COURT OF APPEAL FOR ONTARIO

CITATION: Continental Currency Exchange Canada Inc. v. Sprott, 2023 ONCA 61
DATE: 20230127
DOCKET: C70412

Paciocco, Harvison Young and Thorburn JJ.A.

BETWEEN

Continental Currency Exchange Canada Inc., Scott Penfound, Tracie Penfound, Kyle Penfound, Kourtney Penfound, Madison Penfound, Angela Penfound and Tracie & Company Limited

Plaintiffs (Appellants)

and

Eric Sprott, Sprott Inc., Sprott Continental Holdings Ltd., Continental Bank of Canada, Sharon Ranson, John Teolis, Jim Roddy, Larry Taylor, John Jason, John Lahey and Phil Wilson

Defendants (Respondents)

AND BETWEEN

Continental Bank of Canada and Sprott Continental Holdings Ltd.

Plaintiffs (Respondents)

and

Continental Currency Exchange Canada Inc.

Defendant (Appellant)

M. Paul Michell and Zain Naqi, for the appellants

Paul Le Vay, Samuel M. Robinson and Stephen Aylward, for the respondents

Heard: December 8, 2022

On appeal from the order of Justice Peter J. Cavanagh of the Superior Court of Justice, with reasons reported at 2022 ONSC 647.

Thorburn J.A.:

OVERVIEW

[1] The parties spent many years and millions of dollars on a joint venture to establish a new Schedule 1 bank. However, in January 2015, the respondent Eric Sprott advised that he no longer wished to participate in funding the project, relations among the parties deteriorated, and litigation was commenced. Several years after the actions were commenced, the respondents discovered that the appellants were in possession of privileged documents belonging to them regarding the venture at issue in the ongoing litigation that had been stored on a computer file server that they had shared (the "File Server"). The respondents also learned that the appellants had obtained copies of their email correspondence. The respondents successfully sought a stay of proceedings.

[2] The motion judge found that the appellant Scott Penfound was responsible for managing the litigation on behalf of the other appellants and that he had access to privileged documents including (i) legal opinions and strategy documents prepared for the respondents by their external counsel, Norton Rose, Stockwoods, and Baker McKenzie; and (ii) every email sent or received by anyone from the

respondent Continental Bank of Canada's email address including emails from in-house counsel and documents prepared for the purpose of this litigation.

[3] The appellants led no evidence to refute the presumed prejudice that arose from these findings.

[4] The motion judge held that the presumed prejudice to the respondent was serious, and the only appropriate remedy was to stay the proceeding.

[5] The sole issue on this appeal is whether the motion judge erred in granting the stay of the appellants' proceeding.

[6] The appellants claim the motion judge erred by:

i. Making inconsistent findings on the material issue of whether the appellants actually reviewed the privileged information;

ii. Conflating prejudice to the respondents with the decision to stay the proceeding. The appellants agree that where privileged information is received, there is a rebuttable presumption of prejudice and that if the presumption is not rebutted, the court must consider the appropriate remedy. However, they claim that these are distinct steps and the motion judge conflated them by directly imposing a stay after finding that the presumption of prejudice had not been rebutted by the appellants;

iii. Placing the burden on the appellants to show that a stay was inappropriate rather than placing the onus on the respondents to show that a stay was the only appropriate remedy and no lesser remedy would suffice; and

iv. Imposing a stay against all of the appellants although only Scott Penfound was presumed to have accessed and reviewed the documents.

[7] For the following reasons, I would dismiss the appeal.

BACKGROUND FACTS

A. The Proposed Transaction and Its Termination

[8] The parties sought to establish a new Schedule 1 licenced bank and entered into several agreements in furtherance of this objective.

[9] The proposal was to set up Continental Bank of Canada (“Continental Bank”) as wholly owned by the respondent, Sprott Continental Holdings Ltd. (“Sprott”). Sprott was in turn wholly owned by the individual respondent, Eric Sprott (“Mr. Sprott”).

[10] Continental Bank was to purchase the shares of Continental Currency Exchange Canada (“Continental Currency Exchange”), owned by the appellants Scott Penfound (“Mr. Penfound”), his wife Tracie Penfound, and their four adult children. The business and branch network of Continental Currency Exchange would then become the genesis of the new bank. The proposed transaction was

overseen by the Office of the Superintendent of Financial Institutions (“OSFI”) and all parties were represented by counsel.

[11] In the course of working to establish the licenced bank the parties moved into the same office space and shared the same File Server.

[12] On November 22, 2013, OSFI issued an order permitting Continental Bank to formally organize under the Bank Act and letters patent were issued giving the Continental Bank until December 3, 2014, to obtain a final order allowing it to begin business as a bank. Further efforts were made, money expended, and Mr. Penfound was involved in management, operations and attending Board meetings as Continental Bank’s President and Chief Operating Officer.

[13] However, on January 12, 2015, the respondent Mr. Sprott advised the board of Continental Bank that he would no longer continue to fund the common business venture. Mr. Penfound was informed of this development the following morning. The transaction was not completed.

B. Continental Bank’s Emails in the Email Server Copy

[14] On January 13, 2015, shortly after receiving the news that Mr. Sprott would no longer continue to fund the common business venture, the appellant Mr. Penfound instructed his assistant, Nicole Lafete, to have Continental Bank’s information technology (“IT”) services provider back up all of Continental Bank email accounts in the File Server to a separate location.

[15] Continental Bank emails consisting of 22 “PST files” were copied onto a removable hard drive (the “Email Server Copy”). PST files are archived files created by Microsoft email systems. Each PST file contains many thousands of emails as well as attachments to those emails. The Email Server Copy contains a copy of every email sent or received by any user with an email address ending in @continentalbank.ca up to January 13, 2015.

[16] At Mr. Penfound’s request, all 22 PST files were placed onto Ms. Lafete’s laptop and some of those emails were reviewed by her. On at least two occasions, February 23 and October 12, 2015, Ms. Lafete forwarded some email chains between Continental Bank employees found in the PST files to Mr. Penfound in response to the latter’s queries.

C. Continental Bank’s Non-Email Documents in the File Server

[17] For nine months after the transaction was terminated, Continental Bank and Continental Currency Exchange continued to operate out of the same location and share the same File Server. The File Server was configured so that certain files from Continental Bank employees’ computer devices would be automatically backed up to their personal folders on the File Server each time they logged in.

[18] On September 9, 2015, Mr. Sprott applied for a receiver to be appointed, which worsened the parties’ relationship.

[19] On September 16, 2015, Mr. Penfound asked Kevin Gilbride, Continental Bank's Chief Financial Officer and instructing representative to litigation counsel, to confirm that he had all data "now on your own servers or those under your control". Mr. Gilbride was on vacation and said he would look into the matter upon his return.

[20] On September 27, 2015, the appellants removed the File Server which at the time still contained the respondents' data.

[21] On October 8, 2015, the respondents' counsel wrote to the appellants' counsel demanding a copy of the Continental Bank data on the File Server. The appellants' counsel did not respond. (The appellants note that their counsel was preoccupied preparing for Mr. Sprott's receivership application.)

[22] On November 5, 2015, the respondents' counsel sent a follow-up letter requesting a response to the October 8 letter. Mr. Penfound instructed an employee, Vince Carere, to confirm with the appellants' IT provider that the Continental Bank data on the File Server was not accessible. In response, the IT provider confirmed on November 6 that "no Continental Currency Employees currently have access to the Continental Bank data stored on the server". In cross-examination, Mr. Carere, confirmed that the use of the word "currently" was included because, until that date, the Continental Bank data was accessible to the appellants.

[23] On November 10, 2015, on Mr. Penfound's advice, the appellants' counsel confirmed that the data had been secured and removed from their possession as of September 3, 2015. Unbeknownst to counsel, the data was not actually secured nor was access removed until November 6, 2015 at the earliest.

[24] On November 16, 2015, Mr. Gilbride asked its IT provider to secure the Continental Bank data in the File Server.

D. Continental Bank's Discovery that the Appellants were in Possession of its Documents and their Decision to seek a Stay of Proceedings

[25] In May 2019, when the respondents received the appellants' productions, they learned that the appellants were in possession of Continental Bank's privileged documents, including email exchanges between Angela Shaffer, Continental Bank's General Counsel, and various external counsel as well as exchanges between Ms. Shaffer and officers of Continental Bank. The motion judge accepted Ms. Shaffer's evidence that she used her email account to send and receive privileged and confidential correspondence with lawyers retained by Continental Bank and Mr. Sprott, with respect to the transaction and agreements at issue in this litigation.

[26] The respondents sought an explanation as to how the appellants obtained copies of these privileged documents.

[27] Mr. Penfound said he did not disclose the fact that he had requested backup copies of the emails on the Email Server Copy when this issue arose in June 2019 because over the ensuing years, he had forgotten that he had made this request.

[28] A further investigation by the respondents' computer forensic investigator revealed that the appellants also had files from the laptop of Continental Bank's then instructing representative to litigation counsel, Mr. Gilbride. Mr. Gilbride's last backup from his laptop occurred in the morning of September 5, 2015, and his files were saved on the File Server (the "Jump List"). The Jump List documents included legal opinions and strategy documents prepared for the respondents by outside counsel for the purpose of this litigation. The motion judge accepted the investigator's evidence that these documents would have been accessible to the appellants.

[29] The Email Server Copy and certain PST files from Mr. Gilbride's personal backup folder on the File Server were loaded onto a database to be reviewed by the appellants' internal document review team (which included one junior member of the appellants' external counsel) beginning in approximately March 2018. The search continued until October 2020, well after the motion was brought.

[30] As a result of the discovery of the appellants' access to the above privileged and confidential information, the respondents brought a motion to stay the proceedings.

THE LAW OF STAYING PROCEEDINGS WHERE THERE IS UNAUTHORIZED ACCESS OF PRIVILEGED INFORMATION

[31] The test to decide the appropriate remedy where privileged information is received by an opposing party (in this case, the appellants) or its counsel is set out in *Celanese Canada Inc. v. Murray Demolition Corp.*, 2006 SCC 36, [2006] 2 S.C.R. 189, and *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235. The focus of the analysis is on trial fairness and the integrity of the adjudicative process. In *Celanese*, at para. 34, the Supreme Court noted that a breach of privilege "creates a serious risk to the integrity of the administration of justice" and to prevent this, the courts must act "swiftly and decisively".

[32] There are three stages to the analysis.

The First Stage: The respondents must establish that the appellants obtained access to relevant privileged material

[33] At the first stage, the moving party (in this case, the respondents) must prove that the opposing party (in this case, the appellants) obtained access to their privileged materials

The Second Stage: The appellants must rebut the presumption of prejudice

[34] At the second stage, once the respondents establish that the appellants obtained access to privileged material, there is a rebuttable presumption of prejudice: *Celanese*, at paras. 42-43, 48. The respondents need not prove the risk of significant prejudice or "the nature of the confidential information" that was disclosed beyond the requirement to prove access by the appellants: *Celanese*, at

paras. 42, 48. Instead, the appellants bear the onus to rebut the presumed prejudice flowing from receipt of the privileged information: *Celanese*, at para. 48.

[35] The presumption of prejudice can be rebutted by identifying to the court "with some precision" that: (i) the appellants did not review any of the privileged documents in their possession; or (ii) they reviewed some documents, but the documents reviewed were not privileged; or (iii) the privileged documents reviewed were nevertheless "not likely [to] be capable of creating prejudice": *Celanese*, at para. 53.

[36] The evidence adduced must be "clear and convincing" such that "[a] reasonably informed person would be satisfied that no use of confidential information would occur": *MacDonald Estate*, at pp. 1260 to 1263; see also, *Celanese*, at para. 42. "A fortiori undertakings and conclusory statements in affidavits without more" do not suffice: *MacDonald Estate*, at p. 1263.

[37] Any "[d]ifficulties of proof" in rebutting the presumption of prejudice "should fall on the heads of those responsible for the search [in this case, the appellants], not of the party being searched": *Celanese*, at para. 55.

[38] In *MacDonald Estate*, the precise extent of solicitor-client confidences acquired over a period of years was unknown and possibly unknowable. Justice Sopinka wrote, at p. 1290, that:

> "once it is shown by the client that there existed a previous relationship which is sufficiently related to the

> retainer from which it is sought to remove the solicitor, the court should infer that confidential information was imparted unless the solicitor satisfies the court that no information was imparted which could be relevant."

[39] As summarized in *Celanese*, at paras. 49-51, there are compelling reasons for the presumption of prejudice and the reverse onus on the appellants in receipt of privileged information:

i. Requiring the respondents whose privileged information has been disclosed or accessed to prove actual prejudice would require them to disclose further confidential or privileged materials;

ii. Placing the burden on the appellants who have access to the privileged information is consonant with the usual practice that "the party best equipped to discharge a burden is generally required to do so"; and

iii. The respondents should not have to bear "the onus of clearing up the problem created by the [appellants'] carelessness".

The Third Stage: The respondents must show that a stay is the only appropriate remedy

[40] The third stage of the analysis is to fashion an appropriate remedy.

[41] By the time the court reaches the remedy stage, the appellants have failed to rebut the presumption of prejudice. Because prejudice is a necessary precursor, the question at the remedy stage is not whether there is prejudice but how to rectify it to ensure fairness.

[42] A party seeking a stay (namely, the respondents) has the burden to show "special circumstances" to justify a stay as a stay is only granted where there is (i) prejudice to the right to a fair trial or the integrity of the justice system and (ii) no alternative remedy to cure the prejudice: *Etco Financial Corp. v. Ontario*, [1999] O.J. No 3658 (S.C.), at para. 3; *R. v. Babos*, 2014 SCC 16, 367 D.L.R (4th) 575, at para. 32.

[43] Before imposing a stay, remedies that are less serious must first be considered as a stay is an extraordinary remedy that should be reserved for the clearest of cases: *Celanese*, at para. 56. It is a remedy of last resort to be imposed only to prevent ongoing prejudice, unfairness to a party or harm to the administration of justice: *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, 470 D.L.R. (4th) 328, at paras. 83-85.

[44] In *Celanese*, at para. 59, the Supreme Court set out a number of non-exhaustive factors to be considered in determining the appropriate remedy. *Celanese* contemplated whether to remove counsel for the appellants who gained access to the respondents' privileged documents in executing an Anton Piller order. While in this case, the appellants, not their counsel, were in receipt of the respondents' privileged materials, the factors from *Celanese* nonetheless remain helpful. Those factors include:

i. How the documents came into the possession of the appellants or their counsel;

ii. What the appellants and their counsel did upon recognition that the documents were potentially subject to solicitor-client privilege;

iii. The extent of review of the privileged material;

iv. Contents of the solicitor-client communications and the degree to which they are prejudicial;

v. The stage of the litigation; and

vi. The potential effectiveness of a firewall or other precautionary steps to avoid mischief.

[45] Where the appellants who were in receipt of privileged documents fail to identify the documents they reviewed, they put the court in an “invidious position” of being unable to determine the extent of the actual review of the material and the degree of resulting prejudice. The court will, thus, presume that the third and fourth factors weigh against the appellants: *Celanese*, at paras. 62-63; *MacDonald Estate*, at p. 1263. This adverse presumption can be drawn even though the burden at the remedy stage shifts to the respondents to show that a stay is the appropriate remedy.

THE MOTION JUDGE'S REASONS

[46] In this case, the motion judge held that (i) the respondents discharged their burden to demonstrate that the appellants obtained access to their confidential and privileged information that was relevant to the issues in this litigation; (ii) the appellants did not rebut the presumption of prejudice as they led no evidence as to what documents they reviewed; and therefore, (iii) the only appropriate remedy was a stay of proceedings.

[47] In arriving at his conclusion, the motion judge found that the appellants had access to the respondents' relevant and privileged information in (i) the Email Server Copy, which contained all of Continental Bank's email communications up to January 13-15, 2015, including email chains to and from Ms. Shaffer, the board, and the respondents' outside counsel, Baker McKenzie, Norton Rose Fulbright, and Stockwoods LLP; and (ii) the File Server, which contained all materials in Mr. Gilbride's backup folder on the Jump List, including his communication with the respondents' aforementioned counsel, as well as two PST files not found in the Email Server Copy.

[48] The motion judge held that there was no direct evidence that the appellants reviewed the documents (which numbered over 600,000) as they were never put into evidence. The motion judge was not asked by either party to inspect them. He

concluded that it was therefore impossible to know whether the documents were significant or mundane.

[49] The motion judge held, however, that because the appellants led no evidence to establish what documents they reviewed, there was no evidence to rebut the presumption of prejudice to the respondents.

[50] In imposing a stay of proceedings, the motion judge noted that "even if the [appellants] had new lawyers", the presumed prejudice to the respondents and the harm to the administration of justice would not be cured as the client, not the lawyer, obtained access to privileged information belonging to the opposing party.

[51] A stay was granted.

ANALYSIS

The First Issue: Did the motion judge make inconsistent findings as to whether the appellants accessed and reviewed privileged information?

[52] The appellants claim that the motion judge made inconsistent factual findings in noting that the respondent's privileged emails were "reviewed by Ms. Lafete under Mr. Penfound's direction for a long period" while also observing that "[w]hat was reviewed cannot be known" and that "it is impossible to know" whether the documents reviewed were "mundane or insignificant."

[53] I disagree with the appellants' assertion that the motion judge made inconsistent findings about the appellants' access to and review of the respondents' privileged information.

[54] The motion judge correctly noted that the *Celanese* test clearly provides that "the onus is on the party with unauthorized access to another party's privileged documents to show that there is no risk that privileged and confidential information attributable to a solicitor and client relationship will be used to the prejudice of the party possessing the privilege."

[55] He then held that the appellants and their lawyers,

> have had access to relevant confidential and privileged documents over an extended period…[The appellants] had access to all [Continental Bank] emails over an extended period of time, including privileged emails from Ms. Shaffer about the proposed transaction at issue in the litigation, and these emails were reviewed by Ms. Lafete under Mr. Penfound's direction for a long period of time. Although it is less clear whether, or the extent to which, privileged documents from Mr. Gilbride's backed up emails on the File Server were reviewed by [the appellants], …these documents, including highly confidential and privileged documents on the Jump List were accessible to the [appellants] until November 6, 2015. In these circumstances, prejudice is presumed. (Emphasis added)

[56] The motion judge noted that Ms. Lafete reviewed and forwarded to Mr. Penfound, Continental Bank emails from the Email Server Copy for over two and a half years though "it is impossible to know whether the[se] emails appear to be mundane or insignificant". He found that, once the PST files from the Email Server Copy and the appropriate program to access these files were installed on Ms. Lafete's laptop, Mr. Penfound asked his assistant to conduct searches of the emails on her laptop roughly on a "weekly" basis.

[57] He concluded that the appellants had access to privileged communications for “a long period” and that some of these privileged communications were reviewed by Mr. Penfound’s secretary under his direction although the nature and sensitivity of the materials was not known to the motion judge.

[58] There was ample evidence to support this finding. On at least two different occasions, on February 23 and October 12, 2015, Ms. Lafete forwarded email chains between Continental Bank employees to Mr. Penfound that “dealt with documents for the proposed business transaction”. Mr. Penfound and other Continental Currency Exchange employees (as well as Ms. Lafete) were not otherwise copied on these communications. It was therefore open for the motion judge to infer that these emails must have come from the Email Server Copy. Furthermore, the respondents’ expert evidence, accepted by the motion judge, provided that the appellants accessed two PST files from Mr. Gilbride’s backup folder on the File Server on October 19 and 20, 2015.

[59] The motion judge did note that, because the appellants did not provide any evidence as to what documents they reviewed, it was impossible to know the actual scope of their document review, the sensitivity of the information and the extent of resulting prejudice. However, applying *Celanese*, because the appellants provided no evidence of what they actually reviewed, the motion judge correctly held that the appellants failed to rebut the presumption of prejudice.

[60] This ground of appeal therefore fails.

The Second Issue: Did the motion judge conflate the presumption of prejudice to the respondent with the imposition of the remedy of a stay of the appellants' proceeding?

[61] As noted in the legal analysis above however, imposition of a remedy presupposes prejudice and at the remedy stage, the respondents, not the appellants, have the onus to establish that a stay of proceedings is the only appropriate remedy.

[62] The appellants argue that the motion judge's reasons imply that reliance at the remedial stage on a failure to rebut the presumption of prejudice leads inexorably to the imposition of a stay every time a party receives privileged documents belonging to the other.

[63] I disagree. The motion judge did not hold or imply that a stay is always warranted whenever the presumption of prejudice has not been rebutted. The presumed prejudice can be more or less serious. If, for example, the evidence accessed was privileged but not relevant to this litigation, the risk of prejudice may not warrant a remedy as severe as a stay of proceeding.

[64] The motion judge assessed the significance of the privileged information to the litigation. He noted that (i) the privileged information in the appellants' possession included communications with legal counsel "about the transaction and the agreements in respect of that transaction that are at issue in the litigation" rendering it significant to the litigation, (ii) it was voluminous, and (iii) it was

available for approximately two and a half years and the appellants “continued to review the [Continental Bank] emails even after this motion was brought”.

[65] He also considered other possible remedies, although his exercise was hampered by a lack of evidence filed on the issue. He noted that the appellants had not discharged their onus of rebutting the presumption of prejudice, and the court was entitled to draw an adverse inference on the extent of the privileged material reviewed and the degree to which it was prejudicial to the appellants since the appellants failed to adduce evidence as to the documents they reviewed.

[66] Where it is not possible to determine “the degree to which [the privileged documents accessed] are prejudicial” and the “nature of the privileged information” because they are not identified for the court, the party that “created this problem [that is, the appellants] will now have to shoulder the consequences”: *Celanese*, at paras. 44, 60 and 63.

[67] The motion judge held that access to privileged information such as legal opinions about the transaction risks serious prejudice. Because the appellants adduced no evidence as to the information reviewed, he concluded that, “I am unable to find that the material that was reviewed is not significant to the litigation and not capable of creating significant prejudice.” There is no error in this analysis.

[68] The motion judge further held that a change of legal counsel would not resolve the issue in this case where it was the client who was in receipt of privileged information.

[69] In this case there is no way for a court to remove a party's presumed illicit knowledge of privileged information, which is voluminous, material, and available for a prolonged period and, "it would be difficult, if not impossible, for a witness who has read the [privileged material] to erase its contents from his or her consciousness": *R. v. Bruce Power Inc*., 2009 ONCA 573, 98 O.R. (3d) 272, at para. 48.

[70] As such, the motion judge's determination of the appropriate remedy did not conflate presumed prejudice and remedy. Presumed prejudice is the precondition for imposition of any remedy and the lack of evidence on the scope of documentary review and the nature of documents accessed is relevant to fashioning the appropriate remedy. The motion judge took all of these factors into consideration, before addressing possible remedies. As such, this ground of appeal fails.

The Third Issue: Did the motion judge err in holding that the appellants had the onus to "show that there is another remedy, short of a stay of the action, that will cure the problem"?

i. The motion judge did not reverse the burden in his stay analysis

[71] I agree with the appellants that the motion judge mistakenly stated that the appellants had the onus to "show that there is another remedy, short of a stay of

the action, that will cure the problem". In fact, the onus is on the respondents, not the appellants, to show that a stay was the only appropriate remedy.

[72] However, I disagree with the appellants that in conducting his analysis, the motion judge in fact reversed the burden of proof. It is evident that in spite of his statement, he applied the correct analysis.

[73] The motion judge noted that the appellants had access to the privileged communications over an extended period, the documents were about the very transaction at issue in this proceeding, and some of those documents were searched and reviewed by Mr. Penfound's assistant under his direction. Although the motion judge held it was less clear whether, or the extent to which, privileged documents from Mr. Gilbride's backup files on the File Server were reviewed by the appellants (he had noted earlier there was evidence of actual access on October 19 and 20, 2015), the presumption of significant prejudice applied. Mr. Gilbride's files, too, were highly confidential and were accessible to the appellants until at least November 6, 2015.

[74] Moreover, the motion judge did not appear to accept that the appellants simply made a mistake. Instead, he found that (i) Mr. Penfound instructed his assistant to seek a backup copy of all of Continental Bank's emails on an urgent basis on the same day he learned that the business transaction failed; (ii) Mr. Penfound informed his counsel (who then relayed the information to the

respondents' counsel) that access to the respondents' data had been secured when it had not; (iii) after the respondents discovered that the appellants had access to confidential emails, Mr. Penfound failed to disclose that he had sought and obtained the Email Server Copy; and (iv) Mr. Penfound (through his document review team) continued to review the respondents' privileged documents even after the motion was brought.

[75] As such, the motion judge was entitled to and did presume that the respondents suffered significant and ongoing prejudice for a prolonged period.

[76] Only after making these observations did the motion judge conclude that,

> In the absence of a stay, the [respondents] will be forced to defend the litigation brought against them by adverse parties who have had access to and reviewed all of their emails about the transaction at issue, including privileged emails. In my view, to allow the [appellants'] action to proceed in these circumstances would be manifestly unfair to the [respondents] and would bring the administration of justice into disrepute. If the litigation were to continue, even if the [appellants] had new lawyers, the public represented by the reasonably informed person would not be satisfied that no use of confidential information would occur. The [appellants] have not shown that there is a remedy, short of a stay, that will cure the problem

[77] Contrary to the appellants' assertion, the motion judge did not say that a stay would always be warranted whenever the presumption of prejudice has not been rebutted. Rather, he held that a stay was warranted in this case because there was significant presumed ongoing prejudice to the respondents.

[78] This conclusion is consistent with the decision in *Bruce Power* where this court upheld a stay of proceedings based on the prosecutor's review of one privileged defence report, which the justice of the peace found "could well be used to the disadvantage and prejudice of the defendant": see paras. 48, 59-66.

[79] Thus, while the motion judge erred in stating that the appellants had the onus to "show that there is another remedy, short of a stay of the action, that will cure the problem", he did not in fact impose a burden on the appellants to show that a lesser remedy was available in his analysis. Given the serious prejudice resulting from the breach by the appellants themselves (not their counsel), the motion judge correctly held that no remedy short of a stay would cure the problem. I see no error in his analysis or conclusion.

ii. A stay of proceedings was the only viable solution in this case

[80] On the motion, the appellants suggested that the respondents should identify all relevant and privileged documents among the 600,000 documents, and an independent referee could then be appointed to determine which, if any of these documents, were in fact subject to privilege. However, this proposed solution was properly rejected by the motion judge because it would impermissibly reverse the *Celanese* burden: it is the appellants who have the burden to satisfy the court that any privileged material they reviewed did not create significant prejudice to the respondents.

[81] On this appeal, the appellants submit that the motion judge himself should have reviewed the privileged documents. They suggest that they could not have adduced the email chains between Ms. Lafete and Mr. Penfound because doing so would have required them to file potentially privileged documents. They point to the decision in *Goodis v. Ontario (Ministry of Correctional Services)*, 2006 SCC 31, [2006] 2 S.C.R. 32, at paras. 15, 20-21, where the court held that where a party asserts privilege in certain documents and the validity of the claim is in issue, the opposing party and its counsel are not permitted to see the documents unless they satisfy a threshold of "absolute necessity."

[82] However, the appellants did not raise the privilege argument on the motion.

[83] Moreover, if, as they now claim, there is a risk Ms. Lafete's reporting emails to Mr. Penfound contained privileged material, they could have sought to have a vetting process take place either by the motion judge or an independent third party after: (i) providing an affidavit with information as to the nature of the documents Mr. Penfound received from his assistant and whether Mr. Penfound reviewed attachments to the privileged emails; or (ii) obtaining an IT log showing the documents accessed. This is not to say that these steps are necessarily sufficient to rebut the presumption of prejudice and/or avoid a stay, but, at a minimum, such evidence could have shed some light on the significance of the prejudice suffered by the respondents to enable the court to consider this factor in fashioning the appropriate remedy. They did not.

[84] In any event, the appellants claim that to impose a stay would be inconsistent with other decisions where one party gained access to an opposing party's privileged documents. In those cases, the court ordered the return or destruction of the documents, prohibited the party from relying on these documents to the prejudice of the opposing party, and/or imposed costs consequences: see, *O'Dea v. O'Dea*, 2019 NLSC 206; *Morneault v. Dynacorp Acquisition Ltd*., 2006 ABQB 831; and *Dixon v. Lindsay*, 2021 ONSC 1360.

[85] However, in all of these cases, the court was presented with specific evidence on the particular documents accessed and reviewed by the party in receipt of the privileged information. As such, the court was able "to consider the documents inappropriately accessed in the context of the issues in the litigation, to assess the potential harm" and ultimately, tailor a remedy so that "[f]airness in this proceeding can be restored": *O'Dea*, at paras. 68-69. Furthermore, in two of these cases, the court decided not to impose a drastic remedy of a stay because the documents were either not privileged or if privileged, they were nevertheless "relatively harmless": *Dixon*, at para. 27; *O'Dea*, at para. 27. A stay was not sought or considered in *Morneault*.

[86] In this case, by contrast, the appellants chose not to identify which documents were accessed and reviewed, putting the motion judge in the "invidious position" of being unable to assess the extent of documentary review, the nature

of information accessed, and the subsequent prejudice that results from the appellants' unauthorized access.

[87] The appellants did not produce any evidence to indicate the nature and scope of the privileged communications they accessed and reviewed, or take any measures to adduce such evidence. As this court in *Bruce Power* aptly observed in upholding a stay of proceedings, at para. 63, "if the [party in receipt of privileged material] had been able to lead evidence to rebut the presumption of prejudice, it would have done so." I arrive at the same conclusion. In the absence of such evidence, the appellants "will now have to shoulder the consequences" of having adverse inferences drawn against them at the remedy stage: *Celanese*, at paras. 62-63.

[88] For these reasons, the third ground of appeal fails.

The Fourth Issue: Did the motion judge err in imposing a stay against all of the appellants although only Mr. Penfound was presumed to have accessed and reviewed the documents

[89] The appellants other than Mr. Penfound claim the motion judge erred by imposing a stay against them as there was no evidence any appellant other than Mr. Penfound accessed or reviewed any documents. They further claim, he erred in inferring that because Mr. Penfound "was in a position to share" privileged information that he did.

[90] I disagree. Mr. Penfound was responsible for managing the litigation on behalf of the appellants and on cross-examination, each member of the Penfound

family confirmed that they had delegated to Mr. Penfound the responsibility to manage the litigation on their behalf. Given Mr. Penfound's role in conducting and managing the litigation, the discussions surrounding the litigation were affected by his access to privileged communications, and those concerns cannot be resolved.

[91] This final ground of appeal fails.

CONCLUSION

[92] For the above reasons, I would dismiss the appeal. Costs in the amount of $100,000 all inclusive are payable to the respondents as agreed by the parties.

Released: January 27, 2023. "David M. Paciocco J.A."

"J.A. Thorburn J.A."
"I agree David M. Paciocco J.A."
"I agree A. Harvison Young J.A."