

CANADA / JUDGMENT

Araya v. Nevsun Resources Ltd.

2020 BCSC 504

COURT

Supreme Court of British Columbia

DECIDED

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2020 BCSC 504 Araya v. Nevsun Resources Ltd.

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Araya v. Nevsun Resources Ltd.,

2020 BCSC 504

Date: 20200402

Docket: S184108

Registry: Vancouver

Between:

Daniel Mekonen, Daniel Tekie, Eyasu Yesmaw, Goitom Legese, Habtom Chekole, Kokob Samuel, Milkiyas Mengesha, Mussie Andemariam, Nur Abdelkader, Solomon Gebreselassie, Tadese Tesfamariam, Yemane Sebehatleab, Bereket Russom, Mekonen Berhane, Ftsum Mehari, Semere Teweldebrhan, Tesfagabr Okbagergh, Kiflom Ande, Habtemariam Kifle, Semere Mebrathom, Tekleweini Teweldemedhn, Pawlos Beyene, Negusse Gebreab, Berhane Tedese, Merde Araya, and Tadese Teklehaymanot

Plaintiffs

And

Nevsun Resources Ltd.

Defendant

Before: The Honourable Madam Justice C. Ross

Ruling Re Witness Interview

Counsel for Plaintiffs:

J. Fiorante, QC

J. Thornback

Counsel for Defendant:

G. Cameron

T. Posyniak

Place and Date of Hearing:

Vancouver, B.C.

February 6, 2020

Place and Date of Judgment:

Vancouver, B.C.

April 2, 2020

Introduction

- [1] Nevsun seeks to examine Elsa Chyrum, a material witness in these proceedings who resides in London, in advance of the mediation that the parties have scheduled for June.
- [2] Nevsun had previously requested that Ms. Chyrum, who is currently and has been an agent of the plaintiffs, to attend an interview, in Vancouver, BC, or London, England. The plaintiffs' counsel responded on her behalf, refusing an interview, but offering to provide written answers to questions.
- [3] Nevsun applies, in the alternative, for an order to examine Ms. Chyrum either (a) as an agent of the plaintiffs pursuant to R. 7-2 of the Supreme Court Civil Rules; (b) as a pre-trial examination of a witness pursuant to R. 7-5; or (c) through the letters rogatory and deposition process pursuant to R. 7-8. Finally, Nevsun submits that in the event there is a gap in the provisions of the Rules, the Court can make an order for Ms. Chyrum to be examined pursuant to its inherent jurisdiction.
- [4] The plaintiffs do not dispute that Ms. Chyrum has relevant evidence on material issues in the case. They submit that R. 7-2 has no application in the case of a party who is an individual, as are all the plaintiffs in this case. They submit that the offer to provide written responses is a full answer to a request for an interview pursuant to R. 7-5 and that in any event the court does not have jurisdiction under R. 7-5 to order the examination of a witness located outside of British Columbia. They submit that given the scope of her information and issues of privilege, an interview is not efficient. They submit that this is in substance an attempt to obtain discovery and therefore not appropriate for letters rogatory. Finally, they submit that there is no gap in the Rules as it relates to the defendant's ability to discover relevant non privileged information in the possession of Ms. Chyrum because such information can be

discovered by leaving information requests at the discoveries of individual plaintiffs or by way of written questions.

Rule 7-2

[5] Nevsun seeks an order pursuant to subrules 7-2(1), (5) and (27) that Ms. Chyrum, in her capacity as agent for Solomon Gebreselassie, a plaintiff in the Mekonen action, be examined for discovery in lieu of Mr. Gebreselassie. It is not in dispute that Ms. Chyrum has been and remains an agent for the plaintiffs. It is also not at issue that as such, she has material evidence, in particular in relation to the issue of postponement of the limitation period.

[6] Rule 7-2 provides, in part:

Examination of parties

(1) Subject to subrule (2), each party of record to an action must

(a) make himself or herself available, or

(b) if any of subrules (5) to (10) apply, make a person referred to in that subrule available,

for examinations for discovery by the parties of record to the action who are adverse in interest to the party subject to examination.

Examination of party that is not an individual

(5) Unless the court otherwise orders, if a party to be examined for discovery is not an individual,

(a) the examining party may examine one representative of the party to be examined,

(b) the party to be examined must nominate as its representative an individual, who is knowledgeable concerning the matters in question in the action, to be examined on behalf of that party, and

(c) the examining party may examine

(i) the representative nominated under paragraph (b), or

(ii) any other person the examining party considers appropriate and who is or has been a director, officer, employee, agent or external auditor of the party to be examined.

Application to persons outside British Columbia

(27) So far as is practicable, this rule applies to a person residing outside British Columbia, and the court, on application on notice to the person, may order the examination for discovery of the person at a place and in the manner the court considers appropriate.

- [7] In *Blenheim Properties Ltd. v MacRae* (1981), 33 B.C.L.R. 124 (C.A.), a decision under the previous Rules, the Court held that a party may examine an agent of an individual party, in addition to the examination of the individual. Nevsun submits that, while the language of the rule has changed since that decision, the principles and jurisdiction to grant such an order remains.
- [8] Nevsun relies upon the "[u]nless the court otherwise orders" provision in R. 7-2(5) and the court's inherent jurisdiction to secure for itself necessary evidence: see *Re Jones Estate* (1959), 27 W.W.R. 631 (B.C.S.C.).
- [9] The plaintiffs submit that the court does not have jurisdiction to make the order Nevsun seeks in relation to R. 7-2. Pursuant to R. 7-2(1) a party must make himself available for examination unless one of subrules (5) through (10) apply. Subrule (5) does not apply to Mr. Gebreselassie because he is an individual; see *Kovacevic Consult Inc. v Coastal Contacts, Inc.*, 2015 BCSC 569 at para. 21; and, *Henni v Food Network Canada Inc.*, 2018 BCSC 276 at paras. 5-8.
- [10] The plaintiffs submit further that the court cannot apply its inherent jurisdiction to adopt practices that are inconsistent with the clear effect of the Rules. Counsel cites *National Bank Financial Ltd. v. LePoidevin*, 2018 BCSC 1175, in which Justice Voith stated:
- [16] Furthermore, I do not consider that this conclusion, save for a narrow range of exceptional circumstances, is broadened by the inherent jurisdiction that judges of this Court have. In *F.M. Irvine, McLachlan & Taylor, British Columbia Practice*, the author, at p. 1.2, states:

In order for a court to invoke inherent jurisdiction, there must be some extenuating circumstances which the procedural rules do not appear to contemplate. Where no extenuating circumstances exist, inherent jurisdiction is not ousted - there is simply not basis to employ the unusual power. A judge of the Supreme Court should not resort to inherent jurisdiction to grant orders where a party has failed to invoke procedural rules that were appropriate to their situation. Rather, inherent powers are drawn upon in an auxiliary way to assist or help in the exercise of the processes of the court: *Buchan v. Moss Management Inc.*, [2010] B.C.J. No. 1732, 9 B.C.L.R. (5th) 276, 2010 BCCA 393. In *Endean v. British Columbia*, [2016] S.C.J. No. 42, 88 B.C.L.R. (5th) 1, 2016 SCC 42, at para. 24, the Supreme Court of Canada said "courts should first determine the scope of express grants of statutory powers before dipping into this important but murky pool of residual authority that forms their inherent jurisdiction".

- [17] A review of *Buchan*, and of the authorities referred to in the preceding quote, makes clear that the Court's inherent jurisdiction can be used, for example, to prevent abuses, or efforts to thwart the Court's processes or in extenuating circumstances. It is, however, a power that is to be used sparingly. Furthermore, the inherent jurisdiction of the Court is not "a panacea for the parties or for the court": *Buchan* at para. 29. Accordingly, absent a narrow range of circumstances, the court's inherent jurisdiction should not be used by the court to adopt practices that are inconsistent with the Rules: see also *Lines v. Gordon*, 2009 BCCA 107 at paras. 23-25; *Gichuru v. Smith*, 2014 BCCA 414 at para. 98.

Rule 7-5

[11] Rule 7-5 provides, in part:

Order for examination

- (1) If a person who is not a party of record to an action may have material evidence relating to a matter in question in the action, the court may
 - (a) order that the person be examined on oath on the matters in question in the action, and
 - (b) either before or after the examination, order that the examining party pay reasonable lawyer's costs of the person relating to the application and the examination.

Affidavit in support of application

- (3) An application for an order under subrule (1) must be supported by affidavit setting out
 - (a) the matter in question in the action to which the applicant believes that the evidence of the proposed witness may be material,
 - (c) that the proposed witness
 - (i) has refused or neglected on request by the applicant to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question, or
 - (ii) has given conflicting statements.

Application of examination for discovery rules

- (10) Rule 7-2 (12), (16), (18), (22) and (25) to (28) applies to an examination under this rule.
- [12] The purpose of R. 7-5 is to provide a "new investigative technique" to facilitate full disclosure of the facts before trial, to ensure that all relevant evidence is brought before the court, to discover the evidence a person may give at trial, to provide a basis for cross examination if the person is called as a witness by the other party, see F.M. Irvine, McLachlin & Taylor, *British Columbia Practice*, 3rd ed. (Markham, Ont.: LexisNexis Canada, 2006) at 7-274.3
- [13] In *Gardner v Viridis Energy Inc.*, 2014 BCSC 232 at para. 10, Justice Pearlman cited Justice Dillon in *Sinclair v. March*, 2001 BCSC 102, aff'd 2002 BCCA 65, who described the purposes, policy and scope of this rule for pre-trial examination of witnesses as follows:
 - (a) The purpose of the rule is to provide an investigative technique to facilitate full disclosure of the facts before trial, thus avoiding a party being taken by surprise and ensuring that all relevant evidence is brought before the court (at para. 10);
 - (b) The policy of the Rule is to permit examination of an uncooperative witness (at para. 10);

- (c) The purpose of the Rule is to provide information, not to record evidence or provide admissions. The scope of the inquiry is broader under Rule 7-5 than in the examination for discovery of a party because it [is] not limited to matters at issue between the parties as defined in the pleadings but includes all that is generally relevant between all parties (at para. 13);
- (d) The Rule is to be interpreted liberally so as to eliminate the element of surprise at trial (at para. 14).
- [14] It has been held under the previous version of this rule that no order can be made under R. 7-5 for examination of a person outside the jurisdiction: *Howard v. Marsh* (1984), 54 B.C.L.R. 125 (S.C.). The underlying policy for such limitation is that the court should not make an order where obedience could not be compelled: see *Miramichi Investments Ltd. v. La Galerie Walter Klinkhoff Inc.* (1990), 45 C.P.C (2d) 265 (B.C.S.C.).
- [15] However, in *Krall v. Singh*, [1991] B.C.J. No. 2840 (S.C.), an order under a previous version of this rule was obtained where the solicitor for the plaintiff was agreeable to having an examination of the plaintiff's parents, who were not parties to the action, at his office in Calgary if the defendants obtained an order under the rule. Justice Meredith concluded that then R. 28 permitted such extra-provincial discovery orders, in part because of R. 27(26), which applied to R. 28 by operation of subrule (8), now R. 7-5(10). However, Meredith J. noted the order itself might not be capable of enforcement in the province concerned. The focus of the order was not to compel the plaintiff's parents to attend the examination, but to ensure, if they did testify, the defendant would be informed of any material evidence and such testimony could be used at trial.
- [16] The plaintiffs submit that the current rule likewise provides no means for the enforcement of an order for the examination of a witness outside the province.
- [17] A previous ruling in this litigation, *Araya v. Nevsun Resources Ltd.*, 2019 BCSC 260, concerned the plaintiffs' efforts to a conduct a deposition of Trevor Moss, a resident of California and former Chief Operating Officer and Executive Vice President of Nevsun, i.e. a non-party witness. The plaintiffs commenced proceedings in the United States District Court, Northern District of California, pursuant to Title 28 of the United States Code §1782, for a subpoena compelling Mr. Moss to produce documents and provide evidence under oath at a deposition. Section 1782(a) of the United States Code authorizes a United States District Court to grant any interested person an order for the discovery testimony and documents or things from a person who resides or is found within its district for use in a foreign or international tribunal or proceeding (see, at para. 15).
- [18] One of the issues in that ruling was whether the plaintiffs should have proceeded in British Columbia under the Rules in this jurisdiction instead of commencing proceedings in California. In addressing the provisions of the Rules in this context, Justice Abrioux noted, at paras. 53-55, that the issue of the jurisdiction of the court under the present R. 7-5 to make an order for the pre-trial examination of a non-party witness who resides outside the

jurisdiction does not appear to be settled. He noted further that he was not aware of any cases in which such an order had been made.

- [19] While the plaintiffs rely upon what they submit is the limited jurisdiction under R. 7-5, they concede that Ms. Chyrum could be examined as an agent of plaintiffs' counsel. Their objections to such an order are not jurisdictional.
- [20] The plaintiffs submit that no order under R. 7-5 may be made where, as Ms. Chyrum has done, the proposed witness has agreed to provide a written statement, citing *Rintoul v. Granger*, 2008 BCSC 1852 at paras 22-25; *North Star Properties Ltd. v. British Columbia (Transportation and Infrastructure)*, 2014 BCSC 2630 at paras. 25-26; and, *Johnston v. Royal Jubilee Hospital* (1980), 25 B.C.L.R. 398 (C.A.).
- [21] In response, Nevsun submits that offering to answer written questions is not always a complete defence to an application pursuant to R. 7-5 where written answers would not provide a workable and efficient solution in complex litigation. Nevsun cites *Gestion Soprema Canada Inc. v. Nanji*, 2017 BCSC 1227, in which Justice Grauer stated:
- [20] This application was resisted on the basis that Mr. Law had offered to give a responsive statement in writing through Mr. Fraser, and therefore the Nanji defendants could not satisfy the mandatory requirement of Rule 7-5(3)(c)(i) that the application be supported by an affidavit setting out that the proposed witness had refused or neglected on request to give a responsive statement, either orally or in writing, relating to the witness' knowledge of the matters in question. As to the mandatory nature of this requirement, see *Johnston v Royal Jubilee Hospital* (1980), 25 BCLR 398 (CA).
- [21] This is not a case like *Carmichael v Austin*, [1994] BCJ No 348 (SC) where there was an initial refusal followed by a subsequent offer to answer questions posed in writing. There, Master Powers, as he then was, considered that the initial refusal brought the matter within the rule, and granted the order. He was able to conclude that the prospective witness' actions amounted to a refusal in the circumstances. There was no such initial refusal here. Nor is this a case like *Cheema v Kalkat*, 2009 BCSC 736, where the proposed witness agreed to give evidence if both parties consented, and one party withheld that consent unless he could review the questions in advance. There, Master Keighley concluded that the conduct of the prospective witness in declining to answer without consent amounted to a refusal.
- [22] On behalf of the Nanji defendants, Mr. Boyar relied heavily on the judgment of Mr. Justice Bruce Macdonald, then of this court, in *Ochoa v Canadian Mountain Holidays Inc.* (1995), 7 BCLR (3d) 182, where the judge held that public policy should "level the playing field", and ordered an examination notwithstanding that a list of proper questions had not first been provided. His Lordship concluded that the overall object of the rules to secure the just, speedy and inexpensive determination of the proceeding on its merits should be the governing consideration.

- [23] Mr. Fraser argues that Ochoa was wrongly decided, given the Court of Appeal's decision in Johnston, and that in any event its facts are distinguishable. Certainly it involved very different circumstances from those arising here. But Macdonald J.'s reference to the overall object of the Rules is important, and I am unable to conclude that his decision was rendered *per incuriam*.
- [24] I have been managing this litigation now for a number of years. It has evolved considerably since 2014, not always in accordance with Darwinian principles. The issues raised are complex. One action has become two actions. The number of interlocutory judgments I have rendered is significant, including several concerning the producibility of documents. Several applications remain outstanding in that regard. The document lists are vast. Mr. Law's involvement in the matters at issue in this action was direct and spanned a number of years.
- [25] It is my view that in the particular circumstances of this case, and taking into account the overall object of the Rules, an offer to provide written answers through counsel to written questions effectively constitutes a refusal to provide a responsive statement. This is because such a process would be unworkable, unpractical and interminable. As was anticipated in both *Delgamuukw v British Columbia* (1988), 26 BCLR (2d) 317 (SC) and in *Ochoa*, the answer to one question will lead to several more, and references to various documents will lead to other references to other documents. The quality of responsiveness would disappear in any practical sense. Given the extent and duration of Mr. Law's involvement, and the number of documents produced, the expense and time involved would be insupportable. That is not to say that an oral examination would not also be expensive and time-consuming, but I am satisfied that in addition to eliciting truly responsive evidence, it would be far more manageable and productive, and far more likely to achieve the object of the Rules.
- [26] Accordingly, were it necessary, I would allow the application for leave to examine Mr. Law on oath on the matters in question in the two actions pursuant to Rule 7-5.
- [22] The plaintiffs submit that the observations of Justice Grauer on this point were obiter as the court had already concluded that the witness could properly be examined as a representative of the corporate party under R. 7-2.

Rule 7-8

- [23] In the final alternative, Nevsun submits that the Court should grant an order making a letter of request to authorities in the United Kingdom to direct the examination of Ms. Chyrum.
- [24] Rule 7-8 provides, in part:

Examination of person

- (1) By consent of the parties of record or by order of the court, a person may be examined on oath before or during trial in order that the record of the examination may be available to be tendered as evidence at the trial.

Examination of person

- (2) An examination under subrule (1) may be conducted before an official reporter or any other person as the court may direct.

Grounds for order

- (3) In determining whether to exercise its discretion to order an examination under subrule (1), the court must take into account
- (a) the convenience of the person sought to be examined,
 - (b) the possibility that the person may be unavailable to testify at the trial by reason of death, infirmity, sickness or absence,
 - (c) the possibility that the person will be beyond the jurisdiction of the court at the time of the trial,
 - (d) the possibility and desirability of having the person testify at trial by video conferencing or other electronic means, and
 - (e) the expense of bringing the person to the trial.

Place of examination

- (7) Unless the court otherwise orders or the parties to the examination consent, an examination under this rule must take place at a location within 30 kilometres of the registry that is nearest to the place where the person to be examined resides.

Application of rule outside British Columbia

- (8) So far as is practicable, this rule applies to the examination of a person residing outside British Columbia, and the court may order the examination of a person in the place and the manner the court considers appropriate.

If person willing to testify

- (9) If the person whose examination is ordered under subrule (8) is willing to testify, the order under subrule (8) must be in Form 27 and the instructions to the examiner appointed in the order must be in Form 28.

If person not willing to testify

- (10) If the person whose examination is ordered under subrule (8) is unwilling to testify, or if for any other reason the assistance of a foreign court is necessary, the order under subrule (8) must be in Form 29 and the letter of request referred to in the order must be in Form 30.

Letter of request

- (11) If an order referred to in subrule (10) is made, the letter of request must be sent by the party obtaining the order to the Under Secretary of State for External Affairs of Canada (or, if the evidence is to be taken in Canada, to the Deputy Attorney General for the Province of British Columbia), and must have attached to it
- (a) any interrogatories to be put to the witness,
 - (b) a list of the names, addresses and telephone numbers of the lawyers or agents of the parties, both in British Columbia and in the other jurisdiction, and
 - (c) a copy of the letter of request and any interrogatories
- (i) translated into the appropriate official language of the jurisdiction where the examination is to take place, and
- (ii) bearing the certificate of the translator that it is a true translation and giving the translator's full name and address.

Filing of undertaking

- (12) The lawyer for the party obtaining the order referred to in subrule (10) must file with the Under Secretary of State for External Affairs of Canada (or the Deputy Attorney General for the Province of British Columbia, as the case may be) the lawyer's undertaking to be personally responsible for all the charges and expenses incurred by the Under Secretary (or the Deputy Attorney General, as the case may be) in respect of the letter of request and to pay those charges and expenses on receiving notification of the amount.

Notice of examination

- (13) The examining party must give notice of an examination under this rule by serving copies of the subpoena referred to in subrule (5) on all parties of record at least 7 days before the date appointed for the examination.

Mode of examination

- (14) The examining party must conduct a direct examination of the witness and the witness is subject to cross-examination and re-examination.

Objection to question

- (15) If an objection is made to a question put to a witness in an examination under this rule,
- (a) the question and the objection must be taken down by the official reporter,
 - (b) the validity of the objection may, on application, be decided by the court, and
 - (c) the court may, on an application referred to in paragraph (b), order the witness to submit to further examination.
- [25] Nevsun submits that the rule is intended to be flexible where the interests of justice require it, citing *Lomax v Weins*, 2003 BCSC 396 at para. 14. Counsel submits that in British Columbia, courts have adopted a more flexible approach to enforcing letters rogatory in aid of discovery, citing *Henry Bacon Building Materials Inc. v. Royal Canadian Mounted Police* (1994), 98 B.C.L.R. (2d) 59 (S.C.); *GST Telecommunications, Inc. et al v. Michael Provenzano*, 2000 BCSC 72. In any event, counsel submits that Ms. Chyrum's evidence is sought for use at trial in addition to discovery.
- [26] The plaintiffs submit that R. 7-8 is intended to obtain evidence for use at trial, not for purposes of obtaining discovery. Counsel relies upon decision decided under previous versions of the rule, including *Pacific Concessions, Inc. v. Weir and Weir*, 2005 BCSC 432; and, *Peoples Trust Co. v. Midland Mortgage Corp.* (1995), 14 B.C.L.R. (3d) 396 (S.C.). Counsel submits that the same principles remain applicable.
- [27] The plaintiffs submit further that there is no evidence that Ms. Chyrum will be unavailable to testify at trial, that the convenience or expense of bringing her to trial will be prohibitive, that videoconferencing or other means of giving evidence would be impossible.
- [28] Counsel notes Justice Harris's discussion in *Byer v. Mills*, 2011 BCSC 158 at Appendix A, of the problems associated with defence evidence taken by deposition prior to trial:
- a) The majority of the defence evidence of fact was taken by deposition before trial began. This was done by consent as the Civil Rules permit. I presume it was done to convenience the witnesses, most of whom live in or near Quesnel and to save the expense of bringing witnesses to testify "live" before the court in Vancouver.
 - b) During the course of one deposition, I expressed some reservations about using depositions in this way. What follows are some reflections triggered by the use of this practice, and are not comments directly arising from the way counsel in the case before me conducted the depositions. They are also not complete, but merely illustrative of the kind of problems that arise by taking evidence by deposition.
 - c) It is well settled in our trial practice that the basic rule is that witnesses should testify live before the court. This proposition is reflected in Civil Rule 12-5(27) and in the many cases in which our courts have considered the basis on which to exercise their discretion to make an order that evidence be taken by deposition.

- d) In this case, the defence evidence was taken before trial and therefore before the plaintiff had led any evidence at all. In my view, there are good reasons why in a conventional trial a plaintiff is required to lead evidence first on matters on which he or she bears the burden of proof. The defence is then required to respond to the plaintiff's case, including leading evidence on any matters on which it carries the burden. This provides an orderly framework for the receipt of evidence by the court. It helps keep the relevance of evidence in focus.
- e) Taking defence evidence first carries with it risks and potential inefficiencies. First, there is the risk that a defendant may not correctly anticipate what the plaintiff's evidence turns out to be at trial. The defence evidence may not be properly responsive to the plaintiff's case. Evidence may be taken that is unnecessary. Issues may not be adequately addressed in the defence case, creating the risk that a party may need to apply to have a witness who has been deposed supplement his or her evidence. It seems to me to be generally undesirable to take trial evidence out of the normal order.
- f) There are further difficulties inherent in taking evidence by deposition. The evidence is not taken live and its receipt as trial evidence is not controlled by the trial judge as the evidence is being given. Objections may be made, as occurred in this case. Inevitably, the objection is made and left on the record. The witness then provides the evidence to which there is an objection, subject to a later ruling.
- g) This seems to me to be unsatisfactory. It is preferable that objections be ruled on before the evidence is given for a number of reasons. First, if the objection is upheld, a witness does not spend time answering improper questions. Where several witnesses are testifying about the same matter, a ruling at the outset will limit the scope of the evidence of all the subsequent witnesses. Secondly, it is not uncommon for counsel to frame questions in an objectionable manner, even though there are ways properly to elicit the evidence counsel is seeking. It is far better for the court to have the opportunity to ensure that questions are properly framed and evidence properly received than to try to "unscramble an omelette" after the fact. This is not just a practical issue. Often the way in which evidence is elicited can affect the weight it is entitled to receive. There is a risk of substantive prejudice to the parties if the trial judge is denied the opportunity at the time it is given to ensure that evidence is properly received.
- h) Finally, the trial judge has an important additional role to play in controlling the trial process. It is not uncommon for a trial judge to be called on during cross-examination, either at the request of counsel or on his or her own initiative, to control the conduct of the cross-examination. For example, it may be necessary to decide how much of a prior allegedly inconsistent statement ought properly to be put to a witness. That is a decision that should be made at the time the witness is confronted with the statement. Taking evidence by deposition necessarily deprives the trial judge of an essential judicial function. Doing so is fraught with risks to the trial process and risks substantive prejudice to the parties.

- i) I appreciate the Civil Rules permit depositions to be taken by consent. In my view, the purpose of allowing this to occur by consent is to obviate the need for an order where it is clear that the circumstances exist that would lead a court to make an order. Generally, the party applying to take evidence by deposition has a burden to meet to justify departing from the general rule that evidence be given live. I will not rehearse the law on this point. But I do not think the drafters of the Civil Rules intended to encourage a practice that is inconsistent with conventional trial practice.
 - j) It follows from my comments above that I would discourage counsel from electing to resort to taking depositions by consent unless there are pressing reasons to do so. If there are legitimate concerns about cost and convenience, there are provisions permitting taking evidence by video conference. At least then the evidence is taken live.
- [29] The plaintiffs submit that a deposition in the present circumstances, at this stage of the litigation, would be disadvantageous and prejudicial to trial fairness and efficiency.

Discussion

- [30] In the present case it is common ground that Ms. Chyrum is and has been the agent of plaintiffs' counsel and that she has material evidence.
- [31] I have concluded that Nevsun cannot conduct an examination for discovery of Ms. Chyrum as an agent of a plaintiff because R. 7-2(5) is restricted to the case where the party to be examined is not an individual. In this regard, I agree with the plaintiff. The discretion to otherwise order conferred by subrule (5) does not extend to granting an exception to the clear provisions of R. 7-2(1) that the individual plaintiff is to make himself available for discovery. It does not confer a discretion to order the examination of an agent of Mr. Gebreselassie in lieu of that individual plaintiff.
- [32] While Nevsun submits that it seeks her evidence both for use at trial and for discovery, I am mindful of the difficulties associated with pre-trial depositions conducted by the defence as outlined earlier. Further, at this stage of the proceedings, I think it is more accurate to characterize what Nevsun seeks as primarily evidence in the nature of discovery. There is at present no reason to believe that Ms. Chyrum will not make herself available to testify at the trial. There is also no evidence that the expense of bringing Ms. Chyrum to testify at trial would be prohibitive, nor that videoconferencing or other means of obtaining her evidence at trial would not be possible.
- [33] In all of the circumstances, I have concluded that it is not appropriate to make an order pursuant to R. 7-8 at the present time.
- [34] In my view, the rule that has the best fit to the present circumstances is R. 7-5. Although Ms. Chyrum resides out of the jurisdiction, she remains the agent of the plaintiffs. She has offered, through counsel to provide written responses.

- [35] I agree with plaintiffs' counsel that, pursuant to both the clear language of the rule and the jurisprudence, a precondition to obtaining an order for an examination under this rule is evidence that the proposed witness, on request, has refused or neglected to give a responsive statement either, orally or in writing. Here Ms. Chyrum has offered, through counsel, to respond in writing.
- [36] I accept that there could exist circumstances in which an apparent agreement to provide written responses amounted to a de facto refusal. However, I am not satisfied on the present record before me that this is the case in relation to Ms. Chyrum's evidence. I agree with the plaintiffs' submission that given the language of the rule and the existing jurisprudence, such a conclusion would require more than the belief that a different procedure would be more efficient, see for example North Star at para. 29.
- [37] In summary, I have concluded that the requirements for an order pursuant to R. 7-5 have not been met because Ms. Chyrum has agree to provide responses in writing. In the circumstances, the application is adjourned to give Nevsun the opportunity to pose questions in writing, with liberty to apply for directions and to provide further materials.

"Ross J."

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