Docket: 2006-2167(IT)G

BETWEEN:

MICHAEL J. BARKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

Application heard on February 21, 2012 at Vancouver, British Columbia

Before: The Honourable Justice G. A. Sheridan

Appearances:

Counsel for the Appellant:	David R. Davies
Counsel for the Respondent:	Raj Grewal
Counsel for the Non-Party, Peter Charlton:	Barry Weintraub

ORDER

Upon the Respondent having brought a Motion for leave to examine for discovery a non-party, Peter Charlton, pursuant to subsection 99(1) of the *Tax Court of Canada Rules (General Procedure)*;

And upon having heard from the parties and counsel for Mr. Charlton and having read the materials filed;

In accordance with the attached Reasons for Order, the Respondent's Motion is dismissed, with the matter of costs to be left to the trial judge.

Signed at Vancouver, British Columbia this 27th day of February 2012.

"G. A. Sheridan"

Sheridan J.

Citation: 2012 TCC 64
Date: 20120227
Docket: 2006-2167(IT)G

BETWEEN:

MICHAEL J. BARKER,

Appellant,

and

HER MAJESTY THE QUEEN,

Respondent.

REASONS FOR ORDER

Sheridan J.

[1] Pursuant to subsection 99(1) of the *Tax Court of Canada Rules (General Procedure)*, the Respondent brings a motion for leave to examine for discovery a non-party, Peter Charlton ("Present Motion"). The trial of this appeal is scheduled for March 12-14, 2012, than three weeks from the hearing of the Present Motion.

Background

[2] The Present Motion is the Respondent's second attempt to secure leave to examine Mr. Charlton[1]. A similar motion was filed on April 1, 2011 and scheduled for hearing on May 12, 2011 ("First Motion"). After one unsuccessful attempt to serve Mr. Charlton, the Respondent requested the First Motion be adjourned *sine die*. No further steps to effect service of Mr. Charlton were taken.

[3] In June 2011 the Appellant unilaterally requested the matter be scheduled for hearing. By Order of this Court dated July 26, 2011, upon the joint application of the parties, the appeal was set down for hearing in March 2012.

[1] Affidavit of Jennifer McDougall dated February 14, 2012.

[4] On December 9, 2011, the Respondent wrote to Mr. Charlton requesting answers to some 23 detailed questions and advising there were "additional matters" the Respondent wished to discuss with him. The letter also indicated that the Respondent might renew the First Motion[2].

[5] On January 30, 2012, Mr. Charlton replied to the Respondent's letter by email as follows:

> I have now ready [*sic*] after the holidays, to deal with this matter. I am prepared to answer the questions that I am capable of doing. I have been advised to get legal advice. As this matter occurred approx. 14 to 15 years ago, I need to provide my lawyer with materials so they can understand the transaction. …[3]

[6] Without further reply, two days later, the Respondent filed the Present Motion on February 1, 2012 with service effected on Mr. Charlton by email the following day.

Section 99 of the *Tax Court of Canada Rules (General Procedure)*

[7] The key issue in the appeal is whether a debt that the Appellant incurred in 1997 to finance the acquisition of units in a limited partnership tax shelter ("Tax Shelter") was a "limited-recourse debt" as defined in section 143.2 of the *Income Tax Act*. Under subsection 143.2(7) of the *Act*, the unpaid principal of an indebtedness is deemed to be a limited-recourse debt unless interest is payable at a rate equal, at least, to the prescribed rate and is, in fact, paid within a certain time frame ("Interest Issue").

[8] According to paragraph 2 of the Respondent's Notice of Motion, an Order for the discovery of Mr. Charlton is sought:

> … to discover the facts related to the Interest Issue. [Mr. Charlton], through a company called UMED, was the person who liaised with partners like [the Appellant], administered, sought and collected interest payments from the partners and even purportedly paid 50% of the interest due on their behalf through his wholly-owned corporation, Charlindea Inc.

[9] The Respondent brings its Motion pursuant to subsection 99(1) of the *General Procedure Rules*, the relevant portion of which reads:

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[2] Affidavit of Shannon Ryder, Exhibit 'A'.

[3] Affidavit of Shannon Ryder, Exhibit 'C'.

> **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.

[10] The grounds for the Respondent's motions are:

a) the information sought from Mr. Charlton is narrow and relates directly to the requirements of subsection 143.2(7) of the *Income Tax Act*, specifically whether and how much interest was paid on behalf of the Appellant on a debt that the Minister determined was a "limited recourse amount" within the meaning of subsection 143.2(1) of the *Income Tax Act* (the "Interest Issue");

b) the Respondent has done all it can do to obtain required information from both the Appellant and Peter Charlton;

c) a list of the unanswered undertakings that were given at the examination for discovery that relate to the Interest Issue is at Schedule "A" to the Notice of Motion;

d) it would be unfair to require the respondent to proceed to trial without having the opportunity to examine Peter Charlton, as the outcome of this matter will have an impact on two other Tax Court appeals and 96 objections being held in abeyance at the Canada Revenue Agency;

e) the order sought is in the interests of justice and fairness to ensure that the Respondent is not taken by surprise at trial;

f) Peter Charlton is already deeply involved with this litigation and therefore will be no unfairness to him if he is examined;

g) the examination sought will not unduly delay this matter and will not entail unreasonable expense for the Appellant;

h) as set out in the Affidavit of Linda Aiello dated April 28, 2011, there is reason to believe that Peter Charlton has the information sought and the information is relevant to a material issue in the appeal, which is addressed at paragraphs 13(w), 13(x), 13(y), 14(a), and 17 of the Reply to the Amended Notice of Appeal; and

i) sections 95 and 99 of the Rules.

[11] That Mr. Charlton has information relevant to a material issue in the Appellant's appeal is not disputed. However, before the Court may exercise its discretion under subsection 99(1), it must be satisfied that the moving party has met the criteria set out in subsection 99(2):

> (2) Leave under subsection (1) shall not be granted unless the Court is satisfied that,
>
> (*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
>
> (*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. [Emphasis added.]

[12] Both Mr. Charlton and the Appellant take the position that the Respondent has not satisfied these requirements. For the reasons set out below, I agree with their position. Accordingly, the Respondent's Motion is dismissed with the matter of costs to be left to the trial judge.

Paragraph 99(2)(*a*): The Respondent has been unable to obtain the information from the Appellant or from Mr. Charlton.

[13] Notwithstanding the use of the word "or" in paragraph 99(2)(*a*), the provision is to be read conjunctively, thus putting the onus on the moving party to satisfy both prongs of the requirement.

[14] Counsel for the Appellant conceded that the Respondent was unable to obtain the information sought from the Appellant. Counsel for Mr. Charlton, however, disagreed, arguing that it was the Respondent's choice, in making its undertaking requests to the Appellant, to limit the source of such information to Mr. Charlton. He submitted that there are several others involved in the Tax Shelter who might also be able to answer the questions flowing from the Respondent's examination for discovery of the Appellant on January 23, 2009 and August 27, 2010. The Respondent argued that attempting to examine such other non-parties would likely be seen as a fishing expedition.

[15] As I am not persuaded that the Respondent has exhausted its means of obtaining this information directly from Mr. Charlton, I need not decide whether the first prong of paragraph 99(2)(*a*) has been satisfied.

[16] Turning, then, to the second criterion of paragraph 99(2)(a), at paragraph 3 of the Notice of Motion, the Respondent alleges that Mr. Charlton "has always been

actively involved with this matter", as early as the audit stage[4]. At paragraphs 4 and 6, the Respondent notes his involvement at the examination for discovery of the Appellant. Mr. Charlton presented himself at the examination for discovery of the Appellant on January 23, 2009 but was excluded by the Respondent "on the basis that he [was] a material witness". Following the second day of discovery of the Appellant on August 23, 2009, the Respondent had made some 59 requests for undertakings concerning Mr. Charlton. Those undertakings were answered on December 17, 2010[5]. (Note: there is a typographical error in paragraph 10 of the Respondent's Written Submission showing this date as December 17, 2011.) At paragraph 5 of the Notice of Motion, the Respondent suggests Mr. Charlton may be funding the litigation.

[17] Yet, notwithstanding the Respondent's acknowledged awareness of Mr. Charlton's role, it did nothing to obtain information directly from him until April 1, 2011 when it filed the subsequently adjourned First Motion. The Respondent blamed its inability to serve the First Motion materials on Mr. Charlton's efforts to avoid service. In any event, the Respondent made no further attempts to serve Mr. Charlton or to arrange for substituted service.

[18] Indeed, nothing more was done to obtain information directly from Mr. Charlton until the Respondent's December 9, 2011 letter. Given the detailed nature of the Respondent's questions and the intervening holiday period, I do not consider the fact that Mr. Charlton did not respond until January 30, 2012 to constitute a refusal to provide the information requested. Furthermore, his responding email shows a willingness to make at least some effort to co-operate with the Respondent's request. Rather than following up on Mr. Charlton's response, however, on February 1, 2012, the Respondent filed the Present Motion materials with service on Mr. Charlton the following day.

[19] In my view, the Present Motion was precipitated, not by the Respondent's inability to obtain the information requested from Mr. Charlton within the meaning of paragraph 99(2)(*a*), but rather by the looming trial date and the untimeliness[6] of the Respondent's request. Nothing in the Respondent's materials provides a satisfactory explanation as to why, notwithstanding its long-standing awareness of

[4] Affidavit of Jennifer McDougall, Exhibit 'C'.

[5] Affidavit of Jennifer McDougall, Exhibit 'C'.

[6] See *S.K. v. Lee*, [2002] O.J. No. 590. (Ont. S.C.) for a similar case of delay.

Mr. Charlton's involvement in the Tax Shelter, steps were not taken sooner to obtain information from him.

[20] In these circumstances, I agree with the submissions of counsel for the Appellant that the present matter is factually similar to *Teelucksingh v. The Queen*, 2007 D.T.C. 511. At paragraph 2, Bowie, J. noted that "… Rule 99 provides for an extraordinary remedy that ought to be applied sparingly and only where there is demonstrably strict compliance with subsection (2) of the Rule." In the circumstances of that case, he found "inadequate" the Minister's efforts to elicit information from the non-party.

[21] In my view, the same can be said of the Respondent in the matter at hand. The Respondent's failure to satisfy the second prong of paragraph 99(2)(*a*) is sufficient to dispose of the matter; however, out of an abundance of caution, the evidence in respect of the other elements of subsection 99(2) are considered below.

Paragraph 99(2)(*b*): It would be unfair to require the Respondent to proceed to hearing without having the opportunity of examining Mr. Charlton.

[22] The Respondent's contentions in respect of paragraph 99(2)(*b*) are set out in subparagraphs 4(d) and (e) of the Notice of Motion:

> (d) it would be unfair to require the respondent to proceed to trial without having the opportunity to examine [Mr. Charlton], as the outcome of this matter will have an impact on two other Tax Court appeals and 96 objections being held in abeyance at the Canada Revenue Agency;
>
> (e) the order sought is in the interests of justice and fairness to ensure that the respondent is not taken by surprise at trial.

[23] For many of the same reasons set out in respect of paragraph 99(2)(*a*), it seems to me that any "surprise" that the Respondent may experience at trial is attributable to its not having acted sooner to obtain information directly from Mr. Charlton. It must be remembered that it is the Appellant who bears the onus of proving wrong the assessments; it is for him to rebut, *inter alia*, the Minister's assumptions in respect of the Interest Issue that no interest payments were made by the Appellant or the partnership. (See paragraphs 13(x) and (y) of the Reply.)

[24] As for the other appeals and objections, the Respondent did not challenge counsel for the Appellant's assertion that the present appeal is not a "test case", the outcome of which will be binding on other taxpayers assessed in respect of the Tax

Shelter. While having the opportunity to examine Mr. Charlton in the Appellant's appeal might well assist the Respondent in future proceedings involving other taxpayers involved in the Tax Shelter, I fail to see how that supports the Minister's request to examine Mr. Charlton for the purposes of the present appeal. Mere expediency or convenience does not justify the granting of leave under section 99[7].

Subparagraph 99(2)(*c*)(i): The examination will not unduly delay the commencement of the hearing of the proceeding.

[25] Counsel for the Respondent noted that there is precedent for granting leave to discover a third party as late as the day before trial; *Spruce Credit Union v. Her Majesty the Queen*, 2009-3121(IT)G. While such an order may have been granted in that case, it does not assist the Respondent in the present circumstances to satisfy the subsection 99(2) criteria.

[26] Counsel for the Respondent assured the Court that, should the Present Motion be granted, the Respondent had no intention of seeking "unduly difficult undertakings" from Mr. Charlton in respect of the five questions[8] listed in Schedule 'A' to the Notice of Motion, or in any other way delaying the commencement of the hearing scheduled for March 12, 2012.

[27] While I take counsel for the Respondent at his word, good intentions have a poor reputation as paving stones to happy outcomes. As a practical matter, the trial will commence a scant 14 days from the date of this Order. Counsel for the Appellant correctly noted that the proposed questions involve records of transactions dating back some 15 years and spanning a 12-year period.

[28] Counsel for the Respondent alternatively proposed that the Court could limit the scope of the discovery by simply ordering that the questions be "related to the requirements of subsection 143.2(7) of the *Income Tax Act*". With respect, such broad language strikes me as likely to have quite the opposite effect.

[29] Even if Mr. Charlton were to commence his responses with a willing spirit effective the date of this Order, I am persuaded by the submissions of counsel for the Appellant that there is a very real risk the hearing of the Appellant's appeal would be

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[7] *S.K. v. Lee*, above.

[8] An answer to undertaking #57 in Schedule 'A' was provided in the Affidavit of Carole A. Lacapra dated February 17, 2012.

delayed. Such risk could have been averted if the Respondent had acted sooner. In these circumstances, the Respondent has failed to satisfy me that the examination of Mr. Charlton would not unduly delay the hearing of the appeal.

Subparagraph 99(2)(*c*)(ii): The examination will not entail unreasonable expense for the Appellant.

[30] Counsel for the Appellant acknowledged that the Appellant could be reasonably compensated in costs for such expenses as travel and accommodation, should they arise. The Respondent takes the position that there would be no unreasonable expense to the Appellant because he would be provided with a free copy of the transcript of the examination of Mr. Charlton. However, the Respondent did not provide a satisfactory response to the risk that the examination of Mr. Charlton would divert counsel from trial preparation and any expense that might flow from that contingency.

Subparagraph 99(2)(*c*)(iii): the examination will not result in unfairness to Mr. Charlton.

[31] Counsel for Mr. Charlton contended that the Respondent's real purpose in seeking to examine his client was to impeach his client's credibility at trial. (See paragraph 2(d) of the Notice of Motion.) Such a motive does not justify an order under subsection 99(1) of the *Rules*[9]. He also argued that Mr. Charlton's poor health made him a poor candidate for examination. (Affidavit of Karen Singh.) I agree with counsel for the Respondent that the second-hand nature of the information in the Singh affidavit weakens its force. Counsel for Mr. Charlton also submitted that ordering the examination for discovery of his client would put him to the expense of hiring lawyers and accountants to assist in reviewing the documentation necessary to respond meaningfully to the Respondent's questions. I have some doubts in this regard, given the extent of Mr. Charlton's involvement in the litigation to date. However, as with all the other criteria, it was for the Respondent to demonstrate the examination would not result in unfairness to Mr. Charlton and the evidence falls short of the mark.

Conclusion

[9] *Sackman v. Canada*, 2007 CarswellNat 2664 (Bowman, C.J.); appeal allowed, in part, [2008] F.C.J. No. 726; *Teelucksingh v. The Queen*, above.

[32] In all the circumstances, the Respondent has failed to satisfy the criteria under subsection 99(2). The Present Motion is dismissed, with the matter of costs to be left to the trial judge.

Signed at Vancouver, British Columbia this 27th day of February 2012.

"G. A. Sheridan"

Sheridan J.

CITATION:	2012 TCC 64
COURT FILE NO.:	2006-2167(IT)G
STYLE OF CAUSE:	MICHAEL J. BARKER AND THE QUEEN
PLACE OF HEARING:	Vancouver, British Columbia
DATE OF HEARING:	February 21, 2012
REASONS FOR ORDER BY:	The Honourable Justice G. A. Sheridan
DATE OF ORDER:	February 27, 2012

APPEARANCES:

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Counsel for the Respondent:	Raj Grewal
Counsel for the Non-Party, Peter Charlton:	Barry Weintraub

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