IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *Thomson v. A.R. Thomson Group,* 2023 BCSC 431

Date: 20230321
Docket: S158569
Registry: Vancouver

Between:

Lisa Thomson

Plaintiff

And

A.R. Thomson Group

Defendant

Before: Master Hughes

Reasons for Judgment

Counsel for the Plaintiff:	R. Morse D. Boere, Articled Student
Counsel for the Defendant:	T. Clifford
Place and Date of Hearing:	Vancouver, B.C. March 10, 2023
Place and Date of Judgment:	Vancouver, B.C. March 21, 2023

Introduction

[1] The plaintiff applies for an order pursuant to R. 7-2 of the *Supreme Court Civil Rules* [*Rules*] that Todd Thomson attend an examination for discovery as a representative of the defendant partnership for a duration of up to two and a half hours, and that no additional representatives may attend the discovery.

[2] The defendant is agreeable to making Todd Thomson available for discovery, without an additional representative in attendance. The sole issue is timing of the discovery.

Background and Issues in Dispute

[3] This action, which was commenced in 2015, centres on the existence and terms of a disputed oral agreement between the plaintiff and her late father, Allan Roy Thomson ("Al Thomson"), who was the managing partner of A.R. Thomson Group ("ARTG"). In brief, the plaintiff alleges that she and her father agreed that she, through a corporation that she operated, would be reinstated as a partner of ARTG following the resolution of a dispute between ARTG and the plaintiff's former spouse, Gordon Taylor.

[4] Al Thomson was examined for discovery on April 5, 2016. He did not answer all of the questions put to him, and the plaintiff applied for an order to compel his attendance at a continuation of the discovery and that he be required to answer certain unanswered questions. On June 28, 2016, Master Scarth ordered that Al Thomson submit to a further discovery of up to two and a half hours and answer specific questions listed in an appendix to her order.

[5] The parties have attended several case planning conferences. On December 9, 2016, a case plan order suspended further examinations for discovery until the plaintiff's application seeking leave to file an amended notice of civil claim and to add parties was determined. That suspension was reiterated in a subsequent case plan order dated May 1, 2017, with a shortened time frame for resumption of discoveries following determination of the leave application.

[6] The plaintiff's application to amend her notice of civil claim and add two plaintiffs and one defendant was heard and granted in part on August 11, 2017, although some of her proposed amendments were disallowed. She appealed a portion of that order, and the appeal decision was released March 2, 2018 (the "Appeal Decision").

[7] Following the Appeal Decision, the parties engaged in settlement discussions over a protracted period from 2018 to 2021.

[8] Al Thomson died July 1, 2018, without ever having submitted to the continuation of his discovery ordered by Master Scarth.

[9] With the settlement discussions failing to bear fruit, the defendant filed an application on June 24, 2022, seeking to strike the plaintiff's claims as an abuse of process (the "Strike Application") or, in the alternative, judgment by way of summary trial. Due to difficulties in securing a mutually available hearing date of appropriate length, that application has yet to be heard. The parties are hopeful that the Strike Application can be set for hearing for three days in June 2023, although they have not yet secured hearing dates from Supreme Court Scheduling as the booking window has not yet opened.

[10] On August 15, 2022, the plaintiff filed a notice of trial, setting the trial of this matter for 15 days commencing January 29, 2024.

[11] On October 6, 2022, the plaintiff filed a notice of case planning conference to be held on October 28, 2022. Three issues were listed on the notice, including the scheduling of an examination for discovery of Todd Thomson. On the morning of October 28, 2022, the plaintiff agreed to adjourn the case planning conference on the basis that the defendant agreed to make Todd Thomson available for discovery on a date to be set.

[12] On November 2, 2022, the plaintiff delivered an appointment to examine Todd Thomson for discovery on March 7, 2023. Defendant's counsel subsequently sent a detailed email on November 3, 2022, setting out his position that the discovery must

wait until after a decision on the Strike Application. Conduct money was provided and returned, and a certificate of non-attendance was produced when Todd Thomson failed to attend on March 7, 2023.

[13] This application was filed on February 23, 2023, after the defendant returned the conduct money.

[14] On March 6, 2023, the defendant applied in chambers for short leave to bring on an application pursuant to R. 7-1(22) for an order that the discovery of Todd Thomson be delayed until after determination of the Strike Application, the same position taken in the defendant's application response. The defendant sought leave to have that application heard together with this application on March 10, 2023, but the short leave application was refused. The plaintiff takes the position that the defendant cannot now seek an order for delay of the discovery without having a formal application before the Court.

[15] The defendant says that if it cannot seek delay of discovery, its alternative position is that the application should be dismissed, potentially with leave to reapply if the Strike Application is dismissed or if it is not set down for hearing within a reasonable time.

[16] The issue of whether the defendant can seek a postponement of the discovery until after the Strike Application without having a formal application is, in my view, a contorted exercise that simply muddies the waters. The object of the *Rules* is to secure the just, speedy and inexpensive determination of every proceeding on its merits (R. 1-3(1)). In the circumstances of this case, requiring a separate application in order to raise a defence or an alternative solution to an issue that is already before the Court, and already fully pleaded in the application response as a response to the application, does not further the object of the *Rules*. It is not a new issue or a new head of relief sought, but rather an issue integral to the matter already before the Court. The plaintiff is not taken by surprise at the defendant's position. No additional evidence or legal argument is needed. Requiring the defendant to put its objection into the form of an application to be heard on a

later date causes delay, expense, and use of additional court time without in any way enhancing the ability of the Court to fully consider the merits.

Applicable Law

[17] The plaintiff is entitled to conduct a discovery in accordance with the *Rules*. Master Joyce (as he then was) succinctly described this general rule in considering an application under R. 27(13) (the predecessor to R. 7-2) in *Zabolotniuk v. Tehcon Construction Services Ltd.,* (1993), 79 B.C.L.R. (2d) 250 (S.C.) at 8:

> In my view, each party *prima facie* has the right to proceed with his examination for discovery of the other party on the date set in the appointment provided he has complied with R. 27(13) and provided the appointment is served in accordance with the rules.

This general rule is the starting point.

[18] In the case at bar, it is undisputed that the plaintiff has complied with R. 7-2 by providing proper notice and conduct money. Master Scarth has already ordered a continuation of the discovery of the defendant's representative, Al Thomson. Al Thomson is no longer available to be discovered, and the plaintiff has selected Todd Thomson as the representative she wishes to discover, as she is entitled to do under R. 7-2(5)(c)(ii). The selection of Todd Thomson as the most appropriate representative of ARTG was questioned by the defendant, but not disputed. I am satisfied that the plaintiff has a *prima facie* right to proceed with a discovery of Todd Thomson.

[19] However, R. 7-1(22) provides as follows:

> **Determination of issue before discovery**
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> (22) If the party from whom discovery, inspection or copying of a document is sought objects to that discovery, inspection or copying, the court may, if satisfied that for any reason it is desirable that an issue or question in dispute should be determined before deciding on the right to discovery, inspection or copying, order that the issue or question be determined first and reserve the question of discovery, inspection or copying.

[20] Although R. 7-1 relates to discovery of documents, there is no dispute that sub-rule (22) is equally applicable to postponement of an examination for discovery.

There is broad discretion to make an order under R. 7-1(22) (*Kwantlen University College Student Association v. Canadian Federation of Students Association – British Columbia,* 2017 BCSC 163 at paras. 13 and 14 [*Kwantlen*]).

[21] In *Belzberg v. North American Trust Co.,* [1994] B.C.J. No. 3326 (S.C.), the Court ordered the postponement of discovery of certain documents until the issue of enforceability of a severance agreement was determined. The documents sought related to mitigation of damages, which would only be in issue if the agreement was found to be unenforceable and the plaintiff was subsequently successful on his alternative claim for wrongful dismissal. In considering the application to postpone document discovery, Master Joyce (as he then was) stated:

> 21 Turning then to Rule 26(15), counsel have referred to a number of decisions with respect to this subrule. Those are *Harnam Singh v. Kapur Singh* (1927), 29 B.C.R. 45 (C.A.); *Crestwood Kitchens Ltd. v. Award Industries Ltd.* (1979), 14 B.C.L.R. 90 (S.C.); *Robinson v. Maresh* (1980), 23 B.C.L.R. 381 (S.C.); *Dyform Engineering Ltd. v. Ittup Hollowcore International Ltd.* (1980), 23 B.C.L.R. 394 (C.A.); *Tearle v. Tearle* (1982), 29 R.F.L. (2d) 207 (B.C.C.A.); *Ritter v. Ritter* (1983), 45 B.C.L.R. 1 (S.C); an unreported decision of Master Donaldson, *Noonan v Johnston*, Kelowna Registry No. 16373, November 24, 1993 and, finally, *Harrishfager Corporation of Canada Ltd. v Kranco Inc.* (1991), 39 C.P.R. (3d) 81 (B.C.S.C.).
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> 22 I am not going to review those decision in detail but will attempt to summarize what I perceive to be the essential principles arising from them.
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> > 1. Rule 26(15) cannot be relied upon to postpone discovery of documents pending determination of an issue if those documents may be relevant to the preliminary issue. It is only where the documents relate only to an issue the determination of which can conveniently be postponed pending the determination of other issues that discovery can be reserved. I refer in particular to *Robinson v. Maresh*, *supra* and *Harnishfager Corporation of Canada Ltd.*, *supra* in support of that proposition.
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> > 2. The nature of the issue to be determined first must be such that its resolution may make discovery of the documents unnecessary.
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> > 3. The circumstances in which Rule 26(15) has been applied seem to fall into two categories:
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> > > (a) where the documents are of a confidential and sensitive nature such as trade secrets or confidential, internal financial documents which might cause harm if disclosed to a competitor for which it might be said a party has no right to see unless he can first establish some interest in them. For example, in the *Harnam Singh*, *supra*, case they were documents of a partnership which were not disclosed until the

> plaintiff's claim of partnership could be established. *Crestwood Kitchens*, *supra*, dealt with confidential financial documents of the plaintiff which were not to be disclosed to the defendant competitor who was alleged of conspiracy and *Dyform Engineering Ltd.*, *supra*, dealt with trade secrets.
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> (b)where the necessity for prolonged inquiry into the financial or business affairs of the party from whom discovery is sought would be rendered unnecessary if the preliminary issue is decided in favour of that party. *Tearle v. Tearle*, *supra*, and *Ritter v. Ritter*, *supra*, are two examples of that situation.
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> 4. In either situation, disclosure of the documents may be prejudicial to the party from whom they are obtained which prejudice must outweigh the right of the party seeking their disclosure to have full discovery of all relevant documents and to proceed with the entirety of the action at the same time.
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> 5. While in all of the decisions to which I was referred, except for the *Crestwood Kitchens* case, it was the defendant who objected to the disclosure of documents until the plaintiff had succeeded on some threshold issue it is clear that the subrule is available to any party. In *Crestwood Kitchens* it was the plaintiff who, while seeking damages, including loss of profits, objected to production of documents going to the very issue of the extent of its loss until it had succeeded on establishing liability. The defendants' argument that the plaintiff being the party who was advancing this claim could not resist discovery of relevant documents was specifically argued and was rejected by the court.

[22] In *Belzberg,* the defendant also referred to cases dealing with severance. After discussing the principles to be considered in making a severance order, Master Joyce went on to say:

> 25 Counsel for the defendants submits that the very same principles should apply to applications under Rule 26(15). Interestingly, only one of the decisions to which I was referred under Rule 26(15) makes any mention of Rule 39 or this line of authorities under that rule. That is the decision of Master Donaldson in *Noonan*, *supra*, wherein the master noted that Rule 26(15) is found to apply in relatively unusual situations and where he made reference directly to Rule 39 and to *Morrison Knutsen Company v. B.C. Hydro* [1972] 3 W.W.R. 35.
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> 26 I agree with Master Donaldson that Rule 26(15) should be restricted to the exceptional case and should not be applied too liberally. I also agree with counsel for the defendants that it is difficult, if not impossible, to distinguish between the result of the application of the two rules. In either case, there is a severance of the issues which will result in a split trial or, perhaps, two trials.

[23] In *Northcott v. Allaby et al.,* 2001 BCSC 14, Justice Melvin considered the plaintiff's application to compel production of documents. The defendants opposed the application insofar as it related to production of documents regarding financial aspects of the defendants' operation. The underlying claim pleaded the existence of a joint venture, which was in dispute, and Justice Melvin determined that the financial documents in issue related to compensation or damages that the plaintiff may recover should the joint venture be proven. In postponing discovery until after the issue of the defendants' liability to the plaintiff had been established, he stated:

> [11] Rule 26(15) makes clear that the court has a discretion "if satisfied that for any reason it is desirable that any issue or question in dispute should be determined…".
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> [12] The rule, on its face, does not impose any limitations; however, when the court exercises this discretion in favour of identifying a discreet issue which would lead to the postponement of the discovery process, it should do so on a principle basis…
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> …
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> [17] In *Belzberg v. North American Trust Co*., [1994] B.C.J. No. 3326, Master Joyce reviewed a number of authorities and extracted what he perceived to be the essential principles arising from them with reference to Rule 26(15). These were (1) that the documents relate to an issue the determination of which can conveniently be postponed; and (2) the resolution of the first issue must be such that its resolution may make discovery of the documents unnecessary. Master Joyce also considered other factors which were relevant to the decision before him in the exercise in the discretion granted to the court by the Rules.
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> [18] In the course of his reasons, he referred to an unreported decision of Master Donaldson in *Noonan v. Johnston*, [1993] B.C.J. No. 2583, Kelowna Registry No. 16373, November 24, 1993, and stated that Rule 26(15) should be restricted to exceptional cases and should not be applied too liberally.
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> [19] In that respect, I disagree. The issue is not whether or not the rule should be applied liberally; the issue is whether or not there is a discreet issue which is convenient to be postponed until a major or other issue has been resolved. The convenience should relate to factors previously touched on, bearing in mind that whatever order is made it should not prejudice the opportunity of the plaintiff to prove its case.
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> [20] More recently, the issue of the applicability of Rule 26(15) arose in the decision of *AR Sixteen Holdings Ltd. v. Down* [1997] B.C.J. No. 284, a decision of Mr. Justice Burnyeat dated February 4, 1997. In the course of his reasons, Mr. Justice Burnyeat, dealing with Rule 26(15), stated:
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> > It is clear that the court has a wide discretion to make such an order especially in cases where the determination of the issue to be referred will provide a final determination of the litigation.

[21] He further states:

> Because the court has been provided with a broad jurisdiction to make such an order and as none of the cases reviewed would indicate that the courts of our province have indicated that courts should only make this order rarely, I do not equate the fact that such orders under Rule 26(15) have not been made in great numbers with an assumption that they should only be made on rare occasions. In any event, I am satisfied that it is an appropriate order to be made here.

[24] This same portion of *AR Sixteen Holdings Ltd. v. Laurie*, 28 B.C.L.R. (3d) 394 (S.C.) [*AR Sixteen Holdings*] was cited with approval in *Speckling v. Local 76 of the C.E.P.U.,* 2004 BCSC 714 at paras. 4 and 6. *Speckling* dealt with postponement of discovery until after the determination of the defendants' application to strike all or portions of the statement of claim on the basis of jurisdiction and issue estoppel.

[25] The plaintiff submits that the case law with respect to the Court's broad jurisdiction has changed, and that recent authorities have again narrowed the application of R. 7-1(22) to exceptional cases. The plaintiff relies on *Kwantlen* in this regard, where the Court cited *Belzberg* for the proposition that postponement should be restricted to the exceptional case and should not be applied too liberally.

[26] There is no indication in *Kwantlen* that the Court's attention was drawn to *AR Sixteen Holdings, Northcott* or *Speckling,* none of which follow *Belzberg* in limiting the application of R. 7-1(22) (or its predecessor) to exceptional cases.

[27] In *Kwantlen*, the Court was asked to postpone discovery until after a summary trial application. Reasoning that there was a risk that the summary trial judge would not have all of the relevant evidence if the orders sought were not made, the master declined to postpone discovery as sought by the defendant. She determined that there would be no judicial economy if the judge agreed, after hearing the entire summary trial application, that further discovery was necessary.

Application

[28] In the case at bar, the pending application is to strike the claim as an abuse of process. If successful, that application may determine the entire action. This case is

distinguishable from *Kwantlen* in that there is no argument of any risk that the judge hearing the Strike Application will not have all of the relevant evidence if the discovery of Todd Thomson is postponed.

[29] As I advised the parties at the hearing, I am not considering the merits of the Strike Application. It may be successful, in which case no further discovery will be required, or it may not, in which case, absent a settlement, the matter will proceed to trial.

[30] The plaintiff's primary concern is one of timing. If discovery is postponed until after determination of the Strike Application, the plaintiff says there may be insufficient time to prepare for the January 2024 trial. This is the fourth time this action has been set for trial. The first trial date, scheduled for 9 days commencing February 14, 2017, was adjourned by Justice Smith at the first case planning conference on May 10, 2016. The second trial date, scheduled for 10 days commencing January 29, 2018, was adjourned by Master Scarth on December 20, 2017. The third trial date, set for 15 days commencing September 20, 2021, was adjourned by consent on June 30, 2021 due in part to the ongoing settlement discussions.

[31] As indicated, there is no date yet set for the hearing of the Strike Application. Even if it proceeds in June 2023, as the parties hope, it may still be several months before a decision is rendered.

[32] The plaintiff submits that, arising from the discovery of Todd Thomson, there might be a number of other steps to be taken, including further requests arising from the discovery, other witnesses to be contacted, compelling responses to the outstanding requests if not forthcoming, and further document demands. These are all speculative.

[33] The questions to be asked are in relation to newly produced documents and outstanding requests from the prior discovery of Al Thomson, as ordered by Master Scarth, and questions arising therefrom. They are limited in scope. The questions

authorized by Master Scarth deal with the nature of the relationships between the various partners of ARTG.

[34] The defendant says that having the Strike Application determined first will save the time and cost associated with the examination for discovery, which may turn out to be unnecessary if the Strike Application is successful. It will also save Todd Thomson from having to answer personal questions that relate to intimate relationships between family members. Finally, the defendant argues that, should the Strike Application be successful, having required the defendant's representative to submit to a further examination for discovery would be a continuation of the plaintiff's abuse of process.

[35] I turn now to the application of the essential principles summarized by Master Joyce in *Belzberg* (cited with approval in *Kwantlen, AR Sixteen Holdings, Northcott* and *Speckling*) to the facts of this case.

[36] First, there was no suggestion that the answers to the discovery of Todd Thomson may be necessary or relevant to the plaintiff's defence of the Strike Application. Although the plaintiff refers to that application being "evidence-heavy", she does not argue a need for additional evidence that may be adduced from the discovery in order to defend it. I am satisfied that the discovery evidence relates to issues to be determined later, if the Strike Application is unsuccessful.

[37] Second, if the Strike Application is successful, further discovery of the defendant's representative will be unnecessary as the plaintiff's claim will be at an end.

[38] Third, the nature of the questions permitted by Master Scarth are very personal, although she obviously determined that they were relevant to the issues between the parties. Aside from the nature of the questions allowed by Master Scarth, no evidence was provided as to concerns about confidentiality or a prolonged inquiry into the defendant's financial or business affairs. The plaintiff

rightly points out that the discovery answers would be covered by the implied undertaking (*Juman v. Doucette,* 2008 SCC 8).

[39] Although the questions are personal, they are relevant to the issues to be determined if the Strike Application is unsuccessful. The plaintiff is entitled to ask those questions if the action proceeds.

[40] In all of the circumstances, I am satisfied that the further discovery of the defendant's representative should wait until after the determination of the Strike Application. The defendant is required by the *Rules* to submit to discovery, but that statutory compulsion is not applicable if the plaintiff's claim is struck as an abuse of process.

[41] If the Strike Application proceeds in June as anticipated, there is still sufficient time to conduct the discovery, if required, in advance of the January 2024 trial date. There has already been considerable delay on the part of both parties in proceeding with this action. If the trial is delayed yet again, any prejudice to the plaintiff is compensable in the event that she is ultimately successful. Although the financial cost to the defendant of submitting to an unwarranted discovery is also compensable, it is also unnecessary.

Result

[42] The plaintiff's application is dismissed, with leave to reapply in the event that the Strike Application is unsuccessful.

[43] As the defendant was prepared to consent to the examination on these terms, the plaintiff shall pay the defendant's costs of this application in any event of the cause.

"Master Hughes"