
CANADA / JUDGMENT

Newell v. Scott

2020 BCSC 1662

COURT

Supreme Court of British Columbia

DECIDED

5 November 2020

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2020 BCSC 1662 Newell v. Scott

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Newell v. Scott,

2020 BCSC 1662

Date: 20201105

Docket: S196598

Registry: Vancouver

Between:

Angie Elita Newell

Plaintiff

And

Keith Morris Scott and EMC Business Solutions LLP

Defendants

Before: Master Muir

Reasons for Judgment

In Chambers

Counsel for the Plaintiff, appearing by teleconference:

S. Coulson

Counsel for the Defendants, appearing by teleconference:

M. Swanson

Place and Dates of Hearing:

Vancouver, B.C.

October 7 and 8, 2020

Place and Date of Judgment:

Vancouver, B.C.

November 5, 2020

Introduction

[1] This is an application by the plaintiff for the following orders:

1. An order requiring the defendants to produce to the plaintiff the following documents, pursuant to Clauses 2.8, 9.4(d), and 12.2 of the Limited Liability Partnership Agreement made December 9, 2013, and ss. 27, 31, and 58 of the Partnership Act; R.S.B.C. 1996 c. 348 [Partnership Act]:
 - a) All opinions and records provided to EMC by KPMG LLP or any other accounting firm engaged by EMC including but not limited to opinions on tax structuring, tax liability, income tax returns, income allocations, partnership distributions, opinions relating to the business of EMC and any risks arising from the business operations of EMC or the actions of its managing partner(s) that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020;
 - b) Any file materials and working materials of KPMG LLP relating to the tax structuring of EMC that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020;
 - c) Any file materials and working materials of KPMG LLP relating to the filing of Ms. Newell's personal income taxes that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020;
 - d) Any correspondence with KPMG LLP as EMC's accountants that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020;
 - e) Any instructions provided by EMC, K Scott, or B Scott to KPMG LLP respecting tax structuring of EMC and tax filings for Angie Newell that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020;
 - f) All records, books, and accounts relating to the business of EMC provided by EMC to KPMG LLP that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020; and

- 9) All invoices for services rendered by KPMG LLP to EMC that came into existence prior to December 9, 2013 and after July 20, 2020 until September 28, 2020.

(the "Documents").

2. An order that the defendants obtain from KPMG LLP any of the Documents not in their possession and produce them to the plaintiff.
 3. An order under Civil Rule 7-1 (13) requiring the defendants to list and produce the above Documents.
 4. Costs.
- [2] The evidence provided by the defendants, confirmed by submissions of counsel, indicates that there are no documents that fall into the second date range, i.e., from July 20, 2020 to September 28, 2020, accordingly, the applications regarding documents from this period are adjourned generally.

Background

- [3] The plaintiff's action is primarily for dissolution of the defendant, EMC Business Solutions LLP (the "Partnership").
- [4] The plaintiff and the individual defendant, Keith Morris Scott ("Mr. Scott"), entered into a written partnership agreement dated December 9, 2013 (the "Partnership Agreement"). The plaintiff is Mr. Scott's adopted daughter. She is a status Indian under the federal Indian Act, R.S.C. 1985, c. 1-5 [Indian Act].
- [5] The plaintiff is the sole equity partner in the Partnership and Mr. Scott is one of the managing partners of the Partnership. Mr. Scott was the sole managing partner of the Partnership until approximately 2019. Mr. Scott's son Blake Scott is now also a managing partner of the Partnership.
- [6] Mr. Scott owns and controls companies that are the partners in Beachcomber Hot Tub Group General Partners ("Beachcomber"). The Partnership is in the business of providing financing to customers of Beachcomber products and engaging in the wholesale purchase and sale of Beachcomber products to retailers.
- [7] The Partnership business is to be conducted on a first nation reserve as defined in the Indian Act, in order to take advantage of the exemption from income tax afforded under the Indian Act.
- [8] In the notice of civil claim in this action, the plaintiff alleges:

Overview

1. The plaintiff, Angie Newell, is the sole equity partner in EMC Business Solutions LLP (the "Partnership"), and the defendant, Keith Morris Scott, is the sole managing partner. Ms. Newell is Mr. Scott's adopted daughter and the Partnership was established for her benefit.
3. Ms. Newell is entirely vulnerable to Mr. Scott under the partnership agreement and relies on him to make all of the business decisions in good faith and in the best interest of the Partnership.
4. Ms. Newell seeks to dissolve the Partnership due to:
 - (a) Mr. Scott's attempts to claim the Partnership's assets as his own;
 - (b) Mr. Scott's threats to convert the Partnership assets to Beachcomber Hot Tubs Group general partners, a business controlled by Mr. Scott;
 - (c) conversion of some of Ms. Newell's distributions;
 - (d) allocation of significant partnership income to Ms. Newell (who is a status Indian under the Indian Act, R.S.C., 1985, c. I-5 and exempt from income tax) without the payment of equivalent distributions and without any explanation or disclosure of the finances of the Partnership; and
 - (e) other actions that constitute a serious departure from the proper conduct and management of the Partnership's affairs.
5. There has been a complete breakdown of trust and confidence between Ms. Newell and Mr. Scott, making the continuation of the Partnership untenable.
6. Ms. Newell also seeks damages against Mr. Scott for conversion of a portion of her Partnership distributions.

Formation and Structure of the Partnership

14. The purpose of the Partnership was to:
 - (a) carry on the Business, as that term is defined in the Partnership Agreement;
 - (b) conduct this Business on a first nation reserve, as defined in the Indian Act,
 - (c) Provide for family succession planning; and
 - (d) Allow Ms. Newell (and possibly other family members) to take advantage of her status under the Indian Act as exempt from Canadian income tax as separate and distinct from the interests of Mr. Scott.

Loss of Confidence and Breakdown in the Relationship

39. Ms. Newell is entirely vulnerable to Mr. Scott under the Partnership Agreement:

- (a) Mr. Scott has sole discretion to control the business and decisions of the Partnership;
43. In 2016, Ms. Newell became concerned that Mr. Scott was managing and using the Partnership for the benefit of Beachcomber and him personally and not Ms. Newell. Mr. Scott did not disclose any of the Partnership's structures, decisions, or finances to Ms. Newell despite her request that they be disclosed. Ms. Newell had concern that as a result of these actions the Partnership may not be able to satisfy any potential liability to her resulting from the allocation of income to her that may be used improperly. As a result, Ms. Newell contacted Mr. Scott on April 18, 2016 and demanded a detailed written explanation of the Partnership structuring and how the Partnership was using the income allocated to her. Ms. Newell did not receive any meaningful response to this demand.
- [9] In the response to civil claim, the defendants deny each of the matters set out above and plead, amongst other things, as follows:
15. The objects for which the Partnership was formed can still be attained and are being obtained such that the continuation of the Partnership pursuant to the Partnership Agreement is not untenable.
- [10] The "objects for which the Partnership was formed" are not set out in the Partnership Agreement.
- [11] KPMG LLP has not objected to production of the documents sought, but required a release to be signed before doing so. That was done and the financial and other partnership documents from the commencement of the Partnership have recently been disclosed.
- [12] The essence of the application, then, is for production of documents that came into existence prior to the formation of the Partnership. The plaintiff submits that she is entitled to production of such documents in accordance with the terms of the Partnership Agreement, under the provisions of the Partnership Act and in accordance with the BC Supreme Court Civil Rules [Rules].
- [13] The plaintiff asserts that she requires these documents in order to ensure that Mr. Scott is managing the Partnership in the manner that was intended. At para. 17 under Part 3: Legal Basis - Partnership Agreement and Partnership Act of the plaintiff's amended notice of application filed September 28, 2020, she explains:
17. In particular, as noted above, the KPMG Documents that came into existence prior to December 9, 2013 are central to the very formation, purpose, and structure of EMC and are at the heart of Ms. Newell's complaint and action against EMC and Keith Scott: that she was never properly informed about or consulted with respect to the creation of EMC, her inclusion as equity partner in EMC, and the use of her status as a Status Indian under the Indian Act for the purpose of the tax structuring of EMC. Moreover, the DPMG Documents that came into existence prior to December 9, 2013 are required to assess Mr. Scott's compliance with and adherence to the tax advice given during his management and control of the partnership and the allegations by Ms. Newell that Mr. Scott breached his fiduciary

duties to her in respect of that management.

- [14] The defendants take issue with production of documents that pre-date the Partnership. They submit that such documents do not relate to any matters in dispute in the action, are not producible under the Rules and are not Partnership documents required to be disclosed under the Partnership Agreement or the Partnership Act.
- [15] The defendants assert that the notice of civil claim is limited to issues that would constitute a breach of the Partnership Agreement and that documents created before its execution cannot be relevant. They assert that the issues raised in the amended notice of application, para. 17, as set out above, are not issues raised in the pleadings and are not issues in the action. Further, they assert that all such matters are covered by the Partnership Agreement.
- [16] In addition, the defendants submit that to the extent that the plaintiff seeks production under the Rules, that proper demand has not been made. They submit that the demands for pre-Partnership documents were made on August 10, August 17, and August 20, 2020 and that the required 35 days for response had not passed before the filing of the original notice of application on August 27, 2020. They submit that failure cannot be cured by the filing of the amended notice of application on September 28, 2020. Further, the defendants assert that none of the demands made in August 2020 stipulated that the demands were being made in accordance with R. 7-1(10) or 7-1(11) of the Rules, nor did the plaintiff explain how such documents could prove or disprove a material fact or lead to a train of inquiry.

Analysis

- [17] The plaintiff relies, amongst other things, on s. 9.4 of the Partnership Agreement as authority for the request for pre-Partnership documents.
- [18] That section, however, governs the reporting requirements for a managing partner. It is, by its terms, limited to production of annual reports and other information during the operation of the Partnership.
- [19] The specific sub-section relied upon, s. 9-4(d), reads:
- (d) Other Matters - upon written request by a Partner, information concerning such other matters with respect to the Partnership, including partnership information returns, as any Partner may reasonably require relating to any of the Businesses or the financial condition of the Partnership or as may be necessary from time to time to enable the Partners to comply with any (i) request of a Governmental Authority, (ii) litigation matter or dispute, (iii) tax matter, (iv) accounting, tax or financial reporting obligation or (v) other reasonable business purpose.
- [20] I do not believe that the language of that section can be stretched to properly include pre-Partnership documents.
- [21] Section 58 of the Partnership Act, provides:

Rights of limited partner

58 (1) Subject to subsection (2), a limited partner has the same right as a general partner to do any of the following:

- (a) to inspect and make copies of or take extracts from the limited partnership books at all times;
- (b) to be given, on demand, true and full information of all things affecting the limited partnership and to be given a formal account of partnership affairs whenever circumstances render it just and reasonable;
- (c) to obtain dissolution and winding up of the limited partnership by court order.

[22] Section 58(1)(b) is sufficiently broad, in my view, to include the pre-Partnership documentation sought. This is particularly so in light of the plaintiff's plea as to the purposes for which the Partnership was formed, the defendants' denial of that plea, and the plea of the defendants that the objects for which the Partnership was formed are still capable of being met.

[23] The pre-Partnership documents sought may well clarify the objects for which the Partnership was formed, which, as noted, are not set out in the Partnership Agreement. The closest the Partnership Agreement comes to defining the objects for which the Partnership was formed is in its definition of partnership business. That definition is so broad as to be useless, however, as it includes:

any other businesses that the Managing Partners determine should be carried on by the Partnership, and all other activities incidental thereto;

[24] In the context of this action, the purpose for and objects of the Partnership are clearly, "things affecting the limited partnership".

[25] As to the allegation by the defendants that the plaintiff has failed to give notice as required by R. 7-1(10) and (11) of the Rules, I am satisfied that proper notice has been provided.

[26] By letter of April 7, 2020, the plaintiff noted:

Further, please note that we make the following demand for documents or categories of documents pursuant to Rule 7-1(10) and 7-1(11) as specified below:

4. All documents in relation to the organizational structure of the Partnership, and all related entities up to and including the present date.

These documents are demanded pursuant to Rule 7-1(10) as they could be used at trial to prove or disprove a material fact at issue, including those facts contained at paragraph 12, 43 of the Notice of Civil Claim and the facts alleged at paragraph 14 and the facts contained [in the] Response to Civil Claim.

- [27] The defendants responded by asserting that some documents relating to the organizational structure had been provided.
- [28] The plaintiff then made a demand directly to KPMG LLP on July 20, 2020, listing the specific categories of documents sought in this application.
- [29] By letter of August 10, 2020, counsel for the plaintiff sought these same categories of documents from the defendants and noted:

These demands are not limited to "materiality" in the extant litigation and the pleadings do not constrain the scope of the general partner's obligations under the Partnership Act (which obligations apply regardless of any terms of the Partnership Agreement, though in this case they are consistent), though our client's position is that they are material in any event. Moreover, these demands engage the managing partners' fiduciary duties.

Our client will make applications under the civil rules as necessary.

- [30] That request was reiterated by letter of August 20, 2020.
- [31] I am of the view that the pre-Partnership documents sought are all broadly characterized as relating to the organizational structure of the Partnership. Those documents were sought under R. 7-1(10) in April 2020. In addition, the reference to materiality in the August 10, 2020 demand is clearly a reference to production under R. 7-1(10).
- [32] I am satisfied that the pre-Partnership documents could be used to prove or disprove a material fact. In addition to going to the objects or purposes for which the Partnership was formed, it is alleged that, in managing the Partnership, Mr. Scott wrongly prefers his own interests to those of the plaintiff. Documents evidencing the purpose or object of the Partnership will assist in proving or disproving that allegation.
- [33] That the object of the Rules of encouraging discussion and voluntary production was met is evident by the extensive correspondence regarding document production and the fact that many of the documents sought in the original notice of application were produced before this application was heard.

Conclusion

- [34] As a result, the plaintiff's application for production of pre-partnership documents, i.e. documents that came into existence prior to December 9, 2013, is allowed in accordance with the terms of the orders sought in the amended notice of application.

Costs

- [35] As to costs, COVID-19 notices 28 and 42 both note:

Parties will be held to the time estimates provided. There may be cost consequences for parties who exceed their time estimates.

- [36] This application was scheduled for one hour. It commenced at 2:35 p.m. and went until about 4:10 p.m. with the usual afternoon break. Of those 80 minutes, counsel for the applicant took 50 minutes in his submissions even after I told him I was concerned about the time. At 4:10 p.m., with several other urgent matters waiting, I advised counsel that I would have to adjourn this application over until 9 a.m. the next day.
- [37] Counsel took an additional 35 minutes the next day. The total time for the application was closer to two hours than one. This is a constant concern in chambers. It is simply not adequate for counsel to continue blithely past their estimated time.
- [38] The parties here were fortunate that I was available to hear the conclusion of their application. If I had not been available, I would have had no choice but to direct them to reset their application on the chambers list and start again.
- [39] In *Sangha v Goel*, 2018 BCSC 2267, Chief Justice Hinkson had occasion to deal with the issue of costs where an application ran significantly over time. He noted:
- [34] The Sangha and Dhaliwal parties set the hearing of their petitions for 1 hour and 45 minutes on a busy Chambers day.
- [35] The hearing of the petitions, including the Goel parties' adjournment application, in fact occupied almost 2 hours and 45 minutes with the result that applications by other litigants could not be heard that day.
- [37] Given the circumstances set out in para[s]. 34 and 35 above, I decline to award the costs of the applications to any party. Counsel who underestimate the time required for the hearing of their applications in chambers at the expense of other counsel or litigants must be discouraged from so doing. It serves no one's interests to terminate a hearing whose required time has been underestimated at the completion of that time estimate, and the only means by which such inaccuracy can be addressed is by refusing costs where such conduct occurs.
- [40] In the circumstances, neither party will have costs of this application.

"Master Muir"

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