

IN THE SUPREME COURT OF BRITISH COLUMBIA

Date: 20110311
Docket: M095847
Registry: Vancouver

Between:

David Leonard Seguin

Plaintiff

And:

Paul T. Stack and Clare Construction Services

Defendants

Before: Master Baker

Oral Reasons for Judgment

In Chambers

Counsel for the Plaintiff:	J.M. Cameron
Counsel for the Defendants:	J.R. Walsh
Place and Date of Hearing:	Vancouver, B.C. March 11, 2011
Place and Date of Judgment:	Vancouver, B.C. March 11, 2011

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[1] **THE COURT:** This is an application by the defendant for an order directing that the evidence of its sole witness, a specialist, specifically Dr. Regan, be taken by deposition and that that proceed a week today. That application is opposed by the plaintiff for various reasons.

[2] The reasons that Dr. Regan is, at this time at least, not available for the trial which is set to commence on the 4th of April for five days is that his typical week allows two days for surgery, Tuesdays and Thursdays, and the other three days are for other clinical or legal matters. In that particular week, he is booked, I believe counsel advised, for two other trials, but certainly at least one plus a Worker's Compensation matter in Richmond, that plus his normal clinical and surgical activities.

[3] Jumping ahead, one of the objections to the order was that, well, these are elective surgeries and they can take a lower priority. I do not know. I agree with Mr. Walsh, I do not know that they are elective at all, but even if they are, I mean, that is an awfully broad topic and it is not for me to vicariously tell some party out there waiting for surgery that they have just been bumped because of the needs of this trial. I do not know that it is for me to say that at all.

[4] I do have concerns about the other aspect of this, about the non-availability for other trial matters. Mr. Cameron's absolutely right that the procedure and the rules for requiring or retaining and consulting experts require that at the very outset they be advised of the trial date to, one hopes, assure their availability. I say immediately on that that counsel attempted to do that and probably reasonably assumed that they had done that with their letter of instruction to Dr. Regan of October 5th, 2010, which the second paragraph says:

The trial date is currently said for five days commencing April 4th, 2011.
Please make a note of the trial date as your attendance may be required for cross-examination.

[5] It could not be clearer. Any mistake made I think is, with respect, probably at Dr. Regan's office.

[6] The argument is made that to refuse the application would create an extreme prejudice on the part of the defence as Dr. Regan is essentially the only defence witness currently proposed. Having considered that, I certainly understand that, But I am not prepared to make the order today. The arguments made by Mr. Cameron on behalf of the plaintiff are, in my view, compelling. They repeat concerns of Mr. Justice McColl some 21 years ago in ***Abermin Corp. v. Granges Exploration Ltd.***, 1990 CanLII 1827 (BC S.C.).

[7] That cudgel, if you will, has been taken up again by Mr. Justice Harris recently in ***Byer v. Mills***, 2011 BCSC 158. It is acknowledged that Judge Harris's comments were clearly in obiter. That is understood. The appendix to that decision is a clear and emphatic reiteration, of course, of the court's concerns with deposition evidence and the various pitfalls that accompany that.

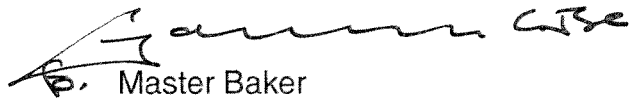
[8] Mr. Cameron has persuaded me that those pitfalls are such that they should not be allowed, that the tactical advantage, if you will, that may shift with the process, whether that is intended or not by the defence, I believe it is a real possibility and has to be recognized.

[9] The plaintiff has offered significant flexibility, in my view, to permit Dr. Regan's evidence to be taken live, as we say, truly *viva voce*, in other words, out of turn, for example, on Tuesday early, if the court is disposed to start early or sit late. The plaintiff is agreeable to taking Dr. Regan's evidence by video conferencing, which again is, while technologically assisted, still live in real time, so to speak.

[10] It is interesting to me that as recently as the trial management conference, which is specifically designed under the rules to anticipate these problems and sort them out when matters can still be adapted and sorted, there was no reference. I am told that the trial management report was that Dr. Regan would be a witness and that he would be attending at the trial.

[11] All in all, then, I am persuaded by the arguments I have heard today and by the concerns expressed by Mr. Justice Harris in the **Byer** case, that the order should not go. As a consequence, the application is dismissed.

[12] Costs will be in the cause.


P. Master Baker