Davies v. Clarington (Municipality), [2010] O.J. No. 4900

Ontario Judgments

Ontario Superior Court of Justice

P. Lauwers J.

Heard: November 2, 2010.

Judgment: November 15, 2010.

Court File No. CV-00-1075-00CP

[2010] O.J. No. 4900 | 2010 ONSC 6103 | 2010 CarswellOnt 8662 | 195 A.C.W.S. (3d) 67

Between Bonnie Davies, Plaintiff, and The Corporation of the Municipality of Clarington, Via Rail Canada Inc., Canadian National Railway Company, Timothy Garnham, The BLM Group Inc., Apache Specialized Equipment Inc., Apache Transportation Services Inc., Blue Circle Canada Inc., Ontario Hydro Services Company, Defendants

(53 paras.)

Case Summary

Civil litigation — Civil procedure — Discovery — Examination for discovery — Subsequent examination — Production and inspection of documents allowed — Motion by defendants to compel plaintiff to answer undertakings and refusals, and to provide further production after plaintiff's increase in damages sought from $10 million to $50 million — Plaintiff sued for damages resulting from a train derailment — Most documents relating to plaintiff's business transactions had been destroyed — Plaintiff intended to prove loss of income through witnesses — Plaintiff to produce witness statements from all proposed witnesses who were to testify on income loss — Plaintiff to produce copies of documents to which these witnesses had access — Plaintiff to fulfill all undertakings and provide English translations of documents.

Motion by the defendants to compel the plaintiff to answer undertakings and refusals, and to provide further production. The plaintiff was the only remaining class member in a class action for damages resulting from a train derailment. The plaintiff had earlier been granted leave to increase the amount claimed in damages from $10 million to $50 million. As a result of the dramatic increase in damages sought, the defendants sought to examine the plaintiff further with respect to his claim for damages and sought production of any documents to which any of the plaintiff's witnesses called to support his income had access. The defendants also sought sworn witness statements from any such witnesses prior to the continuation of the plaintiff's examination for discovery. At the time of the accident, the plaintiff was CEO of a group of companies he created. He claimed that most of the documents to support his income had been destroyed because they were confidential and that most of the companies had now been dissolved. The plaintiff intended to support his income claim through evidence from witnesses.

HELD: Motion allowed.

The defendants must be provided with the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action known to the plaintiff and from whom the witnesses giving evidence at the trial on the plaintiff's behalf would be drawn, summaries of what the information that they possessed, and copies of any relevant documents that they had in their possession. The plaintiff was to answer all outstanding undertakings. The plaintiff was also to make all reasonable efforts to produce the bank records sought by the defendants. The plaintiff was also to provide English translations of the documents that he

had produced. The defendants could examine the plaintiff for discovery in relation to the information provided under Rule 31.06 and the answers to the undertakings, including any document production. In the interests of proportionality, the continued discovery of the plaintiff was limited to five full days.

Statutes, Regulations and Rules Cited:

Courts of Justice Act, *R.S.O. 1990, c. C.43, s. 125*

Rules of Civil Procedure, Rule 1.05, Rule 26.01, Rule 31.06(2), Rule 34.09

Counsel

J. Strype and D. Fulton, for Christopher Zuber, Class Member.

R. Winsor, for the Defendant, The Corporation of the Municipality of Clarington.

D. Merner, for the Defendants, VIA Rail Canada Inc. and Canadian National Railway.

J. Regan/A. Sciacca, for the Defendants, Apache Specialized Equipment Inc., Apache Transportations Services Inc.

S. MacDonald, for the Defendant, Ontario Hydro Services Company.

M. Edmonds, student-at law, for the Defendant, The BLM Group Inc.

REASONS FOR DECISION

P. LAUWERS J.

1 This is a continuation of two procedural motions brought in relation to the claim of the sole remaining member of a class action. As explained in my decision released September 2, 2010,[1] Christopher Zuber was a passenger on an east-bound VIA train that was derailed in an accident on November 23, 1999. A class action brought by passengers was settled for all the members of the class except for Mr. Zuber. At the date of the last hearing I had two motions before me. The first, brought by Mr. Zuber, sought leave to amend the Statement of Claim. I granted leave to increase the amount claimed in damages from $10 million to $50 million.

2 The second motion, brought by the defendants, was to compel the plaintiff to answer undertakings and refusals, and to provide further production. It was adjourned on January 15, 2010, on the basis that the parties were close to a consent order. The parties left a draft of the consent order with me. I mistakenly thought that it would deal with the further discovery of Mr. Zuber so I did not address the defendants' requests for additional discovery and other relief as terms of the order permitting the amendment of the Statement of Claim. This error was brought to my attention by Mr. Winsor when it later became clear that the consent order was not agreeable. I directed that the defendants'

undertakings, refusals and production motion along with the continuing issue over the terms of my original order be argued together.

3 For the reasons set out below, I conclude that trial fairness requires more fulsome disclosure under Rule 31.06 from the plaintiff than the current practice provides and certainly more than has been provided to date. I also address the issue of whether document production obligations include document translation and conclude that, on the facts of this case, they do.

4 As a preliminary matter, Mr. Strype submits that I have no jurisdiction to address the matter of any terms to be added to my order granting leave to amend because the defendants have sought leave to appeal my decision. This does not follow; my task is to complete the first motion so that the formal order can be taken out and be considered as part of the leave motion. Pending the resolution of terms, the order has not yet been taken out and I am not *functus officio*. Nothing prevents Mr. Strype from seeking leave to appeal the terms that I impose today.

5 The two motions overlap somewhat. I will deal first with the terms of the order permitting amendment of the Statement of Claim and then with the defendants' undertakings, refusals and production motion.

The terms of the order permitting amendment of the Statement of Claim

6 Rule 26.01 of the *Rules of Civil Procedure*, *R.R.O. 1990, Reg. 194* (the "*Rules*"), obliges the court to grant leave to amend a pleading, on such terms as are just. Further, Rule 1.05 of the *Rules* allows the court to impose "such terms and give such directions as are just" when making an order under the Rules.

7 Mr. Winsor, who is supported in his argument by counsel for the other defendants, seeks the following terms: Clarington, and by inference the other defendants, should be permitted:

(a) full rights of examination for discovery with respect to Zuber's claim for damages with Zuber to attend in Toronto at his own expense for whatever period is reasonably required to complete such examination commensurate with the nature and size of his claim;

(b) any defence medical examinations which Clarington reasonably requests following the completion of Zuber's examination for discovery;

(c) if Zuber intends to call witnesses to support his evidence with respect to the income he earned and the income he lost, an order that:

(i) Zuber make all reasonable efforts to obtain copies of any documents to which such witnesses have access, and if such efforts are unsuccessful, then Clarington is to be given a reasonable opportunity to bring any necessary motion to examine such proposed witness in advance of the trial in an orderly manner;

(ii) Zuber provide sworn statements from such witnesses before the continuation of his examination for discovery setting out the full substance of their proposed evidence.

8 It appears that the parties have a workable approach to the defence medical examinations so Mr. Winsor withdraws the request for an order for related to the term in para (b) without prejudice to his right to renew it later on.

9 Mr. Winsor argues that the other terms sought are necessary in order to dispel prejudice resulting from the dramatic increase in the size of the claim. This prejudice, he argues, is inherent in the fact that the defendants as a group treated the case with less seriousness when it was a $10 million claim than they would have done if the exposure had been to a claim for $50 million; he notes that Clarington's original exposure was to about $900,000, and now it has increased to almost $5 million. The defendants allowed Mr. Regan to carry the matter, and Mr. Regan had Mr. Zuber examined by junior counsel. Mr. Winsor says that the discoveries were inadequate in part

because he and the other senior counsel did not participate, but neither he nor the other defendants point to any particular deficiency.

10 Mr. Strype resists the request by Mr. Winsor to be permitted to cooper up the examination for discovery. There have been three days so far, on April 11, 2006, on April 4, 2008 and on April 10, 2008. He points out that the report completed by Joe Smoczynski, an accountant at the partnership of Baker Tilly Smoczynski, dated October 11, 2007, estimated Mr. Zuber's average annual income loss at $1.4 million USD; that should have warned the defendants that his claim was going to exceed $10 million. The Baker Tilly Smoczynski report was available prior to the 2008 examination of the plaintiff and Mr. Regan's firm had full opportunity to ask accounting questions and medical questions with that knowledge. While the defendants may be entitled to further examination for discovery arising out of the answers to the undertakings and the productions that are forthcoming, Mr. Strype submits that they should not be permitted to effectively start over.

11 Mr. Winsor responds that he is not looking to start the discoveries from scratch. He is prepared to accept the existing state of the discoveries but wishes to pursue further questions. While he does not intend to repeat the earlier examinations for discovery, he believes that some proper questions may require set-up questions that might cover some old ground. Mr. Winsor estimates that he will take five days to complete the examination of Mr. Zuber for Clarington and he expects that the other defendants may have additional questions as well. He is looking for a two-week window within which to conduct the discovery.

12 As I noted in my earlier decision at para. 53: "At $10 million or $50 million, this case was a major undertaking for the defendants and was treated that way. The liability trial before Ferguson J. took 11 weeks and was well attended by representatives of the defendants." I would therefore not normally permit further examination for discovery just because of the increase in the amount claimed. But this case is different for the reasons explored below.

Inadequate Document Disclosure and the Effect on Discovery

13 The document production process prior to discovery is intended to allow the parties to understand each other's case, particularly as it lays out in the documents. The documents are ordinarily critical to proving a loss of income claim. They are provided before the examination for discovery in order to inform it and make it more useful. Both document production and examination for discovery constitute fundamental steps in the pre-trial process, and exist to ensure trial fairness and efficiency. The observations of McLachlin J. in *R. v O'Connor* [1995] 4 S.C.R. 411 at para 193 apply, with necessary modifications, to fairness and justice in civil cases: What the court aims for is not necessarily "the fairest of all possible trials, but rather a trial which is fundamentally fair ... Perfection in justice is as chimeric as perfection in any other social agency. What the law demands is not perfect justice, but fundamentally fair justice."

14 Many of the documents that would normally be available in assessing the loss of income claim apparently no longer exist. The situation is set out in the Affidavit of Dieter Fischer, who is the senior claims manager with Frank Cowan Company and risk manager for Clarington. He summarizes the evidence of Mr. Zuber at his examination for discovery on August 11, 2006. Mr. Fulton, who acts for Mr. Zuber, relied on this evidence at the earlier motion:

> 26. At the time of the accident, Mr. Zuber was the CEO of Bastion Consulting Group, which was a loosely affiliated group of companies that he created. Mr. Zuber claimed that he earned an average annual income of over $1,000,000.00 (U.S.) between 1995 and the time of the accident primarily by being involved in negotiating the sales of large state-owned companies in Poland. However, he stated that the records that were available did not reflect his actual income during that period. Mr. Zuber claimed that the records of the transactions he negotiated were destroyed because they were confidential.
>
> 27. Mr. Zuber claimed that he suffered from severe headaches and nausea as a result of the injuries from the accident. Therefore, he had not been able to attend conferences and network, and as a result, he was unable to meet people in order to generate business the way he had prior to the accident. Mr. Zuber claimed that he sold his stake in Bastion in late 2004 because he did not have any contracts for

> 2005. He also stated that he had not earned any income in the previous two years. During his examination for discovery, Mr. Zuber provided undertakings to provide all income tax records in his possession and all documents used to determine his income loss.

15 The Baker Tilly Smoczynski report explains the absence of much of the documentation:

> We were not shown:
>
> * Financial Statements of the related companies, for the years 1992 to 2006, which Mr. Zuber controlled within the EU and off-shore (SPV's special purpose vehicles).
> * Costs that may be related to the income earned by Mr. Zuber's controlled companies;
> * The existence of another reason of why income could have reduced or dried up.
>
> Mr. Zuber states that all the companies were either liquidated or disposed of in other ways, that no financial statements exist and as SPV's (Special Purpose Vehicles) they were used for the tax avoidance of income and did not incur costs. It is usual to dispose of an SPV after the reason why it was formed in the first place ceases to be relewant [*sic*].

16 Mr. Strype says, somewhat ambivalently, that he is "pretty much absolutely sure that no further records are in existence." He acknowledges that he may well have difficulty in proving the case. Recognizing the inadequacy of the documentary record, he proposes to prove that Mr. Zuber made about $1.4 million USD annually through various witnesses from Europe, effectively as a substitute for the documents which the defendants would normally have had in their possession before commencing, and certainly before completing, examinations for discovery.

17 Mr. Winsor submits that the defendants need and are entitled to some reasonable method for testing Mr. Zuber's income loss claim and its factual underpinning. In the absence of documents there is virtually no independent source of information. Without better information the defendants will be left to pick holes in the plaintiff's evidence at trial. In these circumstances, Mr. Winsor argues strongly that Mr. Zuber should be required to provide statements sworn by possible witnesses before the resumption of the examination for discovery.

18 Mr. Strype resists Mr. Winsor's motion for this relief. He is prepared to provide willsays for the witnesses he intends to call just prior to trial "as the Rules provide." But the Rules actually provide for no such thing although a practice of some disclosure has evolved.

19 Instead, Rule 31.06(2) of the *Rules* provides:

> *Identities of Persons Having Knowledge*
>
> (2) A party may on an examination for discovery obtain disclosure of the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action, unless the court orders otherwise.

20 The cases have added to the disclosure obligation. The seminal case is the decision of Granger J. in *Dionisopoulos v. Provias*, *(1990) 71 O.R. (2d) 547*, *[1990] O.J. No. 30* at para. 16 (H.C.), following the decision of Borins D.C.J. in *Sacrey v. Berdan*, (1986), 10 C.P.C. (2d) 15 at page 21 (Ont. Dist. Ct). Granger J. held:

> **16** To summarize, a party being examined for discovery is required under rule 31.06 to provide the names and addresses of persons who might reasonably be expected to have knowledge of the matters in issue, but are not required to provide a list of trial witnesses. A summary of the substance of the evidence of those persons who might reasonably be expected to have knowledge of the matters in issue, must be provided if requested. Rule 31.06(1) requires a person being examined to answer "any proper question relating to any matter in issue" or "any matter made discoverable by subrules (2) to (4)" and questions may not be objected to on the ground that "the information sought is evidence". If the "names and addresses of persons having knowledge" is discoverable, then it would seem to me that a proper question relating to that

> is "what is the substance of their knowledge?" This is so even if the information to be disclosed is evidence. [Emphasis added.]

21 This approach was approved by the Court of Appeal in *General Accident Assurance Co. v. Chrusz*, *[1999] O.J. No. 3291*, *45 O.R. (3d) 321* at para. 26 (C.A.) and has been consistently followed.

22 In *Robb v. St. Joseph's Health Care Centre, [1999] O.J. No. 854*, *87 O.T.C. 290* at para. 21 (Ct. J. (Gen. Div.), E. Macdonald J. noted that parties are now expected to avoid a trial strategy that involves "mystery" witnesses and "trial by ambush". She then noted in paragraph 22:

> The absence of a reliable witness list interferes with the orderly progression of the trial and compromises effective preparation of cross-examination. As a trial strategy, it is no longer acceptable. Therefore, I am directing Mr. Arenson to provide a list of any anticipated witnesses who are not yet disclosed, together with a summary of what they will say ...

23 The cases note, however, that it is not trial witnesses who are addressed by Rule 31.06(2), but "persons who might reasonably be expected to have knowledge". See: *Mayer v. Lodzer Centre Congregation, [2003] O.J. No. 524* at para. 7 (S.C.J.) per Master Dash. This is a larger group of people of whom eventual trial witnesses would form a smaller subset.

24 In *Arunasalam v. Guglietti Estate*, *[2010] O.J. No. 3303* at paras. 22, 25 (S.C.J.), Master Short, following the analysis in *Dionisopoulos, supra,* addressed the content expected of such a "summary of the substance of the evidence". At para. 27 Master Short stated: "it is my view that the summary ought to set out any information that [has] been obtained from the non-party witness." I agree with this approach.

25 Master Short went on to consider what form of discipline might be imposed to ensure a sufficiently fulsome summary of the information. He considered an analogous application of Rule 31.10, which permits the discovery of non-parties with leave, and stated at para 18:

> It is my inclination to establish a rule that says if the party opposite is unwilling to go beyond the information they have with respect to the evidence of a non-party witness, then that part[y] ought to be limited at trial to presenting only evidence by that witness consistent with the summary given. If the party opposite [...] obtains further information from the witness, [their] ongoing disclosure obligations will require them to advise the other side of any further evidence obtained.
>
> This would be an effective form of discipline, but it is beyond my authority as a motions judge, and is more a matter for the trial judge.

26 I revert to Rule 31.06(2) and the case law to hold that the defendants must be provided with "the names and addresses of persons who might reasonably be expected to have knowledge of transactions or occurrences in issue in the action" known to the plaintiff and from whom the witnesses giving evidence at the trial on the plaintiff's behalf will be drawn, summaries of what the information that they possess, and copies of any relevant documents that they have in their possession. In the circumstances, this material must be provided well before the continuation of the examination for discovery. As to content, any such summary must contain a fair degree of detail addressing the normal journalistic questions related to the person and the relevant knowledge that he or she possesses, being: "who, what, where, when, why and how". If the level of detail is inadequate in the opinion of the defendants, I may be spoken to. A summary need not be sworn or signed.

The defendants' undertakings, refusals and production motion

27 The parties have been able to resolve most of the issues around undertakings and refusals through a new consent order that I have signed. There are, however, some outstanding undertakings and production requests.

28 Mr. Sciacca, who led the defendants' submissions, complains that the updated Affidavit of Documents is deficient, first, in that it uses the wrong title of proceedings, and second, because Mr. Zuber swore it "by teleconference" on November 11, 2009. As I see it, Mr. Zuber is bound by his signature. There is no point in compelling the complex and expensive trans-Atlantic exercise that would be required to regularize the Affidavit of Documents. There is no reason why Mr. Zuber could not sign the document properly at the commencement of the continued discovery, which is customary in many cases where immediate access to the affiant is not available.

Undertakings

29 In respect of the discovery of Mr. Zuber on August 11, 2006, there are outstanding undertakings: confirmation of the date of the document at Tab 15 (question 459, page 118); the exact figures paid to Mr. Zuber for sick leave (question 477, page 122); and documentation for the special damages being claimed by the plaintiff (question 483, page 125).

30 In respect of the examination for discovery of Mr. Zuber held on April 4, 2008, there are outstanding undertakings: to provide a record that Ms. Kowalczyk pays for Mr. Zuber's social security tax every month (question 228, page 64); and to provide an English language translation of the document created by the Polish authorities with respect to charges brought against the people who attacked Mr. Zuber, as well as the records of the state doctor (question 385 at page 108).

31 In respect of the examination of Mr. Zuber held on April 10, 2008, there are outstanding undertakings: to provide the records of the rehabilitation therapists for or who were attending at Mr. Zuber's house, (question 642 at page 175); to provide Dr. Gary Shapro's records, (question 648 at page 178); and to provide Dr. Sherwood Appleton's records, (question 650 at page 179). In respect of the latter two doctors Mr. Strype takes the position that they are not treating doctors, so the defendants are not entitled to their clinical notes and records. Having given the undertaking, however, Mr. Strype cannot resile from it: *Towne v. Miller*, *(2001) 56 O.R. (3d) 177*, *[2001] O.J. No. 4241* per Quinn J. at paras. 9, 11, and 13 (S.C.J.).

32 The undertakings will be answered within 60 days of the date of this order.

Document production

33 At Mr. Zuber's discovery on April 10, 2008, he undertook to provide the original documents for review (question 731 at page 206). The complaint is that the documents provided are photocopies and their authenticity is in question. Mr. Zuber also undertook to provide the documentation used to create his income tax returns from 1999 to the present (question 902 at page 253). Mr. Strype now says that the documents are not available. Mr. Sciacca points to the income tax return for 2000 which names Teresa Dobrowolska as the apparent preparer, who should be contacted by Mr. Strype to determine what she has by way of documents.

34 Mr. Zuber's Curriculum Vitae lists a large number of companies in the Bastion Group International that are in his control including: Bastion Group International, Bastion Consulting Group, Bastion Publishing, Bastion Vogue, Bastion P.R., Bastion I.T., Bastion Personnel, Bastion Media Group, and Bastion Education. The defendants seek production of financial statements from all of these companies in order to assess the legitimacy of Mr. Zuber's income loss claim.

35 Mr. Zuber produced a number of invoices under the letterhead of the Bastion Consulting Group. The defendants seek bank statements reflecting these transactions. The account numbers for the banks are reflected on the invoices, which all appear to be Bastion accounts.

36 Mr. Zuber produced a spreadsheet summarizing a number of invoices from August 2002 and earlier. These are referred to in the Baker Tilly Smoczynski report. Tab "AA" of the Affidavit of Joseph V. Deans, sworn December 11, 2009, contains another similar spreadsheet. The defendants seek copies of the underlying invoices.

37 Mr. Zuber produced invoices sent by Interdivco Amsterdam P.V. addressed to the Bastion Group which refers to a contract dated 26 May, 1998. The defendants seek production of the contract.

38 A number of photocopies of documents appear at Tab "Z" of the Mr. Deans' Affidavit. These documents were produced by Mr. Zuber and the defendants now seek more legible copies.

39 In Exhibits "BB" and "CC" of Mr. Dean's Affidavit, there are copies of bank records produced by Mr. Zuber. Most of the entries contain contact and account information but a few do not and appear to have been altered by the whiting out or omission of certain information. As far as I can make out, these relate to: Wypiata, WYPI, Wyplata, Yplata Dyspozycja ustna, Wpityspoz ustna and similar short forms, among others. The defendants seek production of accurate photocopies including the missing information.

40 These requests all seem reasonable to me and I order Mr. Zuber to provide the documents or an explanation as to why they cannot be produced within 60 days of the date of this order.

41 As noted above, many of the documents being sought by the defendants may no longer exist. The plaintiff's effort to comply with the order may demonstrate the problem. I find, however, that Mr. Strype's offer to authorize the defendants to search for more documents not to be sufficient compliance with the undertakings in the circumstances. I am not satisfied that any person in Poland or in any other country who receives a request for documentation from the defendants would feel obligated to assist if Mr. Zuber is not the one making the request. Mr. Zuber will make renewed efforts to produce the documents; he will provide the appropriate authorizations to the defendants including waivers of confidentiality and releases. The defendants may also make use of the Court's formal order to pursue such document production as they see fit.

The Language of the Documents

42 Mr. Regan points out that half of the Affidavit of Documents is in Polish as are a large number of the documents. He requests that Mr. Zuber be ordered to produce translations of the documents in English. Mr. Strype is prepared to provide only translations of the documents on which he will be relying. He also submits that a good number of them have already been translated by the defendants, so that a costly new translation of those is simply not necessary.

43 Section 125 of the *Courts of Justice Act, R.S.O. 1990, c. C.43* ("*CJA*") provides:

> 125.(1)The official languages of the courts of Ontario are English and French.
>
> Proceedings in English unless otherwise provided
>
> (2)Except as otherwise provided with respect to the use of the French language,
>
> (a) hearings in courts shall be conducted in the English language and evidence adduced in a language other than English shall be interpreted into the English language; and
>
> (b) documents filed in courts shall be in the English language or shall be accompanied by a translation of the document into the English language certified by affidavit of the translator.

44 Rule 34.09 of the *Rules* offers a suitable analogy:

> 34.09 (1) Where the person to be examined does not understand the language or languages in which the examination is to be conducted or is deaf or mute, a competent and independent interpreter shall, before the person is examined, take an oath or make an affirmation to interpret accurately the administration of the oath or affirmation and the questions to and answers of the person being examined.
>
> (2) Where an interpreter is required by subrule (1) for the examination of,

(a) a party or a person on behalf or in place of a party, the party shall provide the interpreter;

(b) any other person, the examining party shall provide the interpreter,

unless the interpretation is from English to French or from French to English and an interpreter is provided by the Ministry of the Attorney General.

45 In accordance with section 125 of the *CJA* and Rule 1.04(2) of the *Rules*, as a general rule a person producing a document as relevant should be obliged to provide a translation of it in the official language in which the proceedings are being conducted as part of the document discovery process.

46 In *Birshtein v Royz*, [2000] O.J. No. 957 (S.C.J.), Pitt J. ordered a party to provide a translation of a Russian manuscript of several hundred pages written by the defendant about the plaintiff. He ordered the plaintiff, who was relying on the document, to have the manuscript translated before further proceedings, in part because both the court and defence counsel. It is not clear from the endorsement how close the matter was to a hearing.

47 In *Kyriazis v. Pineay*, [2001] O.J. No. 4017 (S.C.) at paras. 26- 29, Master Albert dismissed a motion by the plaintiff to have letters she wrote in Greek translated at the defendant's expense into English before "she is required to answer questions about them."She held:

> **28** The Birshtein case is distinguishable. There, the document was extensive and it was to be used in a public hearing in open court, namely an injunction motion. The court needed to know what the document said. Here, the letters are only 12 pages in length. They were put to the witness at discovery, which is not a court proceeding where the court needs to know what the text says, but rather is a private proceeding that does not call for the court's adjudication. If the documents are to be admitted in evidence at trial then an official translation will be required at the expense of the party seeking to rely on the document.

48 With respect, a discovery is not a private proceeding. And it may call for adjudication on the propriety of questions, among other things. The need for translated documents prior to discovery is clear: *Tube-Mac Industries Ltd. v. Ratos AB* [2007] O.J. No. 2763 (S.C.) per Master Glustein. There may be situations where proportionality might suggest limits on translation, for example where the costs become oppressive. There may be other factors such as the conversancy of the parties and counsel with the foreign language. Here, however, the plaintiff has put forward Polish documents as relevant. In the context of a case worth $50 million, according to the plaintiff, and where all the defendants are functioning in English, proportionality suggests no such limits.

49 I require Mr. Zuber to provide English translations of the documents that he has produced or will produce as relevant, subject to two caveats.

50 First, since Mr. Regan frankly admits that a number of documents have already been translated by the defendants, I see no reason to compel the plaintiff to expend funds uselessly. The defendants will provide a full list and copies of any documents that they have translated to Mr. Strype so that he can determine which documents are left to be translated. Second, I expect counsel to be cooperative in this exercise. Documents that have no real significance in this action need not be translated and if the parties are unable to agree on the status of a particular document, I may be spoken to.

Continued Examination for Discovery

51 The defendants may examine Mr. Zuber for discovery in relation to the information provided under Rule 31.06 of the *Rules*, and the answers to the undertakings including any document production. In the interests of proportionality, the continued discovery of Mr. Zuber will be limited to five full days to be distributed among the defendants as they may agree. If they cannot agree, I may be spoken to.

52 The defendants ask that the expenses of re-attendance be paid by Mr. Zuber. Mr. Strype submits that the expenses should be borne by the defendants since Mr. Zuber is (allegedly) now impecunious and this is essentially

a damages assessment in which the expenses will flow through to them. I reject this submission because it assumes that offers to settle will not change the ultimate cost disposition. Since the need for re-attendance is largely caused by the action or inaction of Mr. Zuber, he will re-attend in Toronto at his own expense.

Costs

53 I left the issue of costs of the amendment motion to the trial judge and that would include the costs of the argument on the terms. I also reserve the costs of the motion on undertakings and productions to the trial judge.

P. LAUWERS J.

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1 *Davies v. Corporation of the Municipality of Clarington*, et al., *[2010] O.J. No. 3703*.
