Citation: 2008 TCC 511
Date: 20080912
Docket: 2006-3533(IT)G, 2007-2496(IT)G
2007-2611(IT)G, 2007-3038(IT)G
and 2007-3039(IT)G

BETWEEN:

STANLEY LABOW, DANNY S. TENASCHUK,
MARCANTONIO CONSTRUCTORS INC.,
GIUSEPPE MARCANTONIO
and DOMENICO FILOSO,

Appellants,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Bowie J.

[1] The respondent moves in these five appeals under the *Income Tax Act*[1] for orders permitting her to amend her Replies to the Notices of Appeal. She also seeks orders in the appeals of Marcantonio Constructors Inc. and Danny Tenaschuk to have the appellants reattend examinations for discovery to answer further questions that are said to arise out of the answers to undertakings given by them. In the alternative, if I should find that the respondent is not entitled to continue the examinations, then she asks in those two appeals for orders under *Rule* 93(1) permitting a second examination, or alternatively for orders under *Rule* 99 permitting her to examine Joann Williams, a non-party. She also asks in those two appeals for orders that would require the appellants to produce unredacted copies of certain documents. In the appeal of Dr. Labow she seeks, in addition to amending the Reply, to be permitted to examine Sylvain Parent, a non-party, under *Rule* 99.

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1 R.S. 1985 c.1 (5th supp.), as amended.

[2] I shall deal first with the respondent's proposal to amend the Replies, then with the proposed continued, or additional, examinations for discovery, then with the proposed examinations of non-parties, and finally with the request that the appellants be required to produce unredacted copies of documents.

proposed amendments to the replies to the notices of appeal

[3] The amendments to the Replies to the Notices of Appeal will be allowed except so far as they would amend paragraph 16 in the appeal of *Stanley Labow*, paragraph 20 in the appeal of *Danny S. Tanasychuk*, paragraph 18 in the appeal of *Marcantonio Constructors Inc.*, paragraph 16 in the appeal of *Giuseppe Marcantonio* and paragraph 16 in the appeal of *Domenico Filoso*.

[4] Those paragraphs contain the assumptions said to have been made by the Minister of National Revenue when assessing the appellants. The voluminous material filed on these motions contains no evidence to provide a factual basis for amending those pleaded assumptions. The cases make it clear that assumptions are to be pleaded fully, fairly and accurately, so there is a presumption that the original Replies do that. Obviously, errors and ambiguities can happen, and I recognize that there may be instances when it is appropriate to change, add to, or even subtract from the assumptions pleaded. In such cases the Crown has the onus to show, by evidence, why the assumptions were not fully, fairly and accurately pleaded in the first instance, and to show that the proposed amended pleading will properly and fully remedy that error.

[5] I appreciate that some of the amendments proposed to those paragraphs appear to be inconsequential housekeeping amendments of no substance. However, I do not propose to decide which are such and which are not, in the absence of evidence. I assume that all the proposed amendments have a substantive purpose. If there is one, the reason that the original pleading was defective needs to be explained. If there is not, then there is no need for the amendment.

[6] Ms. Kamin argues in several instances that the amendments ought not to be permitted because they allege a fact that is contrary to answers given by the Crown's officer on discovery. Paragraph 16(*a*)(ii) in the *Labow* appeal is an example. The respondent may have great difficulty at trial in proving the facts alleged in such cases, but this is not the time to be making these factual findings. The practical test to be applied at this point is whether the allegation, had it been made in the pleading originally filed, would have been susceptible to striking out.

[7] The amendments certainly raise questions, as well as alleging new facts and legal conclusions. I would have permitted the appellants to have additional discovery had they asked for it, but they prefer to get the matters on to trial. In some instances, the appellants sought explanations of the arguments now raised. To some extent, those were supplied during argument. The appellants may seek confirmation of these, and additional particulars, by Demands under *Rule* 52. That *Rule* allows the respondent 30 days to respond. Time to amend the Answers shall run from the date of the response to any Demand the appellants have delivered.

continuation of the examinations for discovery

[8] Broadly, these appeals are concerned with a health and welfare trust and plan (Drs. Labow and Tenaschuk) and a group accident and sickness trust and plan (Marcantonio Constructors Inc., Giuseppe Marcantonio and Domenico Filoso). In the latter two cases the major issue is whether contributions made by Marcantonio Constructors Inc. amounts to a taxable benefit to the appellants. In the other three cases the principal issue is the deductibility of contributions to the plans. Issues of sham and of non-arm's length dealing between the appellants and the trustees are raised in the pleadings. It is not disputed that the manner in which certain actuarial valuations were computed is relevant to issues pleaded.

[9] Sylvain Parent and Joann Williams are consulting actuaries whose computations were the foundation for the contribution structure of the plans. Counsel for the respondent has, on the basis of the information available to him, constructed a theory as to the manner in which he believes that the actuarial valuations were arrived at. It is to obtain verification of this theory that he now seeks to further examine Dr. Tenaschuk and Mr. Filoso, or in the alternative the actuaries themselves, and to obtain unredacted copies of their working papers.

[10] Mr. Chambers takes the position that Dr. Tenaschuk and Mr. Filoso, in his capacity as the nominee of Marcantonio Constructors Inc., are obliged to reattend to answer further questions in relation to the actuarial computations, on the basis that these questions arise out of the answers given by the appellants to undertakings given on their examinations.

[11] Insofar as Dr. Tenaschuk is concerned, the examination is completed. He was examined by Mr. Chambers on May 15, 2008. At page 174 Mr. Chambers concluded his examination "… subject to questions that may arise from answers to Undertakings …". On June 30, 2008, Ms. Kamin wrote to Mr. Chambers, enclosing the responses to nine questions, eight of which had been taken under advisement. It cannot be said that the answers are incomplete, although in one minor respect not

relevant to the issues in this motion an objection by the appellant was maintained. Seven of these answers, it appears, required the appellant to obtain information from Ms. Williams. There does not appear to have been any mention during the examination of the respondent's theory of which counsel now seeks confirmation. Indeed, it may have been, in part, a product of the answers given. It does not appear, however, that the appellant was asked to obtain from Ms. Williams a narrative description of the manner in which she did her valuation, although that certainly could have been asked.

[12] An examining party is entitled to ask further question arising out of answers given pursuant to undertakings, or on questions taken under advisement: *Muslija v. Pilot Insurance*, (1991) 3 O.R. (3d) 378. What the respondent seeks in this case, however, is not some clarification of an answer, but to test a theory, possibly developed since the examination, to which the answers may or may not have contributed. As Ms. Kamin pointed out in argument, *Rule* 130 is available whereby the respondent may request an admission of the accuracy of the theory. If the appellant unreasonably refuses to admit the facts comprising the respondent's theory, there may be costs consequences as a result.

[13] Nor is this a proper case in which to permit a second examination of the appellant. The respondent's desire to conduct a further examination of Dr. Tenaschuk, or for that matter to examine Ms. Williams, does not arise out of some new matter recently raised for the first time. Indeed, it appears from the material before me that the *bona fides* of the valuations has been in issue throughout. In *SmithKline Beecham Animal Health Inc. v. The Queen*,[2] The Federal Court of Appeal approved the decision of Prothonotary Hargrave to refuse a second examination for discovery under *Federal Court Rule* 235 in *McLeod Lake Indian Band v. Chingee*[3], because the material as to which counsel wished to examine had been available at the time of the first examination. *Federal Court Rule* 235 is different in its wording from *Rule* 93, but not materially so. Prothonotary Hargrave's test, I think, is a sensible one and should be applied to our *Rule* as well. The respondent had the actuary's working papers before the discoveries in these cases took place. Questions relating to Ms. Williams computations were asked, and were answered by way of undertakings. The respondent's theory could have been put to the appellant, who could have made the inquiry of Ms. Williams along with all the

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2 [2002] 4 C.T.C. 93.

3 (1998), 149 F.T.R. 113.

other inquiries that he had to make of her. That did not happen. As Prothonotary Hargrave said in the *McLeod Lake* case

> … discovery must, at some point, come to an end.

In Dr. Tenaschuk's case that point has been reached.

[14] In the appeal of Marcantonio Constructors the situation is quite different. At the examination for discovery of Domenico Filoso as an officer of the company on April 14, 2008 the following appears:

> Q. 142 Okay. All right.
>
> So, it seems that certainly Ms. Williams was given the $500,000 figure and asked to make actuarial benefit valuations based on that amount rather than on your salaries.
>
> Could you find out from Ms. Williams whether this was so?
>
> MS. KAMIN: I have checked with the actuarial firm and that was not so.
>
> MR. CHAMBERS: It was not so.
>
> MS. KAMIN: It was not so.
>
> MR. CHAMBERS: Then how did she arrive at $24,338?
>
> MS. KAMIN: That must be taken in conjunction with the document at Tab 14.
>
> MR. CHAMBERS: 14?
>
> MS. KAMIN: Yes.

On May 30, 2008 counsel for the appellant wrote to counsel for the respondent, giving answers to undertakings given on the examination. As to Question 142, her letter said this:

> In addition, upon review of the discovery transcript and further inquiries, there is the following correction to an answer in accordance with section 98 of the *Tax Court of Canada Rules (General Procedure):*
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> > Page 48-50, question 142: The answers which counsel provided should be changed to reflect the fact that Ms. Williams was given the

> figure of $500,000 by William Johnston's office, as an amount that might be appropriate for the Plan liabilities.
>
> If you have any questions, please do not hesitate to contact me.

[15] Having been given an incorrect answer at the time of the examination about a matter which is important to the respondent's case, counsel is entitled now that the answer has been corrected to resume the examination to pursue the line of enquiry that would no doubt have followed if the correct answer had been given in the first instance, including questions designed to ascertain if the elements of the respondent's theory as to the methodology used by Ms. Williams in connection with the plan are accurate. Rule 98(2) gives the respondent that right, and although it was not specifically invoked by counsel it is a remedy that I can, and in this case should, grant pursuant to Rule 93. Mr. Filoso, therefore, will reattend at the appellant's expense to be further examined on that issue.

examination of non-parties

[16] Counsel for the respondent also asks for orders under Rule 99 permitting him to examine Sylvain Parent in the appeal of Dr. Labow, and as an alternative remedy in the appeal of Dr. Tenaschuk to permit him to examine Joann Williams. The object of the proposed examination in each case is to seek to obtain confirmation of the respondent's theory as to how they, as consulting actuaries, computed the valuations and the benefits for the plans.

[17] *Rule* 99 reads as follows:

> 99(1) The Court may grant leave, on such terms respecting costs and other matters as are just, to examine for discovery any person who there is reason to believe has information relevant to a material issue in the appeal, other than an expert engaged by or on behalf of a party in preparation for contemplated or pending litigation.
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> (2) Leave under subsection (1) shall not be granted unless the Court is satisfied that,
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> (*a*) the moving party has been unable to obtain the information from other persons whom the moving party is entitled to examine for discovery, or from the person sought to be examined,

> (*b*) it would be unfair to require the moving party to proceed to hearing without having the opportunity of examining the person, and
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> (*c*) the examination will not,
>
> (i) unduly delay the commencement of the hearing of the proceeding,
>
> (ii) entail unreasonable expense for other parties, or
>
> (iii) result in unfairness to the person the moving party seeks to examine.
>
> (3) A party who examines a person orally under this section shall, if requested, serve any party who attended or was represented on the examination with the transcript free of charge, unless the Court directs otherwise.
>
> (4) The examining party is not entitled to recover the costs of the examination from another party unless the Court expressly directs otherwise.
>
> (5) The evidence of a person examined under this section may not be read into evidence at the hearing under subsection 100(1).

Paragraph 99(2)(*a*) is cumulative. I cannot grant the orders unless I am satisfied that the respondent has been unable to obtain the information from either the appellants or the actuaries. The respondent has satisfied the second part of this requirement. Counsel wrote to Ms. Williams on August 12, 2008. He enclosed a considerable volume of material, including a 3 page statement of his theory as to the manner in which she had done her valuation. He asked her to review the material and to comment on the accuracy of the narrative. He wrote to Mr. Parent on August 14, 2008 in connection with Dr. Labow's appeal, enclosing a copy of the relevant plan and a copy of Mr. Parent's valuation dated January 1, 1996, and posing a series of questions that he asked Mr. Parent to answer. Ms. Williams did not reply to the request. Mr. Parent replied that he would not provide the information requested.

[18] Rule 99 requires more than that, however. I am not satisfied that the respondent could not have obtained the information she now wants by putting the questions to the appellants during their examinations for discovery. A number of questions were asked of Dr. Tenaschuk that required the appellants to give undertakings to obtain information from the actuaries. This was done, and the answers were provided. There is no reason to believe that the questions that counsel now seeks answers to could not have been dealt with in the same way. In

Dr. Labow's case, the subject was not addressed at all on discovery. It follows that Rule 99 cannot now be available to the respondent.

[19] Nor am I persuaded that it would be unfair to require the respondent to proceed to trial without the benefit of having examined the actuaries under oath. The purpose of the proposed examinations is, it appears, not so much to obtain information from the actuaries, because the respondent appears to have the information, as it is to get their affirmation of the respondent's theory recorded under oath prior to trial by a process similar to the deposition of witnesses that is a feature of some legal systems, but not of ours. The requirements of *Rule* 99 are purposefully stringent, and in this case they have not been met.

unredacted working papers

[20] The right of the Minister of National Revenue to receive copies of the actuaries' working papers in these and other cases pursuant to demands made under section 231.2 of the *Income Tax Act* on the firm of Welton Parent Inc., consulting actuaries, was the subject of an application to the Federal Court. The decision of Gauthier J., reported as *M.N.R. v. Welton Parent Inc.*,[4] held that the Minister was entitled to receive, among other things, the working papers in question in the Mercantonio Constructors Inc. and Tenaschuk motions, but subject to the redaction of "… the names of the employers and their coordinates if any …". These redactions were ordered to protect solicitor-client privilege. Ms. Kamin wrote on June 20, 2008 to Mr. Chambers regarding the appeals of Mercantonio Constructors Inc., Giuseppe Marcantonio and Domenico Filoso. In that letter the solicitor-client privilege in respect of the working papers is specifically waived. It is not clear from the material before me whether there has been a similar waiver by Dr. Tenaschuk.

[21] On consent of the parties, the Court ordered in both these appeals that documents be produced under Rule 82, which requires production of all relevant documents. The only basis for the redactions to these documents was to protect the solicitor-client privilege that Gauthier J. found to exist in them, and as the documents are clearly material to the issues in the appeals, there can be no basis for withholding any part of them from production after the privilege has been waived. Mercantonio Constructors Inc. is required to produce unredacted copies of the actuary's working papers to the respondent. Dr. Tenaschuk is required to do so unless he continues to assert solicitor-client privilege in respect of the documents.

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[4] 2006 DTC 6093.

costs of the motions

[21] I shall reserve the matter of costs to be dealt with after the parties have had the opportunity to make submissions. Those submissions shall be made in writing, not to exceed five pages, to be filed with the Registrar by September 30, 2008.

Signed at Ottawa, Canada, this 12th day of September, 2008.

"E.A. Bowie"

Bowie J.

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COURT FILE NO.:	2006-3533(IT)G, 2007-2496(IT)G, 2007-2611(IT)G, 2007-3038(IT)G and 2007-3039(IT)G
STYLE OF CAUSE:	STANLEY LABOW, DANNY S. TENASCHUK, MARCANTONIO CONSTRUCTORS INC., GIUSEPPE MARCANTONIO, DOMENICO FILOSO and HER MAJESTY THE QUEEN
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 5, 2008
REASONS FOR ORDERS BY:	The Honourable Justice E.A. Bowie
DATE OF ORDERS:	September 12, 2008

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