
CANADA / JUDGMENT

Aquilini v. Aquilini

2012 BCSC 1616

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Supreme Court of British Columbia

DECIDED

31 October 2012

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2012 BCSC 1616 Aquilini v. Aquilini

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Aquilini v. Aquilini,

2012 BCSC 1616

Date: 20121031

Docket: E120577

Registry: Vancouver

Between:

Taliah Aquilini

Claimant

And:

Francesco Aquilini

Respondent

Before: The Honourable Mr. Justice N. Smith

Reasons for Judgment

Counsel for Claimant:

P. Daltrop

Counsel for Respondent:

K. Shirley-Patterson

L. A. Murphy

Place and Date of Trial/Hearing:

Vancouver, B.C.

October 24, 26, 2012

Place and Date of Judgment:

Vancouver, B.C.

October 31, 2012

- [1] The respondent in this family law case seeks production of a report by a business valuator who he says is, or should become, a jointly appointed expert. The claimant says the valuator was retained as her expert and there is no obligation to produce the report unless and until she decides to rely on it at trial and gives appropriate notice of her intention to do so.
- [2] This application is based on R. 13-3 of the Supreme Court Family Rules [Family Rules], which makes the joint appointment of financial experts the default procedure in family cases. Although that rule has now been in force for more than two years, there seems to have been little or no judicial consideration of it to date.
- [3] The claimant seeks division of the respondent's share of business assets with a total value likely in the hundreds of millions of dollars. These assets are held in a complicated web of partnerships, corporations and trusts in which the respondent's brothers and parents also hold interests. As I understand it, there are few if any specific properties or assets of which the respondent is the sole or majority owner.
- [4] The expert, Gary Mynett, has either completed or has almost completed a report on the value of these assets and the value of the respondent's interest in them.

Family Rules 12-3 and 13-4

[5] Rule 13-3(2)(a) says:

- (2) If any party wishes to present to the court expert opinion evidence on a financial issue,
 - (a) that evidence must be presented to the court by means of a jointly appointed expert unless the court otherwise orders or the parties otherwise agree....

[6] "Financial issue" is defined in R. 13-3(1) to include an issue arising out of a claim to division of family assets under the Family Relations Act. Rule 13-4(1) and (2) set out a procedure the parties must follow in jointly appointing an expert, but R. 13-4(3) gives the court jurisdiction to make orders if the parties do not agree:

- (1) When an expert is to be jointly appointed by 2 or more parties under Rule 13-3 (2) or (3) (a), the following must be settled before the expert is appointed:

- (a) the identity of the expert;
 - (b) the issue in the family law case the expert opinion evidence may help to resolve;
 - (c) any facts or assumptions of fact agreed to by the parties;
 - (d) for each party, any assumptions of fact not included under paragraph (c) of this subrule that the party wishes the expert to consider;
 - (e) the questions to be considered by the expert;
 - (f) when the report must be prepared by the expert and given to the parties;
 - (g) responsibility for fees and expenses payable to the expert.
- (2) If the parties agree on the matters referred to in subrule (1), they must enter into a written agreement that reflects those agreed upon matters and
- (a) the agreement must be signed by each party to the agreement or their lawyers,
 - (b) the agreement must be signed by the expert to signify that he or she
 - (i) has been made aware of the content of this Part, and
 - (ii) consents to the appointment reflected in the agreement, and
- (c) a copy of the agreement must be served, promptly after signing, on every party to the family law case who is not a party to the agreement.
- (3) If the parties do not agree that a joint expert is required or do not agree on any matter relating to the appointment of a joint expert, any party may apply to the court in accordance with Rule 10-5 for an order
- (a) appointing a joint expert, and
 - (b) settling any matter relating to the appointment of the joint expert.
- [7] Rule 13-4 (5) provides that once a joint expert is appointed, he or she is the only expert who may give evidence on that issue, unless the parties agree or the court orders otherwise.
- [8] The reference to jointly appointed experts is a new feature of the Family Rules that came into force on July 1, 2010. Prior to that, there was nothing to prevent parties from agreeing to appoint joint experts in a particular case, but there was no explicit provision in the rules of court. There was a provision for court appointed experts, as there continues to be in R. 13-5.
- [9] Jointly appointed experts are now referred to in both the Family Rules and the Supreme Court Civil Rules [Civil Rules], but with a significant difference between those two sets of rules. Under the Civil Rules, a joint expert may be appointed by agreement or by order of the court at a case planning conference (R. 11-3). In the absence of such an agreement or order, the parties are free to each appoint their own experts in the traditional way. Under the Family Rules, the procedure is reversed in respect of financial experts. Opinion evidence

can only come from jointly appointed experts unless there is an agreement or court order authorizing a departure from that procedure.

- [10] In making those Family Rules, the Lieutenant Governor in Council has stated a strong policy preference for the use of jointly appointed financial experts in family cases. That policy decision responds to common features of family cases that are not necessarily present in other kinds of litigation. These include:
- a) The central importance of the division of family assets and the corresponding need for valuation or accounting evidence;
 - b) The cost of obtaining such expert evidence in many cases;
 - c) The fact that the parties frequently do not have equal ability and resources to retain experts;
 - d) The fact that while separately appointed valuation or accounting experts may disagree on some matters, they frequently find a great deal of common ground, resulting in needless duplication of costs (this, of course, assumes that all experts, whether jointly or separately appointed, have proper regard to their duty to assist the court and not act as advocates for either party); and
 - e) The overly adversarial nature of some family cases, which can put in issue matters on which the parties should be able to agree.

Chronology

- [11] Mr. Mynett became involved in this matter in the spring of 2011, almost a year before the notice of family claim was filed. The parties at the time were preparing for a mediation. The claimant says that Mr. Mynett was contacted by her former counsel. That is confirmed by the first written record of his involvement, which is a letter to the claimant's then counsel, dated March 29, 2011, setting out in general terms the kind of information and documents that would be required for a valuation.
- [12] The respondent says in his affidavit that he and the claimant agreed to have Mr. Mynett prepare the valuation and he understood that the report would be available to both parties when it was completed. The claimant denies that and there is no written evidence of any such agreement.
- [13] However, the respondent has paid Mr. Mynett's fees, which have to date totalled almost \$150,000. In addition to those fees, he has paid approximately \$78,000 for property appraisals that were provided to Mr. Mynett. The respondent says he does not believe that he would have agreed to pay for Mr. Mynett's work if he had not expected to get a copy of the report.

[14] On April 12, 2011, counsel for the claimant wrote to a lawyer then acting for the respondent, seeking assurance that the respondent was "committed to complying with the process of mediation" and seeking the respondent's position on a number of matters, including:

Paying for Mrs. Aquilini's Business Valuator (whether Mr. Aquilini wishes for the valuation to be joint or not)[.]

[15] There is no evidence of a specific response to that letter, but Mr. Mynett submitted his first account to the respondent --for a \$50,000 retainer--on May 18, 2011. There is no evidence of any conditions attached to the payment that followed, but I note the invoice was sent to the respondent at his business address, not to counsel. Claimant's counsel's letter of April 12, 2011 was sent to the same firm that now acts for the respondent, but in the intervening period the respondent has changed counsel twice and for a time represented himself in the mediation process.

[16] Mr. Mynett signed a confidentiality agreement with the Aquilini Investment Group Limited Partnership on May 20, 2011.

[17] On June 14, 2011, Mr. Mynett provided the claimant with an engagement letter that she signed the following day. The engagement letter said Mr. Mynett had been asked to provide "our estimate as to the fair market value" of the respondent's interest in the Aquilini group of companies. The respondent says that he had no knowledge of that agreement at the time and was not aware of it until after this action was commenced.

[18] Although litigation had not yet been commenced, the engagement letter includes the following:

We understand that our assistance as described above has been requested for purposes of the above-noted family law matter. We further understand that, in the event that the above-noted matter proceeds to trial, any reports we produce may be used as expert witness evidence.

The letter also states:

We understand that you have exercised your option under Rule 13-3(2)(a) to appoint your own expert and therefore our engagement is not a joint engagement.

[19] I do not know if the second statement was included on Mr. Mynett's initiative or was provided by counsel. In either case, it is based on a fundamental misunderstanding of the rule, which had by then been in force for eleven months. Neither party has an "option" to unilaterally appoint his or her own financial expert to give evidence at trial. In the absence of agreement or order, no report by Mr. Mynett will be admissible at trial if he is not a joint expert.

[20] The mediation effort eventually collapsed and the notice of claim in this action was filed on February 22, 2012.

- [21] By April 2, 2012, the respondent's current counsel had become involved and counsel for the claimant wrote to raise a number of issues, including delayed payment of some of Mr. Mynett's fees. Counsel for the respondent replied on April 12, 2012 that Mr. Mynett's billings would be brought up to date, provided that each counsel receives a copy of his report and "as long as your client agrees to use it for litigation." Counsel for the claimant replied on May 4, 2012 that she had not yet had time "to ascertain whether or not my client will agree to provide a copy" of the Mynett report.
- [22] On May 18, 2012, counsel for the claimant wrote that she did not agree to the joint appointment of two other experts, but did not refer to Mr. Mynett. She proposed that the parties each retain their own experts for a separate valuation of two major corporate assets--the Vancouver Canucks hockey team and Rogers Arena--and for valuation of the respondent's "interest in the various Aquilini Family companies, partnerships properties and other assets".
- [23] On May 25, 2012, counsel for the respondent agreed with that proposal but added :
- ...[I]t is our position that a copy of the Gary Mynett report, which we understand has valued the various Aquilini Family assets, be provided to Francesco Aquilini.
- [24] On the same day, counsel wrote directly to Mr. Mynett stating the position that the report must be released to both parties. Mr. Mynett responded on May 28, 2012, citing the passage in his engagement letter that referred to the claimant's "option" to appoint her own expert. However, he agreed to not issue his report until this application is decided.
- [25] On June 20, 2012, counsel for the claimant wrote that the claimant had retained Mr. Mynett for her own purposes and would not agree in advance as to how she would use the report. The letter stated that the respondent had agreed to pay for the claimant's business valuation "without any expectation of Mrs. Aquilini sharing work-product and Mr. Mynett was retained by Mrs. Aquilini on that basis." The claimant changed counsel at some point after that, but her current counsel takes the same position.

Analysis

- [26] The evidence before me demonstrates that, at the time Mr. Mynett was engaged, the parties had no clear mutual understanding of what his status would be in the event of litigation. They certainly did not turn their minds to the specific terms of the joint appointment agreement described in R. 13-4(1). That is understandable in view of the fact that there was no litigation at the time and would not be for almost a year. The changes of counsel that have since occurred on both sides may have added to the confusion.

- [27] I accept the respondent's evidence that he assumed he would receive a copy of Mr. Mynett's report. That was not necessarily the claimant's intention, as can be seen from Mr. Mynett's engagement letter. Unfortunately, her position was not clearly communicated to the respondent. In the circumstances, I find that he reasonably assumed that he would receive a copy of the report that he was paying for.
- [28] Counsel for the claimant argues that requirements for a joint appointment agreement set out in R. 13-4 (1) and (2) are mandatory and there can be no joint expert without such an agreement. With respect, that submission fails to consider R. 13-4(3), which clearly authorizes the court to appoint a joint expert where the parties do not agree. It also fails to consider the wording of R. 13-2(3), which makes a joint expert mandatory unless the parties agree or the court orders otherwise.
- [29] In my view, the matter must be approached in three stages:
- 1) Have the parties agreed to each appoint their own experts on the relevant financial issue pursuant to R. 13-3(2)?
 - 2) If there is no such agreement, should there be an order under R. 13-3(2) that they each appoint their own experts?
 - 3) If there is no agreement or order for separate experts and no agreement on the appointment of a joint expert, should the court appoint a joint expert under R. 13-4(3)?
- [30] On the first point counsel for the claimant argues that the parties have agreed to appoint their own experts. The parties have certainly agreed to do that on some issues, but R. 13-2 refers to a joint expert on a financial issue unless the parties agree or the court orders. It follows that where there are multiple financial issues, any agreement or order must specify the issue or issues on which separate experts will be permitted. Any issues not specified by the agreement or order remain subject to the requirement of a joint expert.
- [31] One of the issues on which the parties have agreed to appoint separate experts is the valuation of the respondent's "interest in the various Aquilini family companies, partnerships, properties and other assets." That is the issue stated in Mr. Mynett's engagement letter.
- [32] However, before Mr. Mynett or anyone else can value the respondent's interest, the total value of the enterprises and properties must be determined. I have no way of knowing how far that overall valuation will go to determining the value of the respondent's individual interest. There may be numerous further considerations involved in separating out the respondent's interest, or it may become a matter of simple arithmetic. But I agree that, at this point, the overall valuation is properly regarded as a separate, threshold issue that has not been identified in any agreement allowing for separate experts.

- [33] In the absence of such an agreement between the parties, the question then becomes whether it is appropriate for the court to make an order dispensing with the requirement for a joint expert. The rule does not state any express limits on the court's discretion to make such an order but, as with any discretion, it must be exercised judicially in the context of the provision at issue.
- [34] The rule creates a mandatory requirement for joint experts, which is then made subject to the parties agreeing or the court ordering otherwise. That structure suggests a legislative intention that joint experts become the norm on financial issues and separate experts the exception.
- [35] Therefore, before the court makes an order relieving the parties of the requirement to present evidence through a joint expert, it should be satisfied that there are circumstances in the individual case that make use of a joint expert inappropriate or impracticable. I make no effort to list what those circumstances might be--that will emerge as the jurisprudence develops. Experience may also identify certain specific issues that will not easily lend themselves to the use of joint experts.
- [36] In this case, the evidence raises two factors that may be considered as reasons for the appointment of separate experts. The first is the statement in Mr. Mynett's engagement letter that it is not a joint engagement. That cannot be determinative because, as said above, it is based on a misunderstanding of the rule and an erroneous belief that one party may unilaterally opt out of the joint expert regime.
- [37] The other factor is the claimant's statement in her affidavit that:
- [7] At all times Mr. Mynett acted only on my behalf both before and since the start of this litigation.
- [38] That is not entirely consistent with Mr. Mynett's engagement letter, which makes clear that he is not being retained as a confidential advisor, but as a potential expert witness. In the course of his review, Mr. Mynett may well have provided advice or information apart from what will be included in his report, but the respondent is not seeking disclosure of any such communication.
- [39] The engagement letter says that any report Mr. Mynett prepares will certify that he is aware of the duty of an expert witness. The letter acknowledges that the certification will include statements required by the Family Rules, including:

We are aware that, in giving an opinion to the court, we have a duty to assist the court and not be an advocate for any party;

This report has been prepared in conformity with that duty....

- [40] It must therefore be assumed and expected that Mr. Mynett will offer the same opinion whether he appears as a joint expert or as the claimant's expert. If he is influenced in any way by a professional relationship with the claimant, any prejudice will be to the respondent, who is nevertheless content that he serves as a joint expert.
- [41] I therefore find there is no basis for an order exempting these parties from the requirement to present joint expert evidence on the overall valuation issue.
- [42] The decision that I have made on R. 13-3(2) means that there can be no expert evidence on the question of overall valuation unless a joint expert is appointed. The question of whether the court should exercise its jurisdiction under R. 13-4(3) must be considered in that context.
- [43] The matters that will likely have to be considered in most cases where the issue arises are:
- 1) Is the financial issue one on which the court is likely to require expert evidence?
 - 2) If so, is there evidence of a properly qualified expert who is available and who the parties, or either of them, can afford to retain?
 - 3) Is appointment of a joint expert consistent with the purpose and intent of the Family Rules?
- [44] In this case, the answer on all of those points is in the affirmative. The ultimate questions before the court will be the value of the respondent's business interests, the extent to which those interests are family assets and what the claimant should receive as or in compensation for her share of family assets. The complexity and size of the assets at issue in this case are such that no one suggests the court could even begin to deal with those matters without expert evidence that first puts a value on the entire enterprise of which the respondent's interest forms part.
- [45] Mr. Mynett is a qualified, experienced and highly regarded expert on such issues. He has already spent more than a year gathering information and forming an opinion and has been paid for his work so far. He is now at the point where he is ready to complete a report, if he has not already done so.
- [46] The purpose and intent of the rule is to reduce the cost and increase the efficiency of family litigation. If Mr. Mynett is not appointed as a joint expert, the respondent will be required to retain another expert to duplicate much of the work Mr. Mynett has already done and which the respondent has already paid for. Counsel for the claimant suggests that she could, at least theoretically, decide not rely on Mr. Mynett's report and retain another expert. That would result in further expense and duplication. To the extent there turns out to be any disagreement among these experts, the trial will be lengthened.
- [47] I recognize that, given the value of the assets at stake, cost may be a lesser consideration for these parties than for most family litigants, but waste is still waste. In any case, the efficiency of the trial process remains an important consideration for the court.

- [48] In addition to those general considerations, there is a further question arising from the specific facts of this case and the manner in which the issue has arisen. That is whether the appointment of Mr. Mynett as a joint expert is barred by a proper claim of litigation privilege.
- [49] Litigation privilege is intended to create a "zone of privacy" around pending litigation. It differs from solicitor-client privilege in that it extends to documents and communications between a solicitor and third parties if they are made for the purpose of litigation, but its scope and duration are limited by the litigation that gives rise to it: *Lax Kw'alaams Indian Band v Canada (Attorney General)*, 2007 BCSC 909 at paras 5 and 6.
- [50] In distinguishing litigation privilege from solicitor-client privilege, the Supreme Court of Canada has cited the following statement with approval in *Blank v Canada (Minister of Justice)*, 2006 SCC 39:
- [28] Litigation privilege, on the other hand, is geared directly to the process of litigation. Its purpose is not explained adequately by the protection afforded lawyer-client communications deemed necessary to allow clients to obtain legal advice, the interest protected by solicitor-client privilege. Its purpose is more particularly related to the needs of the adversarial trial process. Litigation privilege is based upon the need for a protected area to facilitate investigation and preparation of a case for trial by the adversarial advocate. In other words, litigation privilege aims to facilitate a process (namely, the adversary process), while solicitor-client privilege aims to protect a relationship (namely, the confidential relationship between a lawyer and a client)[.]
- [51] The decision of Gray J. in *Keefer Laundry Ltd v Pellerin Milnor Corp*, 2006 BCSC 1180, is one of many authorities setting out the usual test for establishing litigation privilege:
- [96] Litigation Privilege must be established document by document. To invoke the privilege, counsel must establish two facts for each document over which the privilege is claimed:
1. that litigation was ongoing or was reasonably contemplated at the time the document was created; and
 2. that the dominant purpose of creating the document was to prepare for that litigation.
- [52] In this case, Mr. Mynett was retained at a time when the parties were still seeking to resolve the matter without litigation, but litigation was contemplated as a reasonable possibility, as is reflected in the terms of the engagement letter. In any event, the focus is on the time a document is completed. Mr. Mynett was sending bills to the respondent well into this year, indicating that any report, if it has been completed at all, was probably not completed until the litigation had begun.

- [53] In Keefer at para 101, Gray J. said the dominant purpose should, in most case, be established by an affidavit of the document's creator setting out the circumstances and purpose of its creation. There is no affidavit from Mr. Mynett, but the purpose can reasonably be inferred from the terms of the engagement letter, which clearly contemplate the creation of a report that may become expert evidence at trial.
- [54] If this were not a family case, I would find that the dominant purpose test has been met and litigation privilege established. But, in my view, when R. 13-3 applies to a document, it introduces a further factor to be considered in identifying the document's dominant purpose.
- [55] When an expert prepares a report on a financial issue within the meaning of R. 13-3, and there has been no agreement or order referred to in R. 13-3(2), the expert knows or ought to know that the report will only be admissible as a joint report. Although the report still has litigation as its dominant purpose, it lacks the adversarial quality and utility that is the foundation of litigation privilege.
- [56] I therefore conclude that Mr. Mynett's report, at least insofar as it deals with what I have described as the overall valuation issue, is not protected by litigation privilege.

Conclusion

- [57] I therefore exercise the court's jurisdiction under Family Rule, R. 13-4(3)(a) to appoint Mr. Mynett as a joint expert for the purpose of providing an opinion on the overall value of the Aquilini family partnerships, corporations trusts and other entities (other than the Vancouver Canucks hockey team and Rogers Arena) in which the respondent has or may have an interest. To the extent any report Mr. Mynett has prepared or will prepare deals with that overall valuation, it must be produced immediately or upon completion to counsel for the respondent.
- [58] To the extent Mr. Mynett goes beyond that issue and deals with valuation of the respondent's individual interest in those businesses, he is not a joint expert. Portions of his report dealing with that further issue may be redacted from the copy produced to counsel for the respondent or, if the report is not finalized, removed.

from the report and included in a separate report that need not be produced unless and until the claimant gives appropriate notice of her intention to rely on it at trial.

"N. Smith J."

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