SUPREME COURT OF YUKON

Citation: *Stuart v. Doe*, 2021 YKSC 11

Date: 20210219
S.C. No. 18-A0102
Registry: Whitehorse

BETWEEN:

CHARLES STUART

PLAINTIFF
(DEFENDANT BY COUNTERCLAIM)

AND

JANE DOE

DEFENDANT
(PLAINTIFF BY COUNTERCLAIM)

Before Chief Justice S.M. Duncan

Appearances:
Gary W. Whittle — Counsel for the Plaintiff
George Filipovic — Counsel for the Defendant

RULING
(Application - examination for discoveries, interrogatories and pleadings)

Introduction

[1] This application demonstrates how protracted arguments about the application and interpretation of the rules of procedure can delay the resolution of a proceeding on the merits. It also demonstrates the unnecessary expenditure of resources that can result from failure to heed the direction and order provided by this Court in an earlier case management conference.

[2] In this case, the apparent absence of cooperation between counsel and their focus on procedural arguments have prevented this file from advancing. Far too much

time has been spent in pre-trial applications and case management rather than addressing the merits. This case was commenced in October 2018. There have been eight case management conferences and ten applications. Documents and written interrogatories have been exchanged but no further steps have been taken. The case is moving at a snail's pace.

[3] It has often been stated by courts in procedural rulings that the purpose of case management is to advance the efficient operation of the courts, reduce costs and delay for litigants, and assist in achieving a fair result. Appropriate case management strikes a balance between ensuring that the time, process and expenses involved in resolving the proceeding are proportionate to the dollar amount, issues and complexity in the proceeding. Case management orders are to be followed and implemented like any other court order.

[4] Part of the delay in this case is a result of the interpretation of the last case management conference order made in April 2020 (the "April order"). A new order related to discoveries is needed to assist in moving this file forward. Considering the extraordinarily adversarial nature of these proceedings, I will also make an order about the written interrogatories, in an attempt to break the impasse between the parties.

Issues

[5] The first issue is whether the wording of the April order that "examinations for discovery are not required to occur until the COVID-19 pandemic is over" precludes the Court from ordering that examinations for discovery occur virtually.

[6] The second issue is whether this Court should order that written interrogatories objected to by the plaintiff/defendant by counterclaim ("Mr. Stuart"), or insufficiently answered by him, should be answered in advance of the oral discovery.

[7] The third issue is whether this Court should order Mr. Stuart to amend his pleadings to comply with Rule 20(22) of the *Rules of Court* of the Supreme Court of Yukon, O.I.C. 2009/65, (the "*Rules*") because he offers denials in his defence to the counterclaim, without providing an alternative version of the facts.

[8] The fourth issue is whether this Court should order the production of notes of the treating caregivers of Mr. Stuart related to: harm he has alleged to have suffered as set out in the statement of claim; damages claimed; treatment for other allegations of sexual assault, battery or disreputable conduct made against him; and treatment he has received since the date of the incident in question.

[9] The fifth issue is whether this Court should order production of documents pertaining to the grievance brought by Mr. Stuart against his former employer.

Case Management Conference Order - April 9, 2020

[10] The outcome of several issues in this application turns on the existence of the court order from the last case management conference, held on April 9, 2020. The relevant sections of the order are:

> 1. The parties may conduct oral examinations for discovery, subject to the following conditions:
>
> a. each party is entitled to examine the other for four hours;
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> b. the examinations shall be restricted to the allegations contained in the counterclaim;
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> …
>
> d. neither party shall ask questions to which answers have already been received through written interrogatories;

> e. the parties shall answer all questions without objection, with the exception of: questions regarding the names of other people whom a party proposes to be a key witness, and objections regarding solicitor-and-client privilege, litigation privilege and doctor-and-patient privilege. In the rare circumstance where a question is considered to be objectionable and highly prejudicial, counsel may object, not answer and seek directions in case management. It is the intention of this order, however, to prevent delay, so it is expected that such circumstances will be rare;
>
> …
>
> g. examinations for discovery are not required to occur until the COVID-19 pandemic is over.
>
> 2. After oral examinations for discovery have been completed, the parties shall contact the Trial Co-ordinator to fix a date and time for a Case Management Conference to consider alternative dispute resolution.

[11] The purpose of the order, as stated in the reasons delivered on April 9, 2020, was to allow this case to proceed in a more expedient way. I agreed with both counsels' observation that the central issue in this litigation is whether or not there was consent given for the sexual encounters that occurred between the parties on October 14-15, 2017. The purpose of ordering time-limited discovery on the counterclaim at this time is to address this central issue.

Issue #1 - Examinations for discovery

[12] The April 2020 case management conference occurred in the early days of the COVID-19 pandemic. Counsel for Mr. Stuart clearly stated his refusal to hold in-person discoveries out of concern for his young granddaughter who resides with him and has

had health issues. It became clear during the case management discussion that counsel for Mr. Stuart preferred in-person discoveries. He was not set up with a camera on his home computer (where he was working) to do virtual discoveries. He was concerned about testing credibility of witnesses through the video screen, and about the potential for coaching of witnesses by people or aides off-screen. He said he would be prepared to attend in-person discoveries once everyone had been vaccinated.

[13] In April 2020, there was not yet wide-spread experience with virtual hearings or discoveries. Although discovery by video was discussed, and referenced as a possibility if the parties agreed, it was not ordered. Instead, the order was broadly worded to say oral discoveries were not required to be held until the COVID-19 pandemic was over.

[14] Counsel for Jane Doe did not object to counsel for Mr. Stuart's position, nor did he object to the wording in the case management order at that time.

[15] Now, counsel for Jane Doe seeks an order that discoveries occur virtually. He says the April order implicitly meant that in-person discoveries should not be held until the COVID-19 pandemic is over; that the intent of the order, as evidenced by the discussion of the possibility of discoveries by video, was not to preclude virtual discovery.

[16] Counsel for Mr. Stuart objects, saying that the order is clear that discoveries are not required to be held until the pandemic is over and that the discussion showed that virtual discoveries are only possible if counsel consent and he does not consent. He remains opposed to virtual discoveries for the reasons described above. Counsel argues that this Court is *functus*, and that there is no ability to vary or correct a case management order unless there has been a "slip", which did not occur in this case,

because slips are most often criminal in nature. The proper avenue for Jane Doe's remedy is an appeal, which was not pursued.

[17] On review of the transcript of the discussion that occurred in the April 2020 case management conference, I agree with counsel for Jane Doe that the possibility of ordering virtual examinations for discovery was not precluded by the April order. The discussion that preceded the order was related to reasons why discoveries could not be held **in person** until the COVID-19 pandemic was over, which was understood to mean everyone in the room had been vaccinated. The order was not intended to preclude virtual discoveries.

[18] Virtual discoveries were not ordered in April 2020. At that time many people, lawyers included, were not yet set up technologically for virtual proceedings, nor was there much familiarity with or confidence in the various platforms, logistics, and processes. At the time of hearing of this application, November 2020, and at the time of writing in February 2021, not only has familiarity with virtual proceedings increased in the legal community and throughout the justice system, but virtual proceedings in many legal contexts have proven to be successful means of resolving disputes. Courts and lawyers across the country have been using ZOOM, Webex, Microsoft Teams or other platforms to conduct hearings, including trials where witnesses testify and credibility is in issue. Examinations for discoveries have been conducted regularly by counsel through these platforms. In the Yukon, our resident court reporter advised by way of email to counsel for Jane Doe that as of October 2020 she had been involved in ten virtual discoveries. She had received no negative feedback from counsel or parties on the process or resulting transcripts. She noted the virtual document sharing process is one of the positive aspects of virtual discoveries.

[19] The effects and management of the COVID-19 pandemic are ever-evolving with our changing knowledge, experience and conditions. The hope of many in April 2020 was that with the vaccines, which were expected by early 2021, the pandemic would be "over". However, as of February 2021, the world remains in the midst of the pandemic, with no certain end in sight. Although COVID-19 vaccinations have begun, they are far from completed and at the time of writing, have been delayed by manufacturer supply issues. There are other uncertainties: the efficacy of some types of vaccinations for certain variants; the length of protection provided; and the ability of a vaccinated person to be contagious.

[20] Mr. Stuart lives in Northwest Territories and Jane Doe lives in British Columbia. Jane Doe's counsel lives in Dawson City, Yukon, while Mr. Stuart's counsel lives in Whitehorse. Even if all participants are vaccinated, there may still be travel restrictions in place affecting in-person meetings in the Yukon for the foreseeable future.

[21] This entire context, including the ongoing delay of getting to the merits in this case, cries out for additions to the April order.

[22] While I appreciate the concerns expressed by counsel for Mr. Stuart about the limitations and potential for abuse of technology, the time has come to acknowledge that the world has moved on. With the knowledge we have all gained through experience during the pandemic, practices and protections have developed to enhance the use of technology as a tool and reduce its possible negative consequences. As noted by Justice F.L. Myers in *Arconti v. Smith*, 2020 ONSC 2782, a case dealing with the same disputed issue as in this application – that is, whether an out-of-court examination should be conducted by video-conference:

> [33] … [I]n 2020, use of readily available technology is part of the basic skillset required of civil litigators and courts. This is not new and, unlike the pandemic, did not arise on the sudden. However, the need for the court to operate during the pandemic has brought to the fore the availability of alternative processes and the imperative of technological competency. Efforts can and should be made to help people who remain uncomfortable to obtain any necessary training and education. Parties and counsel may require some delay to let one or both sides prepare to deal with unfamiliar surroundings. …

[23] Justice F.L. Myers conducted a risk-benefit analysis in that case and ordered examinations by video-conference, deciding that the benefits of preventing further delay of the proceeding outweighed the risks of any shortcomings of the use of technology.

[24] Similarly, the Court in *Hudema v. Moore*, 2020 BCSC 1502, held:

> [23] … While in ordinary times it is unusual for parties to conduct discoveries over video technology such as Skype or Zoom, these are not ordinary times. During the pandemic, witnesses' evidence is often called in trials using these technologies, mediations are routinely now being conducted using remote technology, and discoveries are being conducted routinely using video technology. Given the pandemic, I would easily grant an order that the parties may attend discoveries using remote technologies. The judicial system must adapt and ensure that the participants are safe during these times as they continue to advance their litigation.

[25] I agree that the prospect of further delay in this matter by waiting until it is possible to hold in-person discoveries is not desirable, and not in keeping with the object of the *Rules* to secure the just, speedy and inexpensive determination of every proceeding on its merits (Rule 1(6)). The premise on which the April order was made – that is, once everyone had been vaccinated it would be appropriate to hold in-person discoveries, may no longer hold true, given the uncertainties as expressed above.

[26] A new order will be made to require that examinations for discoveries on the counterclaim be held virtually on or before May 14, 2021.

[27] Counsel for Jane Doe has requested the Court issue orders or directions about how these virtual discoveries should be conducted, referring to the development of best practices for virtual examinations and hearings by other jurisdictions through their advocates' societies. He has not requested any particular orders or directions.

[28] Given the experience available here already from court reporters and other counsel, I decline to make specific orders or directions at this time about the conduct of virtual discoveries. I encourage counsel to review best practices and follow those that may be applicable, and to discuss with other counsel or court reporters their experiences to reduce pitfalls.

[29] I commend to counsel the decision of Justice Nicholas McHaffie in *Guest Tek Interactive Entertainment Ltd. v. Nomadix Inc.*, 2020 FC 860, for suggestions on approaches to specific issues. If issues about the conduct of virtual discoveries arise that cannot be agreed upon, the parties may return to case management.

Issue #2 - Answers to written interrogatories before discovery

[30] In the April order, I observed that Mr. Stuart refused to answer many of the interrogatories from Jane Doe's counsel and that many objections appeared to be unfounded or inappropriate. However, I made no ruling in case management about whether or not they should be answered in advance of oral discoveries. In this application, counsel for Mr. Stuart provided additional arguments and case law in support of his objections, which I have considered.

[31] Counsel for Jane Doe now requests an order that answers to all of the written interrogatories objected to, be provided on the same basis that the April order

addressed objections on oral discoveries - that is, that answers be provided unless they were privileged or required the provision of names of other people who will not be key witnesses. Only if that evidence is sought to be used at trial will the objection be argued. Counsel for Jane Doe does not address the objections to each interrogatory because he said that would be impractical. He states generally that the objections were inappropriate, or not properly explained or specified.

[32] The use of interrogatories before oral discoveries can serve beneficial purposes such as shortening the length of oral discoveries, and making them more efficient by providing facts that allow a foundation upon which cross-examination can proceed. They allow opposing counsel to prepare for oral discovery more effectively.

[33] In this case however, the request of counsel for Jane Doe for answers to all unanswered interrogatories before discovery is too broad for two main reasons. First, many of the unanswered interrogatories relate to the statement of claim, and not the counterclaim. Discoveries at this time are limited to the counterclaim so those interrogatories are irrelevant. Second, most of the unanswered interrogatories can be asked at oral discovery. Although it might be helpful to have answers in advance, it is not essential that they be answered before oral discovery. The objections to most of them are not covered by the exceptions of privilege and disclosure of names of non-key witnesses set out in the April order. The April order requires Mr. Stuart to answer questions he objects to and argue the objection at trial if necessary. There is no purpose to be served by having this Court rule on the objections now, as it may be completely unnecessary.

[34] There is an exception to this conclusion. Answers to some of the unanswered interrogatories would be helpful to counsel for Jane Doe before oral discoveries. The

objections to these interrogatories are not well-founded. I outline those specific interrogatories and reasons why answers would be helpful below.

[35] First, interrogatory #1 a, b, c(i), d, e, f(i), g, h, i(i): these questions all relate to the Yukon College report to management dated June 12, 2018, after its investigation into the incident in question in this litigation. The interrogatories are to determine whether the report accurately reflects the statements made to the investigator by Mr. Stuart, Student X and Witnesses A, B, and C, and if not accurate, which statements are wrongly attributed or incorrect and why. These are appropriate questions to be answered before oral discovery for the reasons set out below.

[36] Counsel for Mr. Stuart has objections to interrogatory #1. In summary, the relevant objections are: i) the questions are prolix and unreasonably burdensome; ii) questions about whether or not he made the statements in the reports are leading or cross-examination. He has other objections of litigation privilege and documentary discovery. I will not address these as they relate to the interrogatories that I will not require to be answered in advance.

[37] I do not agree that interrogatory #1 is unduly prolix. While I agree that the questions could have been reframed to be asked more efficiently, their length is not sufficient to sustain an objection. I do not agree it is unreasonably burdensome for Mr. Stuart to review the report and identify inaccuracies in the statements, if any. Finally, I do not see how these questions are leading or cross-examination. They are open-ended. If Mr. Stuart's answer is that he made the statements and there are no inaccuracies in his statements or those of the other witnesses, that is the end of the matter. On the other hand, if his answer is that he did not make certain statements or there are inaccuracies in the statements as reported, Mr. Stuart is invited to identify the

inaccuracies and give reasons for his answer. This kind of question and allowance for explanation is not leading and not cross-examination.

[38] It will take Mr. Stuart some time to review the statements in the report in order to answer these questions. This is not a good use of oral discovery time. If these questions are answered before oral discovery, any follow-up questions at the examination are likely to be more focussed and effective.

[39] I therefore order questions in interrogatory #1 a, b, c(i), d, e, f(i), g, h, i(i) be answered before discovery.

[40] The questions in interrogatory #1 c(ii), (iii), (iv), f(ii), (iii), (iv) and i(ii), (iii), (iv) are about whether any other person knows Mr. Stuart or the other witnesses did not make the statements in the report; or that the statements made are incorrect. If so, counsel for Jane Doe asks Mr. Stuart for any writing and its "custodian" that relates to the other person's knowledge or belief that Mr. Stuart or other witnesses did not make the statements as reported.

[41] As an aside, I note the wording of these questions is unusual. Counsel for Jane Doe advised that in developing these questions, he relied heavily on Judge Kevin R. Culhane, *Model Interrogatories*, 2nd ed. (Cosa Mesa: James Publishing, 2016), an American publication. The American system of interrogatories and pre-trial discovery differs in a number of ways from the Canadian system, including vocabulary used and standard questions asked. Caution should be exercised in relying heavily on these materials, as they may not always be appropriate or well-understood.

[42] These interrogatories about other individuals with knowledge about the accuracy of the statements in the report are not necessary to be asked before the oral discovery as it will not assist it in any meaningful way. In any event, given the April order, if there

are individuals with knowledge who are not key witnesses then their names are not required to be provided.

[43] Second, interrogatories #22, #23, #24: these ask if Mr. Stuart conducted any investigation before alleging that Jane Doe is a pathological liar in his defence to the counterclaim; and details of that investigation, if taken; or if not taken, why not.

[44] Counsel for Mr. Stuart objects to answering this question on the ground of litigation privilege (and solicitor's trial brief privilege, which is in effect the same as litigation privilege). He also says he is not obliged to reveal the name of any expert or area of expertise at this time.

[45] Counsel for Mr. Stuart indicated at the April 2020 case management conference that he would be recommending that this pleading not be pursued. However, the pleading has not been abandoned. Assuming Mr. Stuart intends to pursue this pleading, to be successful he will have to provide facts and evidence in support. Currently these have not been disclosed. Without further information of what that material is, it is impossible for the Court to adjudicate on any privilege claim.

[46] It is a fair question for Jane Doe to ask for the facts on which Mr. Stuart bases this pleading. Once that information has been disclosed, if privilege is claimed over it, the Court is in a position to adjudicate. In particular the Court will be in a better position to decide if there is a valid privilege claim, and if so, whether privilege has been waived and to what extent. The current wording of the question, which asks about investigations undertaken to come up with this pleading invites a litigation privilege claim in response. However, wording of a question that is directed at ascertaining the facts underlying this pleading may elicit a different response, or at least a response that may provide additional remedies.

[47] As counsel know, Mr. Stuart is not obligated to disclose the identity of any expert if he does not intend to call that expert at trial. However, once he decides to rely at trial on the evidence of an expert, he is obligated to disclose the name and the proposed evidence to Jane Doe in advance of trial.

[48] As I noted during the April 2020 case management conference, this allegation of pathological lying is a serious one, and it would be concerning if it were being pleaded without foundation.

[49] I therefore order that counsel for Mr. Stuart disclose in advance of oral examinations the facts on which this pleading in para. 7 of the defence to counterclaim is based. The answer before oral discovery may assist counsel for Jane Doe to prepare questions on this technical medically related issue, thereby potentially shortening the oral discovery.

[50] Third, incomplete answers to interrogatories #25, #26: these questions relate to whether any other person has knowledge of the defendant's state of intoxication on the evening in question and if so, the nature of that knowledge and the details of any written, oral or recorded statement about that knowledge.

[51] Counsel for Jane Doe requests an order for further answers to these interrogatories because they are qualified by referring to "direct knowledge" of the defendant's "state of mind" on the night in question.

[52] I order counsel for Mr. Stuart to clarify before oral examinations whether "state of mind" means state of intoxication. If it does not, I order Mr. Stuart to answer the questions (#25 and #26) about whether any other person has knowledge of the state of intoxication of Jane Doe, in advance of oral examination. Additionally, I order counsel

for Mr. Stuart to clarify in advance of oral examination that Mr. Stuart's answers encompass any knowledge, not just "direct knowledge".

[53] Interrogatories #27 and #28: these ask whether Mr. Stuart has obtained a statement from any person about the allegations or defences in the main action or counterclaim and if so, details about the statement, who took it, what type of statement it is and who is its "custodian". Mr. Stuart has answered that he does not have any such statement. However, counsel for Jane Doe points out that counsel for Mr. Stuart has identified in particulars or oral submissions in court two witnesses with knowledge of the matters in issue in the counterclaim. As a result he doubts the answer provided to interrogatory #27 is complete.

[54] These questions as asked need not be further answered at this time. I first note that the part of the question asking about the main action is irrelevant at this time. There are ways for counsel for Jane Doe to pursue knowledge of any witnesses or prospective witnesses, which is the intent of these questions – such as requesting will-say statements of any proposed trial witness at examinations for discovery. I note that counsel for Mr. Stuart has already provided the names, addresses, and phone numbers of the individuals to whom counsel for Jane Doe says interrogatories #27 and #28 are directed.

Issue #3 - Amendment of statement of defence per Rule 20(22)

[55] Counsel for Jane Doe seeks an order that Mr. Stuart amend his statement of defence to the counterclaim to comply with the rule that alternative facts must be pleaded. Currently the defence consists of bald denials.

[56] This request is premature and may be unnecessary. Counsel for Jane Doe has the opportunity to explore fully Mr. Stuart's position and facts he relies on through the

discovery process. If disclosure is not forthcoming, or if different testimony is provided at trial, Jane Doe has her remedies and arguments.

[57] Further, as noted by counsel for Mr. Stuart, the proper remedy is for counsel for Jane Doe to bring an application to strike for failure to comply with the *Rules*. There is no application to strike for me to consider in this application. Even if there were, I note the issue of striking pleadings was discussed in the April 2020 case management conference. I said then that "[a]t this stage, I do not think it's a valuable use of lawyer or court time, before discoveries on the counterclaim are held, to proceed with an application to strike pleadings. I would encourage the parties to go to discovery on the basis of the current pleadings…" (p. 9, lines 25-28). Although this statement was made in the context of counsel for Mr. Stuart's concerns about Jane Doe's defence to the main action, my comments apply equally to the counterclaim pleadings.

[58] Counsel for Jane Doe argues that he was given a deadline by which he had to amend his pleading in the main action and so a similar order should be made here. However, the deadline was ordered after counsel for Jane Doe voluntarily indicated his intention to amend. There was no court order requiring counsel for Jane Doe to amend his pleading, only an order for a deadline. I also note that this was done well before any discussion about examinations for discoveries.

[59] There will be no order to amend the pleading to accord with Rule 20(22) as this is an inappropriate request to make in the absence of an application to strike the pleading. In any event, it should not be entertained at this time, before the completion of discoveries on the counterclaim.

Issue #4 - Production of notes of the treating caregivers of Mr. Stuart

[60] It is not necessary to decide this issue at this time. These requests relate to the claim of Mr. Stuart in the main action for defamation and the damages he seeks from the defendant. At this time, there is an order to proceed to discoveries on the counterclaim only, in an effort to address the main issue in this conflict. These notes do not appear to be relevant in that part of the action.

[61] Of course, if the plaintiff is relying on any of these materials in his defence to the counterclaim, then this may be an appropriate request. Once again, this can and should be addressed in examination for discovery.

[62] There will be no order for production of any notes of any treating caregivers of the plaintiff at this time.

Issue #5 - Production of documents related to the plaintiff's grievance

[63] It is also unnecessary to decide this issue now. Counsel for Jane Doe confirms that Mr. Stuart's statement of claim contains references to harm caused by Jane Doe to his employment and career in general. This is part of the damages claimed in the defamation action brought by Mr. Stuart. It is not pleaded in the defence to the counterclaim.

[64] There will be no order for production of any documents related to the Mr. Stuart's grievance against his former employer.

Conclusion

[65] I therefore order:

a. Examinations for discoveries on the counterclaim shall be held virtually on or before May 14, 2021;

b. Before examinations for discovery the plaintiff or counsel for the plaintiff shall:

i. answer interrogatory #1 a, b, c(i), d, e, f(i), g, h, i(i);

ii. disclose the facts on which the pleading in paragraph 7 in the defence to counterclaim is based;

iii. clarify whether “state of mind” in the answer to interrogatories #25 and #26 means state of intoxication, and if not, the plaintiff shall answer these questions; and

iv. clarify that the answers to interrogatories #25 and #26 encompasses any knowledge, not just “direct knowledge”.

[66] Costs in the cause.

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DUNCAN C.J.