

CITATION: Paragon Protection Ltd. et al. Tamstu-Harjon Holdings of Canada Limited et al.,
2024 ONSC 6461

COURT FILE NO.: CV-23-00710960-00CL

DATE: 20241111

SUPERIOR COURT OF JUSTICE – ONTARIO – COMMERCIAL LIST

RE: PARAGON PROTECTION LTD. and ROSENCRANTZ & GULDENSTERN
INC., Plaintiffs

AND:

TAMSTU-HARJON HOLDINGS OF CANADA LIMITED, JONATHAN
ROSENTHAL, in his capacity as Estate Trustee of the Estate of Cyril Hirsh
Rosenthal, BENJAMIN BARRETT, in his capacity as Estate Trustee of the Estate
of Cyril Hirsh Rosenthal and JONATHAN ROSENTHAL, Defendants

AND RE: TAMSTU-HARJON HOLDINGS OF CANADA LIMITED, Plaintiff by
Counterclaim

AND:

ROSENCRANTZ & GULDENSTERN INC., PARAGON PROTECTION LTD.,
RONALD J. FRANCE, DONNA FRANCE and BUD RALPH, Defendants to the
Counterclaim

BEFORE: Justice Peter J. Osborne

COUNSEL: *Kevin Fisher and James Beesley*, for Paragon Protection Ltd, Rosencrantz &
Guildenstern Inc., R. France, D. France and B. Ralph

Matthew Karabus and James Aston, for Tamstu-Harjon of Canada Holdings
Limited, J. Rosenthal, and B. Barrett (as Estate Trustees of the Estate of C.
Rosenthal)

HEARD: November 11, 2024

ENDORSEMENT

[1] The Defendants, Jonathan Rosenthal and Benjamin Barrett, in their respective capacities as Estate Trustees (the “Succeeding Estate Trustees”) of the Estate of Cyril Hirsch Rosenthal (“Cyril”), seek an order:

- a. pursuant to Rule 30.1.01(8) that the “deemed undertaking” provisions of Rule 30.1.01 not apply to information and evidence disclosed by the plaintiff, Paragon Protection Ltd., (“Paragon”) in this proceeding pertaining to communications with

the documents in the possession, control or power of Syed Pervez (the “Pervez Productions”); and

- b. granting the Succeeding Estate Trustees leave to use the Pervez Productions in the application pending in this Court bearing Ct. File No. CV-20-00652038-00 ES (the “Estate Proceeding”).

[2] Defined terms in this Endorsement have the meaning given to them in the motion materials unless otherwise stated. Where appropriate, I refer to certain parties by their first name, given the commonality of surname.

[3] For the reasons that follow, the motion is granted.

[4] The deemed undertaking rule was codified in Rule 30.1.01(3):

Deemed Undertaking

(3) All parties and their lawyers are deemed to undertake not to use evidence or information to which this Rule applies for any purposes other than those of the proceeding in which the evidence was obtained.

[5] An exception to the rule as provided for in Rule 30.1.01(8) applies if the interests of justice outweigh any prejudice:

Order that Undertaking does not Apply

(8) If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that subrule (3) does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

[6] Finally, another exception to the rule permits the use of evidence for impeachment. Rule 30.1.01(6) provides:

Exceptions

(6) Subrule (3) does not prohibit the use of evidence obtained in one proceeding, or information obtained from such evidence, to impeach the testimony of a witness in another proceeding.

[7] I accept the position of the moving parties that the absence of prejudice is usually dispositive of a motion for relief from the deemed undertaking rule, if the material in respect of

which the relief is sought is relevant to the other proceeding. In *Kitchenham v. Axa Insurance Canada*, 94 O.R. (3d) 276, 2008 ONCA 877 (“*Kitchenham*”) expressed it as follows at para. 68:

[W]here the interests of the party protected by the deemed undertaking would not be adversely affected by the use of the material, and assuming the material has relevance in the subsequent proceeding, the interest of justice would inevitably outweigh any resulting prejudice to the party who had disclosed the evidence.

[8] This action revolves around a dispute concerning the nature and value of the interest in Paragon held by Tamstu-Harjon Holdings of Canada Ltd. (“Tamstu”). That interest arises from a 1978 Consulting Agreement entered into among the parties that included Tamstu and Paragon.

[9] At the time of the Consulting Agreement, Cyril was the sole shareholder, officer and director of Tamstu. Cyril was also the former accountant to Paragon.

[10] Pursuant to the Consulting Agreement, Tamstu was entitled to the following interests:

- a. 25% of the annual pretax profit of Paragon (the “Tamstu Profit Share”);
- b. 25% of the equity of Paragon in the event of a sale to a third party (the “Tamstu Option”); and
- c. the protection of Tamstu’s interest through limitations on the power of the members of the France family who control Paragon to inflate their remuneration from the company (the “France Family Remuneration”).

[11] Cyril died on December 1, 2008, with the result that his Estate became the sole shareholder in Tamstu. In turn, Tamstu’s interest in Paragon is the sole significant asset of the Estate.

[12] Upon Cyril’s death, the original estate trustees were Joe Rosenthal (“Joe”) and Syed Pervez (“Pervez”) (and together, the “Former Estate Trustees”). Joe was Cyril’s brother. Syed is an accountant and previously practised in partnership with Cyril.

[13] The Former Estate Trustees had the fiduciary obligation to administer Cyril’s Estate which, in practical terms, meant protecting the interest of the Estate in Paragon.

[14] The Succeeding Estate Trustees submit that this included the consideration of documents relevant to:

- a. the Tamstu Profit Share and in particular whether the correct amount was paid to Tamstu;

- b. the value of the Tamstu option, and thereby the value of Paragon; and
- c. the issue of whether the appropriate limits on the France Family Remediation were being adhered to (including to ensure that the correct Tamstu Profit Share was paid).

[15] In addition to acting as a Former Estate Trustee, Pervez also provided professional accounting services to Paragon. The Succeeding Estate Trustees submit that this was a clear conflict.

[16] It is in the capacity as accountant to Paragon that Pervez asserts that he generated and/or obtained the Pervez Productions that are the subject of this motion.

[17] The Former Estate Trustees commenced the first of two applications to pass their accounts and be paid compensation in 2016. The Office of the Children's Lawyer filed notices of objection.

[18] On November 26, 2020, the Succeeding Estate Trustees applied to remove the Former Estate Trustees from those roles. Ultimately, that application proceeded on consent, resulting in the order of Cavanagh, J. dated December 17, 2020 made in the Estate Proceeding pursuant to which three relevant things were ordered:

- a. the removal of the Former Estate Trustees;
- b. the appointment of the Succeeding Estate Trustees; and
- c. the requirement on the Former Estate Trustees to deliver to the Succeeding Estate Trustees certain documents, including: "all vouchers, statements, invoices, receipts, tax returns, accounts, notes and other documents, and all other information in Joseph and Syed's power, possession or control relating to the Estate in the administration of the assets and liabilities thereof."

[19] Pervez refused to produce accounting and related documents (the "Pervez Productions") that were acknowledged and admitted to be in his possession, power and control, and which related to the interest held by Tamstu in Paragon, on the basis that he had acquired and/or created those documents in his capacity as accountant for Paragon, and not in his capacity as Former Estate Trustee.

[20] As a result, Pervez took the position that the Pervez Productions are those of Paragon and could not be released without its consent. The Succeeding Estate Trustees then moved for an order finding Pervez to be in contempt of the order of Cavanagh, J. for refusing to produce the Pervez Productions. That motion is pending.

[21] Meanwhile, and in this proceeding, Paragon then delivered an affidavit of documents under cover of which it produced several hundred documents described as “Documents Received from Syed Pervez” which were in his possession, control or power.

[22] The Succeeding Estate Trustees submit on this motion that those documents are documents that Pervez ought to have produced to them pursuant to the order of Cavanagh, J. made in the Estate Proceeding. They therefore seek relief from the deemed undertaking rule, to the extent it is necessary. They submit that it ought not to be necessary since Pervez has the Pervez Productions in his possession, control or power, but nonetheless refuses to disclose or produce them.

[23] The Succeeding Estate Trustees sought the consent of Paragon to the production of the documents and therefore relief from the deemed undertaking rule, and Paragon refused.

[24] The Succeeding Estate Trustees submit, and I agree, that this proceeding and the Estate Proceeding are closely related and revolve around the same central issue: the interest of Tamstu in Paragon. It follows that the conduct of Pervez during the period in which he acted as both Former Estate Trustee and as accountant to Paragon is relevant and indeed central to both this action and his applications to pass his accounts in respect of Cyril’s Estate.

[25] The documents at issue are, on their face, the subject of the order of Cavanagh, J., and as a result have already been ordered to be produced. Moreover, they have already been produced by Paragon in this action.

[26] No sealing order or other protective relief has been sought, and none has been granted.

[27] The Succeeding Estate Trustees want to rely on the Pervez Productions in the Estate Proceeding for two purposes:

- a. to assist in the passing of accounts, to which the documents at issue are relevant; and
- b. in support of their position on the pending contempt motion to demonstrate Pervez did not comply with the order of Cavanagh, J.

[28] In my view, they are entitled to do that, and the interest of justice so requires and supports the granting of leave in order that the documents can be used in the Estate Proceeding, as contemplated by Rule 30.1.01(8), and by the Court of Appeal in *Kitchenham*. In addition, the impeachment exception and Rule 30.1 .01(6) also apply.

[29] The ironic situation underlying this motion is the fact that all of the interested parties here: the moving parties - the Succeeding Estate Trustees; Paragon; and Pervez already have the documents in their possession.

[30] Moreover, Pervez has already been ordered by Cavanagh, J. to produce in the Estate Proceeding all documents pertaining to Cyril's Estate in his possession, control or power, as the documents at issue here are. Pervez himself does not oppose the use or production of the documents in the Estate Proceeding, and agreed to produce them if Paragon would consent.

[31] As noted above, Paragon will not consent, yet still has put forward no evidence of prejudice, and indeed I am satisfied that there is no prejudice to Paragon. Moreover, the documents at issue are sought to be used in the Estate Proceeding adverse to Pervez, not Paragon.

[32] Paragon submits that the moving parties have not particularized sufficiently which documents are the subject of the relief sought or the purposes for which the relief is sought, all with the result that leave granting relief from the deemed undertaking rule ought not to be granted: *Resolute Forest Products Inc. v. 2471256 Canada Inc.*, 2023 ONSC 1471 at para. 19.

[33] In my view, the documents have been particularized sufficiently as set out above and I am satisfied that they are relevant. I am also satisfied that, as set out above, the specific purposes for which the relief is sought have been properly articulated. There is simply no evidence of any prejudice to Paragon.

[34] Against all of this, I am satisfied that significant prejudice will accrue to the Succeeding Estate Trustees in the Estate Proceeding and on the pending contempt motion if they are not permitted to use the documents. What the ultimate result may be in the Estate Proceeding and on the contempt motion our matters about which I make no determination here.

[35] For all of these reasons, the motion is granted.

[36] Order to go in accordance with these reasons.

[37] With respect to costs of this motion, the parties advised at the conclusion of oral argument of the existence of (undisclosed) offers to settle with the result that they submitted that the issue of costs should be addressed in writing following the disposition of the motion.

[38] I encourage the parties to agree on costs. If they are unable to do so, both parties should exchange and file with the Court to the attention of my judicial assistant, Ms. Mary Sibenik at mary.sibenik@ontario.ca, within 10 days, brief costs submissions not to exceed two pages in length, to which may be appended any relevant offer(s) to settle if any, together with a Costs Outline.

Osborne J.