CITATION: Rastin v. Hoag Family Farms Ltd. et al, 2024
COURT FILE NO.: CV-22-00250
DATE: 2024/07/22

SUPERIOR COURT OF JUSTICE - ONTARIO

RE: KYLE JOSEPH RASTIN, Plaintiff

AND:

HOAG FAMILY FARMS LTD. and JONATHAN HOAG, Defendants

BEFORE: Justice M.A. Cook

COUNSEL: M. Bronsveld, Counsel for the Plaintiff

D. Beaulne, Counsel for the Defendants

HEARD: March 20, 2024

ENDORSEMENT

[1] This is a motion by the defendants to compel the plaintiff, Kyle Rastin, to answer undertakings and refusals made during his examination for discovery taken December 9, 2022, and to re-attend at examinations to answer further questions arising from his answers.

[2] The underlying action is claim for damages for breach of contract and a trust remedy for unjust enrichment. The plaintiff alleges that the parties were in a joint venture to grow marijuana in greenhouses built on property known municipally as 817 Charlotteville East Quarterline Road, Vittoria, Ontario (the "**Property**"). The Property is owned by the defendants. The plaintiff claims that he paid expenses for the construction of the two greenhouses, oversaw the growing operations, and later made significant contributions to mortgage payments and improvements made on the Property, but was denied appropriate compensation when the defendants decided to sell the Property before the five-year venture was complete. The plaintiff claims an equitable interest in the Property and damages of $230,000.00.

[3] The defendants deny that they were parties to any joint venture agreement as alleged by the plaintiff and deny that the plaintiff made any contribution to the Property. The defendants allege that the plaintiff was a tenant at the Property who was permitted to grow marijuana in its greenhouses for his personal use. The defendants further allege that the plaintiff sold marijuana online, in breach of the parties' mutual agreement that the

marijuana was to be grown for personal use only. In the alternative, the defendants allege that the joint venture agreement was illegal and therefore unenforceable by the plaintiff.

[4] The statement of claim in the action was issued on February 10, 2022. A statement of defence was served on May 6, 2022.

[5] The parties did not enter into a discovery plan as is required by r. 29.1.03.

[6] The plaintiff delivered an affidavit of documents sworn August 23, 2022. The defendants delivered an affidavit of documents sworn December 7, 2022.

[7] On December 9, 2024, the plaintiff submitted to examination for discovery which lasted approximately 5½ hours. During his examination, the plaintiff gave a number of undertakings, but refused a number of questions or took them "under advisement".

[8] The defendants take the position that many of the answers to the plaintiff's undertakings are deficient, and seek an order compelling the plaintiff to satisfy his undertakings and answer the questions improperly refused.

Basic Principles

[9] In determining the sufficiency of answers given to undertakings made, and the propriety of the refused questions in dispute, I have applied the relevance test stated at both Rules 30.03 and 31.06 of the *Rules of Civil Procedure*, RRO 1990, Reg 194 and the principles of proportionality set out at Rule 29.2.03. I have further considered the scope of discovery as summarized by Justice Perell in *Ontario v. Rothmans Inc*., 2011 ONSC 2504 at para. 129 as follows:

- The scope of the discovery is defined by the pleadings; discovery questions must be relevant to the issues as defined by the pleadings: *Playfair v. Cormack* (1913), 1913 CanLII 599 (ON SC), 4 O.W.N. 817 (H.C.J.).

- The examining party may not go beyond the pleadings in an effort to find a claim or defence that has not been pleaded. Overbroad or speculative discovery is known colloquially as a "fishing expedition" and it is not permitted. See *Cominco Ltd. v. Westinghouse Can. Ltd*. (1979), 1979 CanLII 489 (BC CA), 11 B.C.L.R. 142 (C.A.); *Allarco Broadcasting Ltd. v. Duke* (1981), 1981 CanLII 723 (BC SC), 26 C.P.C. 13 (B.C.S.C.).

- Under the former case law, where the rules provided for questions "relating to any matter in issue," the scope of discovery was defined with wide latitude and a question would be proper if there is a semblance of relevancy: *Kay v. Posluns* (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.); *Air Canada v. McConnell Douglas Corp*. (1995), 1995 CanLII 7147 (ON SC), 22 O.R. (3d) 140 (Master), aff'd (1995), 1995 CanLII 7189 (ON SC), 23 O.R. (3d) 156 (Gen. Div.). The recently amended rule changes "relating to any matter in issue" to "relevant to any matter in issue," which suggests a modest narrowing of the scope of examinations for discovery.

- The extent of discovery is not unlimited, and in controlling its process and to avoid discovery from being oppressive and uncontrollable, the court may keep discovery within reasonable and efficient bounds: *Graydon v. Graydon* (1921), 1921 CanLII 444 (ON SC), 67 D.L.R. 116 (Ont. S.C.) at pp. 118 and 119 per Justice Middleton ("Discovery is intended to be an engine to be prudently used for the extraction of truth, but it must not be made an instrument of torture …"); *Kay v. Posluns* (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.) at p. 246; *Ontario (Attorney General) v. Ballard Estate* (1995), 1995 CanLII 3509 (ON CA), 26 O.R. (3d) 39 (C.A.) at p. 48 ("The discovery process must also be kept within reasonable bounds."); *671122 Ontario Ltd. v. Canadian Tire Corp*., [1996] O.J. No. 2539 (Gen. Div.) at paras. 8-9; *Caputo v. Imperial Tobacco Ltd*., [2003] O.J. No. 2269 (S.C.J.). The court has the power to restrict an examination for discovery that is onerous or abusive: *Andersen v. St. Jude Medical Inc*., [2007] O.J. No. 5383 (Master).

- The witness on an examination for discovery may be questioned for hearsay evidence because an examination for discovery requires the witness to give not only his or her knowledge but his or her information and belief about the matters in issue: *Van Horn v. Verrall* (1911), 3 O.W.N. 439 (H.C.J.); *Rubinoff v. Newton*, 1966 CanLII 198 (ON SC), [1967] 1 O.R. 402 (H.C.J.); *Kay v. Posluns* (1989), 1989 CanLII 4297 (ON SC), 71 O.R. (2d) 238 (H.C.J.).

- The witness on an examination for discovery may be questioned about the party's position on questions of law: *Six Nations of the Grand River Indian Band v. Canada (Attorney General)* (2000), 2000 CanLII 26988 (ON SCDC), 48 O.R. (3d) 377 (S.C.J.).

ISSUE 1: ANSWERS TO UNDERTAKINGS, UNDER ADVISEMENTS AND REFUSALS

[10] The defendants have grouped the undertakings and refusals/under advisements by category. The references I use throughout these reasons reference the numbering used in the defendants' factum and the revised undertaking and refusals chart dated February 16, 2024 appended (as Schedule C to the defendants' factum).

Category 1 – Undertakings Related to the Greenhouses (Undertakings #1, 6, 8 and Under Advisement #16)

[11] The plaintiff has not answered undertakings #1, 6 or 8. The colour-coded spreadsheets produced by the plaintiff may be helpful in understanding the plaintiff's claim, but it is not sufficient for the plaintiff to produce the spreadsheets and tell the defendants to find the documents supporting the entries.

[12] Parties to litigation are entitled to have specific answers to specific questions posed. As Justice Myers observed in *Green v. Canadian Imperial*, 2020 ONSC 5342 (CanLII) at para. 44, a party is entitled to know "the precise list of evidence relied on for each point pled in the action." It is not a party's burden to scour the documents and try to divine which will be used by the other side and for what purpose. Each party is entitled to read

into evidence clear answers to whether facts happened, things were said, or matters believed.

[13] The undertakings made by the plaintiff require him to particularize the amounts he alleges it cost to construct the greenhouses, and the precise evidence that the plaintiff relies on to support his claims. If the plaintiff intends to rely on viva voce testimony, he must produce witness statements with the evidence anticipated from each witness.

[14] With respect to under advisement #16, I find that it is not disproportionate or onerous to require the plaintiff to produce bank records, credit card statements or other proof of payment of expenses claimed in the action. While I agree with the plaintiff that these documentary discovery issues ought to have been canvassed and resolved before oral examinations and as part of the discovery planning process, I am not prepared to decline relief when the documents sought are clearly relevant. If the plaintiff finds it onerous to produce bank and credit card statements as proof of payment of the amounts, then he is at liberty to abandon that part of his claim. Otherwise, his obligation is to produce the evidence relevant to the claims, including proof of payment.

[15] The plaintiff must answer undertakings #1, 6, 8 and under advisement #16.

Category 2: Questions Regarding Chanrith Yin's Involvement (Undertakings #7, Under Advisement #17, Refusal #6)

[16] *Undertaking #7*. This undertaking has been satisfied.

[17] *Under Advisement #17*. The plaintiff has confirmed that "for the 2018 year all payments listed under Chanrith Yin's name were made by the Plaintiff". Accordingly, this question is moot subject only to the defendants' request to re-examine the plaintiff on what it submits is inconsistent evidence. I will the defendants' request to re-examine the plaintiff later in these reasons.

[18] *Refusal #6*. This line of questioning is not relevant to the issues in the action as pleaded and need not be answered.

Category 3: Questions Regarding the Particularization of the Plaintiff's Damages Claim (Undertakings #11–13, Under Advisements #33-38)

[19] *Undertakings #11-13*: The plaintiff's answers are not complete.

[20] The plaintiff has clarified that there is an arithmetic error at paragraph 22 of his statement of claim, and has stated that his global damages claim is $230,000.00. The plaintiff has further stated that his claim at paragraph 22 of the statement of claim is (a) $163,812.87 for the 2018-2021 expenses; (b) the mortgage payments of $55,343 and (c) labour valued at $12,593.33, for a total amount of $231,749.20 (compared to the approximate $227,025 estimated at paragraph 22 of the statement of claim).

[21] To complete his answer to undertaking #11, the plaintiff must fully particularize his claim of $163,812.87 claimed for expenses and the $109,573.35 that he has claimed in relation to the construction of the greenhouses.

[22] To complete his answer to undertaking #12, the plaintiff must identify all line items found in his spreadsheets at tabs 8 – 11 of his affidavit of documents that are included in the claimed amount of $163,812.87 for expenses as pleaded at paragraph 22(a) of the statement of claim.

[23] To complete his answer to undertaking #13, the plaintiff must fully particularize the amount of $55,343 claimed in relation to mortgage payments.

[24] Given the overlap between undertakings #1, 6, 8 and #11-13, a detailed, indexed damages brief, cross-referenced to the evidence supporting each expense, will almost certainly satisfy all of these outstanding undertakings.

[25] *Under Advisement #33*. The required scope of the plaintiff's answer to undertakings #1, 6, 8 and #11-13 render this question repetitive and unnecessary.

Category 4: Claim for Labour (Under Advisements #10-14, 32)

[26] *Under Advisement #10 and #32*. These questions are duplicative of one another and will be addressed together. The defendants seek a list of everything that the plaintiff did in overseeing the grow operation, including the time spent working at the operation, broken down for each year, from 2018 to 2021. The answer provided by the plaintiff does not satisfy the inquiry. While the plaintiff is not required to provide the equivalent to daily time sheets (unless he created such records during the claim period), he must, at a minimum, explain in detail how he arrives at the 2,220 hours claimed.

[27] At under advisement #32, the defendants ask that the plaintiff be required to provide the evidence in support of each of the plaintiff's activities. The plaintiff has answered that he is relying on *viva voce* testimony. The plaintiff must identify all documents that he relies on to support his claim, and he shall provide witness statements for each witness expected to provide *viva voce* testimony to support the plaintiff's claims (identified as Nicolas Huber, Brendan Robinson, Kristen Felming, Tom Ratana, Kristen Ratana and Soupin Inlakhana).

[28] Given that under advisement #32 is broader than #10, the plaintiff shall be required to answer under advisement #32 and not under advisement #10.

[29] *Under Advisements #12-14*: The defendants' questions about the contributions that the plaintiff believes were made by his co-venturers were proper and must be answered. The defendants are entitled to know what the plaintiff thought his alleged joint venturers were doing in the enterprise.

Category 5: Plaintiff's Tax Returns (Under Advisement #19)

[30] *Under Advisement #19*. The plaintiff's income tax returns during the period 2017-present are not relevant to any issue pleaded in the statement of claim. The plaintiff need not produce his tax returns.

Category 6: Legal File of Mr. Jassal (Under Advisements #21-22, 23)

[31] *Under Advisements #21-22*. The plaintiff claims privilege over the file of Mr. Jassal. The defendants argue that the privilege of Mr. Jassal's file is deemed waived.

[32] The plaintiff listed in Schedule A to his affidavit of documents a transmittal email from Mr. Jassal dated September 27, 2019, without attachments, which was sent to the plaintiff and Chandrith Yin. The email provided direction to the plaintiff and Mr. Yin about the steps that would need to be taken to register a security interest against the Property.

[33] The plaintiff was asked several questions about the transmittal email during his examination for discovery. When the defendants sought production of Mr. Jassal's complete file, the plaintiff lawyer took the request under advisement. The plaintiff subsequently refused to answer the question on the basis of solicitor-and-client privilege.

[34] Recently, in *1307839 Ontario Limited et. al. v. Klotz Associates et. al.*, 2024 ONSC 1120 (CanLII), the Divisional Court reviewed the limited circumstances in which privilege may be waived. Kurke J., writing for the court at para. 23 stated:

> [24] Privilege may be waived expressly or impliedly. Implied waiver typically happens either by way of disclosure or reliance. Once a privileged document or legal advice has been disclosed, the privilege attaching to it is considered to be lost. If a party claiming privilege pleads or otherwise relies upon a privileged document or legal advice for the purpose of pursuing their position in a legal proceeding, then the privilege is considered lost. Waiver of privilege attaching to a solicitor-client communication will be implied where the communication is "legitimately brought into issue in an action". Waiver of privilege attaching to legal advice will be implied where a party has put in issue its state of mind and that state of mind has been informed by legal advice received.

[35] I find that that solicitor-client privilege has not been waived with respect to the communications passing between the plaintiff and Mr. Jassal about the plaintiff's efforts to register a charge on the Property.

[36] Solicitor-client privilege is fundamental to the Canadian legal system and is recognized as a rule of substantive law: *R. v. McClure*, 2001 SCC 14, [2001] 1 S.C.R. 445, at para. 17. While it is not absolute, it "must be as close to absolute as possible to ensure public confidence and retain relevance": *McClure*, at para. 35.

[37] The plaintiff states in his affidavit that he did not waive privilege over his solicitor-and-client communications with Mr. Jassal, and claims that any disclosure was inadvertent.

[38] More importantly, the plaintiff has not placed any reliance on any legal advice which he may have received from Mr. Jassal in issue in these proceedings, nor is he putting his state of legal knowledge in issue. At paragraph 17 of his statement of claim, the plaintiff pleads:

> Mr. Rastin instructed his solicitor to [prepare] the required documents for placing a charge on the Property. However, notwithstanding the representations made by Matthew on numerous occasions, Jonathan refused to consent to being placed on title of the Property.

[39] The evidence also indicates that Mr. Jassal acted for both Mr. Rastin and Mr. Yin. Mr. Yin is not before the court to address his claim for privilege and there is no suggestion that Mr. Yin has waived privilege over Mr. Jassal's file.

[40] The plaintiff is not required to produce Mr. Jassal's file. The email transmittal document dated September 27, 2019 is a privileged communication. It shall be listed in Schedule B of the plaintiff's affidavit of documents. The plaintiff may not rely on it in any way in the action.

[41] If I am wrong, and privilege was waived, I would find the request overbroad and disproportionate. The defendants have not demonstrated that the contents of Mr. Jassal's file, or even the draft documents transmitted to the plaintiff by email on September 27, 2019, are relevant to any issue pleaded in the action. They are not relevant to the question of whether the plaintiff had a valid security or other interest in the Property. The request is little more than a fishing expedition.

[42] *Under Advisement #23*. The defendants seek production of any correspondence from Mr. Jassal to Jonathan or Michael Hoag. The plaintiff must answer this question. The correspondence sought, if it exists, is not privileged and is relevant to the validity of the plaintiff's claim to an interest in the Property. The plaintiff shall make a request to Mr. Jassal to produce any correspondence from Mr. Jassal to Michael Hoag or the defendants for the period 2017-2021. If such correspondence is produced to the plaintiff, he shall produce it to the defendants.

Category #7: Plaintiff's Medical Files (Under Advisements #2 and #26)

[43] *Under Advisement #2 and 26*. The plaintiff's medical files are not relevant to any issue in this proceeding and the request is grossly disproportionate in any event. The plaintiff has produced a copy of his licence to produce marijuana. The plaintiff need not produce his medical records.

Category #8: Mortgage Payments made by the Plaintiff (Under Advisement #29, 30)

[44] *Under Advisement #29*. The plaintiff shall answer this question. The plaintiff is either claiming that his mortgage payments entitle him to participate in the increase in market value of the Property over time, or that he is seeking reimbursement of the mortgage payments made. The defendants are entitled to know what relief the plaintiff is claiming and what he is not. The question is not vague, and the answer is yes or no.

[45] *Under Advisement #30*. The plaintiff need not answer this question. The plaintiff has answered questions posed to him about what he says were his contributions to the joint venture and has undertaken to provide particulars. The plaintiff has answered questions posed to him about what he says were his contributions to the improvement of the Property. Plaintiff's counsel is not, in addition, required to give a legal position on the factual question of "what's a contribution to the joint venture and what's an improvement to the value of the Property". The answer would not aid the defendants to understand the case they need to meet given the factual evidence already provided.

ISSUE 2: RE-EXAMINATION

[46] The defendants seek re-examination of the plaintiff in relation to:

a. The particularization of the plaintiff's claim for damages including the amounts spent on the greenhouses, on expenses and in relation to the labour the plaintiff alleges he provided to the joint venture over time; and

b. New documents produced by the plaintiff in answer to undertakings.

[47] I am satisfied that the plaintiff's re-attendance is necessary to fulfill the legitimate purposes of discovery and accept that the defendants will likely be prejudiced if they are not given an opportunity to ask questions arising from the plaintiff's answers to undertakings.

[48] There is, however, a pressing need to contain discovery in this case. The plaintiff has already been examined for approximately 5 ½ hours in a case involving a claim of not more than $230,000.00. The value of the claim only just falls outside r. 76 simplified procedure, where each party would be limited to three hours in which to conduct oral examinations for discovery.

[49] I have considered the factors set out at r. 31.05.1(2) and decline to order the plaintiff to be examined for more than 7 hours in total. In light of the modest nature of the claim, the principle of proportionality, the parties' limited resources, plaintiff's failure to answer the undertakings made on discovery and the fact that the parties failed to engage in any discovery planning prior to commencing examinations, I find it appropriate to order the plaintiff to re-attend at an examination to answer further questions arising out of his answers to undertakings and under advisements, for not more than 90 minutes.

DISPOSITION

[50] An order shall go:

a. requiring the plaintiff to answer outstanding undertakings #1, 6, 8, 11, 12, and 13 and “under advisements” #12, 14, 16, 23, 29, and 32 set out at Schedule C to the defendants’ factum filed on the motion; and

b. requiring the plaintiff to re-attend examination for discovery for not more than 90 minutes to answer further questions rising out of his answers to undertakings, “under advisements” and refusals.

[51] If the parties are unable to resolve the issue of costs, the defendants may make written submissions on entitlement and quantum by not later than August 15, 2024. The plaintiff may file written submissions in response by not later than August 29, 2024. Submissions shall be limited to three pages, double-spaced, plus any bill of costs, copies of any offers, and authorities. There shall be no reply costs submissions absent leave of the court.

[52] Any party seeking costs shall address in their costs submissions why costs should be awarded despite the absence of a discovery plan in this proceeding. As Master McLeod observed more than 13 years ago in *Lecompte v Doran*, 2010 ONSC 6290 (CanLii), "[d]iscovery planning is intended to permit the parties to map out the most efficient and effective way to organize the production and discovery needs of the particular action having regard to the complexity of the records, the issues in dispute and the amounts at stake. It cannot be an adversarial exercise." This motion was a textbook example of the inefficiency, delay and needless cost involved when discovery is approached in an adversarial manner and with cavalier disregard to the parties’ mutual obligation to engage in discovery planning. The circumstances engage consideration of r. 29.1.05 and the court invites the parties to make submissions accordingly.

Justice M.A. Cook

Date: July 22, 2024