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CANADA / JUDGMENT

# The Resolution and Collection Corporation v. Nishiyama

2017 BCSC 2085

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COURT

Supreme Court of British Columbia

DECIDED

27 October 2017

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2017 BCSC 2085 The Resolution and Collection Corporation v. Nishiyama

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

The Resolution and Collection Corporation v. Nishiyama,

2017 BCSC 2085

Date: 20171027

Docket: S162298

Registry: Vancouver

Between:

The Resolution and Collection Corporation

(formerly known as Housing Loan Administration Corporation)

Plaintiff

And

Masahiko Nishiyama

Defendant

Before: The Honourable Mr. Justice Voith

Oral Reasons for Judgment

In Chambers

Counsel for Plaintiff:

R.W. Richardson

Counsel for Defendant:

M.A. Dumais

Place and Date of Hearing:

Vancouver, B.C.

October 17, 2017

Place and Date of Judgment:

Vancouver, B.C.

### **October 27, 2017**

- [1] THE COURT: The Resolution and Collection Corporation ("RCC") seeks to examine Ms. S. Sanchez, who is an employee of RBC Wealth Management, under Rule 13-4(5) of the Supreme Court Civil Rules, B.C. Reg. 168/2009.
- [2] RBC Dominion Securities Inc. ("RBC-DS"), the Royal Bank of Canada ("RBC") and Ms. Sanchez are collectively the application respondents. They do not object to the examination of Ms. Sanchez. Both RCC and the application respondents, however, seek various terms and conditions in relation to Ms. Sanchez's examination.
- [3] The primary issues that arise on this application are:
  - 1. Whether the implied undertaking of confidentiality that will arise in relation to the examination of Ms. Sanchez should be waived?
  - 2. What, if any, obligation is there on the part of either the application respondents or RCC to disclose relevant documents to the other party prior to Ms. Sanchez's examination?

### **Background**

- [4] The plaintiff was established on July 26, 1996 in Japan and was formerly known as the Housing Loan Administration Corporation. It is a wholly-owned subsidiary of the Deposit Insurance Corporation of Japan and it has a mandate to manage, collect and dispose of loan claim receivables and other assets assigned by its specified housing loan companies.
- [5] The plaintiff is a judgment creditor of the defendant, Mr. Nishiyama, in British Columbia in an amount in excess of \$475 million plus interest and costs. That judgment was based on underlying, unsatisfied judgments taken against the defendant by the plaintiff in Japan. The plaintiff seeks to execute on its judgment.

- [6] The history of the plaintiff's financial dealings with the defendant giving rise to his debt, his attempts to expatriate money from Japan to avoid execution by the plaintiff, his criminal prosecution and present incarceration in Japan, bankruptcy proceedings against him in Japan and ongoing parallel civil proceedings against him in other jurisdictions abroad have been set out in several prior applications and the extensive supporting materials filed in this application.
- [7] The following facts are, however, relevant.
- [8] On March 11, 2016 I granted a pre-judgment Mareva injunction restraining the defendant from dealing with his assets in British Columbia. The plaintiff has obtained similar asset freezing orders regarding the defendant's assets located in Japan, Hong Kong and Singapore.
- [9] The defendant was ordered bankrupt in Japan on March 15, 2016. That bankruptcy order does not impact this action or this application.
- [10] On September 29, 2016 default judgment was granted, in this action, against the defendant in the amount of \$477,071,714.63 plus pre-judgment interest and costs.
- [11] On March 13, 2017 Mr. Justice Schultes made a consent order ("the March 13 Order") requiring both RBC-DS and RBC to produce, to the plaintiff, copies of all documents or records that were listed in Schedule A to the March 13 Order. The March 13 Order also addressed the implied undertaking of confidentiality that attached to those documents in terms that I will return to.
- [12] The documents that were disclosed pursuant to the March 13 Order, and I understand there were several thousand documents, identified Ms. Sanchez as having some involvement with the investment accounts of companies that the defendant had an interest or role in, and as the "Investment Advisor" to other account holders such as the defendant's wife and his other relatives.

#### Further Context for this Application

- [13] Rule 13-4(5) of the Supreme Court Civil Rules provides:
- (5) On being satisfied that any other person may have knowledge of the matters set out in subrule (2), the court may order that other person to be examined for discovery concerning the person's knowledge.
- [14] The application respondents do not, as I have said, object to having Ms. Sanchez examined under Rule 13-4(5). Furthermore, counsel for the application respondents did not object to:
1. The plaintiff's request that Ms. Sanchez be made available to be examined for up to seven hours; and
  2. The fact that the plaintiff's instructing counsel in Japan will be one of the persons who will attend at the examination of Ms. Sanchez.

- [15] Still further, the question of what costs of preparation the application respondents may be entitled to was adjourned, by agreement, to another day.
- [16] Finally, some issues arose with respect to whether Ms. Sanchez was being examined as a representative of RBC-DS and RBC or in her own capacity. I understand that issue is relevant because if Ms. Sanchez is to be examined in her own right, rather than as a representative of RBC-DS and RBC, the plaintiff might potentially seek to examine another representative of RBC-DS and RBC at some future time.
- [17] It is clear on the record before me that Ms. Sanchez is being examined as a representative of RBC-DS and RBC. It was as a result of the March 13 Order, and the document production that followed from that Order, that it became apparent that Ms. Sanchez had involvement in the investment accounts of the defendant, his companies, and in the accounts of persons who are related to the defendant. The notice of application filed by RCC on this application identified Ms. Sanchez's status as an "Investment Advisor" and referred to Ms. Sanchez's professional status as described on the website of RBC Wealth Management.
- [18] Before me, counsel for the plaintiff referred to some materials that may suggest that Ms. Sanchez had known the defendant at an earlier time or in some different capacity. Those materials, however, were not before me, are not part of the application record, and are not the basis on which the plaintiff's Rule 13-4(5) application is being advanced.
- [19] Accordingly, I am satisfied that Ms. Sanchez is being produced and will be examined as a representative of RBC-DS and RBC. In saying this, I do not foreclose the ability of the plaintiff to seek a further Rule 13-4(5) examination at some future date. That matter is not before me. It is important, however, to be clear about the basis for Ms. Sanchez's examination.

Issue 1 - Should the implied undertaking of confidentiality that will apply to Ms. Sanchez's examination be waived?

- [20] In the recent case of *Branconnier (Re)*, 2017 BCSC 1896, I concluded that the implied undertaking of confidentiality applies to examinations in aid of execution even though those examinations are a form of post-trial discovery. Neither party questions that proposition. It is also relevant that the March 13 Order expressly waived the implied undertaking of confidentiality that arose with respect to the document production made by RBC-DS and RBC. Specifically paragraphs 2 and 3 of that order stated:
2. The Plaintiff and its counsel of record are given leave to use the Documents obtained under this Order, and specifically are released from any implied undertaking of confidentiality not to disclose the Documents to third parties insofar as the Documents are to be used for the purposes of:

- (a) Investigations by the Plaintiff and the trustee in bankruptcy of the Defendant appointed pursuant to the order of the Kyoto District Court made dated March 15, 2016, being Mr. Hiroshi Morimoto (the "Trustee"), related to the whereabouts of any monies or assets transferred from the Accounts (as defined in Schedule "A") and to the identities and activities of any persons or entities involved in the receipt, handling, transfer, dissipation, encumbrance or disposal of such monies or assets held within the Accounts;
  - (b) Investigations by the Plaintiff, its counsel of record and the Trustee into the nature, scope and extent of wrongdoing committed by persons or entities connected or involved with the Accounts in any way;
  - (c) Initiation or furtherance of new legal proceedings, or furtherance of existing legal proceedings, whether in British Columbia or elsewhere, by the Plaintiff and/or the Trustee against any such persons or entities implicated in civil or criminal wrongdoing as a result of information revealed through the foregoing investigation of the Accounts; and,
  - (d) Reporting or making submissions to courts of proper jurisdiction, including such courts sitting in bankruptcy wherever located;
3. The release of the implied undertaking of confidentiality ordered with respect to the Plaintiff and the Trustee identified in paragraph 2, above, further includes the directors, officers, employees, agents and lawyers of the Plaintiff and of the Trustee, wherever they may be situated;
- [21] Counsel for the application respondent now argues, however, that waiver of the implied undertaking of confidentiality in relation to document disclosure or to the discovery of documents is different in principle from evidence given on an oral discovery. Specifically it is argued that RBC-DS and RBC have a relatively low expectation of privacy in relation to a client's documents. This supports the waiver of the implied undertaking in relation to that material.
- [22] Conversely, it is argued, these entities, and in particular Ms. Sanchez, have a high expectation of privacy in relation to the oral evidence that Ms. Sanchez might provide. I do not consider that this distinction is valid on a principled basis.
- [23] *Juman v. Doucette*, 2008 SCC 8 is the leading authority on the implied undertaking rule, on the ambit of that rule, and on when the rule can be waived. *Juman* expressly addressed both pre-trial document disclosure and oral discovery, and it did so, collectively, as one issue. In *Juman*, Binnie J., for the Court, said:
- [20] The root of the implied undertaking is the statutory compulsion to participate fully in pre-trial oral and documentary discovery. If the opposing party seeks information that is relevant and is not protected by privilege, it must be disclosed even if it tends to self-incrimination.

- [24] Furthermore, the rationale for the implied undertaking rule pertains with equal force to both document and oral discovery. In *Juman* the Court said:
- [23] Quite apart from the cases of exceptional prejudice, as in disputes about trade secrets or intellectual property, which have traditionally given rise to express confidentiality orders, there are good reasons to support the existence of an implied (or, in reality, a court-imposed) undertaking.
- [24] In the first place, pre-trial discovery is an invasion of a private right to be left alone with your thoughts and papers, however embarrassing, defamatory or scandalous. At least one side in every lawsuit is a reluctant participant. Yet a proper pre-trial discovery is essential to prevent surprise or "litigation by ambush", to encourage settlement once the facts are known, and to narrow issues even where settlement proves unachievable. Thus, rule 27(22) of the B.C. Rules of Court compels a litigant to answer all relevant questions posed on...
- [25] The public interest in getting at the truth in a civil action outweighs the examinee's privacy interest, but the latter is nevertheless entitled to a measure of protection. The answers and documents are compelled by statute solely for the purpose of the civil action and the law thus requires that the invasion of privacy should generally be limited to the level of disclosure necessary to satisfy that purpose and that purpose alone. Although the present case involves the issue of self-incrimination of the appellant, that element is not a necessary requirement for protection. Indeed, the disclosed information need not even satisfy the legal requirements of confidentiality set out in *Slavutych v. Baker*, [1976] 1 S.C.R. 254. The general idea, metaphorically speaking, is that whatever is disclosed in the discovery room stays in the discovery room unless eventually revealed in the courtroom or disclosed by judicial order.
- [26] There is a second rationale supporting the existence of an implied undertaking. A litigant who has some assurance that the documents and answers will not be used for a purpose collateral or ulterior to the proceedings in which they are demanded will be encouraged to provide a more fulsome answer.
- [27] For good reason, therefore, the law imposes on the parties to civil litigation an undertaking to the court not to use the documents or answers for any purpose other than securing justice in the civil proceedings in which the answers were compelled (whether or not such documents or answers were in their origin confidential or incriminatory in nature).
- [Underlining added]
- [25] Still further, the rationale for waiver of the implied undertaking, as expressed in *Juman*, again pertains equally to both document and oral discovery:

- [32] An application to modify or relieve against an implied undertaking requires an applicant to demonstrate to the court on a balance of probabilities the existence of a public interest of greater weight than the values the implied undertaking is designed to protect, namely privacy and the efficient conduct of civil litigation.
- [34] Three Canadian provinces have enacted rules governing when relief should be given against such implied or "deemed" undertakings, (see Queen's Bench Rules, M.R. 553/88, r. 30.1 (Manitoba), Rules of Civil Procedure, R.R.O. 1990, Reg. 194, r. 30.1 (Ontario), and Rules of Civil Procedure, r. 30.1 (Prince Edward Island)). I believe the test formulated therein (in identical terms) is apt as a reflection of the common law more generally, namely:

If satisfied that the interest of justice outweighs any prejudice that would result to a party who disclosed evidence, the court may order that [the implied or "deemed" undertaking] does not apply to the evidence or to information obtained from it, and may impose such terms and give such directions as are just.

- [35] The case law provides some guidance to the exercise of the court's discretion. For example, where discovery material in one action is sought to be used in another action with the same or similar parties and the same or similar issues, the prejudice to the examinee is virtually non-existent and leave will generally be granted.
- [36] On the other hand, courts have generally not favoured attempts to use the discovered material for an extraneous purpose, or for an action wholly unrelated to the purposes of the proceeding in which discovery was obtained in the absence of some compelling public interest. See, e.g., *Lubrizol Corp. v. Imperial Oil Ltd.* (1990), 33 C.P.R. (3d) 49 (F.C.T.D.), at p. 51. In *Livent Inc. v. Drabinsky*, 53 O.R. (3d) 126 (S.C.J.), the court held that a non-party to the implied undertaking could in unusual circumstances apply to have the undertaking varied, but that relief in such cases would virtually never be given (p. 130).
- [26] Finally, in *Branconnier (Re)*, I dealt specifically with the implied undertaking rule and waiving that rule in relation to a transcript from the examination of a debtor that had taken place under Rule 13-4. There is no valid basis for the distinction between document and oral discovery that the application respondents seek to draw. It remains necessary to consider, however, whether the nature or extent of the waiver that the plaintiff seeks is appropriate.
- [27] The form of order that the plaintiff now seeks mirrors the terms of paragraphs 2 and 3 of the March 13 Order. Specifically, the plaintiff seeks an order that any evidence, documents and records obtained at the examination of Ms. Sanchez be available for the same purposes as are described in subparagraphs (a) to (d) in paragraph 2 of the March 13 Order. I am satisfied that each of these various terms is appropriate.
- [28] The various actions that have been brought by the plaintiff against the defendant are proceeding concurrently in multiple jurisdictions. In these actions RCC is the plaintiff and Mr. Nishiyama is the defendant. In Japan bankruptcy proceedings have also been commenced. It is clear that the trustee and RCC are working together closely and co-

operatively. It is necessary that counsel in these various jurisdictions, and the trustee, continue to be able to work together efficiently and to communicate with each other about their respective efforts and investigations. The documents that were obtained under the March 13 Order were the product of those investigations. The examination of Ms. Sanchez will be another aspect of the plaintiff's efforts to track and recover the monies the defendant stole or absconded with.

- [29] Still further, I consider, for reasons that I have expressed, that it would be inconsistent to have waived the implied undertaking in relation to the documents that RBC-DS and RBC disclosed under the March 13 Order, and to not do so in relation to the ensuing examination of Ms. Sanchez in relation to those same documents.
- [30] One further related matter arises. Counsel for the application respondents argued that Rule 13-4(8) was relevant to whether I ought to waive the implied undertaking rule. Rule 13-4(8) provides:
- (8) Any part of an examination for discovery under this rule may be given in evidence in the same or any subsequent proceeding between the parties to the proceeding or between the judgment creditor and the person examined for discovery.
- [31] In *Branconnier*, at paragraphs 34 and 35, I observed that Rule 13-4(8) had neither been judicially considered nor otherwise commented on in any meaningful way. I also observed, at paragraph 36, that based on the clear language of Rule 13-4(8) the provision would have no relevance to bankruptcy proceedings where a judgment creditor would no longer be "a party to the proceeding".
- [32] In the context of the present application I observe that Rule 13-4(8) addresses an examination under Rule 13-4 being "given in evidence in the same or any subsequent proceeding". Rule 13-4(8) does not appear to extend, for example, to communications or reports made by counsel for RCC in one jurisdiction to counsel for RCC acting in a separate proceeding in another jurisdiction.
- [33] The implied undertaking of confidentiality gives rise to a serious obligation that is owed by a party and by counsel for that party to the court: *Juman*, para 27. The form of order being sought by RCC obviates the prospect of confusion. It makes clear exactly what RCC and its counsel can do. That clarity is important and a further consideration that militates in favour of the relief that RCC seeks.

Issue 2 - What, if any, obligation is there on the part of either RCC or the application respondents to disclose documents to the other prior to Ms. Sanchez's examination?

- [34] The obligations of RCC and of the application respondents are different and I have addressed them separately.

A. The obligations of the application respondents.

- [35] The obligation of the application respondents to disclose documents in their possession prior to the examination of Ms. Sanchez is largely academic. The March 13 Order compelled RBC-DS and RBC to disclose all documents described in Schedule A to that Order that were in their possession. Presumably that disclosure, and the ensuing production of that material, captured all relevant material in their possession.
- [36] To the extent, however, that that was not the case, or to the extent that Ms. Sanchez has relevant documents, Rule 13-4(11) is directly relevant. Rule 13-4(11) provides:
- (11) Unless the court otherwise orders, the person to be examined for discovery under this rule must produce for inspection on the examination all documents in his or her possession or control, not privileged, relating to the matters referred to in subrule (2).
- [37] Rule 13-4(11) does not expressly address what "on the examination" means. Those words, however, have been judicially considered on several occasions. They have consistently been interpreted to mean, and require, that a judgment debtor or a person being examined under Rule 13-4(5) produce and deliver relevant records or documents in their possession prior to their examination: see, for example, *Bagash and Ansari v. Burns*, 2005 BCSC 213 and *Hundley v. Garnier*, 2013 BCSC 380 at paras 27-29.
- [38] In *Bagash, Burnyeat, J.*, after referring to several further authorities which were to similar effect, said:
- [6] I am satisfied that it is appropriate for an order to be made that documents that will be relevant at the examination in aid of execution should be produced ahead of time so that the party conducting the examination can be more effective in his or her preparation. Prior production may also avoid the need for an adjournment of the examination so that additional documents can be produced and additional lines of inquiry can then be explored.
- [39] Thus, there is a formal basis on which to require the production of documents which are relevant to the issues identified in Rule 13-4(2) prior to an examination.
- [40] Accordingly, if the respondent applicants are in possession of additional documents that they have not yet produced, they are required to do so before Ms. Sanchez's examination. I understand with this ruling in hand counsel will be able to agree on an acceptable schedule or date by which that is to happen.

#### B. The Obligations of RCC.

- [41] The application respondents seek to compel RCC to identify the documents, from the production of the application respondents, that RCC will be asking Ms. Sanchez about. In addition, if RCC intends to put additional documents, based on its own investigations, to Ms. Sanchez, the application respondents seek to have those additional documents produced before Ms. Sanchez is examined.

- [42] There are two components to this issue. At one level it may well be prudent for RCC to identify with some reasonable detail which of the several thousand financial documents that it has received from the application respondents it intends to ask Ms. Sanchez about. This will enable Ms. Sanchez and/or her counsel to prepare for the examination better and to respond to the questions that RCC asks more fully. Absent such early identification of particularly salient documents it is likely, or at least possible, that Ms. Sanchez will not be able to respond and that she will have to further inform herself.
- [43] What may be prudent or appropriate does not mean, however, that that result can be compelled. Rule 13-4(11) has been interpreted so as to place a positive obligation on a judgment debtor or on a person being examined under Rule 13-4(5) to produce relevant materials in their possession prior to their being examined. There is no equivalent rule which places a corresponding obligation on a judgment creditor.
- [44] Furthermore, pre-trial examinations for discovery are inevitably preceded by formal discovery of documents. This process is governed by Rule 7-1 which requires "all parties of record" to prepare a list of documents in Form 22. Once again the Supreme Court Rules and the relevant case law expressly state what the pre-trial obligations of the parties to an action are. Their post-trial obligations are different.
- [45] Rule 13-4(7) expressly incorporates a number of the subrules from Rule 7-2. Rule 7-2 deals with oral examinations for discovery. No part of Rule 13-4, however, incorporates any part of Rule 7-1 which addresses document disclosure and production.
- [46] A further consideration is relevant. There are principled differences between pre-trial and trial processes and post-trial execution proceedings. In *Minghetti v. Interstyle Ceramic Industries Ltd.*, [1999] B.C.J. No. 1807, Master Barber addressed what is now Rule 13-4 and, at para. 7, said:

While each party has rights on this examination, it must be remembered that there has been a determination that the judgment debtor owes a sum of money. There should be no reason why the judgment creditor ought to incur extra expense to be able to at least find out what moneys might be available or what avenues ought to be pursued.

This portion of *Minghetti* was relied on by the Court in *Bagash*.

- [47] Thus, the Rules do not expressly or impliedly require that the examination of a judgment debtor, or the examination of a person who is produced under Rule 13-4(5), be preceded by any disclosure on the part of the judgment creditor. Instead that examination, which is in the nature of a cross-examination, can take place without any such disclosure.
- [48] Accordingly, this aspect of the relief being sought by the application respondents is dismissed.

- [49] No issue is taken with respect to the balance of the terms being sought by RCC. I am satisfied that each of paragraphs 1 to 6 of the draft order I was given is appropriate. The order being prepared by the parties should properly identify the capacity in which Ms. Sanchez is being examined. That order should also include a term which makes clear that the application respondents are to produce any further relevant documents in their possession to the plaintiff prior to the examination of Ms. Sanchez at a time that is agreed upon by counsel.
- [50] Finally, the issue of the costs of this application and the costs of Ms. Sanchez's attendance at her examination are to be adjourned generally.

"Voith J."

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Prepared on 28 October 2026 · Esheria