 51.

[21] Solicitor/client privilege is so important that a court should err on the side of non-disclosure and upholding the privilege if there is ambiguity about whether privilege has been waived: *Graham v. Canada (Minister of Justice)*, 2021 BCCA 118, at para. 61; *Siegerist v. Siegerist*, 2022 BCSC 1427, at para. 26.

Explicit Waiver

[22] An express waiver of privilege may be established where it is shown that the possessor of the privilege: a) knew of the existence of the privilege; and b) voluntary evinced an intention to waive that privilege: *Barbieri v. White*, 2024 BCCA 225, at paragraph 49; *Soprema, supra* at paras. 48 and 49.

Implicit Waiver

[23] Waiver of a privilege may be implicit without a voluntary intention to waive where the holder of the privilege conducts themselves in such a way, or takes a position in relation to privileged materials that would be inconsistent with maintaining the privilege, and it would be unfair to allow the privilege to subsist. Thus, waiver of privilege as to part of the communication will be held to be waiver as to the entire

communication. This may occur by, for example, selectively disclosing part of a privileged document or a category of privileged documents on a particular subject but withholding the remainder of the document or other documents on that same subject. In these circumstances, to uphold the privilege over the remaining communications would be unfair because the opposing party and the court would be deprived of access to the full narrative: *Meng, supra* para. 37, citing *Huang v. Silvercorp Metals Inc.*, 2017 BCSC 795, at para. 143.

[24] Where selective disclosure of privileged documents has occurred, in limited circumstances fairness and consistency require the disclosure of all documents on the same subject to ensure that the partial disclosure does not give an unfair advantage of creating a misleading picture: *Meng, supra* at para. 38. Generally speaking, in cases where fairness is invoked in support of a finding of waiver, there has been some manifestation by the privilege holder of a voluntary intention to waive the privilege, at least to some extent: *Graham, supra* at para. 48.

[25] Waiver can also be implied where a litigant relies on legal advice as an element of their claim or defence. The privilege which would otherwise attach to that advice is lost. *Meng, supra* at para. 36 citing *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 1983 CanLII 407 (BC SC), 45 B.C.L.R. 218, at 220 (S.C.).

[26] If a party advances a state of mind defence or relies on legal advice to justify their conduct, a waiver may be inferred. The party's state of mind as to its understanding of its legal position or advice received will generally not be sufficient to amount to implied waiver. The party must voluntarily inject itself into the litigation legal advice it received or its understanding of the law before waiver can be implied: *Soprema, supra* at paras. 22, 48, and 49; *Graham, supra* at para. 47.

[27] Where waiver of privilege has been found, loss of privilege is only in relation to that particular subject matter over which privilege has been waived. This limit ensures that waiver extends only as far as necessary to ensure fairness: *Meng, supra* para. 39; *Siegerist, supra* at para. 39.

Analysis

[28] In my view, the defendant impliedly waived solicitor/client privilege and the other claimed privileges over the subject matter of the disclosure when it chose to selectively waive privilege over the 454 documents that were previously claimed to be privileged. I appreciate the defendant's argument the defendant has maintained privilege over the documents remaining in Part 4 of the list of documents, but that in my view, is only relevant to whether the defendant has explicitly waived privilege.

[29] Where privilege is waived, production of all documents relating to the acts contained in the communication will be ordered. The policy reasons for this incursion into the sphere of privilege are fairness and consistency. A party cannot cherry pick favourable aspects of privileged communications without disclosing the entirety of the communication: See *FCAS v. CES*, 2023 BCSC 1098, at paras. 8 and 9, and the authorities cited therein; See also, *McDermott v. McDermott*, 2013 BCSC 534, at paras. 113 and 114.

[30] While this does not mean that in every case fairness and consistency will require further disclosure, in my opinion the circumstance of this case require further disclosure to the plaintiffs. It would be unfair to permit the defendant to pick and choose which documents to potentially put before the court to defend against the claims while claiming privilege in respect of other related communications that might be relevant to these proceedings.

[31] I also agree with the plaintiffs' position that the defendant has implicitly waived privilege by advancing a state of mind defence or has relied on legal advice to justify their conduct. The defendant argues that the cases relied on by the plaintiffs for this argument are distinguishable because the documents in issue were more directly used in the litigation. In other words, in my words, the defendant has not relied enough on the disclosed materials to require further disclosure.

[32] I accept that waiver cannot be implied only because the defendant is faced with allegations that put knowledge, that is the subject of its solicitor advice, in issue: See *G.W.L. Properties Ltd. v. W.R. Grace & Co. of Canada*, 1992 B.C.J. No. 1761

(BCSC), in chambers at paras. 15 to 17. Here, the plaintiffs' cases which the defendant seeks to distinguish are in my view, just examples of the application of the applicable legal principles and do not represent a different statement of law that would prevent the plaintiffs from succeeding in this application.

[33] In this case, first, counsel specifically advised that the materials were disclosed to be responsive to the plaintiffs' claim of bad faith. Second, those privileged documents were moved to Part 1 of the list of documents, indicating they might be used to defend against the claim. Third, my review of the contents of the sampling of the documents provided do suggest that they relate to the issue of how the defendant conducted itself with respect to the assessment of the plaintiffs' claim. Fourth, in the examination for discovery of David Edlund, a representative of the defendant, it is plain from his answers that the defendant relied on legal advice at least in part in determining the plaintiffs' claim for coverage. As a result, the defendant has voluntarily injected legal advice it received, into the litigation.

Costs

[34] The plaintiffs seek an order for costs in any event of the cause for this application. In my view, that is appropriate. Counsel for the plaintiffs appear to have diligently pursued disclosure of the documents the defendant intends to rely on to defend the claim and sought explanations for the asserted privilege claims, which thus far have not been forthcoming. It took this application for the defendant to agree to produce the attachments to the documents already provided. The defendant has not provided any explanation as to whether the documents to which privilege is maintained relate to the plaintiffs' claim for coverage or whether they relate to something else entirely.

Order

[35] In making the following orders, to be clear, the defendant is entitled to claim privilege over any materials not related to the subject matter for which I have found the defendant waived privilege over. I have considered whether the order sought by the plaintiffs could be narrowed further to avoid risk of inadvertently breaching

legitimate privilege claims. However, in the end I am satisfied that the order sought by the plaintiffs is appropriate.

[36] For clarity, the order will be: the defendant, Co-Operators General Insurance Company, shall, within 14 days of the pronouncement of this order, amend and serve a list of documents to include in Part 1 of the list:

- 1) All documents contained in the solicitor file of the defendant's former legal counsel, Dolden Wallace Folick LLP ("Dolden"), including communications between the defendant, its consultants, experts, and agents, and Dolden relating to the plaintiffs' claim for privilege under the policy of insurance.
- 2) The documents listed in Part 4 of the defendant's Revised 4th Amended List of Documents dated October 23, 2023, relating to the plaintiffs' claim for coverage under the policy insurance.
- 3) The attachments referred to in the defendant's documents and set out in the notice of application, there are 11 documents, specifically set out. I am not going to name the 11 documents, but those are the documents.
- 4) Make the originals of the newly listed documents available for inspection and copying in accordance with Rule 7-1(15) and (16).

[37] That concludes my reasons.

[38] Costs to the plaintiffs in any event of the cause.

"Walker, J."