SUPREME COURT OF YUKON

Citation: *MacNeil* v. *Hedmann*, 2013 YKSC 81 Date: 20130813
Docket: S.C. No. 09-D4165

Registry: Whitehorse

BETWEEN:

CYNTHIA LYNN MACNEIL

Plaintiff

AND:

DAVID GEORGE CLINTON HEDMANN

Defendant

Before: Mr. Justice E.W. Stach

Appearances:
Debbie Hoffman Counsel for the Plaintiff
David Hedmann Appearing on his own behalf

RULING ON PRETRIAL APPLICATION FOR ADJOURNMENT AND RULING ON APPLICATION FOR SEVERANCE DELIVERED FROM THE BENCH

[1] STACH J. (Oral): Two of three pretrial applications were argued yesterday. The first, an application to adjourn the trial was brought by the defendant, David Hedmann. The second, an application for severance, sought to have one of the trial issues tried ahead of the others. It was brought by Ms. Hoffman for the plaintiff, Cynthia MacNeil.

[2] Argument on these applications consumed the entire first day of this trial. The third pretrial application is to be argued later on this second day of trial following my rulings respecting the first two applications. I will deliver my ruling respecting each of them orally from the bench, beginning with Mr. Hedmann's application for adjournment.

ADJOURNMENT APPLICATION

[3] Mr. Hedmann is self-represented. His application for adjournment was brought on short notice and therefore seeks an order abridging the notice requirement in the *Rules of Court*. That relief is granted.

[4] In his supporting material, Mr. Hedmann lists nine reasons which he says support an order for adjournment of this trial. I do not propose to list them again in these reasons, save to mention that it is incumbent on me to consider each of them and to determine whether, alone or cumulatively, they warrant adjournment of this trial. I say at the outset that neither Mr. Hedmann's materials nor his lengthy but articulate submissions persuades me that adjournment of this trial process is warranted. I will now briefly explain why I came to that conclusion.

[5] A major thrust of Mr. Hedmann's petition for an adjournment is the fact that he is self-represented. He maintains that it has always been his intention to retain counsel, and all the more so since Cynthia MacNeil retained senior counsel to represent her. In fact, Mr. Hedmann has known since February 2013, some six months ago, that Ms. Hoffman was retained as counsel of record for the plaintiff. He also knew since February that Justice Humphreys had ordered this trial to proceed on August 12, 2013. Yet, despite Mr. Hedmann's stated determination to retain trial counsel, the record

before me does not bespeak of serious or consistent attempts by him to retain a lawyer in a timely and effective way. His cupboard on this submission is bare.

[6] Mr. Hedmann also asserts that Ms. Hoffman is in a conflict of interest position which should disqualify her from acting as counsel at trial. Accordingly, he says, this trial will inevitably require adjournment. This submission by Mr. Hedmann gave me great pause, particularly in view of affidavit number two, sworn by Ms. Hoffman on January 22, 2013. That affidavit was filed in these proceedings by Cynthia MacNeil before Ms. Hoffman became counsel of record. The affidavit sets out a brief historical account of the textual source for the prenuptial agreement in issue.

[7] Ultimately, the record before me satisfies me of five things.

1. Ms. Hoffman and David Hedmann were never in a relationship of solicitor-client;
2. Mr. Hedmann admitted in affidavit number one that he signed the prenuptial agreement;
3. The parties themselves are in the best position to outline the circumstances surrounding the agreement, and indeed, the only ones who can testify about their intentions on signing it;
4. The text of the prenuptial agreement will speak for itself;
5. Ms. Hoffman is not a necessary trial witness.

[8] In determining whether to call an individual as a witness in a case, wise counsel will ask themselves at least two questions. First, how much do I need the witness to

prove an essential point in my case? Second, how much can that witness damage my position at trial?

[9] Using this analysis, Mr. Hedmann would have nothing to gain by calling Ms. Hoffman as a witness at trial and much to lose. More to the point, I am persuaded on a balance of probabilities that Mr. Hedmann has subpoenaed Ms. Hoffman as a witness as a ploy in aid of his attempt to delay the commencement of these proceedings. It is a species of gamesmanship that ought not to be tolerated.

[10] Additionally, Mr. Hedmann alleges that unnecessary delays in documentary production by the plaintiff have prejudiced him and now compromise his trial preparedness. To be sure, documentary production is often a troublesome issue in cases where the parties have co-habited for a period of years, where contributions to the relationship or household differ, and where finances are often commingled. I have carefully examined the record here, including the judicial orders made from time to time. I conclude that some of the delay is attributable to the sheer volume of the requests made by Mr. Hedmann, often without the requisite specificity. Some is attributable to the fact that many documents requested by Mr. Hedmann were in the possession of a third party.

[11] While the performance of each of the parties in terms of production is less than ideal, I see nothing here in the way of deliberate delay and certainly no pattern of obstruction. I cannot and do not conclude that Mr. Hedmann suffered any material prejudice on this basis or on the basis of untimely disclosure.

[12] Mr. Hedmann repeats the allegation of deliberate foot dragging on the part of the plaintiff and, that by failing to cooperate in the scheduling of discovery, the plaintiff effectively ran out the clock. It appears from the record that Justice Humphreys made an order in February 2013, directing that, if examinations for discovery were being contemplated, they had to be completed on or before July 12, 2013. That is to say, one month before the commencement of trial.

[13] There is no record of early attempts by Mr. Hedmann to schedule the examination for discovery of Cynthia MacNeil His attempt to schedule it comes relatively late in the day, mostly in June or early July. The record here indicates that the plaintiff offered nine dates for the purpose of that discovery in June or July. Mr. Hedmann's allegation of deliberate non-cooperation on the part of the plaintiff is not made out in my opinion.

[14] Finally, Mr. Hedmann asserts that taken cumulatively, his complaints justify an adjournment of the trial. He says that he will suffer irreparable prejudice and a denial of fundamental justice if an adjournment is not granted. I disagree. Not only has Mr. Hedmann failed to make out a case for prejudice to him, I conclude that the relative prejudice to Cynthia MacNeil by not proceeding with this trial would be the greater prejudice.

[15] For these reasons, Mr. Hedmann's application for adjournment is dismissed.

SEVERANCE APPLICATION

[16] In her severance application, Cynthia MacNeil asks the Court to order that the issue respecting the validity of the prenuptial agreement be severed from the other issues to be tried in these proceedings. She asks that the threshold issue of the validity of the prenuptial agreement be decided prior to any further issues of property and debt division. Finally, she asks, based on the prenuptial agreement, that the defendant bear the costs of these proceedings.

[17] The basis for the application for severance is grounded in the *Rules of Court*, namely Rule 1(6) and Rule 41(18). I am grateful to Ms. Hoffman for providing three authorities in reference to the issue, and for providing them also to Mr. Hedmann. I thought the most helpful among them was the decision of Mr. Justice Groberman in the *Ross River Dene Council* v. *Canada (Attorney General)*, 2013 YKCA 6. It is useful because it discusses, among other things, the scope of and parameters of the severance provision in the context of the purpose of the entire *Rules of Court*.

[18] I have to say at the outset, that I thought the notion of severance to be superficially attractive. After all, the Court of Appeal, in its decision, had indicated, among other things, that the issue whether the 2009 document affected the validity of the marriage agreement was not simply a live issue but critical to the question of whether the marriage agreement continued to define the rights between the parties.

[19] On giving the matter some consideration, I came to the conclusion that the proposal for severance was less attractive and less desirable than I initially thought. Paraphrasing from the decision in *Ross River Dene Council* v. *Canada (Attorney General)*, *supra*, I derive the following propositions that ought to guide me in my

exercise of judicial discretion: a judge's discretion to sever should not be exercised in favour of severance unless there is a real likelihood of a significant saving in time and expense. Severance may be appropriate if the issue to be tried first could be determinative, in that its resolution would put an end to the action. Severance should generally not be ordered when the issue to be tried is interwoven with other issues in the trial. Mr. Justice Groberman observes in general that the jurisprudence on the subject suggests that courts adopt a cautious approach to the severance of issues.

[20] One of the factors that made me hesitant about the initial attractiveness of the severance option is, in fact, a decision of the Supreme Court of Canada, decided in *Hartshorne* v. *Hartshorne*, [2004] S.C.J. No. 20, curiously enough also involving a dispute over a marriage agreement. The sum and substance of that decision indicates that one of the factors that a court must necessarily consider in the context of such agreements is the fairness of the agreement's operation at a couple of points in time, and among other things, it becomes relevant where the financial and domestic arrangements involve some element of commingling. I gather that in the case now before me, there is or will be some evidence of the commingling of at least the business affairs of the parties.

[21] Ultimately, establishing whether the impact of the marriage contract, if indeed it survives intact, is something that will have to be measured with reference to fairness of the result. Inevitably, I think that there is a greater likelihood that evidence of respective contributions may assume some importance here. And where, as here, we have a self-represented litigant, I hesitate to circumscribe the proceedings in a fashion that is potentially prejudicial to him.

[22] It is a close call, but on the balance, I come to the conclusion that there is no clear saving of time, money, and efficiency from an order to sever, and I respectfully decline to make that order here.

[23] Now, you will see that the success on the two motions has been divided. That is in part why I left until this moment whether counsel or Mr. Hedmann wish to address me in reference to costs or whether there is to be a trade-off here. Do you have -- I will hear from you first, Ms. Hoffman.

[24] MS. HOFFMAN: Normally, Your Honour, I would say that because there has been mixed success, that no costs should be awarded. That being said, in this case, this is the fourth time we've been in on an adjournment application in the last month, and so the costs incurred by Ms. MacNeil to repeatedly defend against that adjournment application I think should be taken into consideration in successfully defending against this adjournment application made by Mr. Hedmann. So I'm asking you to take consideration of the context in which that application was made, and the previous denials of an adjournment, including, most recently on Friday at the Court of Appeal, last week.

[25] THE COURT: Okay. Mr. Hedmann?

[26] THE DEFENDANT: Yes, thank you, Your Honour. Yes, Ms. Hoffman points out that this is the fourth time, and she may be correct, on my application for an adjournment. But I would also point out that this is the second time we've been here on the severance issue. So I think on balance, and I didn't have a clock on the timing that was allocated to the two matters, but I think on balance, I think the trade-off is as you

suggest; that there should be -- the parties should bear the costs of the -- their costs in these two matters. I would also point out, at the hearings, where there were motions on my adjournment, there were other matters as well before the Court. So it wasn't that there was a hearing just on the adjournment issue.

[27] THE COURT: No. I agree. There are two things that make me pause rather than just taking the position, well, there is divided success and each of the parties should bear their own costs in respect of each of the motions. They are these: that, as between the two motions, in my opinion, the motion for severance bore the greater chance of success. You will have gathered, Mr. Hedmann, that I was not impressed by what I ultimately regarded as thin or feeble efforts on your part to actually engage a lawyer for the trial of this proceeding, and you will have discerned from my reasons that I was also critical of what I referred to as an element of gamesmanship in the process. It is those two factors that incline me to make a costs order that results in something other than a sheer trade-off. In terms of the time consumed on the motions, the motion for adjournment was relatively longer and certainly much more complex.

[28] On those grounds, I make a modest order for costs in respect of the adjournment motion for an amount fixed at $500 payable by the defendant to the plaintiff. I make no order for costs in respect of the severance application.

[SUBMISSIONS RE TIME TO PAY COSTS]

[29] THE COURT: It is my intention that the costs be payable forthwith.

[30] MS. HOFFMAN: Yes, and that would be my submission because that is the normal practice.

[31] THE COURT: Yes. Thank you for clarifying that, Ms. Hoffman.

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STACH J.