

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Red Branch Investments Limited v. Long*,
2024 BCSC 1588

Date: 20240828
Docket: S187807
Registry: Vancouver

Between:

**Red Branch Investments Limited and
Gerald Wright**

Plaintiffs

And

David P. Long

Defendant

Before: The Honourable Justice Basran

Reasons for Judgment

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Place and Dates of Trial:

Vancouver, B.C.
April 22–26, 29–30
May 1–3, 30–31, 2024

Place and Date of Judgment:

Vancouver, B.C.
August 28, 2024

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Introduction

[1] The plaintiff, Gerald Wright and the defendant, David Long, are former friends and business associates embroiled in a prolonged dispute over the beneficial interest of a one-third interest in a 1.5% (of 75%) royalty interest in a Thai potash property (the “Royalty”).

[2] Mr. Long successfully sued Mr. Wright and a company he controls, Red Branch Investments Limited (“Red Branch”) for a 50% beneficial interest in the Royalty in *Long v. Red Branch Investments Limited*, Vancouver Registry Action S122642 (reasons for judgment indexed as 2015 BCSC 2192) before Justice Wong in a trial held in 2015 (the “First Trial”). Mr. Long was the plaintiff and Mr. Wright and Red Branch were the defendants in that action.

[3] Following the First Trial, Mr. Wright and Red Branch received Mr. Long’s solicitor’s file for the purpose of assessing special costs as ordered against them by Wong J. In the file, they discovered information that they allege indicates that Mr. Long and one of the witnesses he called in the First Trial, John Darch, perpetrated a fraud on the court by creating the false impression that Mr. Darch was a neutral, disinterested witness. In particular, Mr. Wright and Red Branch, collectively the plaintiffs in the current action, suggest that the newly discovered information shows that Mr. Darch actively assisted Mr. Long prior to the First Trial, and that he was not a neutral witness, but rather, he wanted to ensure Mr. Long’s success at trial. They seek orders to set aside the decisions of Wong J. and a new trial.

[4] The evidence before me reveals that Mr. Darch was not a disinterested witness and that he assisted Mr. Long in preparation for the First Trial. However, I am not convinced that this constitutes a fraud on the court because it would not have made a material difference to the outcome of the First Trial. This is because Wong J. completely disbelieved Mr. Wright and, instead, with the assistance of other supporting evidence, accepted Mr. Long’s narrative regarding the beneficial

ownership of the Royalty. Accordingly, and for the reasons that follow, I am dismissing the plaintiffs' claim.

Previous Proceedings

The First Trial Decision

[5] The First Trial commenced in March 2015 and lasted approximately three weeks, concluding in September 2015. As noted, Wong J.'s reasons for judgment are indexed as 2015 BCSC 2192 (the "First Trial Decision").

[6] Based on his credibility findings between the parties, Wong J. found that Mr. Wright had gifted Mr. Long a 50% interest in the Royalty, that Mr. Wright later reneged on this arrangement after a falling out between the parties, and therefore the 50% Royalty interest was held in trust by Red Branch for Mr. Long.

[7] At the First Trial, the parties agreed that the Royalty was originally in the name of a company called Crew Capital Corporation, the sole directors of which were Mr. Wright, Mr. Darch, and Bob Anderson.

[8] In November 1997, Messrs. Wright, Darch, and Anderson agreed that each of them would purchase a one-third share of the royalty for \$13,333 each.

[9] Mr. Darch's one-third share of the royalty passed to a numbered company controlled by him.

[10] Mr. Anderson died in November 1998, before the purchase of the royalty could take place. His one-third share of the royalty, accordingly, passed to his wife, Alice Anderson.

[11] Mr. Wright opted to put his share of the royalty into Mr. Long's name by way of an agreement.

[12] Justice Wong made the following findings of fact in the First Trial Decision:

- 1) Over many years, Mr. Wright and Mr. Long were friends who engaged in various unsuccessful business ventures together in Ireland funded by Mr. Wright and operated by Mr. Long: First Trial Decision at para. 28.
- 2) Litigation successes in respect of some of these failed Irish business ventures were shared 50/50 by Mr. Wright and Mr. Long, even though Mr. Wright paid all associated legal fees: First Trial Decision at para. 29.
- 3) Mr. Wright told Mr. Long that he was leaving his wife for his mistress and that he preferred that Mr. Long have one-half of the Royalty as opposed to Mr. Wright having to pay taxes on all of it and then splitting the remainder with his wife: First Trial Decision at para. 31.
- 4) The Royalty was placed in Mr. Long's name alone, with Mr. Long holding a 50% beneficial interest in the asset and the other 50 percent held for the benefit of Mr. Wright: First Trial Decision at para. 15.
- 5) In April 2006, Mr. Wright told Mr. Long that the company Italian-Thai had purchased the shares of Asia Pacific Resources Ltd., the developer of the Thai potash mine, and that there was a concern about whether the royalty arrangements would be honoured. For this reason, Mr. Wright told Mr. Long that he, Alice Anderson, and Mr. Darch had retained the law firm Fasken Martineau ("Fasken") to ensure their royalties would be honoured: First Trial Decision at para. 32.
- 6) Consistent with the fact that Mr. Long was the registered owner of the Royalty, Mr. Long was named as Fasken's client. Mr. Wright was not a named client and he did not disclose to Fasken that he had a beneficial interest in the Royalty: First Trial Decision at para. 33.
- 7) At Mr. Wright's request, Mr. Long authorized Mr. Wright to act as his agent in this matter: First Trial Decision at para. 33.
- 8) Mr. Wright obtained tax advice from Fasken in relation to the Royalty on the basis that Mr. Long was ordinarily resident in Ireland.
- 9) Upon receiving tax advice from Fasken, the Royalty was transferred to Red Branch because Mr. Wright wished to do so for tax purposes: First Trial Decision at para. 34.
- 10) Mr. Wright represented to Mr. Long that transferring the Royalty to Red Branch, a Hong Kong company, would provide tax advantages for both of them, that each of them would hold a 50 percent beneficial interest in the Royalty, and that Mr. Wright would make Mr. Long a shareholder and director of Red Branch: First Trial Decision at paras. 19(b) and (c).

- 11) Mr. Wright told Mr. Long that the Royalty would be “our pension plan”: First Trial Decision at para. 30.
- 12) Given the long friendship and business relationship between Mr. Long and Mr. Wright, Mr. Long agreed to transfer the Royalty to Red Branch for \$1.00, pursuant to a written agreement dated September 1, 2009: First Trial Decision at para. 20.
- 13) Mr. Long trusted Mr. Wright to follow through with his promises based on their longstanding business and personal relationship: First Trial Decision at para. 22.
- 14) The transfer of the Royalty from Mr. Long to Mr. Wright occurred in June 2010: First Trial Decision at para. 23.
- 15) Mr. Long and Mr. Wright had a falling out in June 2011 in relation to the company Amanta Resources Ltd. (“Amanta”), of which Mr. Long was a director and Mr. Wright was the CEO. Specifically, in June 2011, Mr. Long requested, in his capacity as director, that Mr. Wright provide certain financial documents and accounts in his possession for Amanta’s accounting committee to review. Mr. Wright reacted to this request in a hostile fashion. Consequently, Mr. Long and Mr. Wright’s relationship ruptured, after which Mr. Wright severed all personal and business ties with Mr. Long and Mr. Long resigned from Amanta: First Trial Decision at paras. 38–44.
- 16) Mr. Long subsequently sought to assert his interest in the Royalty, but Mr. Wright and Red Branch denied that Mr. Long ever had a beneficial interest in the Royalty. Mr. Long then commenced an action against them: First Trial Decision at para. 46.
- 17) Mr. Darch was a long-time business associate of Mr. Wright and a fellow royalty holder. He testified that Mr. Wright told him on several occasions that he was sharing the Royalty with Mr. Long because he would rather receive one-half of the Royalty than one-quarter of it in the event that the Royalty was taxed in Canada and his wife obtained a one-half interest in it: First Trial Decision at para. 47.
- 18) David Anderson, a lawyer and the brother of the late Bob Anderson, confirmed before Wong J. that Mr. Wright told him that Mr. Long owned the Royalty and that Mr. Wright was acting as Mr. Long’s agent: First Trial Decision at para. 52.
- 19) Mr. Gabrielson and Mr. Andrews Q.C. were lawyers at Fasken, retained by Mr. Wright. They confirmed that until the Royalty was transferred to Red Branch, they believed that Mr. Long owned it and that Mr. Wright was acting as his agent. They also confirmed that at no time did

Mr. Wright advise them that he had a beneficial interest in the Royalty: First Trial Decision at para. 53.

[13] Justice Wong found Mr. Darch to be a neutral witness “having no bias in favour or either of the parties” and also concluded that he had no financial interest in the outcome of the litigation: First Trial Decision at para. 50.

[14] After reviewing the evidence, Wong J. found Mr. Long’s version of the events more probable than the narrative advanced by Mr. Wright for three reasons:

- 1) The representation of a beneficial 50:50 share of the Royalty is consistent with the past friendship and financial business relationship of the parties.”
- 2) For personal and tax reasons, Mr. Wright chose not to create a paper trail of the Royalty arrangement, which corroborated Mr. Long’s assertion that Mr. Wright preferred a one-half rather than a one-quarter interest in the Royalty.
- 3) Mr. Wright was a sophisticated and experienced businessman who chose not to leave a paper trail regarding the true nature of the Royalty transfer even though he could have done so via a private declaration of trust document between himself and Mr. Long.

First Trial Decision at para. 57.

[15] Justice Wong held that after their falling out, Mr. Wright chose to renege on his agreement with Mr. Long out of anger. Justice Wong concluded the following:

- 1) Red Branch holds 50% of the Royalty on express trust for Mr. Long;
- 2) Red Branch or Mr. Wright hold a 50% interest in the Royalty on resulting trust for Mr. Long because his interest in the Royalty was transferred for no, or wholly inadequate, consideration to Red Branch;
- 3) the transfer of the Royalty to Red Branch would result in an unjust enrichment to Mr. Wright and Red Branch for no juristic reason; and that a constructive trust should thus be imposed on Red Branch in respect of the 50% interest in the Royalty for the benefit of Mr. Long.

First Trial Decision at para. 59.

[16] Accordingly, Wong J. ordered Red Branch and Mr. Wright to transfer a 50% interest in the Royalty to Mr. Long.

The Costs Decision

[17] On February 9, 2016, Mr. Long sought an order of special costs against Red Branch and Mr. Wright before Wong J. In an oral decision released on the date of the special costs hearing, indexed as *Long v. Red Branch Investments Ltd*, 2016 BCSC 274 (the “Costs Decision”), Wong J. awarded Mr. Long special costs payable forthwith on the basis that Mr. Wright’s conduct, both before and during the trial, was deserving of rebuke: Costs Decision at paras. 7 and 9.

[18] In the Costs Decision, Wong J. held that Mr. Wright’s pre-litigation conduct was unconscionable and in the nature of fraud because Mr. Wright reneged on his gift of the Royalty to Mr. Long. Justice Wong further found that Mr. Wright protracted the litigation and added unnecessary time and expense to the trial by casting character aspersions against Mr. Long without merit and obfuscating the main issue at trial: Costs Decision at para. 5.

[19] Justice Wong noted that Mr. Wright put forward a self-serving narrative suggesting that Mr. Long’s involvement in the transaction was merely a favour for Mr. Wright without beneficial ownership and found this narrative, coupled with Mr. Wright’s character aspersions regarding Mr. Long, to be reprehensible: Costs Decision at para. 6.

The Appeal Decision

[20] Mr. Wright and Red Branch appealed the First Trial Decision. On July 12, 2017, the Court of Appeal dismissed the appeal in reasons indexed as *Long v. Red Branch Investments Limited*, 2017 BCCA 256 (the “Appeal Decision”). The Court of Appeal found that Wong J. made no palpable or overriding errors on the factual issues and that appellate intervention was therefore not warranted.

[21] Justice Willcock, in writing for the Court of Appeal, noted that Wong J. accepted and relied upon the evidence of Mr. Darch in finding in favour of Mr. Long.

Specifically, Mr. Darch’s evidence corroborated that of Mr. Long regarding his 50% beneficial interest in the Royalty: Appeal Decision at paras. 22 and 55.

[22] In dismissing the appeal, the Court of Appeal concluded that Wong J. believed the evidence of Mr. Long and Mr. Darch, who the Court characterized as an independent witness. Specifically, Wong J. believed that Mr. Wright gave Mr. Long half of his interest in the Royalty, which the Court described as “a relatively inexpensive and speculative investment”: Appeal Decision at para. 62.

The Supplemental Appeal Decision

[23] In the course of recovering costs, Mr. Long disclosed information from his solicitor’s file to Mr. Wright and Red Branch. Based on this disclosure, Mr. Wright and Red Branch alleged that there was fresh evidence establishing that Mr. Long and Mr. Darch perjured themselves in the First Trial. They applied to the Court of Appeal to adduce this information as fresh evidence and ask the Court of Appeal to re-open and allow the appeal.

[24] In reasons dated March 28, 2018 and indexed as *Long v. Red Branch Investments Limited*, 2018 BCCA 115, the Court of Appeal dismissed the application (the “Supplemental Appeal Decision”).

[25] The Court of Appeal, in the Supplemental Appeal Decision, summarized the fresh evidence as follows:

[13] [...]

- a) Records of funds paid by Western Investments “on behalf of David Long” to his solicitors to pay their accounts in 2012 and 2013, as well as correspondence indicating that John Darch directed Western Investments to forward some of those funds to Mr. Long’s counsel;
- b) January 2012 correspondence from Mr. Long to his counsel advising them that Mr. Darch, described as a “trusted friend and colleague”, had “volunteered to act as a witness (against Mr. Wright) in the action and assist in any way he can”;
- c) June 2012 correspondence from Mr. Darch to Mr. Long (after the close of pleadings) with advice on how to question Mr. Wright on examination for discovery and offering advice on the pleadings and conduct of the litigation, including the following advice:

At some stage, as it unfolds that Gail [Mr. Wright's wife] is an officer (director or shareholder?) of Red Branch it may be worthwhile to add her name as a defendant as she was conspiring with GW [Mr. Wright] to defraud you of your Royalty.

...

Don't provide what you should not have [sic] until the right time, which to me is after GW has stated things under oath at his Discovery.

The goal is to prove GW is a liar, discredit him, expose his scheme to evade tax, and in 1998 to leave Gail.

...

I have to be the last witness and the one who ties a bow on the case. You have to win with the documents and other witnesses leaving me to confirm. GW's lawyer will do everything to destroy my credibility and use the argument that I am supporting you through malice because of the lawsuit between GW and me. Or that I have been promised a part of the [R]oyalty or some compensation.

...

Probably much more to come up after the case gets underway and some brain storming.

[Willcock J.A.'s emphasis.]

- d) June 2012 correspondence from Mr. Long to his counsel, referring to Mr. Darch as "[m]y business partner, friend and confidant", advising them that Mr. Darch would be arriving in Vancouver from Bangkok and would be "carrying some documents for you", and inviting counsel to meet with him;
- e) June 2012 correspondence from Mr. Darch to Mr. Long and his counsel describing a meeting with counsel for the estate of another holder of a royalty interest to "appraise them about the dispute" and offering further advice about proving the claim;
- f) Later correspondence in the same month from Mr. Darch to Mr. Long and his counsel summarizing his review of files in the offices of Fasken Martineau LLP. and enclosing copies of documents he had obtained from them;
- g) February 2013 correspondence from Mr. Darch to Mr. Long (at about the time discoveries were taking place) in which he states: "I feel that your lawyer MUST present to the judge that you were deceived by GW on the whole issue of tax and that he abused your trust in him and he conned you into signing the transfer[]to Red Branch and ask the judge to rule that your 50% be reinstated in your name";
- h) February 2013 correspondence from Mr. Long's counsel to Mr. Long referring to Mr. Darch's correspondence and advice;

- i) March 2015 correspondence from Mr. Long to his counsel in which he writes: “I note that John (Darch) has responded. Seems to be trying to run the show again? He hasn’t made another mention of the missing files which I definitely left in his office immediately after the Discovery.” [Willcock J.A.’s emphasis.]

[26] The Court of Appeal, in the Supplemental Appeal Decision, also noted that Mr. Darch testified as follows at the trial before Wong J. in his direct- and cross-examination:

[14] [...]

Q All right. And so what is the reason you’re here today, sir?

A I’m here because I had a subpoena to attend this case, and I’m pretty sure that either Mr. Wright or Mr. Long is going to be unhappy with what I have said, but I have no friendship interest, I have no financial interest, I have no business interest in either of the parties. So really to me it makes no difference who wins or who loses. What I have told you are the facts as much as I know them.

[15] ...

Q And, sir, have you ever discussed this legal proceeding with Mr. Long?

A I did.

Q And when did you discuss it with him?

A In the early part of 2012.

Q And so you discussed this with him before he -- he initiated these proceedings?

A Yes.

Q You encouraged him to do so?

A No.

Q Sir, have you ever directly or indirectly contributed to his legal fees related to this proceeding?

A No. Never.

Q Have you provided him or his lawyers with documents relevant to this proceeding?

A I had a meeting with his lawyers, and we reviewed some documents.

Q And when was that?

A 2012.

Q Before the proceedings started?

A Yes.

Q And you provided them with documents?

A No, there may have been some emails that I had at the time.

Q Did you also provide those emails to Mr. Long?

A I think I might have given them to Mr. Long for his lawyer.

[16] [...]

Q Sir, why would you -- why would you volunteer that information? You would have volunteered that information to Mr. Long because you had been assisting him in this litigation?

A I have not been assisting Mr. Long in the litigation. I gave him this information at the time, that if he was being denied something which he claimed was justly his, then it would be inappropriate of me not to tell him where he might find the proof that he needs.

Q Sir, I suggest to you that you hired Mr. Long for a position he wasn't qualified for so that he would have sufficient income to pursue this lawsuit?

MS. TRIBE: Sir, I'm going to object. The question has been asked if he provided any financial assistance. He said no. That has been asked and answered, My Lord.

THE COURT: I will permit the question to be put just to settle the matter.

...

Because he has particularized it in another fashion.

THE WITNESS: Then my response will be to this, My Lord, absolutely I did not hire Mr. Long for any purpose of pursuing any claim against Mr. Wright. That is absolutely not my interest. I have no interest who wins, friendship-wise, business-wise, any other reason. So whatever you may be trying to suggest over and over again is simply not true.

[17] [...]

Q Just to be clear, Doi Chang is a company in which you have an interest?

A I have 50 percent. And if I may just say this, so it's absolutely clear, Long never received anything from me personally, nothing from Western Investments, nothing from Doi Chang. No money was given directly or indirectly in respect of this lawsuit. I am not in favour of the lawsuit. I wish I had no part of it.

[Willcock J.A.'s emphasis.]

[27] The Court of Appeal also set out at para. 18 of the Supplemental Appeal Decision, the following excerpts from Mr. Long's evidence at the trial before Wong J:

[18] [...]

Q Sir, has Mr. Darch provided you with any assistance in this litigation?

A No, My Lord.

Q No financial assistance?

A No, My Lord.

Q But he has provided your lawyers with documents relevant to the litigation?

A I can't answer for my lawyers, My Lord.

Q Are you aware as to whether or not he has provided documents to your lawyers in this litigation?

A I can't say for sure, My Lord.

Q Has he provided you with documents that are relevant to this litigation?

A No, My Lord.

Q Have you ever met with him to discuss the issues in -- that relate to this litigation?

A We've not discussed the litigation, My Lord.

Q Sir, I suggest to you that that is, in fact, not true, that you have spoken to Mr. Darch about, in particular, this litigation.

A My Lord, my recollection is that there has been no discussion of the litigation.

Q That, in fact, sir, you had a discussion with Mr. Darch shortly before these proceedings were initiated, and he told you that if what you were saying was true, that you should start proceedings because you might have a claim?

A No, My Lord, that was not his advice.

Q So just so that I'm perfectly clear, you've never had a discussion with Mr. Darch about this proceeding?

A No, My Lord.

[Willcock J.A.'s emphasis.]

[28] The Court of Appeal extensively reviewed the law relating to an application to set aside a trial judgment based on misrepresentations amounting to perjury. It concluded that the trial court retains jurisdiction to hear and determine a challenge to a judgment based on an allegation of fraud or perjury because trial courts are in a privileged position with respect to the determination of such factual disputes: Supplemental Appeal Decision at para. 58.

[29] Accordingly, the Court of Appeal dismissed Mr. Wright's and Red Branch's application to re-open the appeal and admit fresh evidence, but noted that its decision did not preclude the applicants from commencing an action in this court to set aside the First Trial Decision on the basis that it constituted a fraud upon the court.

[30] Mr. Wright and Red Branch commenced this action on July 13, 2018, seeking to set aside the First Trial Decision of Wong J. and an order for a new trial.

Legal Test for Proving a Fraud on the Court

[31] In the Supplemental Appeal Decision at para. 32, the Court of Appeal, in quoting from *MacDonald v. Pier*, [1923] S.C.R. 107 at 120–122, acknowledged that a judgment may be set aside where a court has been misled by fraud, and such fraud may include cases of perjury.

[32] A party must meet the following four-part test to establish a fraud on the court:

- 1) prove the fraud on a balance of probabilities with clear and cogent evidence;
- 2) show that it did not have knowledge of the fraud or the evidence necessary to prove the fraud at the time of the initial trial;
- 3) the fraud must have affected the result in the judgment but the party need not show that it was a determining factor; and
- 4) prove that it did not act without undue delay:

Canada v. Granitile Inc. (2008), 302 D.L.R. (4th) 40 (Ont. S. Ct. J.), 2008 CanLII 63568 (O.N.S.C) [*Granitile*] at paras. 25, 282, and 319.

[33] When fraud has been established, the fraud must be material to the decision under review: *Granitile* at para. 313.

[34] The evidence of fraud must go to the foundation of the decision or be material to the claim, but it need not be determinative of the decision under attack. It is sufficient that it might mislead the court: *Granitile* paras. 315–316 and 319.

[35] 'Material' means that which goes to the foundation of the decision or which goes to the crux of a central issue before the court. 'Material' obviously means something different from and, in this context, more than 'relevant': *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610 (H.C.J.) at 658, 1988 CanLII 4534 (O.N.S.C.) [*International Corona*].

[36] When it comes to materiality of fresh evidence, the evidence in question must reasonably be expected to have affected the result at trial when considered in combination with the rest of the evidence: *R. v. N.L.P.*, 2013 ONCA 773 at para. 45.

[37] It must be shown that fresh facts have been discovered which, by themselves or in combination with previously known facts, would provide a reason for setting aside the judgment: *Granitile* at para. 309.

[38] The question of whether a party has exercised due diligence when applying for fresh evidence to be considered by the court is one of fact. However, this analysis is relaxed when that fresh evidence did not previously come to light because of deliberate non-disclosure: *Bains v. Bhandar*, 2000 BCCA 466 at para. 56.

[39] A party with knowledge of the alleged fraud at the relevant time cannot claim that they have been deceived or defrauded. At the same time, parties are not expected to be perpetually on guard to discover fraud of another party. Partial or constructive knowledge is not enough to overcome fraud: *Granitile* at paras. 301–303.

[40] Ultimately, the question of whether the party alleging fraud had knowledge of the said fraud should be applied flexibly: *Granitile* at para. 312.

[41] The key underlying principle is that those who deceive others will not be permitted by the court to profit from their deception: *Granitile* at para. 319.

Did Mr. Long and/or Mr. Darch Fraudulently Conceal Evidence Regarding Mr. Darch's Alleged Neutrality?

Factual Findings

[42] Mr. Darch and Mr. Wright were involved in litigation in the early 2000s, which concluded with Mr. Darch paying Mr. Wright several million dollars to settle that case.

[43] In August 2011, Mr. Darch hired Mr. Long to raise capital for one of Mr. Darch's companies. Mr. Long asked Mr. Darch to forward some of his compensation in respect of this work to Mr. Long's law firm in Vancouver. Mr. Darch complied with this request.

[44] In an email dated January 18, 2012 to his lawyers regarding his action against Red Branch, Mr. Long described Mr. Darch as a trusted friend who had volunteered to act as a witness against Mr. Wright, and "assist in any way he can".

[45] On June 17, 2012, Mr. Darch wrote an email to Mr. Long in which he described reviewing Mr. Long's claim against Mr. Wright and the response to counterclaim. Mr. Darch made notes and found emails that would, in his words, "hang the Wrights". In this email, Mr. Darch suggested that Mr. Long focus on Mr. Wright's greed as the basis for him reneging on giving Mr. Long 50% of the Royalty.

[46] In the same email, Mr. Darch also suggested that Mr. Wright used the conflict between him and Mr. Long over the Amanta dispute as the basis for terminating his relationship with Mr. Long. Mr. Darch provided Mr. Long with the following advice "[...] let the case unfold in a way that will draw Wright out so don't be too anxious to present your case and show your strategy". Mr. Darch also wrote: "At discovery, you need Wright to be categorical in his position and repeatedly perjure himself. Once shown as a repeated liar to [sic] you, the Royalty lawyer, Royalty Holders and his accountant, his credibility is gone and you win".

[47] In another email sent by Mr. Darch to Mr. Long on June 17, 2012, Mr. Darch provided Mr. Long with extensive comments and advice on Mr. Long's claim, Mr. Wright's counterclaim, and a series of proposed "Additional Facts" laden with guidance and advice on the issue of Mr. Wright's tax planning involving the Royalty. Mr. Darch also suggested that Mr. Long disclose some documents after Mr. Wright's discovery and that he (Mr. Darch) be the last witness at trial "who ties a bow on the case".

[48] Counsel retained by Mr. Long met with Mr. Darch on June 22 and 27, 2012 to discuss the Royalty action.

[49] Mr. Darch prepared a letter for Mr. Long's counsel in which he summarized the evidence he had that would assist Mr. Long in the Royalty action.

[50] On June 30, 2012, Mr. Darch reviewed documents at the offices of Mr. Wright's counsel and reported his findings by email to Mr. Long and his counsel.

[51] In an October 26, 2012 email, Mr. Darch suggested that Mr. Long "[r]elax my friend and nail [Mr. Wright] with the Securities Commission."

[52] In December 2012, Mr. Wright and Red Branch produced a list of documents that Mr. Long forwarded to Mr. Darch, who then suggested that Mr. Long demand production of a further document. Mr. Darch also attended at the law firm retained by Mr. Wright to review Mr. Wright's documents.

[53] In February 2013, Mr. Darch emailed Mr. Long "[...] I feel that your lawyer MUST present to the judge that you were deceived by [Mr. Wright] on the whole issue of tax and that he abused your trust in him and has conned you into signing the transfer to Red Branch and ask the judge to rule that your 50 percent be reinstated in your name".

[54] On May 6, 2013, Mr. Long and his counsel agreed that they should not use documents that purportedly show that Mr. Darch and Mr. Wright hid assets offshore because Mr. Darch was Mr. Long's ally.

[55] On October 28, 2014, Mr. Long advised his counsel that Mr. Darch terminated Mr. Long's employment in May 2014 as a result of an argument and they had not spoken since. After his employment was terminated, Mr. Long provided documents to the Canada Revenue Agency ("CRA") purportedly showing that Mr. Wright and Mr. Darch had both evaded taxes by using offshore accounts.

[56] On March 5, 2015, less than four weeks before the start of the First Trial before Wong J., Mr. Darch confirmed with Mr. Long that he would be a witness at that trial. On March 9, 2015, Mr. Long wrote to his counsel, Ms. Tribe, stating "I note that John (Darch) has responded. Seems to be trying to run the show again?"

[57] Mr. Darch also asked Mr. Long's counsel to subpoena him for the First Trial so that he (Mr. Darch) could avoid a suggestion that he was colluding with Mr. Long, that he could testify that he was only testifying because he had been subpoenaed, and that he could state that he had not spoken to Mr. Long for almost a year since Mr. Long's employment was terminated by him.

[58] At the First Trial, Mr. Long testified that Mr. Darch provided no assistance to him in the litigation and that they had not discussed it. During the hearing before me, Mr. Long sought to explain this answer by suggesting that his recollection was false because he had not spoken or thought of Mr. Darch for more than a year prior. He also characterized these answers at the First Trial as stupid, but reiterated that he had no intention of being dishonest.

[59] Mr. Darch testified at the First Trial that he had no interest in the outcome of the litigation "friendship-wise, business-wise, [or for] any other reason". Mr. Darch also testified that he had not been assisting Mr. Long in the litigation, but he admitted that he had provided documents to Mr. Long in respect of the litigation.

[60] Mr. Darch strongly asserted during the First Trial that Mr. Long never received anything from him personally or his companies and stated that "[n]o money was given directly or indirectly in respect of this lawsuit. I am not in favour of the lawsuit. I wish I had no part of it."

Positions of the Parties

[61] Mr. Wright’s central contention is that Mr. Darch was not neutral, that he conspired with Mr. Long to create the false impression of neutrality before Wong J., and that this alleged misimpression materially affected the First Trial Decision.

[62] Specifically, Mr. Wright alleges that Mr. Long possessed offshore bank records with which he sought to blackmail Mr. Darch. For this reason, Mr. Darch allegedly assisted Mr. Long in his claim against Mr. Wright and hired him to work on Thai potash projects.

[63] Mr. Long counters that he and Mr. Darch did not seek to mislead the Court and that in any event, the alleged fraud was not material to the outcome of the First Trial.

Discussion

[64] I am not convinced that Mr. Darch assisted Mr. Long with the litigation because he had personal animus against Mr. Wright. While Mr. Darch may still have had some animosity toward Mr. Wright, I find it more likely that Mr. Darch wanted Mr. Long to succeed because he believed in the validity of Mr. Long’s claim against Mr. Wright.

[65] I further reject Mr. Wright’s assertion that Mr. Darch directly or indirectly funded the litigation based on a request by Mr. Long that Mr. Darch direct income to Mr. Long’s law firm. I accept that these amounts were earned by Mr. Long while employed by Mr. Darch.

[66] That said, reviewing pleadings and a draft affidavit, along with providing strategic and tactical litigation advice, goes beyond the role of a purportedly neutral witness. “Nailing Wright” and “putting his head in a noose” suggests that Mr. Darch was strongly in favour of Mr. Long succeeding in his litigation against Mr. Wright.

[67] There is clear and cogent evidence, in the form of several email communications between Mr. Darch, Mr. Long, and Mr. Long’s counsel, that

Mr. Darch provided Mr. Long with strategic and tactical litigation advice in the years prior to the First Trial. At the First Trial, however, Mr. Long and Mr. Darch did not disclose the extent to which they had worked together in preparation for the lawsuit and the history of their personal and professional dealings from 2011 to 2014.

[68] I do not accept Mr. Long’s evidence that he simply forgot about Mr. Darch’s involvement in the litigation when asked at the First Trial. He was asked several questions relating to whether or not Mr. Darch and him had discussed this litigation, which he denied. I find that this was a clear attempt to mislead the court. Additionally, a mere four weeks before trial, Mr. Long alluded to Mr. Darch attempting to “run the show again”, thus demonstrating that Mr. Long was well aware of Mr. Darch’s previous involvement with the file. On that basis, I do not accept that Mr. Long “forgot” or “accidentally” failed to disclose his discussing the litigation with Mr. Darch prior to the First Trial. Rather, I find that Mr. Long sought to deliberately minimize Mr. Darch’s involvement in this litigation at trial.

[69] On the whole, I am satisfied that there is clear evidence that Mr. Long deliberately mislead the court in his evidence and perjured himself regarding Mr. Darch’s involvement with the trial file. As discussed in my findings below, however, that was not material to the outcome of the trial.

Did Mr. Wright Have Knowledge of the Alleged Fraud or the Evidence Necessary to Prove the Fraud at the Time of the First Trial?

Factual Findings

[70] Between 2002 and 2005, Mr. Darch and Mr. Wright were engaged in litigation, which was eventually resolved by way of a settlement that included a significant payment made by Mr. Darch to Mr. Wright.

[71] Mr. Wright did not know that Mr. Darch was assisting Mr. Long in the litigation or that Mr. Darch and Mr. Long were friendly in 2011 and 2012.

[72] On June 30, 2012, Mr. Darch reviewed documents at the offices of Mr. Wright’s counsel on behalf of Mr. Long.

[73] Mr. Darch terminated Mr. Long's employment in 2014. Their friendship and employment relationship also ended at this time.

Positions of the Parties

[74] Mr. Wright argues that he had no knowledge of the relationship between Mr. Long and Mr. Darch and, therefore, there was no way he could have known or had the evidence necessary to prove the fraud at the time of the First Trial.

[75] Mr. Long argues that Mr. Wright had almost all the facts necessary to have conducted an extensive cross-examination of either Mr. Darch or Mr. Long about their relationship during the litigation, but, nevertheless, had failed to do so. Specifically, Mr. Wright knew that Mr. Darch was assisting Mr. Long with the litigation and failed to take steps to inquire about his involvement, either before trial or by impeaching him at trial.

Discussion

[76] I am satisfied that, at the time of the First Trial, Mr. Wright did not have knowledge of the alleged fraud. Notably, Mr. Wright was unaware that Mr. Long and Mr. Darch had been friends in 2011 and 2012 and, therefore, was unaware that Mr. Darch had assisted Mr. Long with the litigation.

[77] I further find that Mr. Wright did not possess the evidence required to prove the alleged fraud at the time. Although Mr. Wright's counsel was aware that Mr. Darch had visited Mr. Long's counsel's office on one occasion, neither Mr. Wright nor his counsel could have known the full extent of Mr. Wright's involvement, including the fact that he provided strategic and tactical advice to Mr. Long about the litigation. This would only become clear once the parties had direct access to Mr. Long's solicitor's file.

[78] Mr. Wright did not have knowledge of the alleged fraud or the evidence necessary to prove it at the time of the First Trial.

Was the Alleged Fraud Material to the First Trial Decision?

Factual Findings

[79] Justice Wong framed the issue before him as the “conflicting credibility between the parties as to their agreed arrangement”: First Trial Decision at para. 5.

[80] Mr. Long and Mr. Wright had been essentially lifelong friends, having met in 1974. Justice Wong found that Mr. Wright gave Mr. Long a one-half interest in the Royalty as consideration for holding the Royalty in Mr. Long’s name. This was “entirely consistent with ventures that they had engaged in in the past. Mr. Wright specifically told Mr. Long that this Royalty would be “our pension plan””: First Trial Decision at para. 30.

[81] Mr. Long was listed as Fasken’s client. Two lawyers from Fasken, namely, Mr. Gabrielson and Mr. Andrews, Q.C. testified before Wong J. that they believed Mr. Long to be the owner of the Royalty before it was transferred to Red Branch, that Mr. Wright was acting as Mr. Long’s agent and would give instructions to Fasken on his behalf, and that at no time did Mr. Wright advise them that he had a beneficial interest in the Royalty.

[82] Mr. Wright sought advice on the taxation of the Royalty on the basis that Mr. Long was not a Canadian taxpayer and was a resident of Ireland. After receiving this tax advice, Mr. Wright sought to have the Royalty transferred to Red Branch: First Trial Decision at para. 34.

[83] Mr. Darch corroborated Mr. Long’s evidence that Mr. Wright gave Mr. Long a one-half interest in the Royalty because Mr. Wight was planning to leave his wife for his Thai mistress and he therefore preferred to retain one-half of the Royalty instead of one-quarter of it. This is presumably based on Mr. Wright’s assumption that, upon an equal division of their family assets, his wife would obtained a one-half interest in the Royalty, and his remaining one-half interest would be taxed in Canada, leaving him with a one-quarter interest.

[84] As noted, David Anderson, a lawyer and the brother of the late Mr. Anderson, also testified before Wong J. that Mr. Wright told him that Mr. Long owned the Royalty and that Mr. Wright was acting as his agent.

[85] Justice Wong concluded that Mr. Wright reneged on his agreement with Mr. Long out of anger: First Trial Decision at para. 58.

Positions of the Parties

[86] Mr. Long submits that the incorrect evidence he provided in the First Trial regarding Mr. Darch's involvement in preparing for the First Trial was not an effort to materially mislead the court and, in any event, it would not have affected Wong J.'s First Trial Decision.

[87] Mr. Wright's position is that Mr. Darch's neutrality was a material factor in the credibility determinations made by Wong J.

Discussion

[88] The authorities establish that materiality refers to the central issue in the case that goes to the foundation of the decision. The central issue in this case was the credibility of the parties.

[89] I have found that there was a fraud perpetrated by Mr. Long. Nevertheless, I find that a fraud regarding Mr. Darch's neutrality was not material to the outcome of the First Trial when considered in combination with the rest of the evidence.

[90] I am satisfied, after reviewing the First Trial Decision, that the neutrality of Mr. Darch was not a material factor in Wong J.'s finding that Mr. Wright gifted Mr. Long the Royalty. I also agree with Wong J.'s finding that Mr. Darch had no financial interest in the outcome of the litigation. In addition to Mr. Darch's testimony, there was ample other evidence to support Wong J.'s finding that Mr. Long held a 50% beneficial ownership interest in the Royalty.

[91] First, there was the evidence of Mr. Long that Mr. Wright gave Mr. Long a one-half interest in the Royalty to avoid splitting the Royalty with his wife and paying

tax on his share, thus leaving him with approximately a one-quarter interest. As Wong J. found, Mr. Long's version of events was more probable because it was entirely consistent with the parties' previous friendship and business ventures: First Trial Decision at para. 30 and 57.

[92] Second, Wong J. disbelieved Mr. Wright's evidence at trial. In assessing the credibility of Mr. Long and Mr. Wright, on the totality of the evidence, he found in favour of Mr. Long and against Mr. Wright.

[93] Third, there was evidence that Mr. Wright sought advice on the taxation of the Royalty based on Mr. Long's residence in Ireland, and only transferred the Royalty to Red Branch after learning that it would be taxable in Ireland: First Trial Decision at para. 34. This tax advice would have been entirely unnecessary and irrelevant if, as asserted by Mr. Wright, Mr. Long merely held the Royalty as a nominee owner for Mr. Wright.

[94] Additionally, even assuming that Mr. Darch was not a neutral witness, his evidence that Mr. Wright told him that he gave Mr. Long a one-half interest in the Royalty nevertheless rings true and was consistent with the evidence of Mr. Long, Mr. Anderson, Mr. Gabrielson, and Mr. Andrews, Q.C. given at the First Trial. The latter three witnesses' testimony all supported Mr. Long's version of events: First Trial Decision at paras. 51–53.

[95] I accept that Mr. Wright did, in fact, tell Mr. Darch that he preferred Mr. Long have a one-half interest in the Royalty and that he would retain the other half as opposed to splitting the Royalty with his wife and paying tax on his share. I further accept that Mr. Darch preferred that Mr. Long succeed in this litigation because he believed that Mr. Long was entitled to a 50% interest in the Royalty, and not because of any personal animus towards Mr. Wright or collusion with Mr. Long. In fact, the evidence demonstrates that at the time of the First Trial, Mr. Darch was no longer friends with Mr. Long.

[96] Finally, Wong J. relied on the fact that Mr. Wright deliberately chose not to leave a paper trail of the transaction between himself and Mr. Long as he was concerned about possible tax consequences of the transfer: First Trial Decision at para. 57.

[97] In my view, evidence of the advice and guidance provided by Mr. Darch to Mr. Long would not have materially affected the finding made by Wong J. regarding the credibility of the parties or affected the outcome of the case.

Perjury and Collusion

[98] In addition to fraud on the court, Mr. Wright has also advanced claims that Mr. Darch and/or Mr. Long committed perjury and collusion.

[99] Mr. Wright argues that evidence of perjury is on its own a basis to set aside the First Trial Decision.

[100] A person commits perjury when they knowingly mislead: *Granitile* at para. 446.

[101] For a judgment to be set aside on the grounds of perjured evidence, such evidence must have been material to the court's decision: *Macdonald* at 121; *Burcevski v. Ambrozic*, 2010 ABQB 570 at para. 51.

[102] Words that are said to constitute perjury must be considered in the context of the testimony as a whole: *R. v. Robinson*, 2017 BCCA 6 at para. 8.

[103] I have already found that Mr. Long gave perjured evidence about Mr. Darch's involvement in the litigation, in that he deliberately misled the court about Mr. Darch's involvement in the litigation preparation. While Mr. Darch did not fully disclose the extent of his involvement with the litigation, I am not satisfied, on the evidence, that this rises to the level of perjury or knowingly misleading the court.

[104] In any event, while the finding with respect to Mr. Long's perjured evidence would likely have an affect on his credibility assessment, I find, for the reasons

already discussed above, that there was sufficient other evidence grounding Wong J.'s decision about the Royalty arrangement. I do not consider the perjured evidence to be material to Wong J.'s decision.

[105] Mr. Wright has also advanced a claim that Mr. Long and Mr. Darch colluded to conceal evidence of Mr. Darch's involvement with the litigation before the First Trial.

[106] Collusion can arise from both a deliberate attempt to concoct evidence or from communication between witnesses that has the effect of colouring their testimony: *R. v. Clause*, 2016 ONCA 859 at para. 81.

[107] I am not satisfied that there is evidence of collusion in this case. My decision is supported by the findings of fact made in these Reasons with respect to the claim of fraud on the court. Notably, although Mr. Long was untruthful in his testimony at the First Trial, Mr. Darch himself admitted to providing documents to Mr. Long, discussing the litigation with him, and providing information to him that would assist with his claim. The testimony of Mr. Darch and Mr. Long were not aligned on this point. Had they colluded together, Mr. Darch would not have contradicted Mr. Long's testimony that the two had never discussed the litigation.

[108] Additionally, I do not find that Mr. Darch assisted Mr. Long with preparation for the First Trial to engineer a particular result or based on his personal animus against Mr. Wright. I accept that, at the time of the First Trial, Mr. Darch had no friendship or financial interest in the outcome. I find it more probable that Mr. Darch was driven by a desire to help Mr. Long retain what was, in Mr. Darch's opinion, rightfully his.

[109] Accordingly, Mr. Wright's claims to set aside the First Trial Decision for perjury and/or collusion are also dismissed.

Conclusion

[110] Mr. Wright and Red Branch’s application to set aside the First Trial Decision and the Costs Decision is dismissed.

Costs

[111] If the parties wish to make written submissions on costs, the submissions may be filed within 30 days of the date of these Reasons. If the parties wish to make oral submissions on costs, they may make the necessary arrangements with Supreme Court Scheduling within this timeframe.

[112] If no submissions are received, Mr. Long will have his costs at Scale B.

“Basran J.”