



SUPREME COURT OF YUKON

Citation: *Harvey v. 5505 Yukon Ltd. et al*, 2011 YKSC
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Date: 20110525
Docket S.C. No.: 08-A0004
Registry: Whitehorse

BETWEEN:

**SHARMAN HARVEY, Administrator of the Estate of
ROBERT RICHARD HARVEY, Deceased**

Plaintiff

AND:

**5505 YUKON LIMITED, ROY A. SLADE,
and CHRISTINE DOKE**

Defendants

Before: Mr. Justice R.S. Veale

Appearances:
James Vilvang
Andrew Hladyshevsky
Jim Bazant

Appearing for the Plaintiff
Appearing for the Defendants
Appearing on behalf of Gareth Howell

**REASONS FOR JUDGMENT
(APPLICATION TO CROSS-EXAMINE)
DELIVERED FROM THE BENCH**

[1] VEALE J. (Oral):

Introduction

[2] This is an application pursuant to Rule 50(9) of the *Rules of Court* to cross-examine Sharman Harvey on her affidavit sworn and filed on November 3, 2009. The application is brought by counsel for 5505 Yukon Limited, Roy Slade and Christine Doke.

[3] The main court action involves an action brought by Ms. Harvey as administrator of the estate of Robert Harvey against 5505 Yukon Limited, and Mr. Slade and Ms. Doke. The dispute relates to the interpretation of a unanimous shareholder's agreement dated June 17, 1997.

Background

[4] As background, the application to cross-examine Ms. Harvey has been brought today so that if granted, the cross-examination can be completed this afternoon and a transcript prepared for assistance tomorrow when the main application will be heard.

[5] Tomorrow's application is brought by Ms. Harvey's counsel for an order to examine the lawyer for 5505 Yukon Limited, Gareth Howells, relating to the unanimous shareholder's agreement, as well as an application to split the trial and do liability first followed by the damages assessment after the liability decision as necessary. Rule 50(9) reads as follows:

50(9) On an application, evidence shall be given by affidavit, but the court may:

(a) order the attendance for cross-examination of a deponent, either before the court or before another person as the court directs ...

[6] There is no dispute that cross-examination under the *Rules of Court* is not a matter of right, but one of discretion of the Court to be exercised judicially.

[7] In some cases it is appropriate to file an affidavit of merits to establish a conflict in the evidence that is relevant to the proceeding. I also add that the cross-examination must be relevant to the issues at hand.

[8] In this case, there are three affidavits, the affidavit of Roy Slade filed June 23, 2009 listing, essentially, the corporate documents that have been produced, and those are extensive, and also a list of several pages indicating those documents to which production is objected based on grounds of privilege, either solicitor-client privilege or litigation privilege.

[9] The second affidavit is Ms. Harvey's affidavit filed November 3, 2009, which is filed in support of tomorrow's application, and the third affidavit is an affidavit of Mr. Slade, again, filed January 18, 2010, setting out Mr. Howells' role, that is the solicitor, as I understand it, for 5505 Yukon Limited, in connection with the preparation and signing of the unanimous shareholder's agreement and all the corporate events that occurred thereafter.

[10] The conflict in evidence that I will say counsel for 5505 Yukon raises is the following: One, Ms. Harvey's affidavit suggests that there are a number of corporate records that have not been produced, which contrasts with Mr. Slade's first affidavit indicating substantial document production. I add that it is clear, though, that the dispute tomorrow is about the documents for which privilege is claimed.

[11] The second issue of conflict raised is the specific alleged contradiction between paragraph 10 of Ms. Harvey and paragraph 8 of Mr. Slade. I am going to set those out. Paragraph 10 of Ms. Harvey's affidavit, she states the following:

I have been informed by Mr. Vilvang and verily believe, that he and Mr. Hladyshevsky attended Mr. Howells' office on or about June 24, 2009 to interview Mr. Howells. Mr. Howells apparently was unwilling to answer questions and stated that he wanted to review his files.

[12] In contrast to Mr. Slade's paragraph 8 of his affidavit of January 18, 2010, which reads as follows:

I verily believe that the Plaintiff's proposed examination of Howells would result in significant unfairness to Howells and expose all solicitors who act for corporate clients to be forced in to every action in which their corporate client are engaged in straightforward lawsuits. I am advised by Andrew J. Hladyshevsky, Q.C., and verily believe, that Howells objects to the Plaintiff's proposed examination and will not consent to the same, as this would

- (a) require that Howells retain legal counsel to advise him on, among other things, issues of privilege;
- (b) require that Howells incur the costs associated with retaining such counsel; and
- (c) place Howells in the difficult position of being examined on privileged matters.

[13] The third issue raised by Mr. Hladyshevsky is paragraph 12 of Ms. Harvey's affidavit which references a list of documents requested by an expert business evaluator, and Mr. Hladyshevsky wishes to know what those documents are.

Disposition

[14] My reading of Ms. Harvey's affidavit is that it is primarily an affidavit based on the knowledge of her lawyer and would often be signed by the lawyer's assistant. The word that comes to my mind, and I used this during submissions of counsel, is innocuous, in the sense that it contains primarily exhibits provided to her by her lawyer and setting out correspondence between counsel.

[15] I just will go through the exhibits, there are five exhibits, A to E. The first exhibit in Ms. Harvey's affidavit is the unanimous shareholder's agreement, which is the subject of this litigation. Exhibit B is correspondence dated October 16, 2008 to the solicitor for 5505 Yukon Limited from Mr. Vilvang requesting documentation relating to the

company. Exhibit C is a letter to Mr. Vilvang from Mr. Hladyshevsky on efforts to have the files delivered to his office. Exhibit D is an e-mail from Mr. Vilvang to Mr. Hladyshevsky dealing with issues of Mr. Howells' role in the matter, and Exhibit E is another letter dated May 28, 2009 from Mr. Vilvang to Mr. Hladyshevsky requesting documentation.

[16] My own view of the matter is that the proposed cross-examination of Ms. Harvey will not add a great deal of useful information to move tomorrow's application forward for these reasons: One, she is the administrator of the estate and was not a party to or involved in any of the proceedings. Two, there is no question that a lot of the corporate records have been produced and the issue really revolves around whether or not the privilege claims are valid claims. Three, the two paragraphs that were specifically cited, paragraph 8 of Mr. Slade's and paragraph 10 of Ms. Harvey's, are really a representation of the two differing views of the lawyers relating to why Mr. Howells', the corporate solicitor of 5505 Yukon Limited, does not want to be a participant in the proceeding.

[17] Fourthly, the documents that were requested by the expert business evaluator is not the real issue that is proceeding tomorrow and I do not see how the cross-examination on that matter will assist, given that it appears to me that Ms. Harvey is simply putting forward the correspondence to give the background to the application that is being presented tomorrow.

[18] So for all of those reasons, I conclude that the application for cross-examination should be dismissed. My view would be the costs should be in the cause, does counsel

wish to make submissions on that?

[19] MR. VILVANG: No, My Lord.

[20] THE COURT: The costs will be in the cause.



VEALE J.