
CANADA / JUDGMENT

Walsh v. BDO Dunwoody LLP

2013 BCSC 392

COURT

Supreme Court of British Columbia

DECIDED

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2013 BCSC 392 Walsh v. BDO Dunwoody LLP

IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation:

Walsh v. BDO Dunwoody LLP,

2013 BCSC 392

Date: 20130308

Docket: S104826

Registry: Vancouver

Between:

Glenn Walsh

Plaintiff

And

BDO Dunwoody LLP, BDO Canada SRL and

Jas Butalia

Defendants

Before: The Honourable Mr. Justice Voith

Reasons for Judgment

Counsel for the Plaintiff:

B.G. McLean

R.V. Aldridge

P. Walia, A/S

Counsel for the Defendants:

D.B. Wende

E. Stock

Place and Date of Trial/Hearing:

Vancouver, B.C.

February 4-7, 2013

Place and Date of Judgment:

Vancouver, B.C.

March 8, 2013

- [1] The plaintiff, Mr. Walsh, has commenced an action against the defendants in connection with tax planning advice he received from them in 1997 and 1998. The defendants now apply to have the plaintiff's claim dismissed under either Rule 7-7(6) or Rule 9-7 of the Supreme Court Civil Rules, B.C. Reg. 168/2009 on the basis that the plaintiff's claim is statute barred. The plaintiff, in turn, argues either that the matter is not suitable for summary disposition or, alternatively, that the defendants cannot succeed on the merits of their application because the defendant Mr. Butalia wilfully concealed material facts from the plaintiff, thereby postponing the applicable limitation period.

Procedural History and Status

- [2] This action was filed on June 30, 2010. The pleadings are closed. The matter is being case managed by Justice Gerow and it is scheduled to go to trial on October 7, 2013 for 15 days. The defendants gave notice of their intention to bring this application some time ago. Limited discoveries have been conducted on the issues raised by this application and Notices to Admit have been exchanged. The defendants sought to have this application heard at an earlier time but the Registry was unable to accommodate that request. Notwithstanding the cooperative efforts of the parties to schedule this application, the position of the plaintiff has, at all material times, been that the defendants' application is unsuitable for summary disposition.

Background

- [3] The following central facts are either not in dispute or have been conceded, for the purposes of this application alone, by the defendants.

- [4] Mr. Walsh is a businessman who owned or controlled various companies. Mr. Butalia is a chartered accountant and was a partner of the defendant BDO Dunwoody. Mr. Butalia had overseen Mr. Walsh's personal and corporate financial matters since at least 1982.
- [5] In 1997 and 1998, Mr. Butalia developed a tax plan (the "Plan") that was intended to shelter approximately \$47 million of income for Mr. Walsh in 1998. The details of the Plan are, for present purposes, unimportant. But the gist of the Plan was described by Justice Woods of the Tax Court in *Grant v. Canada*, 2006 TCC 373 at para. 3, aff'd 2007 FCA 174, a decision which pertains to another of Mr. Butalia's clients:

The general concept of a departure trade is to create interest deductions that reduce tax of an individual who is planning to emigrate from Canada. The departing taxpayer borrows money from a financial institution and incurs interest which is deductible in part for the period prior to the departure. The borrowed money is simultaneously reinvested with the same financial institution and the taxpayer earns interest that is not taxable because it is received after the taxpayer has terminated Canadian residence.

- [6] It is important that Mr. Butalia told Mr. Walsh that, though he believed the Plan complied with the Income Tax Act, R.S.C. 1985, c.1 (5th Supp.) (the "ITA"), there were some risks associated with it. He told Mr. Walsh that the Plan was aggressive, that it would draw the attention of the Canada Revenue Agency (the "CRA") and that the CRA might challenge the Plan under the General Anti-Avoidance Rule ("GAAR") or other provisions of the ITA.
- [7] The Plan, as described above, required that the plaintiff borrow a substantial amount of money in 1998 in order to have an interest payment that could be deducted from Mr. Walsh's 1998 income. The Plan was implemented in 1998 and Mr. Walsh, on Mr. Butalia's instructions, became a non-resident on December 29, 1998. Mr. Walsh paid interest on the moneys he had borrowed on December 31, 1998.
- [8] In 2001, the CRA began to challenge the Plan and, in a letter dated September 5, 2002, the CRA asserted that the Plan was:
- (a) a sham contrary to the General Anti-Avoidance Rule (section 245 of the ITA); and
 - (b) invalid as the interest paid was not deductible against Mr. Walsh's income because:
 - (i) the interest had not been earned for a business purpose in accordance with section 20(1)(c) of the ITA;
 - (ii) Mr Walsh had departed Canada on December 29, 1998, two days before paying \$47 million in interest on the moneys he had borrowed and so he was no longer a resident of Canada when the interest was paid as required under both sections 20(1)(c) and 114 of the ITA.

- [9] In 2002, the CRA issued a \$45 million reassessment to Mr. Walsh. Mr. Butalia retained Mr. Joel Nitikman, a tax specialist with the law firm of Fraser Milner Casgrain, to act on behalf of both Mr. Walsh and the defendant BDO Dunwoody. Mr. Butalia and Mr. Nitikman had a long standing relationship. Mr. Butalia has apparently retained Mr. Nitikman in order to obtain his input on the Plan and in relation to other matters. On June 6, 2003, Mr. Nitikman prepared a Notice of Objection on behalf of Mr. Walsh.
- [10] On January 13, 2003, Mr. Walsh and Mr. Nitikman met for approximately 1 1/2 hours. The defendants placed considerable emphasis on this meeting and I will return to its significance. The CRA formally confirmed its reassessment on June 4, 2004.
- [11] In approximately July or August 2004, Mr. Walsh retained Mr. Stewart, then a tax lawyer with Bennett Jones in Calgary, to assume conduct of his personal tax problems with the CRA. Mr. Stewart had already been acting for some time on behalf of various companies that Mr. Walsh owned or controlled and that had reassessments issued to them by the CRA for various tax years.

Overview of the Action and the Positions of the Parties on this Application

- [12] The Notice of Civil Claim has a particular focus and it was this focus that underlay the application before me. Mr. Walsh was told by Mr. Butalia, as I have said, that the Plan was aggressive and that it might be challenged by the CRA. Mr. Walsh has pled, however, that Mr. Butalia's tax advice was flawed because he directed Mr. Walsh, as part of the Plan, to leave Canada on December 29, 1998. Because Mr. Walsh left Canada on December 29, 1998, prior to paying interest on the borrowed money, he ran afoul of section 114 of the ITA giving rise to what was described before me as the "Departure Date Issue". Mr. Walsh has grounded his action in contract and tort and he has also pled that the defendants breached the fiduciary duties that they owed him.
- [13] Mr. Walsh further argued that, by virtue of section 6(3) of the Limitation Act R.S.B.C. 1996, c. 266 (the "Act"), the running of the limitation period for his action has been postponed. More specifically, Mr. Walsh has alleged that Mr. Butalia wilfully concealed the fact that the Plan suffered from the Departure Date Issue and that the CRA was challenging the Plan on this, amongst other, bases. This is not a fanciful assertion. Mr. Butalia has admitted on Discovery that he was aware of the Departure Date Issue at a very early point in time and that he never disclosed, described or revealed the existence of the Departure Date Issue to Mr. Walsh. He has since resiled somewhat from this position in the Affidavit material filed for the defendants' application.
- [14] Counsel for Mr. Walsh accepted that, if Mr. Butalia had adequately and fully disclosed the existence of the Departure Date Issue to Mr. Walsh prior to June 4, 2004, the plaintiff's claim would be statute barred. It is to be recalled that this action was filed on June 30, 2010 or more than six years after the CRA formally confirmed its reassessment on June 4, 2004. I use the June 4 date as, in *Bourque v. Winterbottom* (September 9, 1998), Vancouver C973325

(B.C.S.C.) affirmed on appeal 1999 BCCA 379, Justice Holmes concluded that the relevant limitation period had been postponed until Revenue Canada issued its confirmation of reassessment because (inter alia), at that point, "the position of Revenue Canada was set"; see paras. 35-37.

- [15] The foregoing description provides both a backdrop for the plaintiff's claim and his response to the assertion that his claim is statute barred. The plaintiff's primary position on the application before me, however, was that the nature of the instant application and the issues that it raised prevented it from being suitable for any form of summary disposition.
- [16] The defendants, on the other hand, argued that if this matter went to trial, the plaintiff would not be able to establish that the Plan failed or, more specifically, that the plaintiff suffered loss as a result of the Departure Date Issue as opposed to any of the other issues identified by the CRA. For present purposes, however, the defendants were prepared to accept that the Departure Date Issue, as a standalone matter, properly formed the basis of an action based on any one of the causes of action I have identified.
- [17] As various conflicts in the evidence emerged, a point I will return to, the defendants accepted that I should assume, for the purposes of this application, that Mr. Butalia was a fiduciary to Mr. Walsh, that he failed to disclose the Departure Date Issue and, indeed, that he "willfully concealed" the existence of that issue from Mr. Walsh, as those words are understood within s. 6(3)(e) of the Act.
- [18] The defendants argued that, even taking his argument at its strongest, the plaintiff could not discharge the burden of proving postponement.
- [19] Rule 9-7 is generally understood to be broader than Rule 7-7(6). The parties focused on Rule 9-7 before me and it is through this lens that I have addressed the application. Rule 9-7(15) provides, in part:
- (15) On the hearing of a summary trial application, the court may
- (a) grant judgment in favour of any party, either on an issue or generally, unless
- (i) the court is unable, on the whole of the evidence before the court on the application, to find the facts necessary to decide the issues of fact or law, or
- (ii) the court is of the opinion that it would be unjust to decide the issues on the application[.]
- [20] The factors which are relevant to determining whether a matter is suitable for summary disposition have been expressed numerous times and were most recently captured in *Gichuru v. Pallai*, 2013 BCCA 60 where Justice D. Smith, for the court, said:
- [30] In *Inspiration Management Ltd. v. McDermid St. Lawrence Ltd.* (1989), 36 B.C.L.R. (2d) 202 (C.A.), the court confirmed that the court under this rule "tries the issues raised by the pleadings on affidavits", that "a triable issue or arguable defence will not always defeat a summary trial application", and that "cases will be decided summarily if the court is able to

find the facts necessary for that purpose, even though there may be disputed issues of fact and law" provided that the judge does not find "it is unjust to do so" (p. 211). In determining the latter issue (whether it would be unjust to proceed summarily), the Chief Justice identified a number of relevant factors to consider (at p. 215):

In deciding whether it will be unjust to give judgment the chambers judge is entitled to consider, inter alia, the amount involved, the complexity of the matter, its urgency, any prejudice likely to arise by reason of delay, the cost of taking the case forward to a conventional trial in relation to the amount involved, the course of the proceedings and any other matters which arise for consideration on this important question.

- [31] To this list has been added other factors including the cost of the litigation and the time of the summary trial, whether credibility is a critical factor in the determination of the dispute, whether the summary trial may create an unnecessary complexity in the resolution of the dispute, and whether the application would result in litigating in slices: *Dahl v. Royal Bank of Canada et al.*, 2005 BCSC 1263 at para. 12, upheld on appeal at 2006 BCCA 369.
- [21] Several of the foregoing factors are directly engaged on this application. The defendants concede that the factual and legal issues raised by the plaintiff are complex. They accept that the claim being advanced involves very significant sums of money - the claim being for some \$45 million. They further accept that the relative imminence of the trial date militates against them. More specifically, both parties agreed that, if I dealt on a substantive basis with the merits of the various limitation issues, one or the other of them would appeal that decision. Both parties accepted that this would cause the existing trial date to be lost. The defendants accept that this has the prospect, depending on the decision that would ensue from such an appeal, of giving rise to both inefficiency and delay.
- [22] In *Coast Foundation v. Currie*, 2003 BCSC 1781, Justice Groberman, as he then was, addressed an application for summary judgment based on a limitation period. The parties in that case accepted that the likely appeal of that judgment would give rise to the adjournment of an existing trial date. These circumstances constituted one of the two factors Groberman J. relied on in deciding that the matter before him was not suitable for summary disposition (paras. 23-26).
- [23] In addition, other authorities indicate that issues of "discoverability" in the limitations context are generally not amenable to resolution by way of summary trial and often warrant a fuller explanation of the evidence; see for example *MacMillan v. McDermid* (2004), 70 O.R. (3d) 252 (C.A.) at para. 1; *The Board of School Trustees of School District No. 72 (Campbell River) v. IBI Group Consultants Ltd.*, 2007 BCSC 280 at paras. 14 -15, 71 B.C.L.R. (4th) 95; *Ferrara v. Lorenzetti, Wolfe Barristers and Solicitors*, 2012 ONCA 851 at para. 65.

- [24] Still further, and notwithstanding the defendants' efforts to narrow the issues so that questions of credibility were not engaged, it is relevant that significant questions of credibility, or at a minimum differences between the anticipated evidence of Mr. Walsh, Mr. Butalia and Mr. Nitikman, exist in the record before me.
- [25] Ultimately, I do not consider that the narrow issue the defendants seek to advance can be addressed with the surgical precision that they would like.
- [26] The relevant portions of s. 6 of the Act provide:
- (3) The running of time with respect to the limitation periods set by this Act for any of the following actions is postponed as provided in subsection (4):
- ...
- (c) for professional negligence;
- ...
- (e) in which material facts relating to the cause of action have been wilfully concealed;
- ...
- (4) Time does not begin to run against a plaintiff or claimant with respect to an action referred to in subsection (3) until the identity of the defendant or respondent is known to the plaintiff or claimant and those facts within the plaintiff's or claimant's means of knowledge are such that a reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard those facts as showing that
- (a) an action on the cause of action would, apart from the effect of the expiration of a limitation period, have a reasonable prospect of success, and
- (b) the person whose means of knowledge is in question ought, in the person's own interests and taking the person's circumstances into account, to be able to bring an action.
- (5) For the purpose of subsection (4),
- (a) "appropriate advice", in relation to facts, means the advice of competent persons, qualified in their respective fields, to advise on the medical, legal and other aspects of the facts, as the case may require,
- (b) "facts" include
- (i) the existence of a duty owed to the plaintiff or claimant by the defendant or respondent, and
- (ii) that a breach of a duty caused injury, damage or loss to the plaintiff or claimant,
- ...
- (6) The burden of proving that the running of time has been postponed under subsections (3) and (4) is on the person claiming the benefit of the postponement.

[27] I start by recognizing that the question of whether a limitation period has been postponed is largely a fact-based inquiry; see *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2008 BCCA 278, 81 B.C.L.R. (4th) 199; *Weldon v. Agrium Inc.*, 2012 BCCA 53 at para. 24, 27 B.C.L.R. (5th) 101; *Ferrara* at para. 38.

[28] For the purposes of s. 6(4) of the Act, the court is to assume that the plaintiff's cause of action will be made out and decided in his favor. The basis for this premise was explained in *Edgeworth Construction Ltd. v. Thurber Consultants Ltd.*, 2000 BCCA 453 at para. 30, 78 B.C.L.R. (3d) 200 where Justice Newbury, for the court, said:

... [When considering s. 6(4),] one sets aside the issues of law raised by the case or assumes they will be decided in the plaintiff's favour, and asks when the plaintiff became aware, or should reasonably have become aware, that he might sue for damages. At this point, the period begins running. This "assumption" of a cause of action is consistent with the approach taken by Mr. Justice Lambert in *Vance v. Peglar* (1996) 22 B.C.L.R. (3d) 251 (B.C.C.A.):

The question of whether there was a breach of duty usually has a legal component but the Act treats that question as a factual one because, for the purposes of any relevant limitation issue there must be an assumption of an ultimate finding of liability against the defendant for breach of duty to the plaintiff, and so the limitation issue assumes the breach of duty and concentrates on when the assumed breach was known to the plaintiff or could have become known to the plaintiff if he or she had taken the steps that he or she could reasonably have taken in the circumstances. So, for the purposes of the limitation issue, the relevant question is one of fact. [Emphasis omitted.]

[29] The relevant case law establishes, and both parties accepted, that the postponement provisions of the Act contain or give rise to four components:

1. The identity of the defendant is known to the plaintiff.
2. The plaintiff has certain facts (including the facts set out in s. 6(5)(b)) within his or her means of knowledge.
3. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that an action would have a reasonable prospect of success.
4. A reasonable person, knowing those facts and having taken the appropriate advice a reasonable person would seek on those facts, would regard the facts as showing that the plaintiff ought, in his or her own interests and taking his or her circumstances into account, to be able to bring an action.

(See *Ounjian v. St Paul's Hospital*, 2002 BCSC 104 at para. 21 and *Brooks v. Jackson*, 2009 BCCA 150 at para. 17, 310 D.L.R. (4th) 564, *Sun-Rype* at para. 111, amongst other cases, adopting Chief Justice McEachern in his dissent in *Karsanjii Estate v. Roque*, [1990] 3 W.W.R. 612, 43 B.C.L.R. (2d) 234 (C.A.).)

- [30] It is also common ground that, if the plaintiff can establish that any one of these four conditions cannot be made out, he would succeed on the issue of postponement. Both parties seemed to accept that it was the second of these conditions that was principally at issue. Specifically, it was argued that, even if Mr. Butalia willfully concealed the Departure Date Issue from Mr. Walsh, the plaintiff nevertheless had available to him the "means of knowledge" to discern the facts relevant to his cause of action.
- [31] Counsel for the defendants argued that there were multiple sources from which, and occasions on which, Mr. Walsh could have, with reasonable due diligence, learned of the specific issues that the CRA was raising in relation to his personal tax situation including the Departure Date Issue. It was argued that Mr. Walsh could have obtained such information from any of Mr. Stewart, Mr. Nitikman or Mr. Horne, the CFO of Mr. Walsh's businesses and the person to whom Mr. Walsh's mail was delivered when he was out of the country. Each of these gentlemen was provided with correspondence or Notices of Assessment from the CRA which addressed the issues that pertained to Mr. Walsh's tax problem - though most did so simply by referring to the various sections of the ITA which the CRA maintained had been violated.
- [32] Although Mr. Walsh was out of the country, and has deposed that he did not receive such correspondence directly, it is argued that he should have made detailed inquiries about the CRA's specific concerns. Had he done so, it is argued, the Departure Date Issue would have surfaced and caused Mr. Walsh to seek further legal advice about possible causes of action or redress against the defendants. His failure to make such inquiries, in all the circumstances, was not reasonable. Indeed, it is argued that his discovery evidence reflects a cavalier indifference to his circumstances and to the concerns of the CRA.
- [33] This broad thesis suffers from both specific and more general difficulties. For example, while it is true that Mr. Stewart did receive some correspondence from the CRA that related to Mr. Walsh personally, he has deposed that he did not act for Mr. Walsh personally until July/August 2004 - or subsequent to the material dates in issue. Instead, he received such correspondence to ensure that the positions he developed for the various Walsh companies he acted for was consistent with the positions developed by Mr. Nitikman on behalf of Mr. Walsh. Under such circumstances, it is not at all clear to me why, on an objective basis, Mr. Walsh should have been pressing Mr. Stewart to explain or describe the details of the CRA's concerns as they related to him personally. At that point, Mr. Walsh had retained Mr. Butalia and Mr. Nitikman to assist him with his personal tax difficulties.
- [34] More importantly, however, the defendants' submission fails to fully appreciate the ambit and content of the "means of knowledge" requirement in s. 6(4) of the Act. In *Levitt v. Carr* (1992), 66 B.C.L.R. (2d) 58, [1992] 4 W.W.R. 160, a five person panel of the Court of Appeal confirmed that the words "means of knowledge" in s. 6 (4), then s. 6(3), did not render the appropriate analysis a "wholly objective exercise"; para.32. Instead, after referring to various English authorities, the court concluded that it did "not think the statutory language was intended to impute knowledge to the plaintiff beyond what he could have discovered if he

had taken steps reasonable in the circumstances, that is to say, his circumstances"; para. 35.

- [35] The court then confirmed this proposition and, at para. 38, said: "[h]aving regard to the purpose of s. 6(3) and to the relevant language, we conclude the facts falling within the plaintiff's means of knowledge are, firstly, those actually known, and secondly, those which would become known if he took such steps as would have been reasonable for him to take in his circumstances."
- [36] The court also quoted from the judgment of Justice Taylor in *Karsanjii Estate* at 262 where he had said: "I think the key question is when could a person in Mr. Karsanjii's position first have discovered the relevant 'facts' in the sense both that he would have reason to seek them out and, had he done so, would have learned them." This portion of Justice Taylor's reasons was recently relied on by the court in *Sun-Rype* at para. 114.
- [37] Aspects of Mr. Walsh's circumstances are not presently known to me. Though clearly a successful businessman, it is not clear how sophisticated he is. The plaintiff's sophistication was a factor emphasized in *Ferrara* at paras. 19 and 68. Mr. Walsh's discovery evidence clearly suggests he knows little about tax matters. Furthermore, at the relevant time, he had a long-standing professional relationship of nearly 20 years with Mr. Butalia and he apparently had significant confidence in him.
- [38] The following additional facts significantly inform Mr. Walsh's circumstances. First, and somewhat unusually, Mr. Walsh knew that the CRA might challenge the Plan and he had been told in advance what the basis of that challenge was likely to be. Thus, this is not a case where the CRA's reassessment came as a surprise and where a taxpayer would be trying, to the same extent, to understand what had happened and why. Second, Mr. Walsh was in continuous communication with Mr. Butalia between 1999 and 2003. Mr. Walsh, in his discovery evidence, indicated that he and Mr. Butalia likely spoke on a weekly basis during this period and that they would sometimes speak daily. Aspects of their communications or the nature of their relationship is captured in the following segment of Mr. Walsh's evidence:

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Q: Do you recall if you communicated that to Mr. Butalia, that because you didn't necessarily understand it, he didn't have to send it to you?

A: I don't know that I -- it isn't likely I ever said that. But, you know, we worked together for a lot of years, and he knew basically, I think, what I needed to see and what I didn't.

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Q: Certainly, if you'd wanted to see all the documentation, you could have asked for it?

A: Yes.

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Q: Okay. Was it, in general terms, your practice, or the practice between you and Mr. Butalia, that when he got something from the CRA or he was going to send something to the CRA on your behalf, that he would have a discussion with you about that?

A: Not in direct terms. I mean, we talked about what was going on, but a lot of the details I wasn't involved with.

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Q: For example, wasn't it your expectation that if he got a letter from the CRA about the departure trade strategy, that in your weekly or monthly telephone conversations, you expected him to bring that up, didn't you?

A: No, I don't think so. I expected that he would keep me abreast of any significant events, but the routine things, no, I wasn't expecting involvement and I wasn't concerned about it.

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Q: Did you think that at the end of 2001, anything to do with the departure trade strategy could be categorized as routine? I would have thought it would be pretty important.

A: Well, it was important, but the details weren't - I didn't get into the details that cropped up with every letter back and forth.

[39] In addition, it appears clear from the evidence I was provided with that Mr. Butalia continued to be reassuring and positive in his discussions with Mr. Walsh about the positions being advanced by the CRA. The discovery evidence of Mr. Walsh is replete with such references. Such activity, if it is established at trial, had the likely prospect of communicating to Mr. Walsh that things were progressing as anticipated. Such activity would be relevant to Mr. Walsh's "circumstances" and to what additional inquiries he should have been making.

[40] There is also some suggestion in the evidence that Mr. Butalia may have done more than simply conceal the Departure Date Issue and communicate an ongoing optimism to Mr. Walsh. The evidence suggests that Mr. Butalia may have diverted Mr. Walsh's attention from any broader inquiry and may have actively misled him. Thus, there are references in Mr. Walsh's discovery to his inquiring about the nature of the issues that were raised by the CRA in relation to other clients of Mr. Butalia who had, on his advice, participated in similar tax planning schemes. The following excerpt from Mr. Walsh's discovery is illustrative:

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Q: So now to get back to the point. Are you aware, in the fall of 2002, when Mr Butalia writes: "It's been decided by our client that since you're currently representing other clients...", are you aware that Mr. Nitikman is also representing Bob Tower?

A: Well, according to this, I must have been, because certainly I know that I - you know, Jas and I discussed the fact that I met Bob Tower and I knew Kitsch, and of course somewhere along the line, and maybe before seeing Nitikman, but somewhere along the line I asked Jas, "Well, what's --" to start with, you know, "Do they have the same strategy as me?" And I think Jas's reply was, "Well, similar, but every case is different." So there are different tweaks to all these things, but it's the same general strategy. Somewhere along the line, I knew the CRA were heavy on their case. Again, whether getting a notice of reassessment, I didn't put that into the mix particularly, but I knew they were on their case. And I asked Jas, "Well, what did they do wrong?" And he said, "Well, they didn't look after their residency properly and didn't count the days, and they got caught."

- [41] The foregoing response, and in particular the reference to "residency requirements", is ambiguous. In particular, it is not clear if it pertains to some difficulty under section 114 of the ITA. If it did, and if Mr. Walsh's evidence about what he was told were accepted, it would raise concerns about whether Mr. Butalia's communications with Mr. Walsh went beyond a mere failure to disclose the existence of the Departure Date Issue and instead extend to actively misleading Mr. Walsh. I do not say that this is so. I do believe, however, that these are the very matters that should be explored before the trial judge and that are directly relevant to an assessment of the objective reasonableness of Mr. Walsh's inquiries, or lack of inquiries, based on his particular "circumstances".
- [42] The essence of the defendants' submission is that Mr. Walsh should have endeavored to understand the particular concerns of the CRA during his dealings with his other advisors. They emphasize that a reasonable person with a very significant potential tax liability would seek to understand the basis of that liability. I do not disagree. In this case, however, there is good reason to consider that Mr. Walsh believed he understood the concerns of the CRA from his repeated and long-standing dealings and discussions with Mr. Butalia. Thus, in real terms, the defendants' submission has less to do with the adequacy of Mr. Walsh's inquiries into the various concerns raised by the CRA than, in a sense, his failure to confirm that what he'd been told by Mr. Butalia was both accurate and complete. These are two very different things.
- [43] Thus, the nature of Mr. Walsh's relationship with Mr. Butalia, his confidence in Mr. Butalia, what he was told or not told by Mr. Butalia about the CRA's concerns and how frequently they had such discussions are all matters which inform the questions of what further inquiries, if any, he should have been making from Mr. Nitikman, Mr. Horne or others. Such factors are directly relevant, to borrow the language of Taylor J.A. in *Karsanjii Estate*, to whether Mr. Walsh "had reason to seek" further details.
- [44] The defendants raised numerous factors and issues in support of their submissions and placed significant emphasis, as I have said, on the January 14, 2003 meeting between Mr. Walsh and Mr. Nitikman. In their written submissions, they argue that "fundamental to the postponement issue is a meeting that took place for 1.5 hours at Mr. Nitikman's office with Mr. Walsh on January 14, 2003". I have addressed this particular meeting directly both

because of the focus placed on it by the defendants and because it highlights the complexities and inconsistencies that infuse the whole of the evidence and that warrant these issues being fully explored.

- [45] It is common ground that the purpose of the meeting was to discuss the Notice of Reassessment that the CRA had delivered. It is also common ground that Mr. Nitikman was very negative about Mr. Walsh's case and his prospects for success, though the two gentlemen have quite different memories of how these sentiments were expressed. Neither gentleman has a good memory of the meeting. Their evidence on the central matter at issue, however, is inconsistent. Mr. Walsh has unequivocally deposed that Mr. Nitikman did not identify or raise the Departure Date Issue with him. Mr. Nitikman, who provided a Will Say Statement, would apparently testify that his usual practice would be to go through a Notice of Reassessment with a client and discuss the issues that the Notice raised, thus suggesting that he would have discussed the Departure Date Issue with Mr. Walsh. The notes of his meeting with Mr. Walsh, which are several pages in length, do not, however, make any mention of the Departure Date Issue.
- [46] The defendants offered to call Mr. Nitikman during the hearing and to make him available for cross examination. Counsel for Mr. Walsh indicated that he has thus far been unable, for various reasons, to secure relevant aspects of Mr. Nitikman's files. Furthermore, he indicated that, depending on what evidence Mr. Nitikman gave in his direct or cross examination, he might, in turn, have to call Mr. Walsh and/or Mr. Grant. Mr. Grant, it is to be recalled, was a client of both Mr. Butalia and Mr. Nitikman. It was his case that made its way through the tax courts on the Departure Date Issue.
- [47] I indicated that I did not consider this process would be necessary or appropriate for several reasons. In *Mayer v. Mayer*, 2012 BCCA 77, 29 B.C.L.R. (5th) 232, the court addressed the various difficulties that had ensued during the course of an application for summary judgment. The application, which was originally intended to be a "surgical strike" (para. 47) on a discrete issue, "morphed" (paras. 42 and 68) into something quite different. The evidence of Mr. Nitikman and his ensuing cross examination had the real prospect of "morphing" in unknown directions and would not, at bottom, fully address the broader issues I have described and that may inform Mr. Walsh's "circumstances" at the relevant times.
- [48] The fact that Mr. Nitikman apparently acted under a joint retainer for both the defendant BDO Dunwoody and for Mr. Walsh, and the factual and legal complexities that such an arrangement might give rise to, had the prospect of further broadening the scope of Mr. Nitikman's cross examination. In *Ferrara*, which admittedly was decided under different limitations legislation, Justice Laskin, for the majority, addressed the fact that none of the plaintiff's various litigation counsel had ever recommended that the plaintiff sue the defendant - his lawyer of 20 years. On the evidence before me, there is no suggestion that Mr. Nitikman raised the prospect of bringing an action arising from the Departure Date Issue against the defendants. The nature of Mr. Nitikman's joint retainer, as well as the ambit

of his earlier relationship and retainers with the defendants, are all potentially relevant to what Mr. Nitikman may have told Mr. Walsh.

[49] Though the circumstances in Mayer were quite different from those raised in this case, the broad cautions expressed by the court are relevant. At paras. 69-70, the Court of Appeal emphasized that, to issue judgment in a summary trial, the judge must be able to find the necessary facts. In determining whether the necessary facts can be found, the trial judge must consider all of the evidence before the court and be able to resolve the conflicts in the evidence.

[50] The court also said:

[80] Further, cross-examination is essential to protect trial fairness since, without it, the court cannot assess the probative value of the evidence: see *R. v. Darrach*, 2000 SCC 46, [2000] 2 S.C.R. 443 at para. 63. In *R. v. Osolin*, [1993] 4 S.C.R. 595 at 663, Cory J. made the following remarks which, although made in a criminal context, are apposite to this discussion:

There can be no question of the importance of cross-examination. It is of essential importance in determining whether a witness is credible. Even with the most honest witness cross-examination can provide the means to explore the frailties of the testimony. ... Its importance cannot be denied. It is the ultimate means of demonstrating truth and of testing veracity. ...

I would add that, in cases of conflicting evidence, cross-examination of the parties offering the conflicting evidence is essential - the credibility of one or the other cannot be considered in a vacuum.

[81] In addition to exposing credibility to scrutiny, cross-examination may also cast a different light on the evidence given by witnesses and may bring out relevant information that might not otherwise be disclosed, thus enabling the court to be informed of all the evidence bearing on the issues.

[51] In this case, the question of what conversations took place between Mr. Butalia and Mr. Walsh, particularly after Mr. Butalia became aware of the Departure Date Issue, is central to the proper application of sections 6(3) and 6(4) of the Act. In particular, the question of the extent to which Mr. Butalia, arguably a fiduciary, both failed to reveal and directly or indirectly averted Mr. Walsh's attention from the existence of the Departure Date Issue are highly relevant to Mr. Walsh's "circumstances" and to the reasonableness of his ensuing conduct.

[52] This is a significant case with a complex factual background that advances a claim for a great deal of money. It raises serious issues of credibility. The relief the defendants seek has the prospect of delaying the presently scheduled trial date and the ultimate resolution of the various issues raised by the plaintiff. Furthermore, I do not consider that the various limitations issues that have been raised by the parties, and that are properly engaged by sections 6(3) and 6(4) of the Act, can be addressed with the clinical precision that the defendants propose. Instead, I consider that those issues are likely to require a fuller

exploration of the evidence that is germane to their resolution. A failure to allow the plaintiff to develop that evidence would be inappropriate and unjust. Accordingly, in all the circumstances, the defendants' application is dismissed.

"Voith J."

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