

CANADA / JUDGMENT

Devathasan v. Devathasan

2019 BCSC 1559

COURT

Supreme Court of British Columbia

DECIDED

29 January 2019

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2019 BCSC 1559 Devathasan v. Devathasan et al

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Devathasan v. Devathasan et al,

2019 BCSC 1559

Date: 20190129

Docket: E161957

Registry: Vancouver

Between:

Christie Kanti Devathasan

previously known as Kanti Devi D/O Ramnath Rai

Claimant

And

Gobinathan Devathasan aka Devathasan S/O Gobinathan Nair,

Dhillon Devathasan, Senna William, Devathasan Neurology & Medical Pte. Ltd. and David Nathan Neurology & Medical Pte. Ltd.

Respondents

Before: The Honourable M. Justice Gomery

Oral Ruling Re: Admissibility of Further Evidence and the Production of Cash Register Receipts of the Businesses

Counsel for the Claimant:

L. MacLean, Q.C.

M. Lam

Counsel for the Respondent, Gobinathan

Devathasan:

M.G. Perry

L.R. Nambiar

Place and Dates of Trial:

Vancouver, B.C.

January 14-18, 21-25, 28-31, and

February 4-7, 2019

Place and Date of Judgment:

Vancouver, B.C.

January 29, 2019

- [1] THE COURT: The claimant seeks an order that the respondent be prevented from calling evidence from three lay witnesses: Ms. Lim, Ms. Dosato, and Ms. Foo, on two grounds:
1. they were not listed in the original witness list provided to the claimant, but only in a late amended witness list provided on January 4, or in the case of Ms. Foo, on Saturday, January 19, following the first week of trial; and
 2. the respondent was late in providing will-say statements he was required to provide by January 4.
- [2] The proposed evidence concerns various matters, but it is clearly focused on the finances and accounting procedures at the respondent's neurology clinic in Singapore. In particular, Ms. Foo is the bookkeeper at the clinic and is to give evidence with respect to audit procedures relating to handling cash and income tax audits at the clinic.
- [3] By cross-application, the respondent, Dr. Devathasan, seeks to adduce in evidence cash register records from his medical practice since 2014. Technically, these are records of the respondent Devathasan Neurology and Medical PTE until 2016 and David Nathan Neurology and Medical PTE since 2016. The two corporations were joined as respondents on October 19, 2018. However, the records would have been within Dr. Devathasan's possession and control since this action began in July 2016.

- [4] In both cases, the proposed evidence is directed to the issue of whether Dr. Devathanan was extracting cash off the books from his clinic's operations. This is a central question in this litigation.
- [5] The very general pleadings in a family action are such that it can be difficult to identify the particular facts in issue and what documents might be used to prove or disprove them. In this case, however, whether Dr. Devathanan was extracting cash from his medical practice was identified as an issue in affidavits and motion materials filed by Ms. Devathanan in January 2017.
- [6] The action was initially set for trial in February 2018. Ms. Daum was appointed as a joint expert and it was a part of her mandate to address Ms. Devathanan's allegations.
- [7] At this stage, Dr. Devathanan was arguing that the parties' disputes should be litigated in Singapore.
- [8] In her first expert report dated January 31, 2018, Ms. Daum was obliged to address the allegations without cooperation and the production of records by Dr. Devathanan. She stated:
137. In assessing the personal accounts of Dr. Devathanan for which we have information, we noted cash deposits totalling 793,000 Singapore dollars, 849,000 Singapore dollars, and 775,000 Singapore dollars in 2014, 2015, and 2016 respectively. This far exceeds the total withdrawals from Dr. Devathanan's corporate and personal business accounts. This also exceeds the identified cash withdrawals from the business account.
138. We noted that cash ceased to be deposited to Ms. Devathanan's and Dr. Devathanan's joint account in January 2014. In March 2014 Dr. Devathanan created the Maybank account in his sole name and where cash was then deposited. Cash deposits to this account continued to the end of the review period.
139. We were unable to determine the source of the cash deposited. Without further information the large cash deposits are support for the theory that Dr. Devathanan was diverting cash revenues from his business to be used personally.
- [9] Since February 2018 Dr. Devathanan has been much more cooperative and Ms. Daum was able to come to conclusions on much more complete records. In her second report dated January 23, 2019, she still concluded that cash deposits substantially exceeded cash withdrawals in many years. The net excess totalled more than \$2.6 million in the years 2011 through 2016. She summarized the parties' dispute on this point as follows:
220. We were unable to determine the source of the cash deposited. We understand that Dr. Devathanan asserts that cash was deposited from previously saved monies held in a safe in his house. Conversely, we understand that Ms. Devathanan asserts that the source of the monies was from cash revenues diverted from Devathanan Neurology.

Should the respondent be permitted to call Ms. Lim, Ms. Dosato, and Ms. Foo?

- [10] The trial management conference was held before Madam Justice Horsman on December 14, 2018. Both parties were represented. Pursuant to Rule 14-3(9)(g) of the Supreme Court Family Rules, Justice Horsman ordered that the parties exchange witness lists and will-say statements for all non-party lay witnesses by Friday, January 4, 2019.
- [11] Despite this order, the claimant maintains that the respondent's delivery of a witness list naming Ms. Lim and Ms. Dosato on January 4th failed to comply with Rule 14-7(28) requiring that witnesses whose evidence is called at trial be listed in the witness list set out in the trial brief. She maintains that these new witnesses listed on January 4 can only be heard with leave of the court and leave should be denied.
- [12] I think that the trial management order contemplated late delivery of witness lists and it would be unfair to the respondent not to permit him to call witnesses listed by that date. I interpret Justice Horsman's order as implicitly granting leave to both parties to call witnesses they had listed by January 4.
- [13] In considering the question of the late will-say statements and the late notice of the respondent's intention to call Ms. Foo, I will have regard to the considerations set out in *Fu v. Zhu*, 2017 BCSC 749 at para. 50. They are:
- (a) whether there is prejudice to the party opposing admission of the evidence;
 - (b) whether a reasonable explanation of the party's failure to make timely disclosure has been provided;
 - (c) whether excluding the evidence would prevent the determination of the issue on its merits; and
 - (d) whether, in the circumstances of the case, the ends of justice require the evidence to be admitted.

Prejudice

- [14] While the Lim and Dosato will-say statements were late, they were not very late. They should have been delivered on a Friday and were, in fact, delivered on the Monday, one week before the trial began. Notice of Ms. Foo's evidence was delivered much later, on January 19, and her will-say statement was not provided until January 27, after the claimant's case had closed.
- [15] I am prepared to infer prejudice from the late delivery of Ms. Foo's will-say statement because the claimant should have had an opportunity to consider it when she was calling her own evidence before she closed her case.

- [16] Mr. MacLean, very fairly, concedes that if these witnesses are permitted to testify, he expects to be able to deal with their evidence in cross-examination. This bears on the quality of the prejudice and leads me to conclude that late admission of the evidence does not threaten the fairness of the trial.

Explanation for failing to make timely disclosure

- [17] Mr. Perry did not offer an explanation for the late delivery of the Lim and Dosato will-say statements. As to the very late addition of Ms. Foo to the respondent's witness list, and the even later provision of her will-say statement, Mr. Perry says he was led to make inquiries and determine that Ms. Foo should be called by a change in the claimant's evidence in chief from testimony she had given on discovery.
- [18] I am not going to comment on the alleged inconsistency, as it will undoubtedly be the subject of thorough submissions in closing argument. Given the centrality of the issue, and the history of the litigation, I am persuaded that Mr. Perry and his client should have attended to the possibility of calling Ms. Foo long before they did.

Would excluding the evidence prevent the determination of the issue on its merits?

- [19] It is already evident that this case presents serious conflicts in the evidence of the claimant and the respondent. Each side challenges the other's credibility. Ms. Devathasan alleges that large amounts of cash were extracted from the medical practice off the books and Dr. Devathasan denies it.
- [20] I have already heard detailed evidence from Ms. Devathasan and Ms. Yap concerning the procedures for handling cash in the clinic. The testimony of other witnesses involved in these procedures is likely to assist in addressing this question. There is a real risk that excluding this evidence will impair my ability to determine this issue on its merits, possibly to the point of preventing a correct determination.

The ends of justice

- [21] Balancing these considerations, I am satisfied that the proposed evidence should be received. At the end of the day the fundamental objective of a trial process is to find the facts according to a fair process. The proposed evidence is important to that end and its admission will not threaten the fairness of the trial.
- [22] Accordingly, I will permit the respondent to call Ms. Lim, Ms. Dosato, and Ms. Foo.
- [23] I will reserve for further consideration whether the late provision of notice should be a factor in addressing costs at the end of the day.

Should the respondent be permitted to adduce the cash register records in evidence?

- [24] Rule 9-1(1)(a) requires the parties to a family action to deliver a document list listing:

1. all documents that are or have been in the party's possession or control and that could, if available, be used by any party at trial to prove or disprove a material fact; and
2. all other documents to which the party intends to refer at trial.

[25] After an adjournment of the trial in February 2018, the respondent formally acknowledged this court's jurisdiction and subsequently provided records to the claimant and Ms. Daum. He did not list or provide to Ms. Daum the cash register records he now seeks to put in evidence.

[26] They relate to a material fact, Dr. Devathasan's income, and whether he is or was extracting off-book cash from his medical practice. It is central to the litigation and is again addressed in Ms. Daum's second report dated January 23, 2019.

[27] Rule 9-1(18) provides:

Unless the court otherwise orders, if a party fails to make discovery of or produce for inspection or copying a document as required by this rule, the party may not put the document in evidence in the family law case or use it for the purpose of examination or cross-examination.

[28] The respondent having failed to make discovery of documents as required by Rule 9-1, the question is whether I should relieve him of the consequence that the documents may not be put in evidence or used for examination or cross-examination.

[29] The consideration to be canvassed in addressing this question are the same as I have already reviewed in connection with the question of whether the witnesses should be permitted to testify: *Tran v. Kim Le Holdings Ltd.*, 2011 BCSC 1463 at para. 19.

Prejudice

[30] I am told that the cash register records occupy a box that is larger than a banker's box. They are in the process of being photocopied. On Sunday, January 27, Mr. Perry delivered to Mr. MacLean photocopies of the month end summaries containing the information he would rely upon. They take up 36 pages.

[31] The trial has been underway for more than two weeks. The cash register records should have been listed long ago.

[32] I do not think they would have made a difference to Ms. Daum in the second report she prepared because her approach was not to attempt to investigate the detailed handling of cash at the clinic and she did not request these records. However, had they been listed and produced, I think that Mr. MacLean would have investigated them. He could have asked Ms. Daum to pursue the matter. He could have addressed them on discovery. He says that he could have pursued a comparison of the cash register records with the practice's appointment records.

- [33] There is prejudice to the claimant in that Mr. MacLean has been denied the opportunity to take these steps in the discovery period before the trial began.
- [34] Mr. Perry says that Mr. MacLean could have requested these records and did not. That submission is, at least, superficially attractive, but it overlooks the important point that under Rule 9-1(1) the party in possession or control of material documents has a positive obligation to produce them whether or not they are requested.
- [35] Unlike the extended discovery obligation that may arise consequent on a demand made pursuant to subrule (8), the obligation under subrule (1) is not demand driven. Moreover, the parties' positions are not symmetrical. The claimant has not worked in the clinic since 2004 and could not reasonably be expected to appreciate what documents were available. The respondent could look at the files and know exactly what documents he had.
- [36] I am satisfied that in this case the respondent's breach of his obligation to list and produce documents pursuant to Rule 9-1(1) has caused prejudice to the claimant that threatens the fairness of the trial process.

Explanation for failing to make timely disclosure

- [37] Mr. Perry says that the cash register records were not viewed as relevant because until the claimant testified in chief it was understood that her claim was that there was missing cash that had never gone into the cash register.
- [38] Her evidence on discovery could be interpreted in that way, but the issue was broader than that, and the cash register records should have been recognized as relevant well before the claimant was examined for discovery in October of 2018.
- [39] I think the better explanation for the failure to disclose lies in the nature of these records. They are voluminous and technical. The respondent produced the general ledgers from his practice, and these could reasonably be viewed as supporting documentation. It is not uncommon for lawyers to view backup documentation as the kind of material that need only be produced on request. I assume that this is, at least, a part of the explanation for the non-disclosure in this case.
- [40] In many circumstances, that is a reasonable and practical attitude, but it is inherently risky in a case in which the adequacy of the accounting records is a central issue. It runs the risk that late-breaking analysis may reveal that some of the backup documentation is important to the case the party in possession of the documents wishes to put forward. That is what has occurred here.

Would excluding the evidence prevent the determination of the issue on its merits?

- [41] According to the claimant's evidence, she had firsthand knowledge of cash withdrawals from the practice between 1994 and 2002. Ms. Yap's evidence extends the practice to 2008. The cash register records cover the period 2014 to 2018. Whatever the records say, they cannot

directly contradict the claimant and Ms. Yap because a practice that was in place until 2008 may have changed before 2014, so that cash may perhaps have begun to be withdrawn by other means. These records will therefore provide little assistance in a valuation of their evidence.

- [42] Ms. Daum's report covers the period from 2011 to 2018. That is a particularly important period from the point of view of the findings I will be asked to make, and the cash register records cover a little more than half of it. It would possibly be helpful, but I doubt that they would carry such weight that their absence will impair my ability to determine the issue of cash withdrawals from the practice on its merits.

The ends of justice

- [43] Mr. Perry suggested that the prejudice to the claimant could be addressed by a few days' break in the trial during which Mr. MacLean could undertake an analysis of the cash register records. Mr. MacLean responded that if the records are admitted in evidence, he does not wish the trial to be delayed.
- [44] I think it is clear that a delay would prevent the trial from completing in the time that has been set aside for it and the ultimate delay in the resolution of this action by the issuance of reasons for judgment would be, at least, several weeks and perhaps much longer.
- [45] More fundamentally, I do not think that a pause for several days could really address the prejudice in this case. Had the documents been produced during the pre-trial discovery process they could have been subjected to sustained and considered investigation in various ways, as I have indicated, and that lost opportunity cannot now be retrieved.
- [46] To summarize, there has been a failure to produce documents as required by Rule 9-1(1) giving rise to prejudice to the claimant that threatens the fairness of the trial process. In my view, by failing to produce the cash register records in a timely way the respondent assumed the risk that he was failing to produce material that would be helpful to his case and it would not be fair in the circumstances to put that risk onto the claimant at this late date.
- [47] I do not think that excluding this evidence will prevent me from deciding the important issue of whether there have been off-book cash withdrawals from the practice on its merits. Weighing these considerations together, I decline to relieve the respondent from the consequence of Rule 9-1(18).
- [48] Accordingly, the cash register records may not be put in evidence.

"Gomery J."

The Honourable Mr. Justice Gomery

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