Date: 1998 04 07
Docket: CV 06978

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

**KITIKMEOT DENTAL SERVICES LTD. and
ADAM DENTAL CLINIC LTD.**

Plaintiffs

- and -

HAZEM KOBAISY

Defendant

MEMORANDUM OF JUDGMENT

[1] The plaintiffs' application, pursuant to Rule 231(1) of the Rules of Court, is granted as directed at the conclusion of this memorandum.

[2] In this action the plaintiffs claim damages for breach of fiduciary duties. It is alleged in the Statement of Claim that the defendant acted in bad faith against the interests of the plaintiffs so as to further his own interests. The allegations, in a brief summary, are that (i) the defendant was employed as a dentist by the plaintiff Adam Dental Clinic Ltd.; (ii) the defendant was also a director and shareholder (along with the plaintiff Clinic) in the plaintiff Kitikmeot Dental Services Ltd.; (iii) the defendant provided dental services in the Kitikmeot region pursuant to his involvement with the Clinic and because the Clinic had a contract with the Government of the Northwest Territories to provide dental services in the region; (iv) the defendant worked closely with the plaintiffs in the preparation of a proposal to the Government when the contract came up for renewal in 1996; (v) after the proposal was submitted, in the name of Kitikmeot Dental Services Ltd., the defendant purported to resign and sever his ties to the plaintiff companies; (vi) the Government awarded the new contract to Qikiqtaq Co-Operative Limited (then known as the "Kakertak Co-Operative"); (vii) the Co-Op proposal included the defendant's name as the designated dentist for the actual delivery of services should

the Co-Op's proposal be accepted; and (viii) the defendant has in fact been performing the dental services covered by the contract.

[3] The plaintiffs seek production of documents relating to the proposal and the contract from both the Government and the Co-Op. They are not parties to this litigation. The Government has to date refused to release any documents on the basis that they assured confidentiality to those who submitted proposals. As it turns out, the plaintiffs and the Co-Op were the only ones to submit proposals. The Government is, however, prepared to abide by any direction of this court. Similarly, the Co-Op is prepared to abide by any such direction. It takes no position on this application. Neither of these non-parties advanced any suggestion that the documents were subject to some type of privilege.

[4] It is axiomatic to say that it is in the public interest to ensure that all relevant evidence is available to the court. That is essential if justice is to be done between the parties. Without access to all relevant documents it may be impossible for either the plaintiffs to prove their case or for the defendant to resist it. It is also important to the parties that they have early production of relevant documents. The settlement of disputes at an early stage is of great benefit to litigants and to the judicial system. In order to make an informed decision on settlement, or whether to proceed to trial, counsel must be in possession of all pertinent material.

[5] Rule 231(1) reads as follows:

> 231. (1) Where a document is in the possession of a third person who is not a party to the action and there is reason to believe that the document is relevant to a material issue in the action and it is not privileged, the Court may, on the application of any party, order the production of the document at such time and place as the Court directs.

[6] A similar rule, although perhaps not exactly in the same wording, can be found in most jurisdictions. Its purpose is to facilitate the procuring of evidence from non-parties without the need to include those parties in the litigation or to compel their attendance at trial simply for the purpose of supplying a document. But, as I will explain, it is not restricted to the trial stage of the proceedings.

[7] The Rule refers to "a document ... in the possession of a third person". It seems to me that this requires that there be identifiable documents, not just some general type. So there must be evidence that the non-party actually possesses certain documents.

[8] The Rule also refers to there being a "reason to believe that the document is relevant to a material issue in the action". The Rule does not require the demanding party to establish relevance, merely to provide reasons to believe that the document is relevant. Relevance in this context (as perhaps in every other) simply means that it is likely to be logically probative.

[9] The leading case of Rhoades v. Occidental Life Insurance Co. of California, [1973] 3 W.W.R. 625 (B.C.C.A.), set a standard of "probable relevance" as the test for ordering production of documents from non-parties. It, and cases such as Ed Miller Sales & Rentals Ltd. v. Caterpillar Tractor Co. (1988), 63 Alta. L.R. (2d) 189 (Q.B.), set out the appropriate parameters for engaging the rule (as formulated by Wachowich J. in Ed Miller Sales at pages 191-192):

> 1. The rule should not be used as a fishing expedition to discover whether or not a person is in possession of a document.
>
> 2. The documents need not *necessarily* be admissible in evidence at trial.
>
> 3. The documents of which production is sought must be adequately described, but not necessarily so specifically that they can be picked out from any number of other documents.
>
> 4. The third party's objections to production must be considered, but are not determinative.
>
> I accept this approach, with the additional condition that the rule cannot be used as a method of obtaining discovery of a person not a party to the action.

[10] In this case, as plaintiffs' counsel noted, we know that the proposal and contract documents exist because the defendant is providing services under the auspices of the contract awarded to the Co-Op. Having regard to the allegations against the defendant, it is inevitable, in counsel's submission, that these documents will be not only helpful but necessary to decide the issues.

[11] Defendant's counsel argued that this application is premature. At a minimum, it is submitted, this application should await the examinations for discovery so that the issues can be focussed on what the defendant did and whether these documents may be helpful. As was noted by counsel, the point of this litigation is not what happened as

between the Government and the Co-Op but the actions of the defendant. And, at this stage of the proceeding, there is a great deal of uncertainty as to the activities of the defendant and his relationship, at the relevant times, with the plaintiffs.

[12] Uncertainty there may be at this stage and, ideally, discoveries will cure some of that. But it seems to me, having regard to the issues as framed by the pleadings, that the Co-Op proposal and the contract are probably relevant to the acts complained of by the plaintiffs. This is not an action for damages because the defendant walked away from the plaintiffs; it is an action based on allegations that the defendant used confidential knowledge for his own account through the vehicle of the Co-Op proposal and now is benefitting from that as a result of the Government awarding the contract to the Co-Op. The proposal, the contract, and documents relative to both, should shed light on these issues.

[13] Further to his argument as to prematurity, defendant's counsel argued that the Rule is designed to facilitate the use of documents from non-parties at trial. There is certainly much authority in support of this point: see Stevenson & Côté, Civil Procedure Guide (1996), pages 898-899. I note, however, that in neither the Rhoades nor Ed Miller Sales cases, referred to above, is there any suggestion that this relief is restricted to the trial stage of the proceedings. I note as well that there is nothing in Rule 231 that purports to limit this application to any particular stage of the proceedings (Rule 231 itself is found within Part 15 - "Discovery of Documents" - of the Rules of Court). The oft-expressed concern that a production order should not be a "fishing expedition" so as to compel indirectly discovery from a non-party is not the same as saying that production can only be ordered if the document is to be used for trial. It seems to me that documents, and I include the ones sought here, can often most effectively be used for examinations for discovery.

[14] For these reasons the order sought is granted.

[15] I direct the Government to produce, to the solicitors for the parties to this action, copies of the Co-Op's proposal, the contract with the Co-Op, and any correspondence or memoranda as between the Government and the Co-Op relating to these two items up to the date of the award of the contract. Any costs incurred by the Government in doing so are to be reimbursed by the plaintiffs.

[16] I further direct Qikitqaq Co-Operative Limited to produce, to the solicitors for the parties to this action, copies of its proposal to the Government, including any drafts thereof, its copy of the contract with the Government, and any correspondence or

memoranda passing as between the Co-Op, the Government, and/or the defendant relating thereto. The other categories of documents sought from the Co-Op by the plaintiffs, as set out in their Notice of Motion, are too broad a demand and would be tantamount to a "discovery" demand. Again, any costs incurred by the Co-Op in providing these documents are to be reimbursed by the plaintiffs.

[17] Costs of this application as between the plaintiffs and the defendant are reserved for the trial judge.

[18] Dated this 7th day of April 1998.

J.Z. Vertes
J.S.C.

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