

**SUPERIOR COURT OF JUSTICE – ONTARIO**

**COMMERCIAL LIST**

**RE:** JASON GRIEVE and MARIO BOSCARINO AS ESTATE TRUSTEES OF THE ESTATE OF ROY MICHAEL ZAKKA, Plaintiff

**AND:**

RICHARDSON GMP LIMITED, Defendant

**BEFORE:** HAINEY J.

**COUNSEL:** *Julia Webster*, for the Plaintiff

*Kate Findlay*, for the Defendant

**HEARD:** March 16, 2017

**ENDORSEMENT**

**Overview**

[1] This is a motion by the plaintiff for an order requiring the defendant, Richardson GMP Limited (“RGMP”), to produce Robert Smith, who is RGMP’s Director Wealth Management & Portfolio Manager, as its corporate representative on its examination for discovery. The defendant objects to producing Mr. Smith and, instead, takes the position that Michael Ankers, its Director, National Sales, should be produced as its corporate representative.

[2] The action is being brought by the Estate of Roy Michael Zakka. Mr. Zakka was an investment advisor at RGMP who passed away unexpectedly. The action concerns the sale of Mr. Zakka’s book of business to other RGMP investment advisors and amounts alleged to be owed by RGMP to Mr. Zakka’s Estate.

**Positions of the Parties**

[3] RGMP objects to producing Mr. Smith as its corporate representative for the following reasons:

- (a) The Plaintiff has acknowledged the importance of Mr. Ankers to the matters in issue. The Plaintiff chose to specifically plead the involvement Mr. Ankers in the Statement of Claim (the “Claim”). Nowhere in the Claim is there any reference to Mr. Smith;

- (b) Mr. Smith has insufficient knowledge of the matters in dispute in the litigation. Mr. Ankers has superior knowledge of the matters in dispute in this action in comparison to Mr. Smith;
- (c) Mr. Smith is not comfortable and does not want to act as RGMP's representative on discovery for a valid reason;
- (d) Unlike Mr. Ankers, Mr. Smith considers that acting as RGMP's witness will put him in a conflict of interest between his employer and the Estate of Mr. Zakka due to his position as the financial advisor for Mr. Boscarino, one of the Estate Trustees for Mr. Zakka's Estate that is bringing this claim. It is unfair to both Mr. Smith and RGMP and prejudicial to RGMP to require Mr. Smith to act as RGMP's witness in these circumstances;
- (e) There is no prejudice to the Plaintiff by allowing Mr. Ankers to act as the witness for RGMP on discovery.

[4] The plaintiff submits that it has a *prima facie* right to select the corporate representative to be examined on behalf of the defendant pursuant to Rule 31.03(2) of the *Rules of Civil Procedure*. According to the plaintiff, the defendant has not established any oppression or prejudice that would result if Mr. Smith is produced. Further, the plaintiff submits that since Mr. Smith would be a fact witness and not an advocate for the defendant there is no conflict of interest that would disqualify him as a witness.

#### **Analysis**

[5] Under Rule 31.03(2) the plaintiff has a *prima facie* right to select the corporate officer, director or employee to be examined. In determining whether to substitute another corporate representative for the individual selected by the plaintiff I must consider the following:

- (a) Does the selected individual have sufficient knowledge of the matters in issue?
- (b) Does the selected individual have direct involvement in the matters in issue?
- (c) Can the selected individual inform himself/herself of the matters in issue?
- (d) Would it be unduly onerous for the selected individual to be examined? and
- (e) Would substituting the selected individual be prejudicial to the examining party?

[6] Mr. Smith has been the Branch Manager at RGMP's North York branch since November, 2013. He worked with Mr. Zakka for 12 months and had access to and information about Mr. Zakka's book of business. He also met with Mr. Zakka's Estate representative three times. I am, therefore, satisfied that Mr. Smith has sufficient knowledge about the matters in issue in this litigation. I am also satisfied that he had direct involvement in the matters in issue.

[7] Mr. Smith can adequately inform himself about any aspects of the matters in issue in this litigation of which he does not have personal knowledge. In this regard he is no different than Mr. Ankers. This is not a complicated case and it will not be overly onerous for Mr. Smith to do this.

[8] There is no evidence before me that it would be unduly onerous for Mr. Smith to be examined for discovery on behalf of RGMP. It has not been established that significant undertakings will be required or that the examination will take longer or be more costly if he is examined instead of Mr. Ankers. There is also no evidence as to the effect of Mr. Smith's absence from the defendant's business and operations for the purpose of the examination. I am of the view that it would not be unduly onerous if Mr. Smith is examined as RGMP's corporate representative.

[9] I do not agree with the defendant's submission that Mr. Smith would be in a conflict of interest because he is an employee of RGMP and he is also Mr. Boscarino's investment advisor. As the corporate representative of RGMP Mr. Smith will be required to answer questions truthfully and honestly. This cannot put him in a conflict of interest vis-à-vis his employer or Mr. Boscarino.

[10] Finally, the plaintiff has persuaded me that Mr. Smith has personal knowledge of internal offers made for Mr. Zakka's book of business and other relevant facts. I find that the plaintiff would be prejudiced if it cannot examine Mr. Smith because this would curtail its ability to fully explore matters at issue in this litigation with a witness who the plaintiff believes has the best firsthand knowledge of these issues.

### **Conclusion**

[11] For all of these reasons I am satisfied that RGMP should be required to produce Mr. Smith as its corporate representative on its examination for discovery.

[12] The plaintiff's motion is therefore granted. There shall be an order compelling the defendant to produce Robert Smith as its corporate representative to be examined for discovery.

[13] If the parties cannot settle costs counsel may attend before me at a 9:30 a.m. appointment with their costs outlines.

  
HAINNEY

**Date:** May 18, 2017